SIN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 65802

DAVID PIERCE

Employee-Appellant

v.

BSC, Inc.

Employer-Respondent

and

BUILDERS ASSOCIATION SELF INSURANCE FUND

Insurer-Respondent.

Appeal from the Labor and Industrial Relations Commission

APPELLANT'S BRIEF

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II. JURISDICTIONAL STATEMENT

This appeal is from a final award issued by the Labor and Industrial Relations Commission of Missouri which affirmed an award of an Administrative Law Judge of the Missouri Division of Workers' Compensation denying compensation.

This appeal does not involve any of the categories reserved for the exclusive appellate jurisdiction of the Supreme Court of Missouri.

Therefore, jurisdiction lies in this Court under Article V Sec. 3 of the Missouri Constitution and Sec. 287.495 Rs.Mo.

III. STATEMENT OF FACTS

I. General Description of What an Ironworker Does

At the time of the hearing David Pierce, the employee, was 38 years of age. He is right-handed. He had a four-year apprenticeship with an Ironworkers' Local Union (Tr. 10) Mr. Pierce had been a ironworker continuously from 1988 until 2002. (Tr. 11)

He had numerous construction jobs operating out of a union hall with numerous steel companies. Ironworkers erect the steel structures of buildings. They place reinforcing rods on concrete structures and they do the welding and the bolting together of the frame. Most of the time, the job involves new construction. (Tr. 11)

The steel beams weigh from 50 pounds to 50 tons. The employee would frequently have to lift up to 100 pounds including steel beams, steel decking, kegs of steel bolts, and reinforcing rods known as rebars. (Tr. 12)

The job can best be described as heavy manual labor. Even the tools were very heavy. The employee would have to use a "helldog" which is a device to remove a bolt. It is a pneumatic tool like a jackhammer that is picked up and held over the bolt and a trigger is hit. The jackhammer pushes the bolt through the layers of iron. The device is also used to punch holes. It weighs 75 to 100 pounds and was used frequently by the injured employee. (Tr. 13-14)

The employee had to wear a very heavy tool belt in his job. It was worn around the waist and weighed 30 to 40 pounds when it was loaded with all the tools and the bolts needed for the job. It had pockets for bolts and washers. There was a hook for a sledgehammer.

(Tr. 14) (Pictures of the demonstrative evidence are attached to the transcript as Ex. D Tr. 267)

The sledgehammer alone weighs 8 pounds and is attached to the tool belt so it is hanging down the left leg of the employee. (Tr. 16)

Other heavy tools used continuously by the injured employee in his job as an ironworker are illustrated by the picture, which is Ex. C. (Tr. 266)

II. Specific Jobs Regarding the Injury in Question

The injured employee testified that he worked for the Bratton Steel Corporation, the employer herein, from May 30, 2002 to September 25, 2002. This was continuous employment involving two jobs, first at the Nebraska Furniture Mart in Kansas City, Kansas, and then at the "Grandview triangle" in Kansas City, Missouri. (Tr. 20-21)

It was on the Nebraska Furniture Mart job when his shoulder first started to hurt. He reported it to supervisor Neal Barnes. (Tr. 23-24)

The job at the Nebraska Furniture Mart involved floor and roof decking. The injured employee would have to drag 20 to 25 feet long by 3 feet wide steel plates weighing 40 to 50 pounds and bolt them into place. (Tr. 22) When this job was done, he immediately was assigned to work at the "Grandview triangle." (Tr. 24-25) This job involved building an overhead pass, above U.S. 71 highway, 40 to 50 feet in the air. The job involved working on 12 to 15 inch girders. He was on the job for about a month. This was extremely hard physical labor involving repeated use of the sledgehammer shown in Ex. D. (Tr. 267) The job involved pounding bolts into holes and securing steel beams. The shoulder injury

became progressively worse. The employee estimated that he had to secure 200 bolts at each point of connection. There were an estimated 50 points of connection, so that during the 30 days he worked on this job he used the sledgehammer approximately 10,000 times in fastening the beams. (Tr. 30)

III. Work for Builders Steel Corporation

Following the completion of the job at the "Grandview triangle," the employee was off work for about a week (Tr. 31) and again returned to the Nebraska Furniture Mart in Kansas City, Kansas working for the Builders Steel Corporation. (Tr. 32)

This job involved some supervisory work and mostly welding while building stairwells and handrails. The injured employee testified that the job was a lot easier as compared to the "Grandview triangle" job because he did not have to use a sledgehammer. (Tr. 32) This job was completed sometime in early March of 2003. (Tr. 32)

IV. Job at Elementary School in Johnson County, Kansas

Following the job at the Nebraska Furniture Mart, Builders Steel sent the injured employee to a job at a elementary school in Johnson County, Kansas. (Tr. 33) He was only on this job about a week or two doing some welding and X-bracing. (Tr. 33)

V. Job at General Motors for Builders Steel

Builders Steel then sent the injured employee to the General Motors plant in Kansas City, Kansas for a couple of weeks as a "swapper." This job involved driving a forklift, which was like a miniature crane, and moving materials around inside the plant. The "swapper" was sort of a traffic cop because the person operating the mini-crane, when the

boom was extended, could not see around the corner so that the "swapper" was needed to walk in front of the machine to watch for oncoming traffic or somebody coming around the corner. (Tr. 33) This job lasted 2 to 3 weeks. (Tr. 34)

This was the last job that the employee ever worked at as an ironworker. (Tr. 34)

The three jobs with Builders Steel at the Nebraska Furniture Mart, the school, and General Motors were a lot easier than the job at the "Grandview triangle" for Bratton Steel (BSC, Inc.). (Tr. 34)

VI. Jobs at Ford Motor Company

Following the job at the "Grandview triangle," which severely worsened his shoulder pain, the injured employee decided to seek employment outside the ironworker industry. He went to Missouri Voc Rehab first, who sent him to Mary Brothers, M.D., for an evaluation, but then found a job on his own at the Ford Motor Company.

He started working for the Ford Motor Company on or about March 17, 2003 and worked for them continuously until February 13, 2004 when he was laid off, not for physical reasons but because of a general layoff at the plant. He returned to work at Ford in the third week of July 2004, and at the time of the trial was still there. (Tr. 35-36)

His first job at Ford was securing trailer hitches. That did not hurt his shoulder at all and did not involve overhead work. (Tr. 36) He then installed rear shock absorbers, again which did not involve overhead work. (Tr. 36) He then secured rear springs, again which did not involve overhead work, and he did not hurt his shoulder at this job. (Tr. 37) He then

got a job installing "Y" pipes which fasten to the motor of the vehicle underneath the transmission. The vehicle came down the assembly line on top of him. Although the "Y" pipe weighed 2 to 3 pounds, this job did involve overhead work. The injured employee had to grab a pipe from a pile of stock, walk over, place it up inside the vehicle, and hand start two nuts. Each vehicle took about 30 to 45 seconds. He did not use a pneumatic tool in this job. The job did cause him pain in the shoulder. (Tr. 38)

He reported the pain in his shoulder to the Ford plant, and they sent him out for an MRI and also gave him some physical therapy and put him on restrictive duty for awhile. When he came back from restrictive duty, Ford put him on a motor mount installation job that did not involve overhead work. (Tr. 39) He had this job until he was laid off on February 13, 2004. When he went back to Ford in the third week of July 2004, he went to work at a bench on the assembly line to hook up vacuum hoses to a carbon cannister. The job did not involve any overhead work as he was working on a tool bench. He was assembling some type of device that went into an SUV. This job lasted three weeks. He was then switched to the job he was doing at the time of the hearing. (Tr. 40)

The current job involved battery tray installations. A plastic battery tray was placed inside the motor compartment on a bracket, and the injured employee screwed four screws to hold it down. The job involved no overhead work. The injured employee would have to lean over a fender to put the battery tray under the hood. He used an impact wrench to tighten the screw. The wrench hung from a retractable device and he had to pull it down. (Tr. 40-41)

The injured employee was asked to compare the jobs at Ford with his job as a ironworker. He never had to lift 100 pounds at Ford; he did not have to wear a heavy tool belt at Ford; he did not have to use a sledgehammer at Ford. (Tr. 41) He described the job at Ford as compared to the ironworker jobs as "much easier." (Tr. 42) Women would do the same jobs he did at Ford, but he never saw a woman do the type of work he did as an ironworker. (Tr. 42)

VII. Prior Accidents

The injured employee has had numerous sports-related injuries over the years playing football and baseball involving broken, bruised, and dislocated fingers. On April 11, 1989 he was in a rollover accident as a passenger in a vehicle. This is when he originally injured his right shoulder. (Tr. 43) He was taken to the emergency room at North Kansas City Hospital. The injured employee admitted that since 1989 he had problems off and on with his shoulder and treated with Dr. Campobasso, Dr. Marx, and Dr. Wilkinson. However, from 1989 up until 2002 that shoulder injury never prevented the injured employee from working. (Tr. 44) The treatment by these doctors consisted of injections and physical therapy. (Tr. 45) It was not until he worked for this employer at the Nebraska Furniture Mart for the first time, that the shoulder started getting bad. The job at the "Grandview triangle" involving the steel beams is when the injured employee knew he had to switch professions. (Tr. 45) He could no longer swing a sledgehammer. (Tr. 45)

VIII. History of Treatment for the Right Shoulder

On April 11, 1989 the injured employee was taken to the emergency room at the

North Kansas City Hospital following the one vehicle rollover accident. (Tr. 157) He was diagnosed with a possible fracture of the right acromion, although X-rays were non-conclusive. (Tr. 159)

It was not until October 13, 1998 that the injured employee saw a physician again for shoulder pain after throwing a football. (Dr. Campobasso) (Tr. 211) It was not until June 11, 1999 that the patient returned to Dr. Campobasso with shoulder complaints. (Tr. 209) On July 21, 1999 Dr. Marx issued a tentative diagnosis of post-traumatic arthritis in the right shoulder with possible adhesive capsulitis and recommended range-of-motion exercises and an orthopedic consult. (Tr. 208)

On June 23, 2000 the injured employee finally had an orthopedic consultation for his right shoulder problems with Everett J. Wilkinson, Jr., D.O. Dr. Wilkinson took X-rays of the shoulder which showed degenerative joint disease at the glenohumeral joint with a loose osteophyte. Dr. Wilkinson believed that there was instability in the right shoulder with an impringement syndrome. He gave the patient an injection and instructed him to perform physical therapy-type exercises. Dr. Wilkinson believed that the patient could be a candidate in the future for shoulder surgery if he continued to have signs of severe degenerative joint disease but did not recommend surgery at that time. (Tr. 149)

On October 6, 2002 the Missouri Division of Elementary and Secondary Education sent the injured employee to Mary Brothers, M.D., an occupational medicine specialist in Kansas City, for an assessment. (Tr. 227) Dr. Brothers' physical examination showed a slightly loose right shoulder on passive manipulation. Dr. Brothers was concerned about

recurrent dislocation of the loose right shoulder and advised against sustained or aggressive heavy lifting with the right arm. She advised him to avoid vibrating or pneumatic equipment. She advised that the patient should be cautious with pushing, pulling, and shoving heavy objects above mid-chest level. She indicated that surgery to stabilize the shoulder joint was a possibility. (Tr. 230)

A. Opinions of the Rating Doctors

On February 10, 2004 the injured employee was sent by his attorneys to James A. Stuckmeyer, M.D., a board-certified orthopedic surgeon, for a rating evaluation. (Tr. 354) The report of Dr. Stuckmeyer was entered into evidence pursuant to §287.210-7 R.s.Mo. Dr. Stuckmeyer's physical examination of the right shoulder showed a prominence of the AC joint with tenderness in the subacromial space and the glenohumeral joint. Pain was elicited with extremes of internal and external rotation, and there was some weakness with abduction. (Tr. 358) Dr. Stuckmeyer was quite well aware of the job duties as an ironworker performed by the injured employee. (Tr. 354-355)

Dr. Stuckmeyer opined that, although the patient had a long-standing history of right shoulder problems dating back to the automobile accident of 1989, there was "no question" that the occupational duties as a steelworker aggravated and exacerbated the condition, as the patient stated that his right shoulder symptoms significantly deteriorated following his employment with BSC Steel as an ironworker. (Tr. 359) Dr. Stuckmeyer advised that, because there was still impringement in the right shoulder along with pain, the patient would benefit from an arthroscopic evaluation with possible surgery for a decompression at the

subacromial space or resection of the AC joint and debridement of the glenohumeral joint. Dr. Stuckmeyer advised an orthopedic referral for assessment and possible surgical intervention. (Tr. 360)

The employer and self-insurer referred the patient to Edward J. Prostic, M.D., a board-certified orthopedic surgeon, who examined the injured employee on November 24, 2004. (Tr. 390) Dr. Prostic opined that the patient "could have had" an aggravation of the pre-existing degenerative joint disease in the shoulder by swinging a sledgehammer. Dr. Prostic opined that the patient could have had an aggravation of his shoulder by his subsequent employment as an ironworker after leaving the employ of this employer and as an assembler for Ford Motor Company. Dr. Prostic was unable to attribute any significant amount of impairment to the employment at BSC Steel, although he believed that the patient should abstain from any jobs requiring forceful use of the right shoulder as he believed the patient's prognosis was for gradual worsening and inability to perform such tasks. (Tr. 392)

The deposition of Dr. Prostic was taken on December 3, 2004. (Ex. 2, Tr. 361) Dr. Prostic agreed that any over-the-shoulder activity would tend to increase the symptoms of the patient. (Tr. 383) He believed that the patient would be a candidate for a total shoulder replacement arthroplasty unless he changed occupations. (Tr. 384) Dr. Prostic believed that the swinging of a sledgehammer would cause "at least a temporary aggravation" of the shoulder condition. (Tr. 384) **Dr. Prostic could not recall whether or not he was furnished the job description of any of the jobs performed at the steel companies or at the Ford Motor Company. (Tr. 384) Dr. Prostic did not know how often the injured**

employee had to sling a sledgehammer, and he did not know whether that activity was intensified while the patient worked at the BSC Steel Company. (Tr. 384-385)

Dr. Prostic was informed by the patient that his jobs at the Ford Motor Company were less stressful than the job at BSC Steel. (Tr. 385) Dr. Prostic did not know what a "helldog" was nor what an RFP device was. (Tr. 385-386)

J. Medical Records from Ford Motor Company

The medical department at the Ford plant ordered an MRI of the right shoulder which was performed on September 15, 2003. (Tr. 82) As expected, moderate osteoarthritic changes were seen in the glenohumeral joint with some osteophytic changes. There was no rotator cuff tear but some tendinopathy. This MRI, therefore, was consistent with the diagnosis of Dr. Marx and Dr. Campobosso. The plant medical notes clearly indicate that the shoulder pain began in earnest with repetitious overhead work. (Tr. 93)

The employee requested that the Administrative Law Judge issue a temporary award ordering medical treatment. The Administrative Law Judge found the injury not to be compensable. The Labor and Industrial Relations Commission affirmed. The appeal to this Court followed.

IV. POINTS RELIED ON

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN RULING THAT THE EMPLOYEE DID NOT SUSTAIN A COMPENSABLE OCCUPATIONAL DISEASE DURING HIS EMPLOYMENT WITH BSC STEEL BECAUSE PURSUANT TO §287.063 R.s.Mo. ALL SUBSEQUENT EMPLOYERS HAD NO LIABILITY IN THAT NONE OF THEM EXPOSED THE EMPLOYEE TO THE HAZARD OF THE OCCUPATIONAL DISEASE THAT CAUSED THE INJURY.

A. STANDARD OF APPELLATE REVIEW

Hampton v Big Boy Steel Erection, 121 SW3d 220 (Mo.Banc 2003)

Endicott v Display Technologies, Inc., 77 SW3d 612 (Mo.Banc 2002)

Wells v Brown, 33 SW3d 190 (Mo.Banc 2002)

B. THE APPLICABLE CASE LAW

Endicott v Display Technologies, Inc., 77 SW3d 612 (Mo.Banc 2002)

Maynard v Lester E. Cox Medical Center, 111 SW3d 487 (Mo.App. S.D. 2003)

Putnam-Heisler v Columbia Foods, 989 SW2d 257 (Mo.App. W. D. 1999)

Colony v Accurate Superior Scale Co., 952 SW2d 755 (Mo.App. W. D. 1997)

V. ARGUMENT

THE LABOR AND INDUSTRIAL RELATIONS COMMISSION ERRED IN RULING THAT THE EMPLOYEE DID NOT SUSTAIN A COMPENSABLE OCCUPATIONAL DISEASE DURING HIS EMPLOYMENT WITH BSC STEEL BECAUSE PURSUANT TO §287.063 R.s.Mo. ALL SUBSEQUENT EMPLOYERS HAD NO LIABILITY IN THAT NONE OF THEM EXPOSED THE EMPLOYEE TO THE HAZARD OF THE OCCUPATIONAL DISEASE THAT CAUSED THE INJURY.

A. STANDARD OF APPELLATE REVIEW

In Workers' Compensation cases the reviewing court should make a single determination of whether, considering the whole record, there is sufficient competent and substantial evidence to support the award. Whether the award is supported by competent and substantial evidence is judged by examining the evidence in the context of the whole record.

An award that is contrary to the overwhelming weight of the evidence is, in context, not supported by competent and substantial evidence. Hampton v Big Boy Steel Erection, 121 SW3d 220 (Mo.Banc 2003)

Whether an employee's accident arose out of and in the course of the employee's employment is a question of law so that the decision of the Commission is not binding on the Appellate Court, Endicott v Display Technologies, Inc. 77 SW3d 612 (Mo.Banc 2002) It is equally clear that this Court reviews *de novo* the Commission's conclusions of law. Wells v Brown, 33 SW3d 190 (Mo.Banc 2002)

B. THE APPLICABLE CASE LAW

The Labor and Industrial Relations Commission erroneously applied the doctrine of the Missouri Supreme Court expressed in Endicott v. Display Technologies, Inc., 77 SW3d 612 (Mo. banc 2002). While it is true that the last employer is responsible for an occupational disease exposure, the Administrative Law Judge overlooked the fact that §287.063-2 requires that the exposure **must be for the hazard of the occupational disease for which claim is made.**

Indeed, the Court in Endicott, *supra*, emphasized that the starting point is "the last employer before the date of the claim is liable **if that employer exposed the employee to the hazard of the occupational disease."** Endicott, p. 615. The evidence in this case clearly showed that the exposure by slinging a very heavy sledgehammer overhead to drive in bolts on the job with BSC was not the same hazard to which the employee was exposed at Builders Steel nor at the Ford Motor Company.

During the job with BSC the employee estimated that he had to secure 200 bolts at each point of the connection of the steel. He estimated that there were probably 50 points of connection, so that during the 30 days he worked on the job at the "Grandview triangle" he had to use the sledgehammer approximately 10,000 times in fastening the beams. (Tr. 30)

The injured employee testified that his next three jobs at Bratton Steel were much easier. The job at the Nebraska Furniture Mart in Kansas City, Kansas involved welding and supervisory work and was easier because he did not have to use a sledgehammer. (Tr. 32) The job at the elementary school only lasted a week or two and involved welding and X-bracing. (Tr. 33) The job at General Motors was that of a "swapper" wherein the injured employee drove a forklift and became a "traffic cop" for the operator of a mini-crane. (Tr. 33) This job lasted only two to three weeks. (Tr. 34)

Although the injured employee had several jobs at the Ford plant, the only job which affected his shoulder was installing "Y" pipes which fastened to the motor of the vehicle underneath the transmission. He admitted that the job did cause him pain in the shoulder. (Tr. 38) The injured employee was specifically asked to compare his jobs at Ford with his job as an ironworker. He responded that he never had to lift 100 pounds at Ford, did not have to wear a heavy tool belt, did not have to use a sledgehammer at Ford, and he compared the job at Ford to that of an ironworker as "much easier." (Tr. 41 and 42) He went so far as to say that women could do the same jobs at Ford as he did, but he never saw a woman use a sledgehammer or do the type of work he did as an ironworker. (Tr. 42)

The only other evidence concerning comparison of the jobs came from Dr. Stuckmeyer

and Dr. Prostic and dealt with medical causation for the injury.

The deposition testimony of Dr. Prostic cannot be used to compare the intensity of the ironworker job with that at Ford because Dr. Prostic could not recall whether or not he was furnished the job description of any jobs performed both at the steel companies or at Ford. (Tr. 384) Dr. Prostic did not know how often the injured employee had to sling a sledgehammer and he did not know whether that activity was intensified while the patient worked at BSC Steel. (Tr. 384-385) In fact, Dr. Prostic testified that he was informed by the patient that the jobs at the Ford Motor Company were less stressful than the job at BSC Steel. (Tr. 385) Dr. Prostic's testimony, therefore, has no validity when trying to gauge whether the hazard to which the employee was exposed was the same in the ironworker's jobs as it was at the Ford Motor Company.

It is entirely proper for the Court to inquire as to the exact repetitive nature of the job duties at each job. In Maynard v. Lester E. Cox Medical Center, 111 SW3d 487 (Mo. App. S.D. 2003) the Court looked behind the general rule announced in Endicott, which clearly states that an employee must show which, of multiple jobs, caused the hazard which precipitated the occupational disease which caused the injury.

The evidence in Maynard, *supra*, yielded "no medical opinion that subsequent employment exposed the claimant to repetitive motions capable of producing the injuries for which he sought benefits." Maynard, p. 492

In order to prevail in a repetitive motion case, the injured employee must be specific as to what movements caused the underlying medical condition. The employee must be

specific as to what tasks he was performing. The employee must present medical evidence showing clear causation. Putnam-Heisler v. Columbia Foods, 989 SW2d 257, 260-261 (Mo. App. W.D. 1999) In the case at bar the employee specifically testified as to his job duties at all of the employments involved. Dr. Stuckmeyer reviewed the job duties in his report and opined that it was the slinging of the sledgehammer which caused the shoulder impringement syndrome.

The burden of proof then shifted to the employer-self-insured to prove that a different employment caused the injury. It is clear from the very general and amorphous testimony of Dr. Prostic that the employer did not meet this burden.

How can it be said that the "rule of convenience" adopted by the Supreme Court in Endicott, *supra*, is an absolute rule to be followed in every case involving multiple employers in an occupational exposure case when the Supreme Court explicitly stated that the last exposure rule is not a rule of causation? Endicott p. 615. It is for this reason that the Court stated that the **starting point** for any analysis in these situations is the last employer before the date of claim. The rule of convenience clearly was meant for cases where the same exposure is present with multiple employers so that it is virtually impossible to establish causation with any one employer. If all the exposures are the same, no rule can be adopted if each and every employment was a substantial contributing factor to the injury.

Therefore, nothing in the Endicott decision prohibits this Court from analyzing each exposure from each employment when the exposure to repetitive work is not the same in each employment in order to determine causation for the injury.

Indeed, in Colony v Accurate Superior Scale Co., 952 SW2d 755 (Mo. App. W.D. 1997) (obviously decided before Endicott) this Court did exactly that.

In Colony this Court acknowledged that under the last exposure rule liability is affixed on the employer who last exposed the employee to the hazard prior to the filing of the claim (p. 763) but recognized that just because there are multiple employers does not mean that the employee was exposed to the same hazard at each of them. This Court proceeded to analyze in great detail which repetitive job activities caused which type of repetitive motion disease.

The Supreme Court in Endicott did not mean to create a situation wherein each employment activity is not carefully analyzed as to causation so that a last job repetitively lifting feathers is to be deemed the causative factor job because it was last, where the prior jobs involved slinging a sledge hammer are to be totally discounted because they were not last in sequence.

The Endicott rule of convenience was only designed for cases where the exposure was to the same hazard at multiple employments and was necessary because of the confusion and less than artful drafting of the statute by the General Assembly.

This Court stated the problem thusly:

> Affixing liability where multiple employers expose an employee to disease producing conditions is problematic because the legislature has given little guidance on how to affix liability in such a situation. Colony p. 763.

Anything less than imposing liability on the employment that really caused the condition (rather than a blanket last employer rule) would result in rampant abuse in these

type of claims; i.e., wouldn't it have been easier for this Appellant to file a workers' compensation claim against Ford, the last employer, even though that employment was far less destructive to his shoulder as was his job as an ironworker?

VI. CONCLUSION

The case law mandates that this Court examine all the repetitive jobs to determine causation for the repetitive use injury. Such an examination reveals that the job with BSC, Inc. was the most difficult and labor intensive and was, therefore, the substantial factor in causing the shoulder injury.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that two copies of the above brief and a disc were mailed postage prepaid to the Attorney for the Respondent: C. Anderson Russell, 1621 Baltimore, Kansas City, Missouri 64108-1302 on this _____day of ___October___ 2005.

_____

STATE OF MISSOURI)
) SS

COUNTY OF JACKSON)

Subscribed and sworn to before me this 20th day of October 2005 at Kansas City, Missouri.

_____
Notary Public

My Commission Expires:

_____

CERTIFICATION PURSUANT TO RULE 84.06

1. Pursuant to Rule 84.06 I certify that this brief contains 5,009 words in compliance with Rule 84.06 (b).
2. This brief contains 633 lines.
3. The disc submitted with this brief has been scanned and it is virus free.

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