

FINAL AWARD DENYING COMPENSATION  
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 02-154331

Employee: David Pierce  
Employer: BSC, Inc. (Bratton Steel Corp.)  
Insurer: Builders' Association Self-Insurance Fund  
Additional Party: Treasurer of Missouri as Custodian  
of Second Injury Fund (Open)  
Date of Accident: September 25, 2002  
Place and County of Accident: Kansas City, Jackson County, Missouri

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Act. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated January 27, 2005, and awards no compensation in the above-captioned case.

Although employee requested that a temporary or partial award be issued awarding further medical care and the administrative law judge issued a temporary award and decision denying benefits, resolution of the issues against employee based upon the application of sections 287.063 and 287.067.7 RSMo, has the effect of a final award and decision. We therefore correct the title of the administrative law judge's award and decision to a Final Award and Decision Denying Compensation.

The award and decision of Administrative Law Judge Emily S. Fowler, issued January 27, 2005, are attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 22nd day of July 2005.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

\_\_\_\_\_  
William F. Ringer, Chairman

\_\_\_\_\_  
Alice A. Bartlett, Member

DISSENTING OPINION FILED

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John J. Hickey, Member

Attest:

\_\_\_\_\_  
Secretary

DISSENTING OPINION

I have reviewed and given consideration to all of the competent and substantial evidence on the whole record. Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I reverse the administrative law judge's award and decision and award further medical care. I find employer is responsible for employee's medical condition.

Section 287.063 RSMo, provides:

1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however, short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 7 of section 287.067, RSMo.
2. The employer liable for the compensation in this section provided shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which claim is made regardless of the length of time of such last exposure.
3. The statute of limitation referred to in section 287.430 shall not begin to run in cases of occupational disease until it becomes reasonably discoverable and apparent that a compensable injury has been sustained, ...

Section 287.067 RSMo, provides:

With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

Sections 287.063 and 287.067.7 RSMo are clear that the liable employer must have exposed the employee to the hazard found to be a causative factor of the disease. The last exposure rule is a rule of convenience and not one of causation when an employee is exposed to the same hazard through subsequent employments; however, exposure to an occupational disease through subsequent employment is required. There is an element of causation involved in the last exposure rule. If the employment did not expose the employee to the hazard, then the claim should be denied for lack of a causal connection. See *Coloney v. Accurate Superior Scale Co.*, 952 S.W.2d 755 (Mo. App. 1997) and *Maynard v. Lester E. Cox Medical Ctr.*, 111 S.W.3d 487 (Mo. App. 2003). If employee's subsequent employment had been as a security officer who sits and watches a monitor all day, there would be no question that that employment did not expose him to the hazard of the occupational disease sustained to his shoulder. I agree that the issue is more clouded in the facts before us; however, I do not find that employee's employment with Ford Motor Company or any of his other subsequent employers exposed him to the hazard of the occupational disease for which his claim is made. The liable employer is the one who last exposed the employee to the hazard of the occupational disease. I find the last employer to expose him to the hazard of the occupational disease was Bratton Steel Corp.

Employee credibly testified as to his duties for employer and his subsequent employers. While working for this employer, his job duties were extremely labor intensive. He frequently had to lift 100 or more pounds. He wore a tool belt that weighed 30-40 pounds when he had his tools in the belt. The tool belt also functioned as a safety harness. He was required to carry a sledgehammer in his tool belt that added an additional eight pounds of weight. The first job he worked for employer was at the Nebraska Furniture Mart, which is when employee's shoulder began to hurt. This particular job involved floor and roof decking. Employee had to drag 20-25 feet long by 3 feet wide steel plates weighing 40-50 pounds and bolt them into place. He reported to his supervisor that this job was causing him pain. This job lasted approximately three months. Employee was then placed at a different job site, which involved building an overpass over U.S. 71. The job involved working on 12-15 inch girders located 40-50 feet in the air. His function was to secure bolts into holes to secure steel beams which involved repeated slinging of the sledge hammer with the right arm because the left arm was used to hang on. He had to swing the sledgehammer as hard as he physically could repeatedly during this job, which lasted approximately one month. He estimated that he had to secure 200 bolts at each point of connection, with 50 points of connection, for a total of slamming his sledge hammer approximately 10,000 times during this 30 day job. His right shoulder continued to worsen and he concluded that he should probably find another line of work because of the pain. Employee was then laid off from this job.

His subsequent employment was with Builders Steel Corporation; however, he worked as a working foreman. Although he returned to the Nebraska Furniture Mart, the work was not nearly as labor intensive and he was not exposed to the same hazard as he had been with employer. This job involved some supervisory work and mostly welding. He then worked one to two weeks on a school doing welding and x-bracing. None of his work with Builders Steel Corporation involved wearing the tool belt/safety harness or swinging a sledgehammer. His next job involved working as a swapper, which he described as a traffic cop for cranes. There was no evidence that this job involved repetitive arm activity. After this job ended, employee was hired at Ford Motor Company. Employee had been looking for work outside of the ironworker industry and was able to secure this job with Ford on his own.

Employee basically worked as a floater for Ford. He was assigned to different jobs, but with the exception of one assignment, none of the jobs involved overhead work or bothered his shoulder. The one job that did involve overhead work consisted of lifting a 2-3 pound "Y" pipe and installing it underneath a transmission. The vehicles came down an assembly line over employee's head and employee installed the pipe. On September 3, 2003, employee was trying to install a pipe and pushed against the pipe to install it. When he did so, the pipe wedged and he felt the sensation that his right shoulder had given way. He reported the accident and was sent to Ford's medical department, which referred him for an MRI and prescribed physical therapy. He returned to work with Ford and was not given any overhead work. With the exception of being laid off from February 13, 2004, until the third week in July 2004, employee has continued to work at Ford and none of the jobs that he has been assigned involve overhead work. He further explained that his duties at Ford have never involved lifting 100 or more pounds, wearing a tool belt, or swinging a sledge hammer.

The facts of this claim are similar to those presented in *Coloney*, 952 S.W.2d 755. Mr. Coloney began working for Accurate in August 1988. Employer calibrated large truck and forklift scales that weighed from ten to several hundred thousand pounds. Mr. Coloney's duties consisted of repeated placement and removal of weights from scales to judge accuracy. He lifted between 50,000 and 100,000 pounds of weights on a "light" day. Other days, the weights increased to between 300,000 to 500,000 pounds per day. Sometime in 1990, he noticed symptoms in his hands and shoulders and sought medical treatment. Accurate changed his job duties to that of a salesman. He filed a claim for compensation in February 1992 alleging an injury to his left shoulder. In April 1992, Mr. Coloney went to work for Bugs Away. His duties there included spraying residences with insecticides. The sprayer he used was strapped to his shoulder and weighted 11-12 pounds. He had to depress a trigger on a wand in order to spray the insecticide. He also started up his own "handyman" business during this time frame. He continued to experience problems with his shoulders and hands and sought additional medical treatment in May 1992. He quit Bugs Away in September 1992, and continued to operate his own business. On September 23, 2002, he amended his claim for compensation against Accurate to allege an injury to his right shoulder. He sought additional medical treatment in December 1992, and was diagnosed with bilateral carpal tunnel syndrome. He again amended his claim against Accurate to add injuries to his hands. Mr. Coloney was successful with his claim before the administrative law judge and the Commission and Accurate appealed to the Court of Appeals, Western District. Accurate argued that Mr. Coloney was working for Bugs Away and was self-employed when he filed his claim for compensation alleging injury to his right shoulder and for bilateral carpal tunnel syndrome; thus, it should not be held liable because employee was working elsewhere when the claims were filed.

The Court, in affirming the Commission's award and decision, stated, in part:

Mr. Coloney's work at Accurate clearly exposed him to conditions causing his carpal tunnel syndrome. Mr. Coloney was required to lift fifty pound weights repeated thousands of times over the course of his employment. The lifting of these weights required Mr. Coloney to utilize his shoulders and hands extensively. During his employment at Accurate, Mr. Coloney first noticed pain and weakness in his hands and shoulders. Thus, the injuries to his hands and his shoulders that Mr. Coloney asserted in his claim for compensation related directly to his work activities at Accurate.

In contrast, Mr. Coloney was not exposed to repetitive action capable of producing carpal tunnel syndrome while employed at "Bugs Away". At "Bugs Away", Mr. Coloney was not required to lift any heavy objects; the vacuum pump sprayer Mr. Coloney utilized in his employment was attached to his shoulder and weighed only 11 to 12 pounds.

Similarly, while Mr. Coloney was self-employed he was not exposed to conditions capable of producing carpal tunnel syndrome. His main job responsibility was supervision of his employees, a responsibility which did not expose him to any repetitive motions. Additionally, the physical work he performed in his handyman business was varied and did not involve any repeated lifting of thousands of pounds on a daily basis. While his handyman business exposed him to some repetitive motions, mere exposure is not enough to shift liability to a subsequent employer. Instead, the subsequent employer must expose the employee to repetitive motion capable of producing carpal tunnel syndrome. Mr. Coloney's self-employed business was not capable of creating carpal tunnel syndrome due to Mr. Coloney's ability to control his activity pattern. Because Mr. Coloney's employment at "Bugs Away" and his self-employment was not capable of creating the carpal tunnel syndrome, Accurate was the last employer to expose Mr. Coloney to disease producing conditions prior to the filing of his claim. Accurate, therefore, is also liable for the injuries to Mr. Coloney's right shoulder and his hands.

*Id.* at 762-763 (Emphasis added.)

Additionally, the *Maynard*, 111 S.W.3d 487, case, which was decided after the Supreme Court issued *Endicott v. Display Technologies, Inc.*, 77 S.W.3d 612 (Mo. banc 2002), stated that the date the claim is filed is the starting point in determining whether section 287.067.7 RSMo, is applicable; however, the *Maynard* Court reinforced the proposition that the last employer must have exposed the employee to the hazard for which the claim is filed before the "last employer" can be held liable. If the subsequent employment does not expose the employee to the hazard for which the employee seeks compensation, then the subsequent employer is not liable for the occupational disease.

As set forth above, employee's duties with Bratton Steel exposed him to the hazard for which he seeks compensation. His subsequent employment with Builders Steel and Ford did not expose his right shoulder to the hazard for which he seeks compensation. His accident at Ford is separate and distinct from the repetitive trauma he was subjected to while working for employer.

Although employee had a pre-existing injury to his right shoulder from a car accident in 1989, and he admitted to having off and on symptoms with the right shoulder after that time, he did not miss any work as a result of his right shoulder and was able to perform the duties of an ironworker. His work as an ironworker for employer was a substantial factor in causing his right shoulder to worsen through repetitively swinging a sledgehammer. Dr. James Stuckmeyer, a board certified orthopedic surgeon, stated that there was "no question" that employee's work as an iron worker with employer aggravated and exacerbated the condition of the right shoulder. The doctor was familiar with employee's job duties. Dr. Stuckmeyer believed that employee continued to have right shoulder impingement and would benefit from an arthroscopic evaluation and possible surgical decompression at the subacromial space or a resection of the AC joint and debridement of the glenohumeral joint.

Dr. Edward Prostic examined employee at employer/insurer's request. Dr. Prostic did not recall having job descriptions of employee's various jobs. I do not find his opinions credible because of his lack of knowledge of employee's job duties. Without job descriptions, I do not find a doctor can give a reliable, accurate or credible opinion regarding whether particular job duties are capable of producing a condition, let alone whether the job duties were a substantial factor in causing the condition. Certainly, the difference between lifting a two to three pound pipe overhead for a short period of time versus swinging a sledge hammer as hard as one can during the course of an eight hour work day during a 30 day period and frequently lifting in excess of 100 pounds for a several month duration might make a difference as to causation of a medical condition.

Because I find Bratton Steel was the last employer to expose employee to the hazard for which he seeks compensation, I would issue a temporary or partial award and decision and order employer/insurer to provide the necessary medical treatment as recommended by Dr. Stuckmeyer and order employer/insurer to provide any temporary total disability benefits to which he may be entitled while undergoing such treatment.

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John J. Hickey, Member

## TEMPORARY AWARD

Employee: David Pierce Injury No: 02-154331

Dependents: N/A

Employer: BSC, Inc. Bratton Steel Corp.

Additional Party: N/A

Insurer: Builders' Association Self-Insurance Fund

Hearing Date: December 8, 2004

Briefs Filed: January 18, 2005

Checked by: ESF/lh

## FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: September 25, 2002 (last date of employment with employer)
5. State location where accident occurred or occupational disease was contracted: Kansas City, Jackson County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? No (N/A, occupational disease claim)
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: Repetitive heavy steel work tasks.
12. Did accident or occupational disease cause death? No                      Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Right shoulder
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? \$0
17. Value necessary medical aid not furnished by employer/insurer? \$0
18. Employee's average weekly wages: \$984.00
19. Weekly compensation rate: \$649.32 over 340.12
20. Method wages computation: By stipulation

## COMPENSATION PAYABLE

21. Second Injury Fund Liability: N/A
22. By the employer: N/A
23. Future requirements awarded: None

## FINDINGS OF FACT and RULINGS OF LAW:

Employee: David Pierce Injury No: 02-154331  
Dependents: N/A  
Employer: BSC Steel, (Bratton Steel Corp.)  
Additional Party: N/A  
Insurer: Builders Association Self-Insurer's Fund.  
Hearing Date: December 8, 2004  
Briefs Filed: January 18, 2005 Checked by: ESM/lh

This claim for medical benefits came on for hearing on December 8, 2004 seeking a temporary award for medical benefits. Employer and Insurer appeared by C. Anderson Russell. Employee appeared in person and by counsel, Jerry Kenter. Claimant seeks evaluation and treatment for a right shoulder injury alleged to have arisen out of repetitive use/occupational disease from heavy steel work for BSC Steel while working on the Grandview

Triangle highway construction site in Kansas City, Missouri and the Nebraska Furniture Mart construction site in Kansas City, Kansas. The date of accident alleged in the Claim is the last date of employment for BSC Steel, September 25, 2002. The Claim for compensation was filed with the Division on August 20, 2003. As more fully set forth below, this claim for medical benefits against BSC Steel is denied.

#### ISSUES PRESENTED:

Whether the 287.067 et seq. prohibits the compensation sought under the facts presented as against BSC Steel.

#### FINDINGS OF FACT:

On behalf of employee, the report of James Stuckmeyer, Exhibit A, was offered and admitted. On behalf of employee, medical exhibit B records from various medical providers was offered and admitted into evidence. On behalf of employee, Exhibits C and D two photo exhibits were offered and admitted depicting various tools claimant used in his steel work for employer.

On behalf of the employer and insurer Exhibit 1, the deposition of David Pierce taken June 4, 2004 was offered and admitted into evidence. On behalf of employer and insurer, Exhibit 2, the deposition of Edward Prostic, M.D. taken on December 3, 2004 was offered and admitted into evidence.

David Pierce (claimant) worked for BSC Steel (employer) from May 30, 2002 to September 25, 2002. The evidence firmly established that claimant made no specific complaints regarding his right shoulder to anyone with his employer while working there. Claimant provided no evidence of medical care for his shoulder whatsoever throughout the time frame working for employer. The evidence established that claimant had a longstanding degenerative condition in his right shoulder. The medical records in evidence are replete with injuries, treatment and even disability submissions to the division for prior right shoulder disability from 1989. The following is a summary from Medical Exhibit B, the medical records on David Pierce:

04-11-1989: X Ray report:

Acromio-clavicular separation with moderate superior offset of the lateral end of the clavicle. Mild deformity of the humeral head with an appearance more compatible with old injury rather than acute trauma. Linear lucency in the acromion process of the scapula seen through the humeral head in the axillary view. Additional views of the scapula may be helpful to exclude acute fracture. Claimant's Ex. B Medical Records pg 000075

04-11-1989: Dr. Gordon Thorn: NKC Hospital: 4-wheel car Accident, fractured right clavical and injured outer shoulder, AC joint problem, diminished motion and joint feels loose. Claimant's Ex. B Medical Records pg 000073

08-28-1990: Dr. Lowry Jones: ACL problem. Claimant's Ex. B Medical Records pg 000001

01-28-1992: MEDICAL RESUME – submission to Division of Workers

Compensation by counsel for employee in former claim:

"The injury to the right shoulder of April 11, 1989 does in fact involve the shoulder joint itself with involvement of the acromioclavicular joint, with offset of the lateral end of the clavicle." (Claimant seeking body as a whole pre-existing disability for serious fall injury in 1990) Claimant's Ex. B Medical Records pg 000155

10-13-1998: Dr. Campobasso:

S: Intermittent pain in right shoulder for several years after having fracture of shoulder, became worse several days ago after throwing a football—also wart on 5<sup>th</sup> toe

O: Tenderness in the posterior aspect of the right shoulder, no redness, welling or increased heat, abduction and external rotation of shoulder markedly increase

pain, full range of shoulder in other directions

A: Tendonitis right shoulder, cannot rule out AC separation

P: X-ray right shoulder and stress x-ray of AC joint, Daypro, stretching exercises, cold pack, follow up. Claimant's Ex. B Medical Records pg 000128

06-11-1999: Dr. Campobasso:

S: Complains of right shoulder pain, previous shoulder fracture, pain worse with various motions of shoulder

O: full range of motion but with some pain at full extension and abduction

A: Probable mild capsular adhesions versus tendonitis

P: stretching exercises; Orthopedic follow up if no better in 30 days. Claimant's Ex. B Medical Records pg 000126

07-21-1999: Dr. Marx:

S: pain with certain movement in the shoulder; limited in daily activities including work

O: right shoulder tender at AC joint; somewhat tender posteriorly, pain with abduction, reduced range of motions, x-ray from 10/98 showed 1 cm calcification and a lower capsule recess with minor degenerative changes of the AC joint

A: post traumatic arthritis right shoulder

Probable adhesive capsulitis

P: begin pendulum and range of motion exercises; consult orthopedic surgeon for evaluation. Claimant's Ex. B Medical Records pg 000125

06-15-2000: Dr. James Marx:

S: complains of pain and popping in right shoulder, going on for quite a long time

O: Right shoulder tender over posterior aspect, pain with abduction and external rotation,

A: right shoulder pain

P: consult orthopedic surgeon for evaluation. Claimant's Ex. B Medical Records pg 000124

06-23-2000: Everett Wilkinson:

S: Right shoulder pain and grinding for the last two years, notices most of the pain in the right shoulder as well as crepitants in the right shoulder when he is performing overhead activities as well as throwing activities when he is playing ball with his children; notices this pain during the late cocking phase of throwing, not during acceleration or deceleration phases

O: mild pain and crepitants with internal and external rotation of the shoulder, and this pain is located at the glenohumeral joint region; most of the crepitants is with elevation, abduction, and external rotation, pain and crepitants located to the subacromial region, rotator cuff is mildly painful, forward elevation is mildly painful and full at 180 degrees—X-rays reveal degenerative joint disease of the shoulder; at glenohumeral joint; loose osteophyte is also found in this region; old AC joint injury grade 2 with subsequent degenerative joint disease and osteophyte formation at AC joint

A: Degenerative joint disease, right shoulder

Instability, right shoulder with subsequent impingement syndrome

P: subacromial injection of dilute steroid which tolerated well, physical therapy 3 times a week for 4 weeks to stabilize right shoulder; candidate in future for shoulder debridement versus total shoulder if he continues to have signs of continued severe degenerative joint disease; however, at this point, his main problem, I believe, is the impingement syndrome with associated instability. Claimant's Ex. B Medical Records pg 000065-000066

01-22-2002: Dr. James Marx:

S: Significant pain and grinding in right shoulder

O: ENT-TM's clear. Right shoulder tender at AC joint; pain abduction and external rotation, positive impingement sign,

A: Degenerative joint disease of right shoulder

P: Consult an orthopedic surgeon for evaluation and recommendations.

Claimant's Ex. B Medical Records pg 000121

Claimant worked for less than four months for the named employer, herein. He testified that in that time, he came to the realization that he simply could not keep working the duties of a regular steel worker. He reported this to his supervisor Neal Barnes. Claimant never testified that he specifically told Barnes or anyone else at BSC Steel that he could not do the work because he was suffering with his right shoulder. In fact, at the conclusion of the hearing, when asked:

Q. Did you ever say something about shoulder pain to him (Barnes) as part of the problem?

A. No.

No claim for repetitive use injury was made against Bratton Steel until August 27, 2003 after claimant had been working on the Assembly line doing repetitive tasks at Ford Motor Company for more than three months.

Within just a few days of leaving Bratton Steel, claimant had an extensive medical evaluation by Dr. Mary Brothers offered through vocational rehabilitation. In her extensive report, Dr. Brothers mentions nothing of aggravating injury to the right shoulder while working for Bratton Steel. In fact, her report states:

10-01-2002: Dr. Mary Brothers:

Extremities exam: the right shoulder is slightly loose on passive manipulation, but not acutely painful, old deformity of the outer third of the right clavicle, from reported fracture. Claimant's Ex. B Medical Records pg 000145

Upon leaving Bratton, claimant went to work for another steel construction company, Builder Steel. Claimant testified that although he was a foreman for this company for four months, he was still a "working foreman" which required him to do the regular duties of a steel worker although not as heavy as at BSC Steel. Nonetheless, he worked more than three months at this job and no claim for repetitive use injury was made against either Builders Steel or Bratton during that time frame. Claimant then began working on March 17, 2003 for Ford Motor Company in Claycomo, Missouri. He worked on an assembly line doing repetitive work from the outset. Six months into this assembly line work he made a report of injury based upon a traumatic incident from lifting overhead as well as from repetitive activities.

A clinic note from Ford admitted into evidence at page 000013 of the medical exhibit reads: "Recalls pain beginning about 2 weeks after starting the repetitious work. Intensified on 9-3-03 after starting overhead work." In claimants own words:

When I went to raise the pipe above my head, I tried to install the pipe by pushing against it. The pipe wedged and wouldn't go over the bolt. It felt like my right shoulder gave out. When I brought my arm down, it felt like my shoulder was going out of socket. It has been hurting since then. 9/3/2003 18:30.

Claimant's Ex. B Medical Records pg 000006

It was further reported:

Actually has noted pain to the right shoulder over the last couple of months, increased 3 days ago. Has pain with elevation of the arm. Has to lift the right arm up with the left arm at times due to weaknes. Claimant's Ex. B Medical Records pg 000007

For the first time, claimant is then placed on restricted duty:

No work at or above the shoulder level with the right arm. No lifting more than 5 lbs. with the right arm. No pushing or pulling with the right arm x 1 week. MRI of the right arm.

At hearing, claimant admitted to reporting to Ford as documented and to seeking medical care for the first time since prior to working for BSC Steel. In fact, prior to this treatment sought at Ford, the last time claimant sought treatment for right shoulder pain was when he saw Dr. Marx in January of 2002. Claimant received care through the Ford Medical Plant doctors and therapists after this report of injury. An MRI report of his right shoulder revealed in summary osteoarthritic changes of the glenohumeral joint, narrowing of the joint, osteophyte changes, chondromalacia of the humeral head and glenoid, increased joint effusion, an intact rotator cuff with tendinosis, and impingement. Claimant's Ex. B Medical Records pg 000011. The diagnosis was "sprain/strain of unspecified muscle and tendon at shoulder and upper arm level." Claimant's Ex. B Medical Records pg. 000011.

Although claimant testified that when shifted to a line that had overhead reaching, his activities hurt him more, he was always on an assembly line while working for Ford doing repetitive work with his upper extremities. The medical records from Ford established that he had been having problems for months before the final traumatic overhead reaching incident at Ford that caused him to seek treatment.

He recalls pain beginning about 2 weeks after starting the repetitious work. Intensified on 9-3-03 after starting overhead work. Claimant's Ex. B Medical Records pg. 000013.

Following a course of light duty and therapy, on October 15, 2003, claimant was released to return to work full duty with no restrictions at Ford. The note indicates that claimant has "no real pain to right shoulder now." Claimant's Ex. B Medical Records pg. 000021.

Claimant worked on the line through February 13, 2004 when there was a lay off. He returned to work for Ford on July 04, 2004 where he continues to work full duty with no restrictions to this day.

#### CONCLUSIONS OF LAW:

At the outset, this is a claim for repetitive use injury against Bratton Steel. Hence, the law on repetitive use injuries will apply. Although claimant clearly did not provide notice of a shoulder injury to Bratton within the time allowed by law, the Supreme Court has stated notice is not applicable to occupational disease. Endicott v. Display Technologies, Inc., 77 S.W.3d 612 (Mo.banc 2002). However, under the rule of law in Endicott, when comparing multiple employments and allegations of repetitive use, the responsible employer is the employer for whom the employee has been working and exposed to the risk for more than three months when claim is made. It does not matter that the condition was previously diagnosed and cases holding otherwise were overruled by Endicott as follows:

In fact, the phrase "which is found to be the cause of the injury" modifies the subject "the exposure to the repetitive motion." If this exposure with an employer is for more than three months, that employer — as in this case — may not invoke the exception in section 287.067.7. Cases holding otherwise are overruled. Cuba v. Jon Thomas Salons, Inc., 33 S.W.3d 542, 546 (Mo.App. 2000); Arbeiter v. National Supermarkets, Inc., 990 S.W.2d 142, 145-46 (Mo.App. 1999). Endicott pg. 16.

Immediately upon leaving employment with BSC Steel, claimant saw Dr. Mary Brothers. He was not experiencing any acute pain in his right shoulder, he had full range of motion and "Power in the arms is 4 to 5+ at all muscle groups, including the shoulders." Claimant's Ex. B Medical Records pg. 000145. Regardless of the fact that claimant was not in any particular distress with his right shoulder when leaving BSC Steel, Endicott is not a rule of medical causation. It is a rule of law for the sake of convenience established to end the debate over when to place responsibility for repetitive use occupational diseases after a period of time has passed and repetitive activities are present. Grading of the level of activity is simply not a factor once the three month threshold has passed prior to any claim and the employee is exposed to repetitive activities. It was not until claimant had been working doing repetitive activities from March 17, 2003 to September 2003 some six months at Ford that he sought treatment, was restricted medically and then made claim for compensation. Clearly Endicott applies and BSC Steel is absolved of any liability at that time.

Claimant argues that the work at BSC Steel was heavier than the work he did at Builders Steel and Ford so BSC Steel should be responsible for his evaluation and treatment for shoulder complaints. Once an employee leaves employment without having made claim and then enters new employment for more than three months continuing to be exposed to repetitive tasks, the liability shifts. Truly, had claimant made complaint to BSC Steel of specific shoulder pain, had he sought medical attention and been diagnosed with repetitive injuries from his work tasks and had he made claim before

working for another employer more than three months being exposed to repetitive activities, this decision would be different. The fact is, claimant did not report any specific shoulder complaints to anyone at BSC Steel and he never sought any medical attention for shoulder complaints nor did he ever make claim until after leaving and working at Ford on the assembly line for more than three months.

In fact, the overwhelming evidence is that for more than three months at Ford, he was subjected to intense repetitive line work including overhead work that resulted in a traumatic and painful event that was clearly recorded.

Claimant was seen for an independent evaluation by a non-treating physician, Dr. Stuckmeyer on February 12, 2004. Dr. Stuckmeyer writes that claimant has a 35% disability to the right shoulder of which 15% is pre-existing and 20% due to work at Bratton only. This defies common sense. Claimant clearly had a longstanding history of right shoulder complaints and even sought a Second Injury Fund disability evaluation as far back as 1990 based upon a body as a whole injury for his pre-existing right shoulder injury that he argued went further than a 232 scheduled pre-existing injury. Having thus argued that he had a significant disability already in his shoulder from as far back as 1990, claimant then did not seek any treatment while working for Bratton whatsoever. In an evaluation immediately following employment with Bratton, there were no significant complaints of right shoulder pain. The point is moot since claimant is not seeking permanency through this report but it speaks to the bias of the witness.

Clearly it was not until claimant had worked for several months doing line work and overhead work at Ford Motor that his problems with his shoulder again resurfaced and any need for additional treatment arose. Under Oswald v. National Fabco Mfg. Inc., 77 S.W.3d 611(Mo.banc 2002) and Endicott v. Display Technologies, 77 S.W.3d 612 (Mo. banc 2002) the claim was filed in August 2003, more than three months after being exposed to repetitive tasks

Section 287.063 provides:

**Occupational diseases, presumption of exposure — last employer liable — statute of limitations, starts running, when. —**

1. An employee shall be conclusively deemed to have been exposed to the hazards of an occupational disease when for any length of time, however short, he is employed in an occupation or process in which the hazard of the disease exists, subject to the provisions relating to occupational disease due to repetitive motion, as is set forth in subsection 7 of section 287.067, RSMo.

Section 287.067, subsection 7 provides:

7. With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease.

Under Oswald and Endicott the Supreme Court established a bright line test for repetitive use claims where the risk of exposure at an employment is greater than three months when claim is made. This is true even where a prior diagnosis was made at a time with a prior employer. Where the employment subjecting the claimant to the risk of the hazard of repetitive use is for more than three months when claim is sought, the last employer is responsible and this is a bright line rule. Clearly, it would be unjust to hold BSC Steel responsible for repetitive use injuries, ongoing treatment, and ultimate disability when during his short employment the claimant never specifically complained of right shoulder problems; he never sought treatment and never made a claim for compensation. This is particularly true when he left the employment and then subjected himself to further steel work and then clearly documented injury at the Ford plant from repetitive use. This court finds that claimant's request for a temporary award for medical benefits in this claim is denied. It is so ordered.

Date: \_\_\_\_\_ Made by: \_\_\_\_\_

Emily S. Fowler  
Administrative Law Judge  
Division of Workers' Compensation

A true copy: Attest:

\_\_\_\_\_

Patricia "Pat" Secret  
*Director*  
*Division of Workers' Compensation*