

IN THE SUPREME COURT OF OHIO

State of Ohio, ex rel.,) Case No. 07-747
Pilkington North America, Inc.,)
Appellee,)
v.) On Appeal from the
Industrial Commission of Ohio, et al.,) Franklin County Court of Appeals,
Appellant.) Tenth Appellate District,
Case No. 06AP-232

BRIEF OF APPELLEE, PILKINGTON NORTH AMERICA, INC.

Michael S. Scalzo (0015856)
John A. Borell, Jr. (0068716)
MARSHALL & MELHORN, LLC
Four SeaGate, Eighth Floor
Toledo, Ohio 43604
Tel: (419) 249-7100
Fax: (419) 249-7151
scalzo@marshall-melhorn.com

Counsel for Appellee-Relator
Pilkington North America, Inc.

Marc Dann
Attorney General of Ohio

Sandra E. Pinkerton (0062217)
Assistant Attorney General
Workers' Compensation Section
150 East Gay Street, 22nd Floor
Columbus, Ohio 43215-3130
Tel: (614) 466-6696
Fax: (614) 728-9525
spinkerton@ag.state.oh.us

Counsel for Appellant/Respondent,
Industrial Commission of Ohio

Theodore A. Bowman (009159)
Gallon, Takacs, Boissoneault,
& Schaffer Co., L.P.A.
3516 Granite Circle
Toledo, Ohio 43617-1172
Tel: (419) 843-2001
Fax: (419) 843-6664

Counsel for Appellee/Respondent,
Donald F. Stein

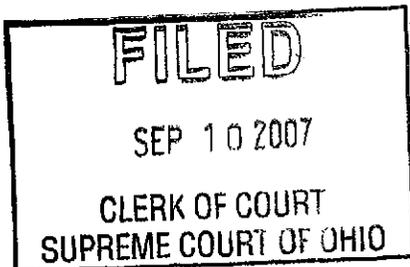


TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

INTRODUCTION..... 1

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS..... 2

ARGUMENT 3

I. The Court of Appeals was correct in holding that the “last-injurious-exposure” rule is inapplicable to the facts of this case. 3

II. A Writ of Mandamus should issue directing the Commission to charge all of Stein’s claim to the State Fund. 7

CONCLUSION 9

CERTIFICATE OF SERVICE..... 10

TABLE OF AUTHORITIES

Cases

<i>State ex rel. Burley v. Coil Packing, Inc.</i> (1987), 31 Ohio St.3d 18.....	9
<i>State ex rel. Conrad v. Indus. Comm.</i> (2000), 88 Ohio St.3d 413, 416	9
<i>State ex rel. Erieview Metal Treating Co. v. Indus. Comm.,</i> 109 Ohio St.3d 147, 2006-Ohio-2036.....	1,3,7
<i>State ex rel. Frisch's Restaurants, Inc. v. Indus. Comm.,</i> 102 Ohio St.3d 292, 2004-Ohio-2892.....	9
<i>State ex rel. Gay v. Mihm</i> (1994), 68 Ohio St.3d 315.....	9
<i>State ex. rel. Kelly Services, Inc., v. Indus. Comm.,</i> 2006 WL 3199287 (Ohio App. 10 Dist.), 2006-Ohio-5868	4
<i>State ex rel. Kohl's Dept. Stores v. Indus. Comm.,</i> 151 Ohio App.3d 624, 634, 2003-Ohio-748	9
<i>State ex rel. Lampkins v. Dayton Mallcable, Inc.</i> (1989), 45 Ohio St.3d 14.....	9
<i>State ex rel. Luria Bros. & Co., Inc. v. Indus. Comm.,</i> 1992 WL 97796 (Ohio App. 10 Dist.)	4
<i>State ex. rel. The Danis Companies v. Indus. Comm.,</i> 2004 WL 2803476 (Ohio App. 10 Dist.), 2004-Ohio-5252	4
<i>State ex. rel. Yellow Freight Sys., Inc. v. Indus. Comm.</i> (1994), Ohio St.3d 139.....	4
<i>State Indus. Ins. Sys. v. Jesch</i> (1985), 101 Nev. 690, 696	5
<i>White Motor Corp. v. Moore</i> (1976), 48 Ohio St. 2d 156, 159.....	8

INTRODUCTION

The issue is whether the “last-injurious-exposure” rule is applicable to the facts of the case. By virtue of the admissions made by Appellant the Industrial Commission of Ohio (“Commission”) in its Introduction to its Merit Brief, it establishes that the claim of Donald Stein does not meet the elements set forth by this Court in *State ex rel. Erieview Metal Treating Co. v. Indus. Comm.* 109 Ohio St.3d 147, 2006-Ohio-2036, for the application of the “last-injurious-exposure” rule. This rule only applies before the allowance of claim and where the claimant worked for several different employers. The Commission admits in its Introduction that neither of these elements exists. Accordingly, the “last-injurious-exposure” rule does not apply to this case. For this reason and those set forth below, the Court of Appeals’ decision should be affirmed and a writ should issue ordering the Commission to vacate that portion of the Staff Hearing Officer’s Order of June 6, 2005, that allocates one hundred percent (100%) of the risk liability to the self-insured status of Relator, Pilkington North America, Inc. (“Pilkington”) based upon the “last-injurious-exposure” rule, and to enter an order that the Commission either (1) charge the entire claim to the State Fund or (2) allocate a percentage of the risk to Pilkington and/or the State Fund without resort to the “last-injurious-exposure” rule.

STATEMENT OF THE CASE

Pilkington accepts the Commission’s Statement of the Case with the exceptions noted below. Pilkington did not argue, as the Commission asserts, that application of the “last-injurious-exposure” rule was unnecessary because Stein’s exposure date can be calculated by subtracting the average latency period for mesothelioma from the initial on-set date. Rather, Pilkington argued that resort to the “last-injurious-exposure” rule was improper because the claim of Donald Stein (“Stein”) had already been allowed, Stein had only one employer, and the

evidence supported a conclusion that Stein's most injurious exposure to asbestos occurred while Pilkington was a State Fund employer. The Commission also states that the Court of Appeals "adopted the magistrate's decision and issued a writ of mandamus, ordering the commission to **devise a mechanism** to distribute liability between Pilkington's self-insured and state fund risks for both the medical and indemnity costs for Stein's mesothelioma claim." *Commission's Merit Brief at p. 2*, emphasis added. However, nowhere in either the Appellate Court's decision nor that of the Magistrate is the Commission ordered to "devise" such a "mechanism." All the Commission is ordered to do is charge the claim to Pilkington or the State Fund, or partly to both, without reference to the "last-injurious-exposure" rule. As set forth below, the Commission has a great deal of experience in apportioning liability in this manner.

STATEMENT OF THE FACTS

Pilkington accepts the Commission's Statement of the Facts with the exceptions noted below. The Commission is correct when it wrote that the Staff Hearing Officer ("SHO") found in her Order of June 6, 2005 that Stein was exposed to asbestos from 1947 until the early 1980's. However, the Commission failed to note that the SHO also found that many changes were made in the 1970's to rid the plant of asbestos and that mesothelioma has an extremely long latency period. Further, the SHO made no finding as to which exposure, pre or post 1970, was probably the most injurious exposure. That evidence was supplied by Dr. Gad, who opined that the most injurious exposure was most likely before 1970. *Stipulated Record filed with the Court of Appeals on May 30, 2006 pp. 114-115, 118-119 ("Stip. p. #") and Supplement pp. 1-3 ("Supplement")*. There is no medical evidence to the contrary. Finally, the Commission again engaged in hyperbole when it stated that the Appellate Court ordered it "**to devise some**

formula” to assign liability for Stein’s claim between Pilkington and the State Fund.

Commission’s Merit Brief at p. 4, emphasis added.

ARGUMENT

I. **The Court of Appeals was correct in holding that the “last-injurious-exposure” rule is inapplicable to the facts of this case.**

While the law regarding the “last-injurious-exposure” rule was somewhat blurred prior to 2006, this Court’s decision in *Erievew*, *supra*, brought into clear focus the applicability of this rule as it pertains to the facts of this case. In *Erievew*, this Court noted two requirements that must exist before application of the “last-injurious-exposure” rule: (1) that it be before the allowance of the claim and (2) that the worker was exposed to an injurious substance while working for each of several employers. The Commission admits in its Introduction that Stein worked for but a single employer, Pilkington, and that Stein’s claim for mesothelioma “has been determined by the appellant Industrial Commission of Ohio (“commission”) to be compensable.” Therefore, according to the Commission’s own admissions, the facts of this claim do not meet the requirements established by this Court in *Erievew* for application of the “last-injurious-exposure” rule.

As this Court further wrote in *Erievew*, the “last-injurious-exposure” rule was inspired by obstacles that an employee faces in a long latency occupational disease claim, where he worked for numerous employers and where pinpointing which exposure planted the seeds of the eventual disease was often impossible. Accordingly, this Court adopted a rule of expediency so as not to deprive injured workers of deserving benefits. However, in a situation like we have here, where the claim is allowed and the claimant has not been denied any benefits, “this difference immediately distinguishes it from all other cases citing the rule.” *Id.* at ¶11. This Court reviewed the question as to whether the “last-injurious-exposure” rule should nonetheless be

extended to situations like we have here and found that it should not. “Here, it is possible to determine with some degree of accuracy which exposure was responsible for [the claimant’s] disability . . . There is, therefore, no reason to resort to the last-injurious-exposure theory.” *Id.*

All the Commission is being asked to do here is assess liability between Pilkington and the State Fund, without reference to the “last-injurious-exposure” rule. As in all issues before the Commission, it needs to take evidence and allow the parties an opportunity to be heard. If it decides that it can assign 100% of the liability against either Pilkington or the State Fund, it is free to do so. If the Commission believes that a fractional apportionment is in order, a percentage to Pilkington and a percentage to the State Fund, it is also free to do that. This is nothing new for the Commission. It makes such fractional determinations routinely when a claimant has multiple claims and is awarded permanent total disability compensation. The Commission assigns fractional percentages to each claim and to each employer, with the total equaling 100%. See, e.g., *State ex. rel. Kelly Services, Inc., v. Indus. Comm.*, 2006 WL 3199287 (Ohio App. 10 Dist.), 2006-Ohio-5868, *State ex. rel. The Danis Companies v. Indus. Comm.*, 2004 WL 2803476 (Ohio App. 10 Dist.), 2004-Ohio-5252, and *State ex. rel. Luria Bros. & Co., Inc. v. Indus. Comm.*, 1992 WL 97796 (Ohio App. 10 Dist.). In *State ex. rel. Yellow Freight Sys., Inc. v. Indus. Comm.* (1994), Ohio St.3d 139, this Court reversed the lower court’s decision that allocated the entire cost of a claim of permanent total disability (“PTD”) to the claimant’s second employer. The claimant, Henry Cunningham, had two separate claims against two separate employers. Because the evidence relied on by the Commission attributed Cunningham’s PTD to both claims, this Court ordered the Commission to further consider the allocation between the two employers. That is all that is being requested of the Commission in the case at bar.

The Commission cited the Nevada case of *State Indus. Ins. Sys. v. Jesch* (1985), 101 Nev. 690, 696, for the proposition that the “last-injurious-exposure” rule is needed because of the “tremendous initial task to discover **all** the employers responsible for the occupational disease.” *Commission’s Merit Brief at p. 7*, emphasis added. However, as is readily apparent, the *Jesch* case is inapplicable to the facts here because Stein had only one employer and the claim has been allowed.

The Commission also argues that “an allocation of liability for a single occupational disease claim to more than one employer is impractical.” *Commission’s Merit Brief at pp. 4-5*. Again, as noted above, that alleged impracticality does not exist here because there is only one employer. Similarly, the Commission conjures up imaginary problems it claims will occur if liability is divided between two payors. *Commission’s Merit Brief pp. 7-8*. However, as also noted above, the Commission has a great deal of experience dividing liability across various claims, as well as employers. Accordingly, the Commission’s arguments here to the contrary are disingenuous.

With regard to apportioning liability between the self-insured employer and the State Fund, there is evidence in the stipulated record that all liability should be assigned to the State Fund. As the Staff Hearing Officer wrote in her Order of June 6, 2005, while Stein testified that he was exposed to asbestos since he began working for Pilkington in 1947, he also testified that many changes were made in the 1970’s to help clean up the plant. The Staff Hearing Officer also noted that Stein’s condition has an extremely long latency period. Further, in addition to offering articles concerning the long latency period for mesothelioma, Pilkington submitted a report from Dr. Mohammed Gad dated April 21, 2005, in which the Bureau of Workers’ Compensation requested that Dr. Gad render an opinion regarding the most injurious exposure in the claim of

William J. Nyers aganst Pilkington. *Stip. pp. 118-119 and Supplement*. In that report, Dr. Gad wrote that the latency period for malignant mesothelioma is 35-40 years and that Nyers' most harmful exposure occurred prior to 1970. The Commission relied on this report from Dr. Gad in allowing Nyers' claim and charging it to the State Fund rather than to Pilkington. *Stip. pp. 118-119*. While that report of Dr. Gad concerned a different employee, his statement of the latency period for mesothelioma claims of 35-40 years was a general statement of medical science, was submitted by Pilkington at the Staff Hearing Officer hearing on June 6, 2005 in Stein's claim, and was the only medical report in the record on this issue.

After Pilkington's appeal of the Staff Hearing Officer Order was denied by the Commission, Pilkington filed a Request for Reconsideration. *Stip. pp. 48-70*. After the Request for Reconsideration was denied (*Stip. pp. 71-72*), Pilkington filed an Amended Request for Reconsideration. *Stip. pp. 108-142*. In that amended request, Pilkington attached a report from Dr. Gad which it had recently obtained specifically addressing Stein's claim. *Stip. pp. 114-115*. In this report, Dr. Gad offered a similar opinion to the one he offered in the *Nyers* claim, that the latency period for the development of malignant mesothelioma is an average latency of 37.5 years and that Stein's most injurious exposure most likely occurred before 1970. *Stip. p. 114*. Dr. Gad's reports remain the only medical evidence specifically on the issue of when Stein's most injurious exposure to asbestos occurred.

It is also noteworthy that the Nyers' claim came after the claim of Stein was decided by the SHO on June 6, 2005. Prior to Stein's claim, Pilkington had seven other employees whose claims were allowed for asbestos related diseases. In each of those claims, the Commission ruled that the State Fund should be charged, not the self-insured employer. *Stip. pp. 73-107*. Stein's was the eighth such claim. Then after Stein, Nyers' claim was filed and it was also decided by

the Commission to charge it to the State Fund. Stein's claim is the only one of nine asbestos-related claims that has been charged to the self-insured employer.

In summary, the principle that threads its way through all of the injurious exposure cases, culminating most recently in *Erievue*, is that the "last-injurious-exposure" rule is inapplicable unless (1) it is before the allowance of the claim, (2) there are multiple employers, and (3) "it is [not] possible to determine with some degree of accuracy which exposure was responsible for [the claimant's] disability. *Erievue* at ¶11. Here, it has been determined with some degree of accuracy which exposure was responsible for Stein's disability. Dr. Gad said it was his exposure prior to December 7, 1970. The Commission further acknowledges that there was evidence in the record from medical journals that gave the same latency period of 35-40 years, or an average of 37.5 years. *Commission's Merit Brief at pages 3 and 4*. The SHO also noted that the majority of Stein's employment (23 years) was before 1970 and that Stein's exposure to asbestos was less after 1970 because of the efforts made by Pilkington during that time to rid the plant of asbestos. All of this evidence places the most likely harmful exposure prior to December 7, 1970.

II. A Writ of Mandamus should issue directing the Commission to charge all of Stein's claim to the State Fund.

The Magistrate's decision was adopted by the Court of Appeals. However, the Magistrate made a mathematical error, which led to the incorrect statement by him and ultimately his recommendation that the Commission reapportion cost of the claim rather than ordering that the entire claim be charged to the State Fund. The Magistrate's incorrect statement was that "we have an inconsistency with respect to Dr. Gad's reports as to the **average latency period** for mesothelioma." *Magistrate's Decision p. 12*, emphasis added. The Magistrate noted that Dr. Gad's report of April 21, 2005 in the Nyers' claim (*Stip. pp. 109-110 and Supplement*) set forth

an average latency period for malignant mesothelioma of 35-40 years. *Magistrate's Decision p. 6*. In Dr. Gad's report dated July 5, 2005 in Stein's claim (*Stip. pp. 114-115*), Dr. Gad said the latency period was 30-45 years. Whether one uses the 35-40 years that Dr. Gad noted in *Nyers* or 30-45 years he noted in Stein, the average latency period is the same - - 37.5 years.

The Magistrate next wrote that approximately 32.5 years elapsed between the date that Pilkington became self-insured and the date that the claimant was first diagnosed with malignant mesothelioma,¹ and correctly concluded that using the average latency of 35-40 years; i.e., 37.5 years, would lead to a conclusion that Stein's mesothelioma more likely was caused by injurious exposure occurring prior to December 7, 1970. However, the Magistrate again erred when he next wrote that using the average latency period of 35-40 years (i.e., 37.5 years), undermines Pilkington's position. Therefore, the Magistrate's conclusion that accepting Dr. Gad's average latency period of 30-45 years could place the injurious exposure during the time that Pilkington was a State Fund employer, as well as during the time that it was a self-insured employer, is incorrect. Regardless of which range one uses, the average latency period is the same, 37.5 years, which places the injurious exposure before December 1970.

The Magistrate then ended by stating that the Commission was not required to accept Pilkington's theory based on Dr. Gad's reports. However, the record contains no other medical evidence as to when the injurious exposure occurred, other than medical journals, which also place the harmful exposure before 1970. Medical evidence is necessary regarding causation on a complex issue such as this. *White Motor Corp. v. Moore* (1976), 48 Ohio St. 2d 156, 159. The only medical evidence in the record is supplied by Dr. Gad's two reports, both of which opine that the injurious exposure most likely occurred before December 7, 1970. While the

¹ It is assumed for the purpose of this argument that Stein has malignant mesothelioma caused by asbestos exposure.

Commission is the exclusive evaluator of evidentiary weight and credibility (*State ex rel. Burley v. Coil Packing, Inc.* (1987), 31 Ohio St.3d 18), it is not permitted to ignore the only evidence in the record on an issue and rule contrary to that evidence. *State ex rel. Frisch's Restaurants, Inc. v. Indus. Comm.*, 102 Ohio St.3d 292, 2004-Ohio-2892. There must be some evidence in the record to support the Commission's decision. *State ex rel. Conrad v. Indus. Comm.* (2000), 88 Ohio St.3d 413, 416; see also *State ex rel. Lampkins v. Dayton Mallcable, Inc.* (1989), 45 Ohio St.3d 14 and *State ex rel. Kohl's Dept. Stores v. Indus. Comm.*, 151 Ohio App.3d 624, 634, 2003-Ohio-748 (absence of competent medical evidence is not some evidence on which Commission can rely). Further, "where the evidence is so one-sided as to support but one result, a return to the Commission can be dispensed with and a judgment consistent with the evidence rendered." *Conrad, supra, at 416, citing State ex rel. Gay v. Mihm* (1994), 68 Ohio St.3d 315. Here, while there is some evidence that Stein was exposed to asbestos after December 1970, there is no evidence that the injurious exposure to Donald Stein occurred after December 1970. Accordingly, the Magistrate erred in failing to recommend that the Commission be required to vacate its Staff Hearing Officer Order of June 6, 2005, and to replace it with another Order allocating 100% of the risk liability to the State Fund.

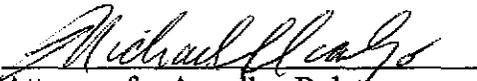
CONCLUSION

The Court of Appeals was correct in ruling that the Commission erred when it applied the "last-injurious-exposure" rule to allocate 100 percent of the risk liability to Pilkington's self-insured status. Therefore, a writ of mandamus should issue ordering the Commission to vacate the SHO order of June 6, 2005 and issue in its place an amended order either (1) charging the entire claim to the State Fund or (2) allocating a percentage of risk liability between Pilkington and the State Fund, without reference to the "last-injurious-exposure" rule.

Respectfully submitted,

Michael S. Scalzo (0015856)
John A. Borell, Jr. (0068716)

MARSHALL & MELHORN, LLC
Four SeaGate, Eighth Floor
Toledo, Ohio 43604
Tel: (419) 249-7100
Fax: (419) 249-7151
scalzo@marshall-melhorn.com
borell@marshall-melhorn.com


Attorney for Appellee-Relator
The Andersons, Inc.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served via regular U.S. mail, postage prepaid, upon Theodore A. Bowman, Esq., Gallon, Takacs, Boissoneault & Schaffer Co., L.P.A., Jack Gallon Building, 3516 Granite Circle, Toledo, OH 43617-1172, counsel for Appellee/Respondent, Donald F. Stein, and upon Sandra Pinkerton, Office of the Ohio Attorney General, Workers' Compensation Section, 150 East Gay Street, 22nd Floor, Columbus, OH 43215-3130, counsel for Appellant/Respondent, Industrial Commission of Ohio on this 7th day of September, 2007.

