0/A 4-10-85

IN THE SUPREME COURT OF FLORIDA

CASE NO.: 65,764

BETTY NEWTON,

Petitioner,

-vs-

McCOTTER MOTORS, INC., CORPORATE GROUP SERVICE, INC. and DIVISION OF WORKERS' COMPENSATION OF THE FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Respondents.

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE

The Petitioner, Betty Newton, is the widow of Leslie Curtis Newton, the deceased employee in this workers' compensation case. She was the claimant in the proceedings before the Deputy Commissioner and the Appellee before the First District Court of Appeal. Her husband's employer, McCotter Motors, Inc., and its servicing agent, Corporate Group Service, were the Appellants below.

This is discretionary review of a decision of the First District Court of Appeal, which expressly declared the one year and five year provisions of §440.16, Fla. Stat., to be valid. It is also a case of first impression in Florida, although a similar statute was declared unconstitutional in Oklahoma.

At the hearing before the Deputy Commissioner, the Petitioner presented her own testimony, the testimony of her husband's treating physician, and of the Medical Examiner of Broward County, Dr. Ronald K. Wright. The employer/carrier presented no evidence. The employer/carrier did not dispute that Leslie Newton died as a result of his industrial accident, nor that the Petitioner is his widow and dependent. They contended that the statute provides no legal remedy to the Petitioner and that the lack of a remedy is constitutional. The Deputy Commissioner awarded benefits, having determined that the statutory requirements that the death occur within one year of the accident or five years of the accident following continuous disability, if applied to the present case, would produce an unconstitutional result.

The First District Court of Appeal reversed, without oral argument, holding:

> "In the past, this Court and the Florida Supreme Court have upheld similar attacks on other sections and subsections of chapter 440. In light of the precedent set by those cases, we find that appellee has not sustained her burden of showing that section 440.16(1) is unconstitutional."
> McCotter Motors, Inc. v. Newton, 453 So.2d 117, at 119 (Fla. 1st DCA 1984)

The District Court of Appeal pointed out:

> "The five year limit on benefits payable for death after continuous disability has remained in effect since the enactment of section 440.16(1), Florida Statutes, in 1935. Medical testimony was presented at the hearing to the effect that although such a five year limitation may have had a basis in fact in 1935 because of the lesser medical ability then to either prolong life or to determine the cause of death after a long period of time, the statute has no basis in fact today since the state of the art of medicine has advanced to the extent that the ability to prolong life has vastly improved as has the ability to determine cause of death even after long periods of disability."
> Id., at 118.

In reversing the Order of the Deputy Commissioner, the District Court of Appeal held:

> "While we hold section 440.16(1), Florida Statutes, constitutional, and decline to invade the province of the legislature in this regard,

> we recognize the equities of appellee's arguments and suggest that section 440.16(1) should be revisited by the Florida legislature to address and debate the public policy underlying the one year and five year limitations in light of the advances made in medical science since the enactment of that statute."
> Id., at 119.

This Court granted review.

STATEMENT OF THE FACTS

Leslie Curtis Newton suffered an admittedly compensable accident on April 30, 1973, admittedly resulting in permanent total disability which was paid to the date of his death on May 5, 1982 (R. 25, 48). He had originally injured his back while trying to close two, big glass doors in the showroom of McCotter Motors, where he worked as a salesman (R. 25, 42). As a result of this accident, he required three back surgeries (R. 55). As a result of his surgeries, he developed thrombophlebitis of both legs (R. 43, 57).

Dr. Augustine, the treating physician, explained that the employee's thrombophlebitis was a complication which resulted from the bed rest required after the surgery (R. 57). The treatment for this condition is anticoagulation therapy with the drug Coumadin (R. 58). One of the side effects of taking Coumadin is that the patient's blood is thinner and the patient can develop hemorrhage and bleeding complications (R. 59). Indeed, Leslie Newton had had an episode of bleeding in the stomach because of his Coumadin therapy in 1980 (R. 60), despite going to the hospital monthly to check the control of the anticoagulation therapy (R. 59-60, 65).

Leslie Newton also developed severe depression and reactive hypertension because of his pain (R. 61-64).

When Dr. Augustine last saw Leslie Newton, which was two weeks prior to his death, he had been in severe pain

and his left leg was swollen (R. 66-67). The doctor wrote at the time "acute back pain and anxiety with secondary hypertension" (R. 67).

On May 3, 1982, Leslie Newton's back "started hurting real bad" (R. 14). He then used his biofeedback machine, but it "didn't work this time" (R. 15). He called to his wife (R. 15), who contacted Dr. Augustine and he was taken to the hospital by ambulance (R. 37). When he got to the hospital, he was unconscious. Dr. Augustine diagnosed intracranial hemorrhage, which was confirmed by CAT Scan, and the patient died on May 5, 1982 (R. 68-70). The immediate cause of death was intracerebral hemorrhage --- bleeding in the brain (R. 20, 70-71). This bleeding was caused by a blood vessel that ruptured in the brain because of the patient's reactive hypertension on account of his pain and because of the anticoagulation therapy which made him bleed more readily (R. 71-72). Dr. Augustine testified:

> "If you ask me if the death is due to the complications of his treatment, probably yes."
> (R. 72)
>
> * * * * *
>
> "Q [Mr. Sicking] Well, what is the etiology or the explanation of that part that the original injury to his back and its sequela, the things that flow from it naturally, played in causing his death.

A [Dr. Augustine] Okay. In this young man, he had a back injury sometime back whenever, in 1973. And he had surgery, which was complicated by constant chronic low back pain. The original operation was an intention to relieve his pain, but which was unsuccessful, which is fairly common with back problems. The patient developed the thrombophlebitis, for which he was put on anticoagulation therapy, and the patient's constant pain aggravated him many times, caused psychological problems also, and which included depression and significant hypertension. Any time when he's depressed or anxious or tense, or even with pain, and with that his blood pressure will shoot up and this definitely at the time of death or at the time when he came to my hospital here in Jess Parrish, his blood pressure was significant enough to cause bleeding or complications, including cerebral hemorrhage, stroke or myocardial infarction.

Q And the Coumadin therapy also played some part as well?

A Yes."
(R. 73-74)

Betty Newton and Leslie Newton were living together as husband and wife (R. 17, 19). It was the only marriage for both (R. 45). She was not working at the time of his accident (R. 17). She was not working at the time of his death, except that she provided home nursing care for her husband, which the employer/carrier paid her to perform (R. 10, 28, 30-31). Since her husband's death, she has been self-employed selling

cosmetics, but she has earned very little (R. 9, 28-29). She planned to attend a program at the local community college that helps women who have been out of the job market for a long time (R. 32-33).

Dr. Ronald K. Wright is a forensic pathologist (R. 87). He is the Medical Examiner of Broward County (R. 88), an Associate Professor at the University of Miami School of Medicine in Pathology, Epidemiology and Public Health (R. 118), and the author of numerous scientific articles on forensic pathology and the causes of death (R. 120-121).

Dr. Wright testified that the state of art of forensic pathology at the present time is such that it can be determined whether death is related to an event which happened five or more years earlier. This is called a delayed death (R. 88-89). Compared to 1935 "...the determination of delayed death has changed remarkably in that period of time" (R. 89), because a great deal more is known about why people die in the physiologic sense, called the mechanism of dying (R. 90) and because changes in medical care since that time have created a large number of people "who stay alive for a period of time but do not get well" (R. 91).

These changes are the introduction of antibiotics in the 1940's, volume respirators (breathing machines) in the 1950's and 1960's and the introduction of sophisticated laboratory testing which allows control of body chemistry (R. 91).

Dr. Wright indicated that, in 1935, it was unheard of in forensic science to make a determination of the cause of death five or more years after an event because "there was practically no ability to obtain any experience in doing that sort of thing" (R. 92).

Comparing the state of the art of medicine from 1935 to the present, he stated:

> "We have very unfortunately done a magnificent job of prolonging death ... we cannot distinguish between individuals who are fatally injured and those who are not. We treat them all, and with the advances in medical science which we currently enjoy, we can keep both 'alive' ... it creates vast numbers of individuals who do not get well ... depending upon how you look upon it, you have just prolonged dying." (R. 92-93)

Prior to the introduction of antibiotics in the 1940's (Penicillin was introduced in 1948) (R. 96), the "seriously injured and bedridden" would die of pneumonia in a few days or a week (R. 94), or die of urinary tract and kidney infection (R. 94), or primary infections in the wounded area (R. 94-95). Gangrene was terrible in 1935 (R. 98). Now, it is not a problem; it does not happen (R. 98). Intravenous fluids and blood transfusions were not used until World War II (R. 97-98). There was no synthetic life machines in 1935 either (R. 97).

Dr. Wright stated that there really was not much progress in medicine between 1900 or 1920 and 1935 (R. 98).

"Modern medicine applied did not change significantly until World War II" (R. 99).

There was knowledge in medical literature, but it was not available to the public in the form of treatment (R. 100). For example, drugs to treat high blood pressure that were known since the 1920's did not come into general use until 1964 (R. 101).

Dr. Wright described Coumadin therapy, which came into use around the time of World War II (R. 105).

"Q [By Mr. Sicking] What would you consider to be the overwhelming side effect of Coumadin therapy?

A [Dr. Wright] The overwhelming side effect of Coumadin therapy? Bleeding to death and variations on the theme of that."
(R. 106)

Dr. Wright's testimony as to any factual basis for the one year and five year provisions in §440.16(1), Fla. Stat., was quoted in the Deputy Commissioner's Order:

"Q (By: Mr. Sicking) 'If death results from the accident within one year thereafter or follows continuously disability and results from the accident within five years thereafter, the employer shall pay.' This is a phrase from the Workers' Compensation Law.

Let's take the first phrase, 'If death results from the accident within one year thereafter'. Today, based on the state of art of medicine, does that have any basis in scientific fact?

A No."

* * * * *

"Q (By Mr. Sicking) The next part is, 'or follows continuous disability and results from the accident within five years thereafter"?

A The answer to that is no.

Q Let me make sure I asked the question because that's the important one. Does that phrase have any basis in scientific fact?

A No.

Q In your opinion, would either one of those within reasonable medical probability have had any basis in scientific fact in 1935?

A Yes.

Q Okay. So, what we're talking about here is the progress in medicine in the meantime?

A Yes, sir."
(R. 134-135 quoting R. 109-110)

That testimony continued:

"Q (By Mr. Sicking) What is the reason for that? What is the reason for the difference?

MR. PYLE: Excuse me, What is the reason for the difference in what?

Q (By Mr. Sicking) Your answers to yes and no depending on today versus 1935 as to having a basis in fact?

MR. PYLE: Scientific fact?

MR. SICKING: Scientific fact, yes.

THE WITNESS: Changes in medical and the ability to determine cause of death."
(R. 110-111)

SUMMARY OF ARGUMENT

§440.16(1), Fla. Stat., requires that in order for a death to be compensable it must occur within one year of the accident or five years of the accident following continuous disability. The deceased employee died nine years later as a result of his industrial accident following continuous disability. The Petitioner is his dependent-widow for whom the statute provides no remedy.

The statute denies due process of law (access to courts) by abolishing the remedy before death occurs thereby denying the widow the opportunity to present facts at a hearing which show the causal relationship of the death to the accident and which show her dependency on the deceased. Dependency and causal relationship cannot cease to exist by Legislative decree on the first or fifth anniversary of the accident. The passage of time does not effect them.

The statute denies equal protection of the law (no reasonable basis). The statute was enacted in 1935 when medicine did not have the ability to prolong life or determine the cause of death beyond the periods of time in the statute. Progress in science in the meantime has rendered the statute obsolete and unreasonable because medicine today can and does prolong life or determine the cause of death way beyond the periods of time in the statute. The statute is similar to the "year and a day rule" in criminal law, which has been widely invalidated because of the progress in medicine since its adoption.

ARGUMENT

POINT ONE

THE PROVISIONS OF §440.16(1), FLA. STAT., REQUIRING THAT A COMPENSABLE DEATH OCCUR WITHIN ONE YEAR OF THE ACCIDENT OR WITHIN FIVE YEARS OF THE ACCIDENT FOLLOWING CONTINUOUS DISABILITY VIOLATE CONSTITUTIONAL GUARANTEES OF DUE PROCESS OF LAW (ACCESS TO COURTS).

§440.16(1), Fla. Stat., provides:

> "If death results from the accident within 1 year thereafter or follows continuous disability and results from the accident within 5 years thereafter, the employer shall pay:"

This subsection has read the same way ever since it was first enacted in 1935. Laws of Fla., Ch. 17481, §16(a) (1935). It has never been changed.

This subsection is a non-claim provision because it means:

> If death results from the accident more than one year thereafter or follows continuous disability and results from the accident more than 5 years thereafter, the employer shall not have to pay.

It is not a statute of limitation because it has nothing to do with the timely or untimely filing of claims. There already is a separate statute paragraph for that. §440.19(1)(b), Fla. Stat., (1972) provided:

> "The right to compensation for death under this chapter shall be barred unless a claim therefor is filed within two years after the death, except that if payment of compensation has been made without an award on account

> of such death a claim may be filed within two years after the date of the last payment."

The current statute of limitation for death claims contained in §440.19(2)(c), Fla. Stat., (1984) is essentially the same. In 1935, the statute read:

> "...the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the last payment." Laws of Fla., ch. 17481, §19(a) (1935)

The question then becomes whether §440.16(1), Fla. Stat., violates due process of law as guaranteed by both the state and federal Constitutions, specifically the access to courts provision.

Fla. Const., Art. I, §21, provides:

> "The courts shall be open to every person for redress of any injury...".

This is a constitutional expression of the maxim that for every wrong there is a remedy. Holland, for Use and Benefit of Williams, v. Mayes, 155 Fla. 129, 19 So.2d 709 (1944).

In the present case, the Petitioner-Widow was dependent upon the deceased employee at the time of the accident, at the time of his death and thereafter.

Dependency is the gist of entitlement to death benefits. See Terrinoni v. Westward Ho!, 418 So.2d 1143 (Fla. 1st DCA 1982). Indeed, §440.16(1)(b), Fla. Stat., specifically provides that death benefits are paid "on account of dependency upon the deceased".

Dependency has nothing to do with the mere passage of time after the accident. A widow, an orphan, or other dependent cannot magically by statute cease to be in fact dependent on the first anniversary of the accident; nor on the fifth anniversary either.

Where there is dependency, the widow has a constitutional right to a remedy and she ought to be entitled to a hearing to establish her dependency and that the employee's death resulted from the industrial accident. The statute as written does not allow for a consideration of these facts.

The Supreme Court of Oklahoma considered the exact question in Roberts v. Merrill, 386 P.2nd 780 (Okla. 1963) and held that a similar provision in that state's workers' compensation act was unconstitutional.

Roberts was the widow of a workman employed by Merrill who suffered a compensable accident resulting in permanent total disability. He died of his injuries more than five years after the accident. The Oklahoma Workmen's Compensation Act provided:

> "If the injury causes death within two (2) years from the date of the accident or if the injury causes continuous disability and causes death within five (5) years from the date of accident * * * compensation shall be payable..." 85 O.S. 1961 §22, subdiv. 7, quoted in Roberts v. Merrill, supra, at 781.

Oklahoma had a provision in its state constitution which guaranteed the right of action for wrongful death, but allowed for workers' compensation death benefits to be enacted by the Legislature, which remedy would be exclusive.

The trial tribunal denied the claim based on the 5 year provision in the statute. The Supreme Court reversed holding that the 2 year and the 5 year provisions were invalid and the Court remanded the case for a determination of entitlement to workers' compensation benefits absent the offending provisions. The Court viewed the problem quite simply as a conflict between a constitutional guarantee that there must be some kind of remedy for death and a statutory provision which allowed workers' compensation for some industrially caused deaths, but not for others. The "not for others" had no bearing on dependency, nor on the actual fact of death having been caused by the accident. The "not for others" was based solely on the passage of time after the accident.

> "In the case at bar, we are not concerned with the question of the general legislative power to regulate procedure governing the prosecution of death benefit rights, but with a restrictive condition which operates to abridge or abrogate the right itself to that class of persons whose decedents die later than the maximum period allowed to intervene between injury and demise. Such restriction, which bars the right to effectively pursue a remedy, is beyond the legislative authority ...
>
> * * * * * *
>
> ...we conclude the lawmaking body of this state remains, as before, without authority to ordain that beyond a given interval between injury and death there exists no right to pursue a remedy before some tribunal. The cause of death,

> regardless of the time when death occurs, presents an adjudicatory fact to be resolved from the evidence, and the Legislature continues to be without power of predetermining causation by means of a statutory fiat."
> Roberts v. Merrill, supra, at 785.

While Florida does not have a specific constitutional guarantee of actions for wrongful death, it does have the broader and more encompassing "access to courts" provision of Art. I, §21, of the Florida Constitution, as well as the due process guarantee of Art. I, §9, of the Florida Constitution and the Fourteenth Amendment of the U. S. Constitution.

In Florida, actions for wrongful death were recognized by statute in 1883. Laws of Fla. 1883, ch. 3439. This was before the Constitution of 1885 (Decl. of Rights, §4) which is the ancestor of the present access to courts provision. [The territorial constitution of 1838, the confederate and reconstruction constitutions of the 1860's are disregarded for obvious reasons]. In other words, actions for wrongful death already existed when the people of Florida adopted the access to courts provision in the Constitution of 1885.

Thus, Florida and Oklahoma both recognize actions for wrongful death as part of the organic law of the state. Florida does so by a broad constitutional definition of legal remedies and Oklahoma does so by a specific one. This Court recognized the power of the Legislature to substitute a workers' compensation act for the state's wrongful death act when industrial injury is involved, but not to abolish the

right by providing no remedy to the widow. See Sasso v. Ram Property Management, 452 So.2d 932 (Fla. 1984). Substituting one remedy for another is acceptable. Providing no remedy is not. Mrs. Newton has no remedy as other widows have.

The fault of the Florida statute is that like the invalidated Oklahoma statute, it creates a class of persons for whom there is no remedy available for death claims: the surviving spouse or children particularly, who are in fact dependent upon the deceased employee for support, when the employee in fact dies of his injuries caused by industrial accident more than 1 year before, or more than 5 years before following continuous disability.

The one year and five year provisions in the statute create a conclusive and irrebutable presumption in law against causal relationship of the death to the industrial accident and a conclusive and irrebutable presumption against dependency.

Notwithstanding the actual facts, there is no opportunity for the widow or children or other dependents to prove their entitlement. For them, there is no remedy at all.

On this point, the Deputy Commissioner was correct in refusing to enforce the one year and five year periods of the statute. As applied to the facts of this case, to do otherwise would produce an unconstitutional result; denial of access to courts and of due process of law. His Order awarding benefits should be reinstated.

POINT TWO

THE PROVISIONS OF §440.16(1), FLA. STAT., REQUIRING THAT A COMPENSABLE DEATH OCCUR WITHIN ONE YEAR OF THE ACCIDENT OR WITHIN FIVE YEARS OF THE ACCIDENT FOLLOWING CONTINUOUS DISABILITY VIOLATE CONSTITUTIONAL GUARANTEES OF EQUAL PROTECTION OF THE LAW.

"All natural persons are equal before the law..."
Fla. Const., Art. I, §2

In Ga. Southern & Fla. Ry. Co. v. Seven-Up Bottling Co., 175 So.2d 39 (Fla. 1965), the Florida Supreme Court invalidated the comparative negligence statute which applied only to railroads. The rationale was that the statute was valid when enacted; it was alright to discriminate against railroads when they were the only business operating dangerous machines all over the country-side, which were capable of maiming and killing large numbers of people. However, changing technology had made other machines used by other businesses (e.g., planes, trucks, cars) equally, if not more, dangerous and they were not subject to the statute. Ironically, comparative negligence later became the rule of law for all. The holding of the case, however, well illustrates that a legislative discrimination, once reasonable, can be rendered unreasonable by advances in technology.

In the present case, the evidence was, and common sense tells us, that in 1935, when this statute was enacted, medicine either did not have the knowledge at all or such knowledge was not readily available to the public, in order to prolong life more than one year after an accident or after

more than five years of continuous disability. In the 1935 world, the 1 year and 5 year provisions served some purpose (disregarding lack of access to courts) because there was no scientific ability to prolong life more than that anyway. Today, this is not true. The statute no longer has any basis in fact because medicine now has the ability to prolong life that much and more and such knowledge is widely available.

The Court will recognize the similarity between the one year and five year provisions of §440.16(1), Fla. Stat., and "the year and a day rule":

> "At the common law, in order to constitute punishable homicide, it was necessary that death ensue within a year and a day from the infliction of a mortal wound by the defendant, 'in the contemplation whereof the whole day on which the hurt was done shall be reckoned the first'. Unless death took place within this period, the law drew the conclusion that the injury was not the cause of death and/or could not be discovered, and did not allow either the court or jury to draw a contrary conclusion."
> Edwards, "The 'Year and a Day Rule' in Florida Criminal Law", 20 Fla. L.J. 296 (1946)

Since we now count time beginning with the next day, Fla. R. Civ. P. 1.090(a), the "year and a day rule" is really the same as a one year rule.

The "year and a day rule" was repudiated by the Pennsylvania Supreme Court in Commonwealth v. Ladd, 402 Pa. 164, 166 A.2d 501 (1960) on the ground that the reason for the rule had vanished due to the advances in medicine and surgery.

Id., at 506-507. It was likewise rejected in New Jersey on the ground that it does not conform to present-day medical realities. State v. Young, 148 N.J. Super. 405, 372 A.2d 1117 (1977), citing In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976).

The Massachusetts Supreme Court abolished the "year and a day rule" by judicial decision holding:

> "In particular the rule appears anachronistic upon a consideration of the advances of medical and related science in solving etiological problems as well as sustaining or prolonging life in the face of trauma or disease." Commonwealth v. Lewis, 409 N.E. 2d 771, at 773 (Mass. 1980).

Ohio has repudiated it, also. Id., at 774, footnote 15.

Florida does not follow the "year and a day rule". §782.04, Fla. Stat., contains no such provision. Edwards, op. cit. supra, at 296 was of the view that it was doubtful that the "year and a day rule" prevailed in Florida by 1946.

It is impossible to justify Florida's position that the "year and a day rule" does not apply to criminal homicide, but does apply to entitlement to widows' and orphans' benefits for industrial death. This exists because of the anachronism of the 1935 statute still being in force today in a world of scientific wonder and medical achievement.

The gist of entitlement to death benefits is dependency. §440.16(1)(b), Fla. Stat. There can be no lawful nor reasonable basis for discriminating against widows and orphans who are dependent upon an employee who happens to die of his industrial

injuries more than one year after the accident or more than five years following continuous disability. Dependency is a fact to be established. It cannot be conclusively presumed to vanish by the mere passage of time. For example, a child one year old at the time of his father's industrial accident would only be eight years old when his father died of that industrial injury seven years later following continuous disability. The child's claim for death benefits is abolished by the 1935 statute although he is obviously still dependent. This makes no sense, particularly in light of the purpose of the Workers' Compensation Law.

> "We have frequently held that the purpose of the Workmen's Compensation Act is to provide for the injured workman and in the event of his death from injuries received in his employment, to provide for the dependents so that the burden does not fall on society but on the industry served." Great American Indemnity Co. v. Williams, 85 So.2d 619 (Fla. 1956).

The reason for this anomaly was explained by Dr. Wright. In 1935, it could not happen because medicine did not have the ability to prolong life. Today, it is a common occurrence.

Neither is §440.16(1), Fla. Stat., a statute of limitation. A statute of limitation is a bar against the making of a claim upon the passage of a period of time after the event which gave rise to the claim. It gives the potential defendant a period of time in which he knows he may have to

defend. After that, he can close his books. Here, the claim cannot be made until after the death, but §440.16(1), Fla. Stat. extinguishes such claim before the death occurs. This is the reason it is called a non-claim statute, rather than a statute of limitation. There already is a statute of limitation which allows claims for death benefits within two years of the death or the last payment of compensation. §440.19, Fla. Stat. In the present case, the claim was filed within two years of the death and within two years of the last payment of compensation. There is no issue about the statute of limitation here.

This gets us back to the question: what was the purpose of the one year and five year time periods referred to in the 1935 statute? The answer is the same as the purpose of the "year and a day rule" in criminal law.

In 1935, the question whether an accident, a trauma, a wound or the like would cause a death years later was mystery beyond man's knowledge. Medicine did not have the ability to prolong life and so as a practical matter, it did not happen. Consequently, the Legislature set limits in terms of time, which it believed were sufficient to include the then extant possibilities that an accident would cause a death at a later time. The statute creates a conclusive and irrebutable presumption in law that a death more than one year after the accident or more than five years after the accident following continuous disability cannot be causally related to that accident.

According to the statute, a dependent is not permitted to present evidence that in fact there is causal relationship.

As Dr. Wright pointed out, in 1935 this was a reasonable rule because as a practical matter it could not happen that anyone would survive longer. They either died shortly after the accident or survived and died of something else or the cause of death was a mystery. Dr. Wright testified that in the present day such a rule has no basis in scientific fact because medicine can and does prolong life for more than the one year and five year periods referred to in the statute and, today, people do die of their injuries years later and medicine can determine the cause of death in such cases.

In the 1935 statute, permanent total disability was payable only for 350 weeks. Laws of Fla. ch. 26877, §1 (1951) increased this to 700 weeks and Laws of Fla. ch. 29803, §1 (1955) changed this to a lifetime by deleting the 700 week limitation. In 1935, the 5 year limitation as to continuous disability had some reference in pari materia with the 350 week limitation for permanent total disability. However, once the Legislature removed the 700 week limitation in 1955, 5 years of continuous disability in the death benefits statute had no relationship to permanent total disability for a lifetime.

Plainly, the statute has outlived its usefulness and now discriminates against widows and orphans without any reasonable basis in fact. It truly denies equal protection of law.

There is something worse than ironic in the employer/carrier providing medical care which prolongs the life of a permanently totally disabled employee and then, when he dies more than 5 years after the accident because of his injuries, the statute would allow the employer/carrier to say to the dependent widow: "We do not owe you death benefits as we would to other widows because your disabled husband lived too long".

On this point, the Deputy Commissioner's Order should be reinstated.

CONCLUSION

The Order of the First District Court of Appeal should be quashed and the Order of the Deputy Commissioner should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to B. C. Pyle, Esq., Attorney for Respondents, McCotter Motors, Inc. and Corporate Group Service, Inc., P. O. Box 66078, Orlando, Florida 32853; and to the Department of Labor and Employment Security, Division of Workers' Compensation, 1321 Executive Center Drive, East, Tallahassee, Florida 32301, by regular mail, this 24th day of January, 1985.

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