O/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.

REPLY BRIEF OF PETITIONER ON THE MERITS

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The Respondents rely on Ruiz v. Industrial Accident Commission, 289 P.2d 229 (Cal. 1955) (Respondents' Brief 10-11). That reliance is misplaced for three reasons: (1) the California statute is completely different from the Florida statute; (2) subsequent cases in California have construed the California statute out of any practical existence; and (3) the equal protection argument made in the present case (i.e., advances in medicine have rendered the statute unreasonable) was never made in Ruiz.

The statute involved in Ruiz was the California statute of limitation, an affirmative defense, which operates to bar the remedy and "not to extinguish the right of the employee". Lab. C.A. §5409.

The Florida statute involved here is not the statute of limitation, which is §440.19, Fla. Stat., which requires that claims for death benefits be filed within 2 years of the death or the last payment of compensation. The statute involved here is the non-claim provision of §440.16, Fla. Stat., which requires the death to occur within one year of the accident or five years of the accident following continuous disability in order to be compensable. This has nothing to do with the filing of claims.

The California statute requires that proceedings must be commenced within

(a) one year from the death when death occurs within one year of the accident;

OR

(b) one year of the date of the last furnished medical care or last payment of compensation for death or disability when death occurs more than one year after the accident;

OR

(c) one year of the death when death occurs more than one year after the accident and compensation benefits have been furnished.

The statute further provides that proceedings may not be commenced more than one year after the death nor more than 240 weeks after the date of injury. Lab. C.A. §5406 [Deering's California Codes annotated, Labor §5406, 1985 Pocket Supplement, p. 13].

Plainly, this statute of limitation is different from the Florida non-claim statute.

However, even in California, the statute has very little practical application because in cases after Ruiz the California courts have made interpretations of the statute which severely restrict its applicability.

In Roblyer v. Workers' Compensation Appeal Board, 62 Cal. App. 3d 574, 133 Cal. Rptr. 246 (5th DCA 1976), it was held that the statute did not apply to a child who had filed claim within one year of the death and within 240 weeks of the child's reaching majority even though death occurred more than 240 weeks after the accident. The Court stated that it had to reach this conclusion in order to avoid the

construction that the right to benefits was lost before it accrued. Id., at 249.

In Berkebile v. Workers' Comp Appeals Board, 144 Cal. App. 3d 193 Cal. Rptr. 12 (2nd DCA 1983), the Court held that a widow's claim was not barred even though death occurred more than 240 weeks after the injury when she filed claim within 240 weeks of the fatal illness. The Court held that the date of injury was not the date of accident, but the date of the widow's knowledge that the fatal illness was industrially related.

From Roblyer and Berkebile, we see now in California the 240 week limitation does not run from the date of accident as the statute seems to say, but from a much later time by judicial interpretation.

More importantly, the argument made here that the Florida statute violates equal protection of the laws because it has been rendered unreasonable since its enactment by advances in medical science is an argument which was not made in California in Ruiz, nor in Oklahoma in Roberts v. Merrill, 386 P. 2d 780 (Okla. 1963).

Neither of the three federal workers' compensation acts nor the statutes of 34 states have any requirement that a death occur within a stated time of the accident in order for the death to be compensable. Two other states only require that the death follow disability.

Ala. Code §25-5-60	"...where death results proximately from the accident within three years..."
AK Stat. §23.30.215	No restriction
Ariz. Rev. Stat. §23-1046	No restriction
Ark. Stat. §81-1315(b)	"If death does not result within one year of the accident within the first three years of the period for compensation payments fixed by the compensation order, a rebuttable presumption arises that death did not result from the injury."
Cal. Labor Code §5406	Claim for death benefits must be filed within 240 weeks of accident
Col. Rev. Stat. §8-50-111	No restriction
Conn. Gen. Stat. §31-306	No restriction
19 Del. Code §§2328, 2330	No restriction
D.C. Code §36-309	No restriction
Fla. Stat. §440.16	Within one year of the accident or five years of continuous disability
Ga. Code §34-9-265	Instantaneously or during the period of disability
HI. Rev. Stat. §386-41	No restriction
ID. Code §72-413	Within four years
48 Ill. Stat. §138.7	No restriction
Ind. Code §22-3-3-17	Within 500 weeks of injury
Ia. Code §85.31	No restriction
Kans. Stat. §44-510(b)	No restriction
Ky. Rev. Stat. §342.750	No restriction
La. Rev. Stat. §§23:1231, 1235	"For injury causing death within two years after the accident..."
39 ME. Stat. §58	No restriction

101 Md. Code §36(8)	Within 7 years
152 Mass. Gen. L. §31	No restriction
Mich. Comp. L. §418.321	No restriction
Minn. Stat. §176.111	No restriction
Miss. Code §71-3-25	No restriction
Mo. Stat. §287.240	No restriction
Mont. Code §39-71-721	No restriction
Neb. Rev. Stat. §48-122	No restriction
Nev. Rev. Stat. §616.615	No restriction
N.H. Rev. Stat. §281.22	No restriction
N.J. Stat. §34.15-13	No restriction
N.M. Stat. §52-1-46	Within two years
64 N.Y. L. (McKinney) Workmen's Comp. §16	No restriction
N.C. Gen. Stat. §97-38	Within two years of accident or 6 years of total disability or two years of final determination of total disability.
N.D. Code §65-05-16	Within 1 year of injury or 6 years of disability.
OH. Rev. Code §§4123.54, 4123.59	No restriction
85 Okla. Stat. §22(8)	No restriction (former statute held invalid and repealed)
Ore. Rev. Stat. §656.204	No restriction
77 Pa. Stat. §561	No restriction
R.I. Gen. L. §28-33-12	No restriction
S.C. Code §42-9-290	Within 2 years of accident or 6 years of total disability.
S.D. Codefied L. §62-4-8	No restriction

Tenn. Code §§50-6-209, 50-6-210	No restriction
Tex. Civ. Stat., Art. 8306, §8	No restriction
UT. Code §35-1-68(2)	Within 6 years
21 Vt. Stat. §632	No restriction
Va. Code §65.1-65	Within 9 years
Wash. Rev. Code §51.32.050	No restriction
W.V. Code §23-4-10	Any time during continuous disability.
Wisc. Stat. §102.46	No restriction
Wyo. Stat. §§27-12-408, 27-12-409	No restriction
Federal Employee's Compensation Act, 5 U.S.C. §8102	No restriction
Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. §909	No restriction

Of the fourteen states that have any kind of time restriction, only California expresses it as a statute of limitation, that is, that a claim must be filed within a given period of time. In the 13 other states, the restriction is a non-claim statute which abolishes the right to benefits before the death. In interpreting a statute somewhat similar to Florida's, the South Carolina Supreme Court held: "This is not a statute of limitations...". Gunnells v. Raybestos-Manhattan, Inc., 198 S.E. 2d 535, at 536. (S.C. 1973).

The non-claim type of statute has only been attacked on constitutional grounds on one occasion prior to the present

case, that being the successful attack in Oklahoma. The real question here is whether the statute is reasonable in light of advances in medical science.

It was this Court that ruled in Georgia Southern and Fla. Ry. Co. v. Seven-Up Bottling Co., 175 So.2d 39 (Fla. 1965) that a statute which was reasonable when enacted is invalid later on equal protection grounds when changing technology removes the reason for the statute's existence.

It is for this Court to decide whether Georgia Southern controls the fate of §440.16, Fla. Stat.

When this statute was enacted, surgery had to be done without blood transfusions (R. 97-98), without antibiotics (R. 96), and without IV bottles to control body chemistry (R. 97-98). The severely injured either got well or died soon after the injury --- a matter of days or weeks (R. 94).

Advances in medical science have created a class of persons who did not exist in 1935 when the statute was enacted: the severely disabled who survive more than five years following the industrial accident, who in fact die as a result of their injuries and leave dependent spouses and children for whom the statute provides no remedy.

This statute discriminates between surviving spouses and orphans dependent upon a disabled employee who survives five years and one who does not.

There is no reasonable basis for such discrimination and the statute should be declared invalid.

Regretably, we feel obligated to point out that the argument of the Respondents contained on pages 16 through 18 of their Brief is largely devoted to matters outside the Record. It should be stricken. More importantly, their argument is contrary to the Deputy Commissioner's findings of fact based on competent substantial (uncontradicted) evidence:

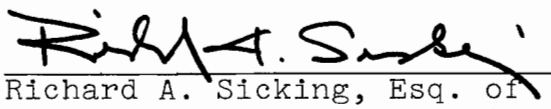
> "...in 1935, the state of art of medicine was relatively primative. The drugs, machines and techniques for curing the injured and thereby prolonging life, simply had either not been invented or were known only to a handful of persons and were not in general use, nor available to the public." (Deputy Commissioner's Order 8, R. 134).

Alas, the Respondents found it necessary to violate the competent substantial evidence rule in order to make their argument.

Neither do they tell us why it is fair that Mrs. Newton, having received nothing, should also have no remedy.

That is because it is not fair and no argument can be made that it is.

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 26th day of February, 1985.

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