IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO: 67,341

LEONARD H. DANIEL,

Petitioner,

vs.

HOLMES LUMBER COMPANY;
FIDELITY & CASUALTY CO.
OF NEW YORK, and
AMERICAN MUTUAL LIABILITY
INSURANCE COMPANY,

Respondents.

_____/

BRIEF OF THE ACADEMY OF FLORIDA TRIAL LAWYERS, AS AMICUS CURIAE, IN SUPPORT OF POSITION OF PETITIONER, LEONARD H. DANIEL

THE ACADEMY OF FLORIDA TRIAL LAWYERS

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STATEMENT OF THE CASE AND THE FACTS

The Statement of the Case and the Facts as recited in the petitioner's Brief is adopted and restated herein.

This case originated as a claim by petitioner, Leonard Daniel, for workers' compensation benefits and medical treatment for a knee injury which Daniel had suffered while working for Holmes Lumber Company in 1978. The deputy commissioner denied the claim on the ground that the claim was barred by the statute of limitations (A.15; R.409) */ Daniel appealed to the First District Court of Appeal, and that court elected sua sponte to consider the appeal en banc.

Upon en banc consideration of the case, the twelve judges of the court of appeal were evenly divided. Six judges voted to reverse the denial of benefits on the ground that Daniel's claim was timely under §440.13 and §440.19, Fla. Stat. (1978) **/ because it had been filed within two years of the last payment of compensation on account of the 1978 injury, which occurred in August of 1982 (A.6-13). The other six judges, despite acknowledging precedent within the First District contrary to their position, voted to affirm on the ground that there had previously occurred a period of over two years during which no compensation had been paid and no medical

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*/ In this brief A.__ refers to the appendix. R.__ refers to the record on appeal.

**/ The law applicable to Daniel's injury.

benefits furnished (A.1-5). Under Rule 9.331(a), Fla. R. App. P., the tie vote resulted in affirmance of the deputy's order.

Daniel moved for rehearing and suggested the court of appeal certify its decision as one presenting a question of great public importance. The court denied the motion for rehearing (again by a six-six vote) but certified the following question as one of great public importance:

> IS A CLAIM FOR WORKER'S COMPENSATION BENEFITS TIMELY WHEN IT IS FILED WITHIN TWO YEARS OF THE LAST PAYMENT OF COMPENSATION OR FURNISHING OF MEDICAL TREATMENT BUT THERE PREVIOUSLY OCCURRED A TWO YEAR PERIOD WHEN NO COMPENSATION BENEFITS WERE PAID OR MEDICAL TREATMENT FURNISHED? (A.14).

Daniel then filed a notice to invoke this court's discretionary jurisdiction. By order entered July 16, 1985, this court directed the parties to file briefs on the merits.

In 1978 Daniel suffered a compensable injury to his right knee while employed by Holmes Lumber Company ("Holmes") (R.11). The injury was originally diagnosed as a torn meniscus (cartilage) (R.327). Holmes, through its compensation carrier at that time, Fidelity & Casualty Co.of New York ("Fidelity"), furnished medical treatment and paid compensation for a period ending on November 1, 1978.

In November of 1981 Daniel, still employed by Holmes, had a minor knee injury on the job and received medical treatment on November 13 and November 17, 1981 at the expense of

Holmes' new compensation carrer, American Mutual Liability Insurance Company ("American") (R.410-411).

Daniel continued to work for Holmes and in 1982 injured his knee again while playing volleyball at home. During Daniel's treatment for this injury it was discovered that Daniel had, in fact, injured his anterior cruciate ligament in the original 1978 accident. Without a functional anterior cruciate ligament Daniel was subject to repeated reinjury. Dr. Rukab and Dr. Brown, Daniel's treating orthopedists, both testified that the 1982 volleyball injury was causally related to the compensable injury in 1978 (R.274-275,329). Dr. Rukab further testified that Daniel needs surgery to reconstruct his anterior cruciate ligament. Without such surgery his knee will be subject to repeated reinjury (R.273-275).

As Holmes' carrier American paid Daniel temporary total disability benefits from July 8, 1982, through August 23, 1982. At the time it paid such compensation, American knew about the volleyball accident and the 1978 injury (R.82-84,95).

On November 19, 1982, Daniel filed a claim for temporary total disability benefits and medical treatment. While the claim was made under the 1981 accident as well as the 1978 accident, the medical evidence showed and the deputy found that Daniel's disability and need for medical treatment in

1982 were causally related to the 1978 injury and not to the 1981 injury. Indeed, the deputy found that the volleyball injury would not have occurred but for the compensable 1978 injury (A.19; R.413). Nonetheless, the deputy denied the claim on the theory that American's acts could not impair Fidelity's rights (A.18-23; R.412-417).

On appeal Daniel argued that the claim was timely because it was filed within two years of the last payment of compensation on account of the 1978 injury and thus meets the express conditions of §§ 440.13 and 440.19, Fla. Stat. (1978), which provide that a claim is timely if filed within two years of the last payment of benefits or furnishing of treatment. Daniel asserted that the last payment of benefits occurred on August 23, 1982, when American made its last payment of temporary total benefits. Daniel relied on Johnson v. Division of Forestry, 397 So.2d 761 (Fla. 1st DCA 1981), pet. for rev. den., 407 So.2d 1103 (Fla. 1981), which squarely holds that a second carrier can extend the statute of limitations notwithstanding the presence of a "two year gap."

On appeal Fidelity argued that its obligation to provide benefits could not be affected by the acts of American. Fidelity did not argue that Daniel was barred from recovery because of the "two year gap" which was ultimately relied upon by the six "affirmers" on the court of appeal. Instead,

Fidelity argued that American could not "waive" the statute of limitations for Fidelity (Fidelity's brief, p.4). Fidelity tried to distinguish Johnson but did not argue that it had been wrongly decided.

In its brief in the court of appeal, Fidelity conceded that voluntary payment of compensation by an employer would extend the limitations period, even after a two year gap:

> "It does make sense that an employer can voluntarily waive the otherwise operatime effect of the statute of limitations. This is done by knowingly paying compensation or providing remedial attention for the injury upon which benefits are sought. This is so because the employer has the opportunity to either pay or provide attention or not to do that. If the employer does decide to pay or provide attention, then it can be assumed that he is sufficiently aware of the facts and circumstances concerning an injury in excess of two years old (or could have been) so that he did not deem it necessary to take advantage of the statute." (Fidelity brief, p.4).

Thus, in voting to recede from Johnson and reinstate the "two year gap" theory, the six affirmers on the court of appeal adopted a position which none of the parties had advocated.

SUMMARY OF THE ARGUMENT

The facts of this case, together with the plain language of Chapter 440.13 and Chapter 440.19, compel a reversal of the Deputy's Order and subsequent tie-vote affirmance by the Appellate Court. Since the decisions in Watson, Johnson and

Bowman, (infra), the Florida Legislature has convened several times and even amended a portion of Chapter 440.19. It could have, but did not, disturb the statutory entitlement this injured Claimant has to benefits for his compensable 1978 injuries, the undisputed nature of which required remedial care and attention in 1981 and 1982.

ARGUMENT

THE STATUTE OF LIMITATIONS SHOULD NOT BE INTERPRETED TO DEFEAT DANIEL'S CLAIM, WHICH WAS TIMELY FILED WITHIN TWO YEARS OF THE LAST PAYMENT OF COMPENSATION.

The Record contains uncontroverted evidence that the Claimant's original compensable knee injury of 1978 resulted in damage not only to the originally-diagnosed and repaired meniscus (R.327), but also significant injury to the anterior cruciate ligament in his same knee (R.274-275,329).

The Deputy correctly found that the Claimant's 1981 on-the-job and 1982 off-the-job (volleyball) injury would not have occurred but for the compensable 1978 injury, and that his disability and need for medical treatment in 1982 was causally related to the original 1978 injury, and not the subsequent one in 1981 (R.413).

Certainly the Claimant, having filed claim in November, 1982, was entitled to rely upon the plain language of Chapter 440.13(3)(b), Fla. Stat. (1978) and Chapter 440.19(1)(a),

Fla. Stat. (1978), which provide, in identical language:

> ". . . if payment of compensation has been made or remedial attention has been furnished by the employer without an award on account of such injury a claim may be filed within two years after the date of the last payment of compensation or within two years of the date of the last remedial attention furnished by the employer. . ." (emphasis added)

Had this Claimant been employed by different employers when his original 1978 injury occurred, and the subsequent foreseeable problems developed thereafter, a different result might apply. However, this Claimant had had the same employer since the original 1978 compensable injury, and his employer, through its carrier (American), paid disability benefits for this same injury from July 8, 1982 through August 3, 1982. The employer and carrier were on notice regarding the 1978 injury and the volleyball accident (R.82-84,95) as the Claimant had been afforded medical benefits twice in November, 1981 (R.410-411).

The plain language of these statutes is to provide care and benefits to just such an injured worker, who suffers significant injury which is foreseeably going to continue to cause him medical problems on and off the job, and eventually require further surgical repair (R.273-275). To interpret the meaning of these statutes, in light of the facts in this case, as a bar to entitlement to benefits for this worker, is to create hoops for the Claimant to try to jump through which

the Legislature never placed in his path. This statute of limitations is short enough, in comparison with others here in Florida, and any interpretation of this shortened statute should certainly take into consideration the uncertainties of medical diagnoses and treatment, particularly with injuries such as this Claimant had, which often are not totally diagnosed or can be diagnosed, even with initial surgery in the area of the injury.

It is well settled that the provisions of the Florida Workers' Compensation Act should be construed in a manner most favorable to the injured worker whenever possible. Farrens Tree Surgeons v. Winkles, 334 So.2d 569 (Fla. 1976); LaBrecque v. Florida Vocational Rehabilitation and Division of Risk Management, 380 So.2d 483 (Fla. 1st DCA 1980).

This Claimant is entitled to the same favorable construction of these controlling statutes, particularly in light of what has been the controlling law in Florida, since this Court's decision in Watson v. Delta Airlines, Inc., 288 So.2d 193 (Fla. 1973). As in the case at bar, there had been no award in the Watson case, and the employer continued to provide compensation and medical benefits voluntarily, even though more than two years had lapsed since the Claimant's original compensable injury had occurred. When the Claimant thereafter attempted to file a claim, the Deputy erroneously

found that it was barred by the statute of limitations.

In its ruling in Watson, this Court distinguished the earlier Miller v. Brewer Company of Florida, 122 So.2d 565 (Fla. 1960), where relief had been denied even though voluntary benefits had been afforded by the employer. This Court, in Watson, supra, pointed to the legislative change which had occurred in Chapter 440.13(3)(b) since Miller, supra, which made voluntary payments of benefits, or providing remedial treatment, acts sufficient to revive the two year statute of limitations. This Court in Watson, supra, implied that the intent of the Legislature was to renew (or "extend") the statute of limitations.

Interestingly, there are many facts in Watson, supra, analogous to the facts in the case at bar. Both cases involve a type of injury which is likely to weaken a part of the body, and be subject to reinjury. Both cases also involve the voluntary payment of compensation, without an award, made beyond the two year statute of limitations. Certainly the employer and carrier are in a much better position to evaluate the likely consequences of an employee's injury than is the injured worker himself. The Workers' Compensation statute of limitations of two years, in abrogation of the common law and the four year statute of limitations in civil cases for negligence, gives an employee

an extremely short period of time within which to demonstrate ongoing difficulties with a knee which has been significantly weakened by compensable accident; similarly, it is an extremely short period of time for such an injured claimant to pursue benefits if he continues to have such problems. Indeed, the period of time is short enough that it lends itself to manipulation and delay by the better-informed and more sophisticated employer and carrier, who may be cognizant of the foreseeable need for future care for a particular injury. Certainly that is not alleged in this case, but is all the more reason to construe the statutory provisions in a light most favorable to the claimant.

In the dissenting half of the First District Court of Appeal Opinion in this case, the dissenters themselves are most articulate on this point:

> "The carrier, Fidelity, with superior knowledge of the claimant's rights, and with ample notice of the seriousness of claimant's 1978 injury and the likelihood of further difficulty at the time it went off the risk in March, 1979 (when American began workers' compensation coverage for the employer), must be charged with knowledge of the possibility of a future payment of compensation or furnishing of medical treatment by the employer through its new carrier, and the potential for further liability on the part of Fidelity." (10 FLW 1109, at 1111).

Although, in Watson, supra, there was not a change in carriers during the period in question, as in the case at bar, a more recent First District Court of Appeals case applied the holding in Watson to a situation involving just such a change of carriers during the period of time after the injury. In Johnson v. Division of Forestry, 397 So.2d 761 (1st DCA 1981), the court pointed out that both carriers were acting as agents of the employer, and cited the case of Iowa National Mutual Insurance Co., v. Webb, 174 So.2d 21 (Fla. 1965), which stands for the proposition that an injured employee has the right to look for compensation without regard to the identity of the insurance carrier. Certainly, any other holding, in light of the superior relationship between the employer and carrier to the injured worker, would be a grave injustice.

The court in Johnson also found that voluntarily furnished remedial treatment was sufficient to revive the statute of limitations time period, citing Watson, supra. The same decision was reached in Bowman v. Food Fair Stores, 400 So.2d 793 (Fla. 1st DCA 1981) pet. for rev. den., 412 So.2d 465 (Fla. 1982), where the court said it was error to deny the claim where payment of compensation or remedial treatment had been paid by the employer.

The Watson decision, and particularly its discussion of

Miller, supra, shows clearly that the Watson court did not consider the two year gap a bar to recovery under the provisions of Chapter 440.13 and Chapter 440.19. It is telling that there was a four year gap of time in the Miller case facts yet, in its extensive opinion and discussion of the Miller case, the Watson decision does not even mention this gap. Certainly the Watson court would reject the result reached by the affirming half of the appellate court at the case at bar, and, as the "reversers" correctly point out:

> "On the law, the Watson court held that the lower tribunal was also in error in concluding that the payment of compensation benefits commencing February 25, 1970 (more than two years from the February 1, 1968 injury) did not reactivate the statute of limitations, since his claim was filed on May 25, 1970, thus within two years of compensation voluntarily paid without an award." (A-10)

The reversing half of the Appellate Court correctly noted that Johnson "has survived through two sessions of our state legislature" (A.7), and the fact that the Florida Legislature did not seize the opportunity to change the result in Johnson, as it did when it overruled Miller, gives strong support to the inescapable conclusion that there is legislative approval of Johnson.

That Johnson, supra, was decided less than two years before the Claimant in the case at bar filed his claim is

acknowledged by even the affirming side of the Appellate Court to be directly on point and directly in this Claimant's favor. To allow this case to alter what has not been mandated by the Legislature or this Court would only create further uncertainty on an issue which needs as much certainty as there can be.

CONCLUSION

The question certified to this Court by the First District should be answered in the affirmative, quashing the decision of the First District, and remanding the cause to the Court of Appeal with instructions to reverse the denial of this Claimant's benefits.

Based upon the plain language of the applicable statutes, and the decision of this Court in Watson, together with the First District's helpful precedents, any other finding would deprive this injured Claimant of vested statutory benefits which he is entitled to claim, through a retroactive reinterpretation of the Watson decision.

RESPECTFULLY SUBMITTED,

THE ACADEMY OF FLORIDA TRIAL LAWYERS

By: _____
HARRY G. GOODHEART, III.

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PAULETTE R. PACE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing were furnished, by mail, this 5TH day of August, 1985 to: E. ROBERT WILLIAMS, ESQUIRE, 231 E. Adams Street, Jacksonville, Florida 32202: WILLIAM R. SWAIN, ESQUIRE, 630 American Heritage Life Building, Jacksonville, Florida 32202; and WILLIAM A. BALD, ESQUIRE 2800 Independent Square, Jacksonville, Florida 32202.

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