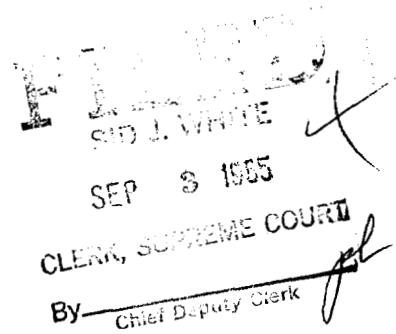
IN THE SUPREME COURT OF FLORIDA

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.

_____/

ANSWER BRIEF OF RESPONDENTS, HOLMES LUMBER COMPANY AND FIDELITY & CASUALTY CO. OF NEW YORK

WEBB, SWAIN & O'QUINN, P.A.

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STATEMENT OF THE CASE AND FACTS

Respondents, HOLMES LUMBER COMPANY and FIDELITY AND CASUALTY COMPANY OF NEW YORK, accept, with limitations, the statement of the case and facts as presented in the Petitioner's initial brief and in the amicus brief of The Academy of Florida Trial Lawyers. These Respondents specifically do not agree that they have conceded that voluntary payment of compensation by an employer would extend the limitations period, even after a two-year gap, as contended by The Academy of Florida Trial Lawyers at page 5 of its amicus brief and by the Petitioner at page 5 of his initial brief. In addition, these Respondents present the following outline of the facts in this case which may be helpful to the Court:

8/15/78	-	Date of accident. Fidelity and Casualty Company of New York ("Fidelity") was on the risk.
10/26/78	-	Last payment of medical benefits on behalf of Claimant by Fidelity.
11/1/78	-	Last payment of compensation benefits to Claimant by Fidelity.
March 1979	-	Fidelity goes off the risk for Holmes Lumber Company and American Mutual Liability Insurance Company ("American") comes on the risk.

11/1/80	-	Statute of limitations runs on Petitioner's claim pursuant to Sections 440.19(1)(a) and 440.13(d), Florida Statutes (1977).
11/3/81	-	Second injury to Claimant's knee arising out of and in the course of his employment.
11/13/81	-	Medical care furnished by American.
11/17/81	-	Medical care furnished by American.
7/6/82	-	Third injury to Claimant's knee while playing volleyball game which was unrelated to his employment.
8/13/82	-	TTD benefits paid by American (retroactive to 7/8/82).
8/23/82	-	Suspension of benefits by American on the grounds that Claimant was able to return to work.
11/19/82	-	Initial Claim for Benefits filed.
11/24/82	-	American controverts further benefits on the grounds that the Claimant's condition was not related to the accident of 11/3/81.
1/14/83	-	Amended Claim for Benefits filed.

SUMMARY OF ARGUMENT

Watson v. Delta Airlines, Inc., infra, is not controlling in this case because it did not involve a situation where, as here, the statute of limitations had already run prior to any voluntary payments of compensation. Nor can there be said to have been any sort of legislative endorsement of Watson or Johnson v. Division of Forestry, infra. Rather, this Court has specifically held in Hodges v. State Road Department, infra, that voluntary payments of compensation are not sufficient to revive a statute of limitations which has already run before the benefits are provided or a claim has been filed.

This view is in accord with that of a majority of the states which have had occasion to address the issue. The objective of the statute being to protect the claimant who reasonably refrains from making claim because of the receipt of benefits voluntarily supplied, it is the majority view that no claimant can allege that his failure to make timely application was excused by something that happened after the claim was already barred.

Further, a reversal of the Deputy Commissioner in this case would offend fundamental notions of fair play and due process of law. The payments made by American in August

1982 were the result of a good faith but mistaken belief that they were owing to the Claimant as a result of his 11/3/81 injury. Although American was not estopped from asserting its defenses to further liability as a result of these payments, under the position urged by the Petitioner, those payments would have the effect of estopping Fidelity from asserting the statute of limitations which had run almost two years earlier.

ARGUMENT

VOLUNTARY PAYMENTS OF COMPENSATION MADE BY A CARRIER NOT ON THE RISK AT THE TIME OF A CLAIMANT'S ORIGINAL INJURY DO NOT REVIVE A STATUTE OF LIMITATIONS WHICH HAD EXPIRED ALMOST TWO YEARS BEFORE THE VOLUNTARY PAYMENTS WERE MADE OR A CLAIM FOR BENEFITS WAS FILED.

The controversy in the instant appeal centers around the proper application of Sections 440.13(3)(b) and 440.19(1)(a), Florida Statutes (1977), to the facts of this case. It is the position of the Petitioner and The Academy of Florida Trial Lawyers that payment of workers' compensation benefits by a carrier which was not on the risk at the time of the Claimant's injury is sufficient to revive a statute of limitations which had run over two years before the initial claim was ever filed. That position is unsupported in law or in equity, and the decision of the Deputy Commissioner should therefore be affirmed.

Petitioner relies primarily on Watson v. Delta Airlines, Inc., 288 So.2d 193 (Fla. 1973), and its progeny, Johnson v. Division of Forestry, 397 So.2d 761 (Fla. 1st DCA 1981). In the instant case, of course, the "affirmers" on the First District Court of Appeal recognized that Johnson had been wrongly decided and elected to recede from its holding since it was based on a misreading of this Court's opinion in Watson.

The pertinent facts in Watson may be outlined as follows:

1963	-	Claimant sustained a non-compensable knee injury while playing football.
August 1967	-	Reinjury of claimant's knee; employer provided medical services voluntarily and no claim was filed.
2/1/68	-	Date of accident; compensable injury to claimant's knee; no medical services provided and no claim was filed.
12/18/69	-	Non-work related, non-compensable injury to claimant's knee.
January 1970	-	Medical treatment provided at authorization of employer on account of 2/1/68 accident.
2/25/70	-	Commencement of voluntary payment of TTD benefits.
5/25/70	-	Claim for Benefits filed.

Based on Miller v. Brewer Co. of Fla., Inc., 122 So.2d 565 (Fla. 1960), the Judge of Industrial Claims denied relief to Watson because more than two years had elapsed after the injury of 2/1/68 before the claim was filed. On review by the Industrial Relations Commission, the order was affirmed.

The Watson court reversed both the JIC and the IRC, holding that Miller had been legislatively overruled by the 1963 amendment to Section 440.13(3)(b), Florida Statutes. Prior to 1963, the statute did not have the exception, which it does now, to provide for a two-year "extended" statute of

limitations from the last voluntary payment of compensation or furnishing of remedial care.

The Petitioner contends that the Watson court was apparently unconcerned with the fact that in Miller there was a four-year gap between the last payment of compensation and the furnishing of further remedial treatment by the carrier. The fact is, however, that the Miller court simply never reached the "gap" issue because of the lack of an "extended" statute of limitations provision in the pre-1963 statute. This was implicit in the Watson decision.

The Petitioner, The Academy of Florida Trial Lawyers, and the "dissenting" judges of the First District Court of Appeal also misread the "dual basis" of the Watson holding contained at 288 So.2d 196. Contrary to their assertions, this is not a holding that the payment of compensation by the employer commencing on 2/25/70 was independently sufficient to revive a claim which was already barred by the statute of limitations. This "dual basis" must be read in light of the actual language of Section 440.19(1)(a):

> The right to compensation for disability under this chapter shall be barred unless a claim therefor is filed within two years after the time of injury, except that if a payment of compensation has been made or remedial treatment 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 after the date of the last remedial treatment furnished by the employer. (Emphasis added.)

Thus, it can be seen that under the terms of the statute, either the furnishing of remedial care or the voluntary payment of compensation will each be sufficient to begin a new two-year period of limitations. On the facts of Watson, a new two-year period began to run as to both remedial care and compensation in January 1970 when the Claimant was treated by Dr. Kurzner. Therefore, the furnishing of compensation beginning on 2/25/70 was not made after a two-year period during which no compensation benefits were paid or medical treatment furnished. Simply stated, Watson is distinguishable from the case at bar because it did not involve the "gap" situation presented herein.

Watson is further distinguishable from this case in that the employer therein was evidently self-insured. Thus, assuming arguendo that the voluntary payments made in Watson were made after a "two-year gap" and that such payments were sufficient to begin a new two-year period of limitations, that rule should not apply herein. The payments made by Delta Airlines were paid by it, not by a workers' compensation

carrier over which it had no control, and they presumably were made with full knowledge that the statute of limitations had already run. It would be a misreading of Watson to allow the actions of American to bind Fidelity for at least two additional years when Fidelity had no knowledge of or control over American's actions.

The Academy of Florida Trial Lawyers and the Petitioner strenuously object that the "affirmers" of the First District Court of Appeal adopted a position not advocated by any of the parties when the court receded from Johnson, supra. Such an objection is not well-founded in that it assumes that an appellate court of this state may not raise issues sua sponte and decide cases on the basis of those issues. This is simply not the law in Florida.

That argument also necessarily raises another issue, and that is the effect of Johnson in this Court. It is readily apparent that whether this case was rightly or wrongly decided (and certainly these respondents agree with the "affirmers" of the First District Court of Appeal that it was wrongly decided) is of no moment in this case as this Court is not bound by that decision in any event.

Nevertheless, a close reading of Johnson will reveal that it is distinguishable from the instant case. In Johnson, the claimant had received two distinctly different injuries,

a 1972 injury to his neck and a 1974 injury to his wrist. The employer provided further remedial care for the neck injury in 1977, after the statute of limitations had already expired. Since the two injuries involved such distinctly different areas of the body, it is reasonable to assume that the 1977 remedial care was furnished knowing that the statute of limitations had already expired. In the instant case, all three injuries were to the Petitioner's right knee. Consequently, in the absence of expert medical testimony, there could have been no knowing payment of benefits and therefore no knowing waiver of the statute of limitations defense.

The contention is also made that the holdings of Watson and Johnson have somehow been legislatively endorsed by virtue of the fact that the statutes have been amended since those decisions. This argument is clearly without merit. First, as shown above, Watson and Johnson do not stand for the proposition asserted by the Petitioner, so there could be no legislative endorsement of the Petitioner's position herein. Second, there is authority for the proposition that in re-enacting a statute, the legislature is presumed to be aware of the construction placed upon it by Supreme Court and, in the absence of clear expressions to the contrary,

is presumed to have adopted the construction placed on it by that court. Davies v. Bossert, 449 So.2d 418 (Fla. 3d DCA 1984). However, the general rule is that re-enactment of a statute after construction by an intermediate court (such as the First District Court of Appeal) is not a legislative adoption of such construction. Rea v. Walker, 215 Ala. 672, 112 So. 211 (1927); 73 Am. Jur. 2d, Statutes, §164 (1974). Therefore, there could have been no legislative adoption of the Johnson holding.

Not only are Watson and Johnson not controlling, but also there is direct authority from this Court to support the Deputy's decision herein. It is significant that neither the Petitioner nor The Academy of Florida Trial Lawyers has addressed Hodges v. State Road Dept., 171 So.2d 523 (Fla. 1965). There, the employer had made disability payments after the statute of limitations had run. This Court specifically held that these payments were mere gratuities for the benefit of the employee and did not amount to a waiver of the statute of limitations. It is also important to note that this decision was rendered at a time when Section 440.19(1)(a) contained the same "extended" two-year period of limitations when voluntary payments are made as is contained in the version of Section 440.19(1)(a) which is

pertinent to this appeal. Thus, this Court has specifically held that voluntary payments of compensation are not sufficient to revive a statute of limitations which has already expired before the benefits are provided or a claim has been filed.

Having demonstrated that the Petitioner's arguments herein are not supported either legislatively or by judicial decision, we must nevertheless face another inquiry; that is, assuming arguendo that Watson dictates a result contrary to that urged by these respondents and that Hodges is not controlling, what should be the law on this issue?

In his treatise on workers' compensation, Professor Larson notes:

> Once the claim has been barred by the passage of time, the majority of states hold that the claim will not be revived and a new period will not be set in motion by the furnishing of medical service years after the injury. The objective of the statute being to protect the claimant who reasonably refrains from making claim because of the receipt of benefits voluntarily supplied, no claimant can allege that his failure to make timely application was excused by something that happened after the claim was already barred. Moreover, since the employer was under no obligation to furnish such benefits once the right to them was barred, it cannot be said that he provided them as voluntary compensation benefits. Larson, The Law of Workmen's Compensation, Section 78.43(i) (1983). (Emphasis added.)

As to the voluntary payment of compensation benefits after a period of limitations has expired, Professor Larson likewise notes:

> [V]oluntary payment or promise of compensation made only after the claim period has expired has been held ineffectual to waive the statutory bar. Larson, The Law of Workmen's Compensation, Section 78.71 (1983).

The majority position on the issue presented herein is clearly illustrated in Zanni v. Rudolph Poultry Equip. Co., 105 N.J. Super. 325, 252 A.2d 212 (1969). In that case, the claimant was injured on 10/24/64 while in the course of his employment. The claimant was provided the appropriate medical care, with the last treatment occurring on 3/9/65. However, the claimant was again treated for the same injury on 3/23/67, and the claim for benefits was subsequently filed on 4/8/67. The court followed the majority rule and held that the furnishing of medical care on 3/23/67 did not operate to revive a claim which had already been barred under that state's two-year statute of limitations. Also see, Riccioni v. American Cyanamide Co., 26 N.J. Super. 1, 96 A.2d 765 (1953); Threadgill v. Lexington Metal Products Co., Inc., 632 S.W. 2d 550 (Tenn. 1982); Woodard v. ITT Higbie Mfg. Co., 609 S.W. 2d 115 (Ark. App. 1980).

In addition to the foregoing, a reversal of the Deputy Commissioner would be particularly inequitable in this case. As stated in the Deputy Commissioner's order and in the opinions of the First District Court of Appeal, the Petitioner's initial industrial accident herein occurred on 8/15/78 at a time when Fidelity was on the risk, and the last payment of compensation by Fidelity occurred on 11/1/78. American went on the risk for Holmes Lumber Company in March 1979. On 11/3/81, the Claimant sustained a second compensable injury to his knee, for which American furnished medical care on 11/13/81 and 11/17/81*. In July 1982 (after the occurrence of the non-compensable volleyball accident of 7/6/82) the Claimant complained to Holmes Lumber Company of knee problems which he related to the accident of 8/15/78 and 11/3/81. Holmes relayed this information to American. The Claimant did not inform Holmes of the 7/6/82 accident at that time.

American thereupon obtained a copy of the First Report of Accident on the 11/3/81 accident, and on 8/13/82 began

*As pointed out by the "dissenters" at 10 F.L.W. 1112, fn. 2, Petitioner has never contended that these payments were "remedial treatment" under the statute so as to recommence the two-year period for filing a claim. Consequently, we are concerned here only with the payments made by American in August 1982.

paying TTD benefits (retroactively to 7/8/82 and continuing). On this point, the testimony of Mr. Rick Hodges, the claims manager for American, is particularly noteworthy:

> Q. Would you tell us, Mr. Hodges, why... you decided to commence payment of temporary total at that time?
>
> [Objection omitted]
>
> A. At that time I learned he was starting to lose time from work, I think the first thing I did was obtain a copy of the medical, of the initial injury report of 1981 from our district office, found that he did have a knee injury in 1981, received treatment for his knee... which I assumed was an aggravation of the 1981 injury. So I requested we begin temporary total benefits. (R: 95-96) (Emphasis added.)

American continued to pay TTD benefits through 8/23/82, at which time compensation benefits were suspended on the grounds that the Claimant was thought by American to be able to return to work. On 9/24/82, American took the Claimant's statement, determined to its satisfaction that the Claimant's problems were not related to the compensable injury of 11/3/81, and, on 11/24/82, controverted further benefits on that basis. American thus determined, and the Deputy so found in his order (R: 411-412), that the Claimant's condition as of July and August 1982 was not related to the accident of 11/3/81. Therefore, the payments made by American to the Claimant in

August 1982 should never have been made by it at all. They were a mistake.

Given the nature of the Florida Workers' Compensation Law, however, the mistaken payments by American are understandable. It is axiomatic in the field of workers' compensation that workers' compensation legislation is designed to accommodate the employer and the employee and to expedite claims. Florida Erection Services, Inc. v. McDonald, 395 So.2d 203 (Fla. 1st DCA 1981). Further, the philosophy of the Act is that an employee shall receive the benefits to which he is entitled with reasonable promptness. McDonald, Id. Benefits are due the injured worker on the 14th day after the employer has knowledge of the injury. Section 440.20(2), Florida Statutes. Workers' compensation carriers are therefore strongly encouraged by the very nature of the Act to move quickly and put the needed benefits in the hands of the injured worker.

In fact, employers and workers' compensation carriers are subject to a variety of sanctions, including penalties, interest, costs, and payment of attorneys' fees, for failure to provide the appropriate benefits to the injured employee promptly and without regard to formality. For example, see Hulbert v. Avis Rent-A-Car Systems, Inc., 10 F.L.W. 1319 (Fla. 1st DCA, May 29, 1985) (even though E/C timely paid

benefits after Request for Wage Loss forms were filed, penalties and interest were due because the E/C had prior knowledge of the compensable wage loss via its attorney's deposition of the claimant's physician); King Motor Co. v. Parisi, 445 So.2d 1074 (Fla. 1st DCA 1984) (employer's failure to correctly calculate claimant's average weekly wage subjected the carrier to an award of attorneys' fees based on "bad faith"); Hernando Co. Board of County Commissioners v. Gleaton, 449 So.2d 935 (Fla. 1st DCA 1984) (attorneys' fees based on E/C's "bad faith" awarded where the E/C paid benefits "long past" the time they were due); Trophy World, Inc. v. Gonzalez, 444 So.2d 1146 (Fla. 1st DCA 1984) (three-month delay in payment of a medical bill sufficient to support a finding of "bad faith"); Farm Stores, Inc. v. Harvey, 10 F.L.W. 1804 (Fla. 1st DCA, July 26, 1985) (award of attorneys' fees proper, without regard to "bad faith," where the E/C unsuccessfully asserts that claimant's medical condition is not causally related to the compensable accident).

From the above-cited cases, it can be seen that a workers' compensation carrier, once it has notice of a compensable injury, denies benefits requested by an injured worker at its peril. Fortunately for the carrier, however, while it may be required to pay some benefits which, looking

restropectively, should not have been paid, a mistaken payment does not thereafter bind the carrier. This is so because:

> To hold that the carrier's previous voluntary payments now estops them from making such a challenge would have the chilling effect of making a carrier reluctant to make any voluntary payment until it is absolutely sure that it is on the risk, thus tending to defeat the self-activating nature of the Act. In other words, no carrier would ever make a payment during its investigative period for fear it would be estopped to later deny liability should its investigation prove the injury to be non-compensable. Allen's Lawn Care Service v. Armstrong, IRC Order 2-2943 (1976).

See also, Azarian v. Azarian, 166 So.2d 442 (Fla. 1964). (The mere fact that a carrier initially accepts a claim as compensable has no bearing on its ultimate liability for payment should a claim be filed for additional benefits.); Alpert & Murphy, Fla. Workmen's Comp. Law, Section 23-12 (3rd Ed. 1978).

This is precisely the situation that occurred in the case at bar. Following his volleyball accident, the Petitioner complained to his employer of continuing knee problems. Mr. Hodges learned that the Petitioner had sustained a compensable injury on 11/3/81, assumed that his present condition (in August 1982) was an aggravation of that injury, and, rather

than denying benefits pending his investigation, initiated the payment of compensation as required by Florida law. What we know now, of course, is that he should not have authorized those payments because the Claimant's condition was not related to the 11/3/81 accident. Nevertheless, American was not estopped to assert its defenses because of these voluntary payments.

In support of his argument that the mistaken payments by American revived the statute of limitations as to Fidelity, Petitioner cites Iowa National Mutual Ins. Co. v. Webb, 174 So.2d 21 (Fla. 1965). That case is clearly distinguishable from the case at bar. First, the case at bar involves payments to a claimant that never should have been made at all, whereas Iowa National clearly did not. Second, and perhaps more importantly, Iowa National simply did not involve a situation where the statute of limitations had already run prior to the voluntary furnishing of remedial care. Iowa National last paid benefits to the claimant on 2/3/57, and voluntary payments were made thereafter by Michigan Mutual in August 1958, before the statute of limitations would have run on 2/3/59.

Further, the rationale for the "dissenting" opinion of the First District Court of Appeal is based on a misreading of the record herein:

> The carrier, Fidelity, with superior knowledge of 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 the 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. This could have occurred immediately after Fidelity went off the risk, at which time no two-year period had elapsed, or it could have occurred (as it did) somewhat later. Fidelity cannot now be heard to complain that the foreseeable and, in this case, the inevitable has happened. Fidelity is and was charged with notice of the applicable law under which it might become liable for future claims by Daniel. (Emphasis added.)

10 F.L.W. at 1111.

This argument mistakenly assumes that Fidelity was aware that Petitioner had torn his anterior cruciate ligament and that he was susceptible to further injury at the time Fidelity went off the risk in 1979. There is absolutely no evidence in the record to support that theory. In fact, the evidence is directly to the contrary. Following his 1978 accident, Petitioner was treated merely for a torn lateral meniscus (R: 327), and it was the anterior cruciate insufficiency that caused the medial meniscus to tear in August 1982 (R: 291).

The record clearly shows that the parties did not become aware that the anterior cruciate ligament had been torn in the 1978 accident until after Petitioner's volleyball accident of 7/6/82, two years after the statute of limitations had run. (10 F.L.W. at 1111; R: 291, 301-302, 328, 330, 335.)

Second, taken to its logical conclusion, the "dissenting" opinion suggests that once any compensable injury occurs, the carrier on the risk at the time is on notice that it may be liable for workers' compensation benefits in perpetuity even after the statute of limitations has expired because of the actions of some third party of which it has no knowledge and over which it exercises no control. This simply cannot be the law.

In summary, the Petitioner, The Academy of Florida Trial Lawyers, and the "dissenting" judges of the First District Court of Appeal would have this Court hold that, while American's actions may not have estopped it from raising its defenses, those actions did estop Fidelity from raising as a defense the statute of limitations which had run almost two years earlier. Such an absurb result simply cannot be the one intended by the legislature in enacting the Workers' Compensation Act. It runs counter to any basic notion of

fundamental fairness and would deprive these respondents of property without due process of law. It should not be made the law in Florida.

CONCLUSION

For the foregoing reason, Holmes Lumber Company and Fidelity and Casualty Company of New York respectfully request this Court to affirm the order of the Deputy Commissioner herein.

Respectfully submitted,

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CERTIFICATE OF MAILING

WE HEREBY CERTIFY that true copies of the foregoing were furnished, by mail, this 30th day of August, 1985, to: WILLIAM A. BALD, ESQUIRE, 2800 Independent Square, Jacksonville, Florida 32202; E. ROBERT WILLIAMS, ESQUIRE, 231 East Adams Street, Jacksonville, Florida 32202; and HARRY G. GOODHEART, III, ESQUIRE, 3119 Manatee Avenue, West, Bradenton, Florida 33505.

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