

SUPREME COURT OF FLORIDA

LEONARD H. DANIEL,

Petitioner,

vs.

CASE NO. 67,341

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

Respondents.

FILED
JAN 1 1985

SEP 3 1985
CLERK SUPREME COURT
By: [Signature] Clerk

ANSWER BRIEF OF RESPONDENTS HOLMES LUMBER COMPANY
AND AMERICAN MUTUAL LIABILITY INSURANCE COMPANY

BOYD, JENERETTE, STAAS, JOOS,
WILLIAMS & FELTON, P.A.

BY: Karen K. Cole
231 East Adams Street
Jacksonville, Florida 32202
904-353-6241

Attorneys for Respondents

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
REFERENCES	iii
STATEMENT OF THE CASE AND OF THE FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT:	
AMERICAN MUTUAL LIABILITY INSURANCE COMPANY BEARS NO RESPONSIBILITY FOR BENEFITS CLAIMED BY DANIEL AS A RESULT OF HIS 1982 INJURY	3
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Chicken 'n' Things v. Murray,</u> 329 So. 2d 302 (Fla. 1976)	5
<u>Johnson v. Division of Forestry,</u> 397 So. 2d 761 (Fla. 1st DCA), <u>pet. for review denied, 407</u> So. 2d 1103 (Fla. 1981)	1

REFERENCES

Petitioner Leonard H. Daniel will be referred to in this brief as "Daniel;" respondent Holmes Lumber Company will be referred to as "Holmes;" respondent Fidelity & Casualty Company of New York will be referred to as "Fidelity;" and respondent American Mutual Liability Insurance Company will be referred to "American."

References to the record on appeal will be indicated by (R.); references to the appendix attached to appellant's initial brief will be indicated by (A.); and references to appellant's initial brief will be indicated by (I.B.).

STATEMENT OF THE CASE AND OF THE FACTS

Respondents Holmes Lumber Company and American Mutual Liability Insurance Company accept the statement of the case and the facts contained in petitioner's initial brief with the following addition and exception:

Daniel states that: "At the time it paid [temporary total disability benefits from July 8, 1982 through August 23, 1982], American knew about the volleyball accident and the 1978 injury (R.82-84, 95)." (I.B. at 3). American does not contest the accuracy of this statement but adds that American assumed, when it paid such benefits, that Daniel was experiencing an aggravation of his 1981 injury for which it had previously paid benefits. (R. 96). American took Daniel's statement on September 24, 1982 and determined that his current problem was unrelated to his 1981 accident. It accordingly controverted further benefits on November 24, 1982. (R. 422).

Although it does not directly affect American's rights, American disputes Daniel's statement that Johnson v. Division of Forestry, 397 So. 2d 761 (Fla. 1st DCA), pet. for review denied, 407 So. 2d 1103 (Fla. 1981) "squarely holds that a second carrier can extend the statute of limitations notwithstanding the presence of a 'two-year gap.'" (I.B. at 4).

SUMMARY OF ARGUMENT

The Deputy Commissioner correctly held, based upon competent, substantial evidence, that Daniel's knee injuries suffered in July, 1982 were related not to Daniel's previous knee injury on November 3, 1981 but to his first knee injury on August 25, 1978. Both physicians who testified at the merit hearing indicated that the 1981 knee injury caused Daniel only a transient strain or sprain and did not cause or in any way relate to Daniel's 1982 knee injuries. At the merit hearing, Daniel's counsel conceded the correctness of this testimony. The Deputy Commissioner incorporated these factual findings into his Order and these factual findings have not been challenged on appeal to the First DCA or by certification to this Court. The certified question deals only with whether Daniel's claim against Fidelity for benefits arising from 1982 accident is barred by the statute of limitations. No party to these appellate proceedings has challenged the correctness of the Deputy Commissioner's finding that American, because it was not on the risk in 1978, is not responsible for Daniel's aggravation, in 1982, of his 1978 knee injury.

ARGUMENT

AMERICAN MUTUAL LIABILITY INSURANCE COMPANY BEARS
NO RESPONSIBILITY FOR BENEFITS CLAIMED BY DANIEL
AS A RESULT OF HIS 1982 INJURY

Although respondent American Mutual Liability Insurance Company is a party to this certified question proceeding, it is not directly affected by it. Fidelity & Casualty Company of New York provided Holmes Lumber Company with workers' compensation coverage on August 15, 1978, when Daniel sustained his first knee injury. American provided Holmes with workers' compensation coverage on November 3, 1981, when Daniel sustained his second knee injury. Fidelity and American provided Daniel with the appropriate benefits for these compensable injuries.

In July, 1982 Daniel sustained his third knee injury while engaging in a volleyball game at his home. American paid Daniel temporary total disability benefits from July 8, 1982 to August 23, 1982 until it discovered that Daniel's injury was related not, as it had initially assumed, to his 1981 knee injury but rather to his 1978 knee injury. American then controverted Daniel's claim for benefits on November 24, 1982. (R. 411).

Daniel concedes, and the Deputy Commissioner found, that the July, 1982 knee problems for which Daniel seeks benefits are unrelated to and were not caused by Daniel's November 3, 1981 accident. Rather, Daniel categorically states, and the Deputy Commissioner found, that Daniel's 1982 knee problems were an aggravation of his August 15, 1978 accident. (R. 140-41; 411-12).

Daniel testified at the merit hearing that his knee injury of November 3, 1981 was a mere strain or sprain whose effects lasted for only a few days. (R. 9-10). He further testified that he returned to pre-injury status within a few days after that accident and had no further problems as a result of that accident. (R. 51-52).

Orthopedic surgeon Dr. Trave L. Brown treated Daniel for both his 1978 accident and his 1982 volleyball accident. When presented with the facts of the intervening November 3, 1981 accident, Dr. Brown testified that, in his opinion, Daniel sustained no permanent disability from the 1981 accident and that accident did not cause the injuries which he sustained in his 1982 volleyball accident. (R. 322, 325, 339). Orthopedic surgeon Dr. Samuel Rukab, the only other physician who testified at the merit hearing, stated that Daniel's 1981 accident caused only a simple sprain of the knee. (R. 266, 269, 292-94).

Daniel's counsel conceded at the conclusion of the merit hearing that Daniel's 1981 accident had nothing to do with, was unrelated to and did not cause Daniel's 1982 injuries.

MR. BALD (attorney for Daniel): Your Honor, I can save him a breath. I agree. There's no testimony that the '81 accident caused the problems for which he was treated in 1982.

MR. SLATER (attorney for Holmes and American): Was caused or related or had anything to do with it.

MR. BALD : I agree with that.

THE DEPUTY: Okay, I've got that correct. The claimant concedes that the '81 accident had nothing to do with this condition of the claimant in '82?

MR. BALD: Right. It's the claimant's position that the '78 accident was the cause.

(R. 140-41).

In his Order of June 16, 1983, Deputy Commissioner Rhodes Gay made the following findings:

11. The evidence is clear (and I so find): (A) that both the second accident and the injury occasioned thereby were trivial and insubstantial beyond the need for primary care as furnished, (B) that said injury was purely a temporary and transient phenomenon (sic), and (C) that said injury and the effects of said accident did not reach, last, or endure beyond November 17, 1981 at the latest. From the occurrence (sic) of the second accident through November 17, 1981, claimant's only needs and entitlements, whether related to the first accident, the second accident, or both, were for the primary care as rendered and paid for by American. American, thus, has paid all it may lawfully be required to pay in workers' compensation. Absent a temporary disability or a medical or merger of permanencies situation, no carrier can be required to pay for the effects of an accident which occurred before it went on the risk. Obviously, then American cannot be held liable for the effects of the first accident after November 17, 1981, inasmuch as the effects of the second accident and injury had by November 17, 1981 totally dissipated. The claim against American, therefore, should be denied.

(R. 411-12); (A. 17-18).

The Deputy Commissioner's findings on the issue of American's liability to Daniel are supported by competent, substantial evidence and were properly affirmed by the First District Court of Appeal. Chicken 'n' Things v. Murray, 329 So. 2d 302 (Fla. 1976). Both Dr. Brown and Dr. Rukab testified that Daniel's 1982 injuries were related not to his 1981 accident, for which American was on the risk, but to his 1978 accident, for which American was not on the risk. The record is devoid of any evidence of any connection between the 1981

accident for which American paid benefits and Daniel's 1982 accident for which he now claims benefits. The question certified to this Court does not relate to or challenge the correctness of the Deputy Commissioner's finding that American has paid all benefits which it owed to Daniel.

CONCLUSION

Accordingly, Holmes and American respectfully request that this Court affirm the order of the First District Court of Appeal as it relates to Holmes and American.

Respectfully submitted,

BOYD, JENERETTE, STAAS, JOOS,
WILLIAMS & FELTON, P.A.

BY: Karen K. Cole
Karen K. Cole
231 East Adams Street
Jacksonville, Florida 32202
904-353-6241
Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail this 30th day of August, 1985, to William R. Swain, Esquire, 630 American Heritage Life Building, Jacksonville, Florida, 32202; and William A. Bald, Esquire, 2800 Independent Square, Jacksonville, Florida, 32202.

BOYD, JENERETTE, STAAS, JOOS,
WILLIAMS & FELTON, P.A.

BY: Karen K. Cole
Karen K. Cole
231 East Adams Street
Jacksonville, Florida 32202
904-353-6241
Attorney for Respondents