SUPREME COURT OF FLORIDA

LEONARD H. DANIEL,

Petitioner,

vs.

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

Respondents.

_____/

CASE NO. 67,341

PETITIONER'S INITIAL BRIEF

PAJCIC PAJCIC DALE & BALD
2800 Independent Square
Jacksonville, Florida 32202
(904) 358-8881
Attorneys for Petitioner

TABLE OF CONTENTS

CITATIONS

Cases

Other Authorities

STATEMENT OF THE CASE AND THE FACTS

This case originated as a claim by petitioner, Leonard Daniel, for worker's 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 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.

---

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

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

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 carrier, 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 operative effect of the statute of limtations. 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 ARGUMENT

The decision of the court of appeal should be quashed because, under the clear language of §§440.13(d) and 440.19(1)(a), Fla. Stat. (1978), a claim is timely filed if it is filed within two years of the last payment of compensation on account of the injury. In this case such payment occurred in August of 1982. The statutes contain no reference to the so-called two year gap.

Watson v. Delta Airlines, 288 So.2d 193 (Fla. 1973), held that Miller v. Brewer Co. of Fla., 122 So.2d 565 (Fla. 1960), which was decided on the basis of a two year gap, is no longer the law and that a claimant has two years from the last payment of compensation in which to file a claim.

The affirmers expressly concede that their position flies in the face of established, recent precedent in the First District Court of Appeal. Johnson v. Division of Forestry, 397 So.2d 761 (Fla. 1st DCA 1981), pet. for rev. den., 407 So.2d 1103 (Fla. 1981), and Bowman v. Food Fair Stores, 400 So.2d 793 (Fla. 1st DCA 1981), pet. for rev. den., 412 So.2d 465 (Fla. 1982), squarely hold the two year gap irrelevant.

There are sound policy reasons to reject the two year gap theory. The reversers' reading of the statutes is in harmony with the remedial purposes of the workers' compensation law and allows decision of claims on their merits without doing substantial violence to the employer's interest in having claims laid to rest.

The First District's about-face from its recent precedents disserves the interest of judicial constancy and certainty and this Court should restore some order in the statute of limitations area by quashing that court's departure from precedent.

ARGUMENT

UNDER A PROPER CONSTRUCTION OF §440.13(3)(b) AND 440.19(1)(a) DANIEL'S CLAIM WAS TIMELY BECAUSE IT WAS FILED WITHIN TWO YEARS OF THE LAST PAYMENT OF COMPENSATION ON ACCOUNT OF THE COMPENSABLE 1978 INJURY.

The timeliness of Daniel's claim for compensation and remedial attention is governed by §440.19(1)(a) and §440.13(d), Fla. Stat. (1978), respectively. In identical language these sections provided:*/

---

*/ The two limitations provisions have since been combined in §440.19, Fla. Stat.

> ". . .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 2 years after the date of the last payment of compensation or within 2 years of the date of the last remedial attention furnished by the employer. . . ."

Since the 1982 compensation payments were made for a condition causally related to the 1978 accident, Daniel's claim was made within two years of the last payment of compensation on account of the 1978 injury.

The twelve judges of the court of appeal agreed that the 1982 compensation payments related to the compensable 1978 injury. Similarly, reversers and affirmers alike recognized that a payment on behalf of the employer by a successor carrier would extend the statute of limitations in the absence of a two year gap.*/ The only point which separated the affirmers from the reversers was whether the existence of a two year gap overcomes the plain language of §§440.13(d) and 440.19(1)(a).

The reversers' opinion that the existence of a two year gap is immaterial is in harmony with the statutory

---

*/ While the affirmers did not say this expressly, it is clear from their opinion that they correctly attached no significance to the fact that Holmes had happened to change carriers. It has been clear since Iowa National Mutual Ins. Co. v. Webb, 174 So.2d 21 (Fla. 1965) that a change in carriers is immaterial to the claimant's rights because it is the employer that furnishes benefits through its insurance carriers.

language and the case law since this Court's decision in Watson v. Delta Airlines, 288 So.2d 193 (Fla. 1973). Neither §440.13 nor §440.19 contains any reference to a two year gap, although it would have been a simple matter for the legislature to have made it clear that the two year gap is relevant. Daniel's claim is timely if the statute means what it says.

The affirmers attempt to deal with the statutory language as follows:

> "The plain language of the statute says that the two year limitation starts after the last voluntary payment. It does not say that a new two year claims period commences upon any future voluntary payment." (A.4).

If we apply such reasoning to Daniel's case, we would consider the November, 1978 compensation payment to be the last voluntary payment despite the fact that voluntary payments were made in 1982. However, this construction does not withstand analysis, for it depends upon the premise that there can be payments after the last payment. It is clear that if "last" is given its plain meaning, Daniel's claim was filed within two years of the last payment of compensation. Indeed, two unanimous panels of the First District Court of Appeal have already held that "last" does indeed mean last.

In Johnson v. Division of Forestry, 397 So.2d 761 (Fla. 1st DCA 1981), pet. for rev. den., 407 So.2d 1103 (Fla. 1981), the court held that the voluntary furnishing of medical treatment had "restarted the clock" after a hiatus of over

three years during which no benefits had been paid or medical treatment furnished.*/ The unanimous opinion noted that:

> "[t]he statutory language is clear that it is the last furnishing of such remedial treatment or payment of compensation from which the two-year limitation is measured" (397 So.2d at 763).

The First District Court of Appeal reached the same result in Bowman v. Food Fair Stores, 400 So.2d 793 (Fla. 1st DCA 1981), pet. for rev. den., 412 So.2d 465 (Fla. 1982). In Bowman the court reversed the denial of a claim on the ground that the voluntary payment of compensation after a gap of over four years had renewed the limitations period. The court held:

> "The statute clearly indicates that where payment of compensation or remedial treatment has been furnished by the employer without an award, a claim may be filed within two years after the date of the last payment of such compensation or after the date of the last remedial treatment furnished by the employer. . . . We therefore conclude that it was error to dismiss the claim." (400 So.2d at 795).

The Johnson decision was based in part upon this Court's decision in Watson v. Delta Airlines, 288 So.2d 193 (Fla. 1973). Watson is this Court's most recent pronouncement

---

*/ Johnson also holds that a later carrier for the same employer can renew the limitations period on an earlier injury. We shall not discuss that aspect of the decision since even the affirmers rejected Fidelity's argument that American could not affect its rights.

on the statute of limitations question. Although the case can be narrowly read not to pass on the significance of a two-year gap, this Court's reasoning is consistent with the position of Daniel and the six reversers that the statute means what it says.

The essential facts of Watson are as follows. Watson sustained compensable knee injuries in August of 1967 and on February 1, 1968. Medical treatment was voluntarily provided in 1967 but neither medical treatment nor compensation was furnished immediately after the 1968 injury. On December 18, 1969, Watson again injured his knee in a non-compensable accident. The employer furnished him medical treatment between January of 1970, and April of 1970, and paid temporary total disability benefits from February 25, 1970, to April 20, 1970, and permanent partial disability benefits based upon a 5% impairment of the left leg beginning April 20, 1970. All of these payments were voluntary. Watson filed his claim on May 25, 1970.

The Judge of Industrial Claims denied the claim on the ground that more than two years had elapsed between the February 1, 1968, injury and the filing of the claim. The JIC found that the voluntary payment of benefits and furnishing of treatment did not reactivate the statute of limitations, based upon this court's earlier ruling in Miller v. Brewer Co. of Fla., 122 So.2d 565 (Fla. 1960). He also found that the

benefits paid and treatment furnished related only to the non-compensable 1969 accident. The JIC's order was affirmed by the Industrial Relations Commission.

This Court quashed the order of the Industrial Relations Commission. It held that the JIC had erred in relying on Miller v. Brewer because §440.13(d), Fla. Stat. had been amended since the Miller case to make it clear that a claim for medical treatment was timely if filed within two years of the last voluntary payment of compensation or furnishing of treatment.*/

The Watson decision's discussion of Miller shows that the Watson court did not consider the two year gap a bar to recovery. In Miller there was a four year gap yet, in its exhaustive treatment of Miller, Watson did not even mention this gap. Instead of distinguishing Miller on the basis of the gap, Watson distinguished Miller on the ground that §440.13(d) had been amended in 1963 to make it clear that a voluntary payment could renew the limitation period on a claim for medical treatment. This court stated:

---

*/ Miller involved a claim for medical treatment only. At the time Miller was decided, §440.13(d) did not (in contrast to §440.19(1)(a)) contain language expressly providing that a claim could be filed within two years of the last voluntary payment of compensation or furnishing of treatment without an award.

> "It was §440.13(3)(b) regarding the remedial remedy that was involved in Miller which was relied upon by the JIC who failed to note that Miller was under the former statute which did not include then, (as §440.19(1)(a) did for 'compensation') the present exceptions now also in §440.13(3)(b). Thus Miller no longer applies and is distinguished from our case." (288 So.2d at 194).

This court then went on to suggest that Miller's holding had been entirely vitiated by the 1963 amendment to 440.13(d) which inserted the reference to voluntary payments already present in 440.19(1)(a), noting that the amendment may have been intended to change the Miller result:

> "It may well be that the 1963 amendment was the result of the denial of relief in 1960 Miller, in order to provide medical recovery as well as compensation in those instances of voluntary payment of compensation or voluntary provision of remedial treatment by the employer which begin a two-year statute of limitations." (Id.)

The Watson opinion concluded its lengthy discussion of Miller by stating unequivocally that a claim is timely if filed within two years of the last payment of compensation or furnishing of treatment:

> "Both statutes now provide the same express exceptions for recovery more than two years after the injury where there has been either compensation or remedial treatment 'without an award,' in which case the two-year statute of limitations runs from the last voluntary compensation payment or last remedial treatment so furnished by the employer without an award." (288 So.2d at 195).

Having held in 1972 that Miller has been retired to the archives of outdated appellate decisions by a statute passed in 1963, the Watson court would undoubtedly be surprised to learn that in 1985 a claimant has been denied needed medical treatment and deserved compensation benefits on the basis of the Miller decision. Yet, that is exactly the effect of the affirmers' action in this case.

There is another indication in Watson that the Watson court would reject the result reached by the affirmers. At the conclusion of its opinion the Watson court notes:

> "Thus, on the dual basis of 1) 'remedial' attention having been voluntarily furnished within the two years required by the same exceptions within the two statutes, and 2) compensation voluntarily paid 'without an award' also within such two years, the claimant falls within the statutory exceptions in §440.13(3)(b) and §440.19(1)(a) and is within such 'extended' two year statute of limitations as a basis for recovery." (288 So.2d at 196).

From this passage it is clear that the Watson court felt that the commencement of compensation payments on February 25, 1970, over two years from the date of the accident, furnished an independent ground for extending the limitations period without regard to the medical treatment furnished within two years of the accident. 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).

There are sound policy reasons for this Court to return to the wisdom of Watson, Johnson, and Bowman. First, the Worker's Compensation Act is remedial and doubts as to its construction should be resolved to provide benefits to injured workers. Thomas Smith Farms v. Alday, 182 So.2d 405 (Fla. 1966); Topeka Inn Management v. Pate, 414 So.2d 1184 (Fla. 1st DCA 1982). Second, a statute of limitations defense, by its nature, is a technical defense which bars claims which are valid on their merits. Far from occupying the favored position accorded it by the affirmers, the statute of limitations is actually the defense most easily waived. Under §440.19(2), Fla. Stat. (1983), the defense is lost if not presented at the first hearing. Third, the employer has little interest in the claim's repose where he himself has recommenced benefits or treatment.

The legislature apparently agrees that the two year gap theory is poor public policy and has given its tacit approval to the Johnson holding. The reversers note that Johnson "has survived through two sessions of our state legislature" (A.7). Indeed, in 1983 the legislature amended

§440.19, Fla. Stat., but left unchanged the language which gives a claimant two years after the last payment of compensation or furnishing of benefits to file his claim (Ch.83-305, Laws of Florida). The fact that the legislature passed up this obvious opportunity to change the Johnson result, an opportunity it did not miss when it overruled Miller, strongly suggests legislative approval of Johnson.

Finally, considerations of judicial stability and certainty weigh heavily in favor of Daniel's position. Johnson, decided less than two years before Daniel filed his claim, is acknowledged by the affirmers to be directly on point and directly in Daniel's favor. The decision was unanimous, as was the Bowman decision that followed. The court of appeal had spoken clearly and, one had a right to expect, finally on the two year gap issue. The 180 degree turn taken in the instant case was steered by no change in statute or directive from this Court, nor even by a majority on the court of appeal. The law on the timeliness of workers' compensation claims ought to be put back on course.

CONCLUSION

Daniel's claim was timely under the plain language of the applicable statutes, this Court's Watson decision and the First District's recent precedents. The certified question should be answered in the affirmative, the decision of

the court of appeal quashed and the cause remanded to the court of appeal with instructions to the court of appeal to reverse the denial of benefits.

Respectfully submitted,

PAJCIC PAJCIC DALE & BALD

By William A. Bald

William A. Bald
2800 Independent Square
Jacksonville, Florida 32202
(904) 358-8881
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies hereof have been furnished by mail to E. Robert Williams, Esq., 231 E. Adams Street, Jacksonville, Florida 32202, and William R. Swain, Esq., 630 American Heritage Life Building, Jacksonville, Florida 32202, this 2 day of August, 1985.

William A. Bald
Attorney