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 REPLY BRIEF

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REPLY TO FIDELITY'S ARGUMENT

Apparently uncomfortable with the clarity of the statutory language permitting a claim to be filed within two years of the last payment of compensation, Fidelity makes various equitable and policy-oriented arguments without ever coming to grips with the language of §§440.13(3)(b) and 440.19(1)(a), Fla. Stat. (1977). Fidelity's approach ignores the fact that this case involves statutes of limitations. All arguments about what the law ought to be are beside the point if the statutes clearly state what the law is. As this Court has put it:

> "In making a judicial effort to ascertain the legislative intent implicit in a statute, the courts are bound by the plain and definite language of the statute and are not authorized to engage in semantic niceties or speculations. If the language of the statute is clear and unequivocal, then the legislative intent must be derived from the words used without involving incidental rules of construction or engaging in speculation as to what the judges might think that the legislators intended or should have intended." Tropical Coach Line, Inc. v. Carter, 121 So.2d 779, 782 (Fla. 1960).

There are two inescapable facts about the statutes in question: (1) they unequivocally state that a claim is timely if paid within two years of the last payment of compensation on account of the injury; and (2) they contain no reference to any so-called "two-year-gap."

Johnson v. Division of Forestry, 397 So.2d 761 (Fla. 1st DCA 1981), pet. for rev. den., 407 So.2d 1103 (Fla. 1981),

was based on what the court recognized as the "clear language of the statute." (397 So.2d at 763). The legislature left that clear language intact when it amended the statutes in 1983 and made no effort to change the Johnson result.

Fidelity asks this Court to ignore the legislature's amendment of the limitations provisions after Johnson on the ground that district courts of appeal are mere intermediate courts whose statutory construction the legislature cannot ratify. This argument is demonstrably incorrect. The district courts of appeal in Florida are not intermediate courts; they are "courts primarily of final appellate jurisdiction." (Ansin v. Thurston, 101 So.2d 808, 810 (Fla. 1958)). This Court has stated that:

> "The District Courts of Appeal were never intended to be intermediate courts." (Johns v. Wainwright, 253 So.2d 873, 874 (Fla. 1971)).

Indeed, decisions of the First District Court of Appeal in worker's compensation cases are even more "final" than other district court of appeal decisions, because the First District has exclusive jurisdiction of worker's compensation appeals under §440.271, Fla. Stat. Thus, there can be no review of such decisions based on inter-district conflict. Having entrusted appellate responsibility for the worker's compensation statute to the First District Court of Appeal, subject only to this Court's limited review powers, the legislature can hardly be considered unaware of that court's

decisions construing the compensation statute. See State v. Dickinson, 286 So.2d 529 (Fla. 1973), where this Court held that reenactment of a statute ratified the interpretation placed on the statute by the administrative body charged with its enforcement.

Fidelity offers no theory of how the statutory language can be construed to bar claims after a "two-year-gap." Instead it makes four basic arguments: (1) that this Court adopted the "gap" theory in Hodges v. State Road Department, 171 So.2d 523 (Fla. 1965); (2) that the actions of American cannot bind Fidelity; (3) that American's payments were a mistake; and (4) that it is somehow inequitable to require Fidelity to provide benefits. None of these arguments holds water.

Contrary to Fidelity's reading of Hodges v. State Road Department, that case is based upon the principle of res judicata, and not any two-year-gap theory. In Hodges there had been an unappealed order finding that the statute of limitations had run as to the claimant's original injury. This Court held that such order had become the law of the case and, under principles of res judicata, precluded a later claim for benefits related to the original injury. Thus, Hodges is plainly distinguishable from the instant case, in which there was no previous order holding that the claim was barred by the statute of limitations.

Fidelity's argument that it cannot be bound by American's actions is contrary to this Court's holding in Iowa National Mutual Insurance Co. v. Webb, 174 So.2d 21 (Fla. 1965), as well as the opinions of both sides of the en banc Court of Appeal in this case. Iowa National expressly holds that a successor carrier, can, by voluntary payment of benefits, extend the statute of limitations as to the former carrier. Discussing the effect of benefits provided by the second carrier (Michigan Mutual), this Court stated:

> "Thus, it must be said that the furnishing of these benefits tolled the running of the statute as to claimant's right to medical benefits required by that injury. It matters not that the benefits were paid by Michigan Mutual and not Iowa National. Insurance carriers only act for the employer who is responsible to furnish the benefits. Therefor, under the statute it matters not which carrier furnished the benefits. They are considered to have been furnished by the employer." 174 So.2d at 24.

Johnson v. Division of Forestry applied Iowa National in holding that a second carrier can renew the limitations period. While disgreeing with Johnson on the gap issue, the affirmers did not suggest that Johnson was wrong to follow Iowa National.

Fidelity argues that the payments by American could not extend the statute of limitations because they were made in the mistaken belief that Daniel's disability in 1982 related to his 1981 work injury. As in the case of its previous argument, Fidelity is advocating a position which neither side of the

court of appeal found meritorious. The affirmers based their opinion solely on the existence of a two-year-gap, and the reversers noted that the benefits paid in 1982 were paid "on account of the [1978] injury" */ since they were causally related to the 1978 injury. In support of this proposition, the reversers cite Escribano v. Westinghouse Electric Co., 453 So.2d 130 (Fla. 1st DCA 1984).

Escribano holds that when the employer furnishes medical treatment to the claimant such treatment extends the statute of limitations if it is causally related to the compensable accident, irrespective of any specific knowledge by the employer that the treatment was, in fact, related to the compensable accident. The treatment in question had occurred when Escribano, having previously suffered a compensable back injury, went to the company medical clinic and complained of back pain without any unusual activity but did not tell the doctor his condition was job-related. The deputy commissioner denied the claim, holding that the claimant had a duty to put the employer on notice at the time of the treatment if he were contending that his back pain was compensable. The court of appeal reversed and held that the treatment was "on account of" the compensable injury because there was some causal connection

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*/ Sections 440.13(3)(b) and 440.19(1)(a), Fla. Stat. (1977) permit claims within two years of benefits "on account of" the compensable injury.

between the compensable injury and the claimant's complaints of back pain. (453 So.2d at 132).

Thus, Escribano adopted a straightforward, objective test to determine what constitutes treatment or benefits "on account of" the injury. By contrast, the approach urged by Fidelity is subjective because it requires the deputy to look into the carrier's mind to determine what it intended. Timeliness of a claim ought not depend on the carrier's intent, or whether or not it made a "mistake."

Finally, Fidelity argues plaintively that to subject it to liability "in perpetuity" because of the actions of American "runs counter to any basic notion of fundamental fairness and would deprive [Fidelity and Holmes Lumber] of property without due process of law." (Fidelity brief, pp.17-18). This argument lacks any semblance of merit.

Worker's compensation is, by its nature, a system that provides continuing benefits for an indefinite period of time. Any carrier who goes "off the risk" leaves with continuing obligations to employees injured while the carrier was "on the risk." One such obligation is to pay benefits to workers whose compensable injuries, while asymptomatic when the carrier leaves the risk, flare up or cause further injury later. Since Iowa National, carriers also have known the limitation period on its obligations can be extended by payments on behalf of the employer by a successor carrier.

In the instant case, Fidelity left the risk knowing Daniel had suffered a compensable injury in 1978 which had required surgery. The true nature of that injury went undiagnosed by Fidelity's authorized treating physician and was not discovered until 1982. There was a two-year-gap not because Daniel sat on his rights, but because he did not learn until 1982 that his continuing knee problems' origin was the 1978 injury. It is not, to adopt Fidelity's terminology, fundamentally unfair to require Fidelity to provide treatment and benefits which are without question related to the compensable injury. It would be fundamentally unfair to read a two-year-gap theory into the statutes and thereby deny Daniel needed medical treatment and benefits.

Respectfully submitted,

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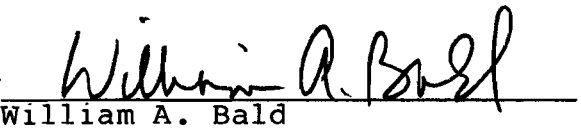
By 

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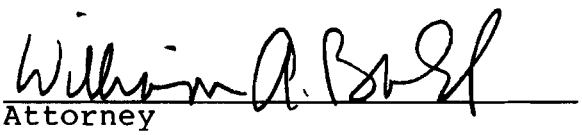
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies hereof have been furnished by mail to E. Robert Williams, Esq., 231 E. Adams Street, Jacksonville, Florida 32202; William R. Swain, Esq., 630 American Heritage Life Building, Jacksonville, Florida 32202; and Harry Goodheart, III, Esq., 3119 Manatee Avenue W., Bradenton, Florida 33505, this 20th day of September, 1985.



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