IN THE SUPREME COURT OF THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA

WILLIAM D. ROE,	CASE NO :	76,702
Petitioner,	1st DCA NO :	89-00847
vs	CLAIM NO :	262-48-5654
CITY INVESTING/GENERAL DEVELOPMENT CORP. and HOME INSURANCE COMPANY,	D/A :	05/04/84
Respondents.		

INITIAL BRIEF OF PETITIONER

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This is an appeal from an opinion of the District Court of Appeal, First District, State of Florida, filed March 21, 1990, and an opinion of the District Court of Appeal, First District, State of Florida, denying Petitioner's rehearing, filed September 7, 1990, said Orders affirming an Order of the State of Florida, Dept. of Labor & Employment Security, Office of the Judge of Compensation Claims, District "M", dated February 27, 1989.

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PRELIMINARY STATEMENT

The Petitioner/Claimant, WILLIAM D. ROE, shall be referred to herein as the "Claimant".

The Respondents/Employer/Carrier, CITY INVESTING/GENERAL DEVELOPMENT CORP. and HOME INSURANCE COMPANY, shall be referred to herein as the "Employer/Carrier" or by their separate names.

The Judge of Compensation Claims shall be referred to as the "JCC".

References to the record-on-appeal shall be abbreviated by the letter "T" and followed by the applicable page number.

References to the Appendix shall be referred to by the letters "App" followed by the applicable page number.

STATEMENT OF THE CASE

Claimant filed an Amended Claim for Compensation Benefits along with Applications for Hearings, wherein he was seeking compensation benefits for injuries sustained as a result of industrial accidents occurring on November 16, 1982 and May 8, 1984, during the course and scope of his employment with the Employer (T-15-21). Claimant was seeking, inter alia, past due and continuing medical care and attention to be provided by Dr. David J. Kaler of Port Charlotte, Florida, past due medical expenses, temporary total or temporary partial disability benefits beginning August 14, 1987, costs, interest, penalties and attorney's fees (T-16, 18, 21).

On December 23, 1987, the Employer/Carrier filed a Notice to Controvert any medical treatment received by Claimant on or after August 14, 1987 (T-83). The Employer/Carrier listed their reasons for controverting treatment on or after August 14, 1987, as follows:

> "Pursuant to Section 440.19 rights to benefits denied. Claimant failed to file a claim within two years from date of accident.
>
> Last TTD paid 8/5/84, last medical treatment 1/16/85." (T-83).

On October 26, 1988, a hearing on the Claim was held before the Honorable JCC Patrick J. Murphy (T-1). At that hearing, Claimant was again seeking, inter alia, past due and continuing medical care and attention under the direction of Dr. David J. Kaler of Port Charlotte, Florida, payment of past due medical bills, temporary total or temporary partial disability compensation beginning August 14, 1987, costs, interest, penalties and attorney's fees (T-1, 38). The Employer/Carrier defended the claim on the grounds that the statute of limitations has run and that this precludes Claimant from being entitled to any further medical treatment or indemnity benefits (T-1, 2, 37).

Thereafter, on February 27, 1989, Judge Murphy entered his Compensation Order (T-148-151). Judge Murphy noted that Fla. Statute 440.19(1)(b) provides that no statute of limitations shall apply to the right for remedial attention relating to the insertion or attachment of a prothesis device to any part of the body (T-149). Judge Murphy found as a matter of law that the reconstruction of a claimant's spine by the insertion of steffi plates is the insertion or attachment of a prothesis device and therefore this exempts Claimant from the statute of limitations (T-150).

Based upon this finding, Judge Murphy ordered the Employer/Carrier to provide remedial care and attention for Claimant under the care and direction of Dr. Kaler (T-150). However, Judge Murphy further found that nothing in the express language of the exemption would revive a claim for indemnity benefits, and as such, Claimant's claim for indemnity benefits (temporary total or temporary partial disability benefits) was dismissed and denied (T-150).

Thereafter, on March 28, 1989, the Employer/Carrier appealed the JCC's Order of February 27, 1989. Additionally, on or about March 28, 1989, Claimant also appealed the JCC's Order of February 27, 1989.

The Employer/Carrier listed as their point on appeal the following question:

> "The Deputy Commissioner erred in interpreting the statutory exclusion from the operation of the statute of limitations provided by section 440.19(1)(b), Fla. Statutes (1987) which statute provides that no statute of limitations shall apply to the right for remedial attention relating to the insertion or attachment of a prosthetic device to any part of the body, to apply to the insertion of "steffi plates", which are inserted in connection with spinal fusion surgery for the purpose of preventing bone graphs from migrating while the bones are in the process of fusing."

Claimant set forth as his point on appeal, on his cross appeal, the following question:

> Whether or not the Deputy Commissioner erred in denying the Claimant's claim for indemnity benefits (temporary total or temporary partial disability benefits) from August 14, 1987 and continuing, when the Deputy Commissioner found that the Claimant was entitled to continued remedial medical care under the direction of Dr. Kaler, which are would include a posterior interbody fusion and steffi plates for fixation."

Thereafter, on March 21, 1990, the First District Court of Appeal (hereinafter the "First DCA") entered its opinion in the above referenced case (App 1-3). In that opinion, the First DCA affirmed the JCC's Order of February 27, 1989. Specifically, the First DCA found that Fla. Statute 440.19(1)(b) contains a specific exception to the statute of limitations with respect to the right for remedial attention relating to the insertion or attachment of a prosthetic device to any part of the body. The First DCA concluded that no defense under this statute accrues with respect to a claim for such remedial care.

The First DCA further found, however, that in contrast, there is no concomitant statutory exemption in Fla. Statute 440.19(1)(a) which would prevent the accrual of a limitations defense against a claim for disability benefits when there has been a lapse of more than two years from the date of

injury, even when a claimant is to be provided with remedial care in the form of the insertion or attachment of a prosthetic device under Fla. Statute 440.19(1)(b).

The First DCA concluded that since more than two years have elapsed since the date of Claimant's injury, the statute bars Claimant's current claim for disability compensation. The First DCA specifically found that the Order requiring the Employer/Carrier to provide Claimant with remedial care relating to the insertion of the prosthesis does not revive a right to disability benefits (App-3).

Thereafter, on April 3, 1990, Claimant filed a Motion for Rehearing in the First DCA. In that Motion, Claimant argued that the denial of disability benefits to a claimant who is in need of insertion of a prosthetic device is contrary to the plain language of Fla. Statute 440.19(1)(a)(1983). Claimant specifically argued that Fla. Statute 440.19(1)(a)(1983) provides the right to compensation for disability if the claim is filed within two years after the date "of the last remedial treatment" furnished by the employer. Claimant argued that if the Employer/Carrier is liable for the cost of a surgical insertion of a spinal prosthetic device, then a claimant, by the clear language of Fla. Statute 440.19(1)(a)(1983) should be entitled to disability benefits so long as a claim therefor is filed within two years from the date of the insertion of the prosthetic device.

Thereafter, on September 7, 1990, the Honorable First DCA rendered its opinion on Claimant's Motion for Rehearing (App-4, 5). In that opinion, the First DCA denied Claimant's Motion for Rehearing (App-4, 5). However, the First DCA certified the following question as one of great public importance:

> "Is a claim for disability benefits under Chapter 440 timely when it is filed within two years of the date that the employer/carrier provides remedial treatment relating to the insertion or attachment or a prosthetic device when there previously occurred a two year period when no compensation benefits were paid or medical treatment furnished?"

Thereafter, on or about October 4, 1990, Claimant timely filed his Notice to Invoke Discretionary Jurisdiction of this Honorable Court pursuant to Fla. Rules of Appellate Procedure 9.030(a)(2)(A)(v). Claimant is seeking review of the aforementioned question of great public importance certified by the First DCA.

STATEMENT OF THE FACTS

Claimant, William D. Roe, is 54 years of age (T-13), and has a 7th grade education (T-14). Claimant has done primarily heavy construction work and heavy equipment operation work his entire life (T-14).

Claimant became employed with the Employer in 1979 (T-68). Claimant was employed as a pneumatic roller operator (T-68).

On or about November 16, 1982, Claimant was involved in an industrial accident during the course and scope of his employment herein when he sprained the muscle in his lower back while bending down to pick up rock in the de-rocking area for soil cement (T-2, 68, 69). Claimant went to the emergency room, saw a physician one time after that, but essentially returned to work in late November 1982 (T-2). Claimant's problems never went away, but he continued working for the Employer until May 8, 1984, when he was involved in another industrial accident during the course and scope of his employment with the Employer (T-2, 11). On May 8, 1984, Claimant was spraying for weeds and pulling weeds, and when he attempted to bend over to pull a weed, he had a sharp pain in his low back (T-2). The parties stipulated that this incident was also a compensable accident (T-37). Thereafter, on May 9, 1984, Claimant came under the care of Dr. David J. Kaler, an orthopaedic physician in Port Charlotte, Florida (T-28, 103, 104). Dr. Kaler's deposition of May 24, 1988, was introduced into evidence (T-100).

Dr. Kaler testified that he first saw Claimant on May 9, 1984 (T-104). Dr. Kaler felt that Claimant clinically had a herniated disc at L5-S1 on the left and scheduled Claimant for a CT Scan on May 10, 1984, at Fawcett Memorial Hospital (T-28).

On May 10, 1984, Claimant underwent a lumbar spine CT Scan which revealed that Claimant did have a protruded disc central and to the left side at L5-S1 (T-50).

Thereafter, on May 14, 1984, Claimant was admitted to Fawcett Memorial Hospital (T-52, 95), where he underwent a left lumbar laminectomy at L5-S1 with discectomy (T-28, 62, 105).

On August 1, 1984, Claimant returned to work for the Employer (T-3, 27, 76, 80). The last

temporary total disability payment received by Claimant was on or about August 5, 1984 (T-83).

Claimant initially returned to work at light duty for about 6 weeks and thereafter went back to regular duty (T-3). The regular duty consisted of driving a truck, operating a forklift, operating a front end loader, working with a shovel and working with a rake (T-3).

Claimant continued to receive treatment from Dr. Kaler until January 16, 1985 (T-26, 107, 108). On January 16, 1985, Dr. Kaler's report stated:

> "Mr. Roe is doing well. He is status post lumbar laminectomy/discectomy. He still has some residual numbness. His Motrin keeps him quite functional. We will continue him on the Motrin on a PRN basis. He has a prescription that he can have refilled. If the patient calls, we can refill this prescription on a PRN basis." (T-26)

Dr. Kaler testified that Claimant had reached maximum medical improvement (hereinafter "MMI") around August of 1984 (T-106, 116), at which time Claimant had been given a 5% permanent physical impairment to the body as a whole (T-117). Dr. Kaler testified that he had not placed any restrictions on Claimant at that time (T-117).

Dr. Kaler also testified that he did not administer any type of treatment to Claimant between January 16, 1985 and August 4, 1987 (T-107). Furthermore, Dr. Kaler's notes do not indicate whether or not he called any prescription medications in to any pharmacy or prescribed any medications for Claimant between January 16, 1985 and August 4, 1987 (T-107). Dr. Kaler stated that the prescription that Claimant was given for Motrin in January of 1985 could be refilled, although he did not know the number of times (T-107).

Dr. Kaler further testified that the treatment that he rendered to Claimant through January 16, 1985, was authorized by the Carrier (T-105), and those services have been paid for by the Carrier (T-107). The record reveals that payment for Claimant's visit of December 19, 1984, and January 16, 1985, was made by the Carrier on November 5, 1985 (T-45).

As noted previously, Claimant had returned to work for the Employer on August 1, 1984 (T-3, 27, 76, 80). Claimant continued to have problems with his lower back throughout his return to employment with the Employer (T-3). In late spring or early summer of 1987, the Employer laid off 9 or 10 employees, of which Claimant was one (T-3). Claimant continued to have problems, and at

that time his back was getting worse (T-3). Claimant eventually returned to Dr. Kaler, who he thought was the authorized physician for further medical treatment (T-3).

Dr. Kaler's records reflect that on August 4, 1987, Claimant was given a prescription for Motrin and a later appointment regarding his back pain (T-26).

Claimant was again seen by Dr. Kaler on August 14, 1987 (T-26, 108). As noted previously, Claimant's visit to Dr. Kaler on August 14, 1987, was the first time that Dr. Kaler had seen Claimant since January 16, 1985 (T-108). On August 14, 1987, Dr. Kaler indicated that Claimant had a recurrence of his left S1 radiculopathy (T-26). Dr. Kaler's report also indicates that he would like to work Claimant up, but apparently the statute of limitations had run out on his claim (T-26).

Dr. Kaler testified that he had called the Carrier and spoke to Sally Palone, a claims examiner with the Carrier, for authorization for the procedures, but Ms. Palone had suggested that the statute of limitations had run out on Claimant's claim (T-108).

Thereafter, on August 21, 1987, Claimant was admitted to Fawcett Memorial Hospital to undergo a lumbar CT Scan and a myelogram (T-26, 55-57, 96). This lumbar myelogram reflected herniation of the L5-S1 disc, and also bulging at L4-5 (T-56). The CT Scan showed a buckling of the annulus and degenerative disc disease collapse of the disc space at L5-S1 (T-26, 57, 109).

Dr. Kaler explained that the disc is similar to a jelly filled donut with a jelly being the nucleus, which is the part that extrudes and creates the problems as far as pressure on the nerves and sciatica and type symptoms (T-109). Dr. Kaler further explained that when the jelly filled portion of the disc is removed, the annulus, or the part similar to the caked part of the donut, tends to be compressed because it is not really a good weight bearing structure (T-109). Dr. Kaler explained that it is similar to putting a marshmallow between your fingers and squeezing it and it tends to bulge out circumferentially around the area that it is incorporated in (T-109). Dr. Kaler indicated that Claimant's CT Scan showed that the annulus structure was bulging posteriorly and pushing on the nerve roots causing irritation and causing the leg pain at the L5-S1 level (T-109).

Dr. Kaler felt that the buckling of the annulus was secondary to degenerative disc disease, the

collapse of Claimant's disc space, secondary to those two problems, and Claimant's previous operation (T-110). Dr. Kaler explained that Claimant's condition was causally related to his previous industrial accidents and the surgery that was performed on Claimant in 1984 (T-110).

Dr. Kaler testified that his proposed method of treatment for Claimant is that he needs an operation to reconstitute the disc height, and to use some type of interbody fusion and to maintain that fusion in a normal position and therefore to use internal fixation plates, known as steffi plates, because it is statistically difficult to get a satisfactorily solid fusion at L5-S1 compared to other parts of the spine (T-111). Dr. Kaler explained steffi plates as follows:

> "They are a plate that has -- the design is such that a shoulder screw will fit into one side of an indentation on the plate and a similar screw on the other side so that you can distract or compress the spine and place these screwheads in the indentations of the plate and maintain the position that you put the spine in after the fusion that you do." (T-111)

Dr. Kaler testified that these steffi plates have been on the market for approximately 3 years (T-128).

Dr. Kaler also testified that it was his understanding that a prosthetic device was:

> "Something to replace anatomy of the, either it isn't present or doesn't function properly." (T-111)

Dr. Kaler testified both in his deposition of May 24, 1988 and by letter dated April 26, 1988, that steffi plates are a prosthetic device (T-40, 111, 112). Dr. Kaler testified that the steffi plates are going to replace the normal functioning facet joints that will be removed at the time of the surgery (T-112). Dr. Kaler further testified that he does not anticipate removing the plates at any time in the future unless there is a problem with the steffi plates, such as the screw placement creating nerve root irritation or if the plate were to break (T-112).

Dr. Kaler also testified that it was his opinion that the additional surgery to Claimant with the use of steffi plates is a necessary remedial procedure for Claimant's condition (T-112, 113).

The JCC, in his order of February 27, 1989, specifically found:

> "... The reconstruction of the Claimant's spine by the insertion of steffi plates is the insertion or attachment of a prosthesis device for the purpose of the exemption. The testimony is quite clear the plates and related surgery will serve to replace missing bone

> and cartilage material and will replace the function of those natural bodily elements in supporting and stabilizing the spine. The surgery reasonably and necessarily contemplates changes to the architecture of the spine so as to accommodate and enhance the function of the artificial bodily parts. I take notice of the standard dictionary, and medical dictionary definitions of prosthesis. Prosthesis is simply an artificial replacement to a missing bodily part. The usual analogies are glass eyes, artificial limbs, dentures, and so forth. Such replacements may be both cosmetic and functional in their character. Thus, the insertion of permanent metal parts would fall within this loss definition." (T-150)

Furthermore, on August 26, 1987, Dr. Kaler wrote a note indicating that Claimant was temporarily totally disabled and would remain temporarily totally disabled for at least 6 months (T-31). Dr. Kaler last saw Claimant on August 27, 1987 (T-26). Dr. Kaler testified that as of August 27, 1987, Claimant was still temporarily totally disabled (T-114). Dr. Kaler testified that Claimant would remain temporarily totally disabled because of his symptoms of S1 radiculopathy unless he has some type of surgical procedure to eliminate the pressure on his nerve roots (T-114, 115).

A more specific reference to facts will be made during argument.

POINT ON APPEAL

IS A CLAIM FOR DISABILITY BENEFITS UNDER CHAPTER 440 TIMELY WHEN IT IS FILED WITHIN TWO YEARS OF THE DATE THAT THE EMPLOYER/CARRIER PROVIDES REMEDIAL TREATMENT RELATING TO THE INSERTION OR ATTACHMENT OF A PROSTHETIC DEVICE WHEN THERE PREVIOUSLY OCCURRED A TWO YEAR PERIOD WHEN NO COMPENSATION BENEFITS WERE PAID OR MEDICAL TREATMENT FURNISHED.

SUMMARY OF ARGUMENT

IS A CLAIM FOR DISABILITY BENEFITS UNDER CHAPTER 440 TIMELY WHEN IT IS FILED WITHIN TWO YEARS OF THE DATE THAT THE EMPLOYER/CARRIER PROVIDES REMEDIAL TREATMENT RELATING TO THE INSERTION OR ATTACHMENT OF A PROSTHETIC DEVICE WHEN THERE PREVIOUSLY OCCURRED A TWO YEAR PERIOD WHEN NO COMPENSATION BENEFITS WERE PAID OR MEDICAL TREATMENT FURNISHED.

Fla. Statute 440.19(1)(a)(1983) clearly provides the right to compensation for disability if the claim is filed within two years after the date "of the last remedial treatment" furnished by the employer. If the Employer/Carrier is liable for the cost of a surgical insertion of a spinal prosthetic device, then a claimant, by the clear language of Fla. Statute 440.19(1)(a)(1983) should be entitled to disability benefits so long as a claim therefor is filed within two years from the date of the insertion of the prosthetic device.

Claimant specifically relies upon this Honorable Court's decision in Daniel v Holmes Lumber Co., 490 So.2d 1252 (Fla. 1986). In Daniel v Holmes Lumber Co., supra, this Honorable Court held that a claim for compensation benefits was timely filed when it was filed within two years of the last furnishing of medical treatment, notwithstanding the fact that there previously occurred a two year period when no compensation benefits were paid or medical treatment furnished. This Honorable Court in Daniel v Holmes Lumber Co., supra, held that the Employer/Carrier in providing medical treatment for the claimant, revived the statute of limitations.

The First DCA reached similar results in the cases of Lafave v Bay Consolidated Distributors, 546 So.2d 78 (1st DCA Fla. 1989), Iuen v Live Wire Electric Co., 538 So.2d 1312 (1st DCA Fla. 1989), and Proctor v Swingset Daycare Center, 498 So.2d 616 (1st DCA Fla. 1986).

The First DCA distinguished the above referenced cases from the case at bar, on the grounds that the provision of remedial care made by the employer in the above referenced cases, which revived the claim for disability, was voluntary because the employer had an accrued defense which it waived by paying that which the statute did not compel. The First DCA found that the provision of remedial care in case at bar is not voluntary because it is required by the statutory terms, involving remedial

care for which no limitations defense accrues thereunder (App-2, 3).

It is respectfully submitted, however, that the distinction made by the First DCA is not, and should not, be applicable to the case at bar. First, it is respectfully submitted that Fla. Statute 440.19(1)(a)(1983) does not make any distinction between remedial treatment voluntarily furnished by the employer, or remedial treatment provided by the employer/carrier pursuant to a JCC's order. Secondly, it is respectfully submitted that a holding which would revive the two year statute of limitations for an employer/carrier who voluntarily provides remedial treatment to a claimant, but does not revive the two year statute of limitations on an employer/carrier who does not make payment on remedial treatment unless statutorily required to do so, or unless ordered by a JCC, is contrary to one of the basic tenets of the Florida Workers Compensation Law, to-wit: That the Workers Compensation Law should be self-executing.

It is therefore respectfully submitted that a claim for disability benefits under Chapter 440 is timely filed when it is filed within two years of the date that the employer/carrier provides remedial treatment relating to the insertion or attachment of a prosthetic device, even though there previously occurred a two year period when no compensation benefits were paid or medical treatment furnished. It is therefore respectfully submitted that the JCC and the First DCA have erred in denying Claimant's claim for indemnity benefits.

ARGUMENT

IS A CLAIM FOR DISABILITY BENEFITS UNDER CHAPTER 440 TIMELY WHEN IT IS FILED WITHIN TWO YEARS OF THE DATE THAT THE EMPLOYER/CARRIER PROVIDES REMEDIAL TREATMENT RELATING TO THE INSERTION OR ATTACHMENT OF A PROSTHETIC DEVICE WHEN THERE PREVIOUSLY OCCURRED A TWO YEAR PERIOD WHEN NO COMPENSATION BENEFITS WERE PAID OR MEDICAL TREATMENT FURNISHED.

The JCC, in his order of February 27, 1989, specifically found as follows:

> "By express language in the statute the Legislature has carved out an exemption from the broad language of the statute of limitations. Nothing in the express language of the exemption would revive a claim for indemnity benefits or give rise to such a claim. I find no basis in law to broadly interpret the exemption to permit a claim or payment of indemnity benefits in the face of the running of the general two year statute." (T-150)

Additionally, the First DCA specifically found:

> "Because more than two years have elapsed since the date of Claimant's injury, the statute bars his current claim for disability compensation. The order requiring Employer/Carrier to provide Claimant with remedial care relating to the insertion of the prosthesis does not revive a right to disability benefits." (App-3)

Based upon these findings, both the JCC, and the First DCA, denied Claimant's claim for indemnity benefits (temporary total or temporary partial disability benefits from August 14, 1987 and continuing) (T-150, App-3).

It is respectfully submitted that the above-referenced finding by the JCC, and by the Honorable First DCA, is error and should be reversed.

Fla. Statute 440.19(1)(b)(1983) provides:

> "No statute or limitations shall apply to the right for remedial attention relating to the insertion or attachment of a prosthetic device to any part of the body ...".

As noted under the Statement of Facts, the JCC specifically found that the reconstruction of Claimant's spine by the insertion of steffi plates is the insertion or attachment of a prosthesis device for the purposes of the exemption set forth under Fla. Statute 440.19(b)(1983) (T-150).

Based upon this finding, the JCC ordered the Employer/Carrier to provide remedial treatment and care under the direction of Dr. Kaler (T-150).

Furthermore, as noted previously, the First DCA found no error in the JCC's award of remedial

care (App-3).

No further appeals have been taken by the Employer/Carrier concerning the JCC and the First DCA's Order holding that Claimant is entitled to further remedial care at the expense of the Employer/Carrier. As such, it is the position of Claimant that his claim for disability benefits in the case at bar has been timely filed, when it is filed within two years from the date that the Employer/Carrier is required to provide remedial treatment relating to the insertion or attachment of the prosthetic device, even though there previously occurred a two year period when no compensation benefits were paid or medical treatment furnished.

Fla. Statute 440.19(1)(a)(1983) provides:

> "The right to compensation for disability, rehabilitation, impairment, or wage loss under this chapter shall be barred unless a claim therefor ... is 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."

First, Claimant respectfully submits that Fla. Statute 440.19(1)(a)(1983) clearly provides the right to compensation for disability if the claim is filed within two years after the date "of the last remedial treatment" furnished by the employer. If the employer/carrier is liable for the cost of a surgical insertion of a spinal prosthetic device, which both the JCC and First DCA concluded, then a claimant, by the clear language of Fla. Statute 440.19(1)(a)(1983) should be entitled to disability benefits so long as a claim therefor is filed within two years from the date of the insertion of the prosthetic device.

It is respectfully submitted that such a holding would be consistent with this Honorable Court's holding in Daniel v Holmes Lumber Co., 490 So.2d 1252 (Fla. 1986), and recent decisions from the First DCA, to-wit: Lafave v Bay Consolidated Distributors, 546 So.2d 78 (1st DCA Fla. 1989), Iuen v Live Wire Electric Co., 538 So.2d 1312 (1st DCA Fla. 1989), and Proctor v Swingset Daycare Center, 498 So.2d 616 (1st DCA Fla. 1986).

This Honorable Court in Daniel v Holmes Lumber Co., 490 So.2d 1252 (Fla. 1986), addressed an issue very similar to the issue presently before this Honorable Court. The question presented to this Honorable Court in Daniel v Holmes Lumber Co., supra, was as follows:

> "Is a claim for Workers 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?" Daniel v Holmes Lumber Co., supra, at 1253.

In Daniel v Holmes Lumber Co., supra, this Honorable Court answered the aforementioned question in the affirmative. Specifically, this Honorable Court held that a claim for compensation benefits was timely filed when it was filed within two years of the last furnishing of medical treatment, notwithstanding the fact that there previously occurred a two year period when no compensation benefits were paid or medical treatment furnished. This Honorable Court in Daniel v Holmes Lumber Co., supra, held that the employer/carrier, in providing medical treatment for the claimant, revived the statute of limitations.

In so doing, this Honorable Court specifically stated:

> "Florida's Workers Compensation laws are remedial in nature and the court's should resolve any doubts as to statutory construction in favor of providing benefits to injured workers ... Yet in the case of sections 440.13(3)(b) and 440.19(1)(a) no ambiguities exist. These statutes unequivocably state that so long as an employee files a claim within two years of the last voluntary compensation payment or dispensation of remedial treatment made without an award the claim is timely ... Neither statute contains any reference whatsoever to the relevance of a two year gap in time. When the language of a statute is clear, courts may not look beyond the plain meaning of that language ... Therefore, given the unambiguous language of sections 440.19(1)(a) and 440.13(3)(b), it would be inappropriate for us to read into the statutes more obstacles for claimants than these provisions otherwise require." Daniel v Holmes Lumber Co., supra, at 1256.

The First DCA, based upon this Honorable Court's holding in Daniel v Holmes Lumber Co., supra, has also held on a number of occasions that an employer/carrier's act of providing remedial treatment for a claimant revives the statute of limitations period even though there previously occurred a two year period when no compensation benefits were paid or remedial treatment furnished, Lafave v Bay Consolidated Distributors, 546 So.2d 78 (1st DCA Fla. 1989), Iune v Live Wire Electric Co., 538 So.2d 1312 (1st DCA Fla. 1989), Proctor v Swingset Daycare Center, 498 So.2d 616 (1st DCA Fla. 1986).

Specifically, in the case of Proctor v Swingset Daycare Center, supra, the employer/carrier voluntarily provided remedial treatment for the claimant's back injury nearly 6 years after the claimant last received a compensation payment or remedial treatment. Thereafter, the claimant filed a claim for

temporary total or temporary partial disability benefits and rehabilitation benefits. This Honorable Court that the employer/carrier's voluntary payment for medical treatment for the claimant's back injury revived the statute of limitations, and thus, the claimant's claim for indemnity benefits (temporary total disability or temporary partial disability benefits) was timely filed.

The First DCA, in its opinion rendered March 21, 1990, distinguished the cases of Proctor v Swingset Daycare Center, supra, and Daniel v Holmes Lumber Co., supra, on the grounds that the employer/carrier in those cases made a voluntary payment for medical treatment, and this voluntary payment revived the two year statute of limitations. The First DCA further found that since the provision of remedial care in the case at bar was not voluntary, it does not revive the two year statute of limitations.

It is respectfully submitted that whether or not the employer/carrier has made a voluntary payment for medical treatment, or the employer/carrier is ordered to provide medical treatment to a claimant, should not in any way affect the claimant's entitlement to disability benefits on a claim filed within two years from the date that such medical treatment is furnished.

First, Claimant would note that Fla. Statute 440.19(1)(a)(1983), the statute upon which Claimant contends makes his claim for indemnity benefits timely, does not in any way distinguish between remedial treatment voluntarily provided by an employer/carrier, and remedial treatment provided by an employer/carrier pursuant to a compensation order. Rather, the plain language of Fla. Statute 440.19(1)(a)(1983) provides that the right to compensation for disability shall be barred unless a claim therefor is 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.

As noted by this Honorable Court in its decision in Daniel v Holmes Lumber Co., supra, it is inappropriate to read into the statutes more obstacles for claimants than those provisions otherwise require. Furthermore, as noted by this Honorable Court in Daniel v Holmes Lumber Co., supra, when the language of a statute is clear, the Courts may not look beyond the plain meaning of that language, Dept. of Legal Affairs v Sanford-Orlando Kennel Club, Inc., 434 So.2d 879 (Fla. 1983).

Thus, since the plain and unambiguous language of Fla. Statute 440.19(1)(a)(1983) provides that a claim for compensation benefits filed within two years from the date of the last remedial treatment is timely, then Claimant's claim for indemnity benefits in the case at bar is clearly timely, since it is filed within two years from the date that the Employer/Carrier is ordered to provide remedial treatment for Claimant, even though there previously occurred a two year period when no compensation benefits were paid or medical treatment furnished.

Additionally, Claimant would note that when this Honorable Court rendered its decision in Daniel v Holmes Lumber Co., supra, the applicable statutes did refer to remedial treatment voluntarily provided by the employer/carrier. Fla. Statute 440.19(1)(a)(1977) specifically provided:

> "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 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."

Additionally, Fla. Statute 440.13(3)(b)(1977), also referred to by this Honorable Court in Daniel v Holmes Lumber Co., supra, provided:

> "All rights for remedial attention under this section shall be barred unless a claim therefor is filed with the Division within two years after the time of injury, except that 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 after the date of the last remedial attention furnished by the employer ...".

Claimant's accidents occurred on November 16, 1982 and May 8, 1984 (T-23, 149). As such, the statutory and decisional law in effect at the time of Claimant's accident prevails in a Workers Compensation proceeding, St. Vincent DePaul Society v Smith, 431 So.2d 252 (1st DCA Fla. 1983), McCall v Dick Burns, Inc., 408 So.2d 787 (1st DCA Fla. 1982), Kerce v Coca-Cola Co.-Foods Division, 389 So.2d 1177 (Fla. 1980).

Beginning in 1979, Fla. Statute 440.19(1)(a)(1977), was amended, by removing the words "without an award" from the statute, see e.g. Fla. Statute 440.19(2)(a)(1979), which was renumbered Fla. Statute 440.19(1)(a) in 1983, see e.g. Fla. Statute 440.19(1)(a)(1983). Thus, the statute in effect

at the time of Claimant's accident on May 4, 1984, to-wit: Fla. Statute 440.19(1)(a)(1983) does not make any mention of compensation or remedial treatment being furnished by the employer without an award.

Since Fla. Statute 440.19(1)(a)(1977), which was the statute applicable at the time of this Honorable Court's decision in Daniel v Holmes Lumber Co., supra, did talk about payment of compensation or remedial treatment furnished by the employer "without an award", a distinction between remedial attention voluntarily provided by the employer/carrier, and remedial treatment provided by the employer/carrier pursuant to a JCC's Order, could arguably have been drawn. However, it is respectfully submitted that since the words "without an award" have been removed from Fla. Statute 440.19(1)(a)(1977), and were not to be found in Fla. Statute 440.19(1)(a)(1983) (nor have the words been re-inserted in Fla. Statute 440.19(1)(a) at any time subsequent thereto), it is respectfully submitted that any distinction between voluntary remedial treatment provided by an employer and remedial treatment provided pursuant to a JCC's Order, no longer exists, at least in so far as it relates to the timely filing of a claim for compensation benefits by a claimant.

Certainly, if the legislature had intended that a claim for compensation benefits would be timely only if filed within 2 years from the date that Employer/Carrier voluntarily furnished remedial treatment without an award, the legislature would not have removed the words "without an award" from Florida Statute 440.19(1)(a).

Furthermore, it is respectfully submitted that a holding which would revive the 2 year statute of limitations for an Employer/Carrier who voluntarily provides remedial treatment to a Claimant, but does not revive the 2 year statute of limitations on an Employer/Carrier who does not make payment on remedial treatment unless statutorily required to do so, or unless ordered by a JCC, is contrary to one of the basic tenets of the Florida Workers Compensation Law.

This Honorable Court has consistently held that:

> "The legislative intent was and is that the Workers Compensation Law should be self executing and that benefits should be paid without the necessity of any legal or administrative proceedings." Florida Erection Services, Inc. v. McDonald, 395 So.2d 203 (1st DCA Fla. 1981).

A holding, such as the one in the case at bar, which does not revive the statute of limitations against Employer/Carrier herein because they failed to voluntarily provide the remedial treatment necessary, would defeat the basis purpose of the Florida Workers Compensation Act requiring Employer/Carrier to provide benefits without the necessity of any legal and administrative proceedings because Employer/Carriers who now voluntarily comply with the Act would be subject to payment of disability benefits, because the statute of limitations would be revived, whereas an Employer/Carrier who refuses to comply with his legal obligation under the Act would be rewarded by not having to pay disability benefits because the statute of limitations would not be revived.

Thus, the holding in the case at bar by the JCC and the First DCA, would in effect reward the recalcitrant Employer who required Claimant to obtain a hearing in order to recover remedial benefits, because that recalcitrant Employer would not be obligated to pay Claimant indemnity benefits, and at the same time would punish Employer/Carrier who voluntarily provided remedial treatment to Claimant without the necessity of a hearing, by requiring Employer/Carrier to pay indemnity benefits to Claimant. Such an interpretation would encourage Employer/Carrier to reject Claimant's requests for remedial treatment after the statute of limitations had expired, even in those instances, such as in the case at bar, where Claimant is clearly entitled to such treatment, because by doing so, Employer/Carrier would save itself from having to pay indemnity benefits. It is respectfully submitted that such a construction would not comport with either the letter or spirit of the Florida Workers Compensation Law.

The Petitioner, therefore, respectfully submits that since Employer/Carrier is required to provide Claimant remedial treatment pursuant to the JCC's Order of February 27, 1989, the statute of limitations as set forth in Fla. Statute 440.19(1)(a)(1983) is revived. It is further respectfully submitted that since Claimant's claim for indemnification benefits has been filed within 2 years from the date that Employer/Carrier last provided Claimant remedial treatment (to-wit: August 14, 1987), Claimant's claim for indemnification is not barred by the statute of limitations. It is therefore respectfully submitted that the JCC and the First DCA erred in denying Claimant's claim for

indemnification benefits. It is further respectfully submitted that the question submitted to this Honorable Court should be answered in the affirmative.

CONCLUSION

It is respectfully submitted that a claim for disability benefits under Chapter 440 is timely filed when it is filed within 2 years of the date that Employer/Carrier provides remedial treatment relating to the insertion or attachment of a prosthetic device when there previously occurred a 2 year period when no compensation benefits were paid or medical treatment furnished. This Honorable Court and the First DCA have previously held that the voluntary payment of compensation or remedial treatment revives the 2 year limitation period in Fla. Statute 440.19(1)(a). It is respectfully submitted that the same rule should apply in those instances where Employer/Carrier is ordered by a JCC to provide remedial treatment, even when there previously occurred a 2 year period when no compensation benefits were paid or medical treatment furnished. First, any reference to voluntary payment, or payment made without an award, in Fla. Statute 440.19(1)(a) was removed by the legislature beginning with Fla. Statute 440.19(1)(a)(1979). Secondly, any interpretation reviving the statute of limitations when Employer/Carrier voluntarily provides remedial care, but not reviving the statute of limitations when Employer/Carrier provides remedial care under the provisions of a compensation order, is contrary to one of the basic tenets of the Florida Workers Compensation Law and would reward recalcitrant Employers who refuse to provide necessary remedial care to a Claimant.

WHEREFORE, it is respectfully requested that this Honorable Court enter an Order finding that the question presented to this Court be answered in the affirmative, and that this Honorable Court enter an Order reversing the First DCA and the JCC's Order denying Claimant indemnity benefits, and that this matter be remanded to the JCC for further proceedings to determine the amount of indemnity benefits to which Claimant is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished on this 5th day of November, 1990 to: Thomas Cassidy, Esquire, P.O. Box 1606, Lakeland, Florida 33802 and to Gerald W. Pierce, Esquire and Chester H. Budz, Esquire, P.O. Box 280, Ft. Myers, Florida 33902-0280, and to The Fla. Dept. of Labor & Employment Security, Division of Workers Compensation, 1321 Executive Center Drive East, Tallahassee, FL 32301, Statutory Respondent.

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