047

FILED
SID J. WHITE
JAN 21 1992
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

SUPREME COURT OF **FLORIDA**
TALLAHASSEE, FLORIDA

JOHN HOLDER,

Petitioner,

v.

KELLER **KITCHEN CABINETS,** et al.,

Respondent.

CASE NO: **78,891**

DCA: **88-3204**

CLAIM NO: **416-52-5666**

D/A: **3/16/79**

REPLY BRIEF **OF** PETITIONER

EDWARD H. HURT, SR., ESQUIRE
1000 E. Robinson St.
Orlando, FL 32801
Counsel for Petitioner

BILL MCCABE, ESQUIRE
1460 West **S.R. 434**
Longwood, **FL 32750**
Co-Counsel for Petitioner

This is **an** appeal from **an** opinion of the District Court of Appeal, First District, State of Florida, filed 8/8/91, **and an** opinion of the District Court of Appeal, **First** District, State of Florida, denying Petitioner's Petition for Rehearing, entered 10/16/91, said orders reversing **and** remanding **an** Order **of** the State of Florida, Department of Labor & Employment Security, Division of Workers Compensation, Office of the Judge of Compensation **Claims,** District "G, dated **12/2/88.**

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER CITES:

FLORIDA STATUTES:

PRELIMINARY STATEMENT

Petitioner/Claimant, **JOHN HOLDER,** shall be referred to herein as the "Petitioner" or "Claimant".

Respondents/Employer/Carrier, KELLER KITCHEN CABINETS and ALEXSIS, INC., shall be referred to by their separate names herein, or collectively as the "E/C" or "Respondents".

The Judge of Compensation Claims shall be referred to herein 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 attached to the Initial Brief of Petitioner shall be referred to by the letters "App" followed by the applicable page number.

References to the Supplemental Record on Appeal shall be referred to by the letter "S" and followed by the applicable page number.

References to the Initial Brief of Petitioner shall be referred to by the letters "IB" and followed by the applicable page number.

References to the Answer Brief of Respondents shall be referred to by the letters "AB" and followed by the applicable page number.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Petitioner/Claimant adopts and realleges the Statement of the Case and Statement of the Facts as set forth in the Initial Brief of Petitioner (IB-2-4, 5-8).

POINT ON APPEAL

IS A COMPENSATION CLAIM UNDER CHAPTER 400, F.S., FOR TEMPORARY DISABILITY DURING KNEE REPLACEMENT SURGERY *AND* FOR CONSEQUENTIAL IMPAIRMENT GOVERNED BY SECTION 440.28, OR BY SECTION 440.19(1)(a), WHEN IMPAIRMENT DISABILITY COMPENSATION HAS BEEN PREVIOUSLY AWARDED AND PAID UNDER A COMPENSATION ORDER WHICH DETERMINED MAXIMUM MEDICAL IMPROVEMENT AT A TIME WHEN FUTURE SURGERY WAS UNCERTAIN?

ARGUMENT

IS A COMPENSATION CLAIM UNDER CHAPTER 400, F.S., FOR TEMPORARY DISABILITY DURING KNEE REPLACEMENT SURGERY AND FOR CONSEQUENTIAL IMPAIRMENT GOVERNED BY SECTION 440.28, OR BY SECTION 440.19(1)(a), WHEN IMPAIRMENT DISABILITY COMPENSATION HAS BEEN PREVIOUSLY AWARDED AND PAID UNDER A COMPENSATION ORDER WHICH DETERMINED MAXIMUM MEDICAL IMPROVEMENT AT A TIME WHEN FUTURE SURGERY WAS UNCERTAIN?

Respondents argue in their Answer Brief that it has long been held and made clear in Florida case law that once an order establishes the date of maximum medical improvement ("MMI") and awards permanent partial disability ("PPD") benefits, a latter claim, whether seeking additional temporary or permanent benefits, must meet the limitation provisions of Section 440.28, not Section 440.19(1)(a) (AB-4). Respondents cite numerous cases to support their contention (AB-4).

It is respectfully submitted that the cases cited by the Respondents are not applicable to the case at bar. The rationale behind the cases cited by the Respondents is that F.S. 440.19(1)(a) is limited to the situation where payments are made without an award, in which case further compensation payments may be made within 2 years after payment of compensation or remedial treatment, whereas F.S. 440.28 is the applicable statute in those instances where compensation benefits have previously been furnished pursuant to an compensation order.

For example, in University of Fla. v McLarthy, 483 So.2d 723 (1st DCA Fla. 1985), a case relied upon by Respondents, this Honorable Court stated that F.S. 440.19(1)(a) and 440.28 are designed to be used in different situations, depending upon whether benefits for a particular injury have been furnished pursuant to a compensation order for a single injury, or entirely without an award. The date of accident was 4/20/75. The statute that this Honorable Court was dealing with this case was F.S. 440.19(1)(a)(1975), which 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." F.S. 440.19(1)(a)(1975).

In General Electric Co. v Spann, 479 So.2d 289 (1st DCA Fla. 1985), the claimant was injured

in 1977. The statute which this Honorable Court deemed applicable was F.S. 440.13(3)(b)(1977) (later renumbered F.S. 440.19(1)(b) and F.S. 440.28(1977). F.S. 440.13(3)(b)(1977) also contained the language "without an award". The First DCA in Bassett's Dairy v Thomas, 429 So.2d 1356 (1st DCA Fla. 1983) dealt with F.S. 440.19(1)(a)(1969), which also contained the language "without an award".

Similarly, the case of Jones v Ludman Corp., 190 So.2d 760 (Fla. 1966), also relied upon by Respondents in their Answer Brief, dealt with F.S. 440.19(1)(a)(1963), which also contained the language "without an award". The claimant filed a claim for TTD benefits more than 2 years after he had been paid PPD benefits pursuant to a Court Order. The claimant contended that his current claim was not one for modification but simply for additional benefits and should be governed by F.S. 440.19(1)(a). This Honorable Court, concluding that the claimant's petition for TTD benefits was governed by F.S. 440.28, and not F.S. 440.19(1)(a), stated

> "The language of that section is limited, however, as already noted in the earlier decision relied on by the Commission, to the situation where payments are made without an award, in which case further claims may be made within two years after payment of compensation or remedial treatment." Jones v Ludman Corp., supra, at 761.

However, the rationale utilized by this Honorable Court in Jones v Ludman Corp., supra, and the First DCA in University of Fla. v McLarthy, supra, and General Electric Co. v Spann, supra, is no longer applicable because of the amendments to F.S. 440.19(1)(a) in 1979.

Effective 7/1/79, F.S. 440.19(1)(a) was amended to provide as follows:

> "The right to compensation for disability, impairment, or wage loss 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 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." F.S. 440.19(2)(a)(1979)

Of particular importance, the amendments to F.S. 440.19(1)(a)(1977), which took effect 7/1/79, removed the words "without an award."

The import of the amendment to F.S. 440.19(1)(a)(1977), which took effect 7/1/79, by removing the words "without an award" from the statutory language, is illustrated by this Honorable Court's most recent decision in Roe v City Investing, 16 FLW 715 (Fla. Nov. 8, 1991), discussed in detail in

Petitioner's Initial Brief (IB-21-23).

Thus, since the phrase "without an award" has been removed from F.S. 440.19(1)(a)(1977), it is evident that the Legislature intended that statute to now apply to any claim filed by a claimant for disability benefits, regardless of whether or not a prior order had been entered.

As this Honorable Court has noted

> "When the language of a statute is clear, Courts may not look beyond the plain meaning of that language." Daniel v Holmes Lumber Co., 490 So.2d 1262 (Fla. 1986)

The plain language of F.S. 440.19(2)(a)(1979) (which was formerly F.S. 440.19(1)(a)(1977), and which is again numbered F.S. 440.19(1)(a)(1991)), enables a claimant to file a claim for compensation benefits as long as that claim is filed within 2 years from the date that the claimant has received a payment of compensation, or remedial treatment has been furnished by the Employer on account of the injury, regardless of whether or not a prior order has been entered.

Other cases cited by the Respondents in their Answer Brief are not applicable to the case at bar. For example, Robinson v JDM Country Club, 456 So.2d 1077 (1st DCA Fla. 1984) is not applicable, since the issue in that case was whether or not the claimant's failure to phrase his claim as a Section 440.28 petition for modification precluded him from obtaining a modification of a prior order. The claimant was attempting to obtain a modification of a prior order which found that he had 0% permanent physical impairment, by having a new order entered finding that the claimant had a 10% permanent physical impairment. The issue of additional TTD benefits was not raised.

Similarly, the case of Bishop v Pinellas Framing & Finishing, 414 So.2d 596 (1st DCA Fla. 1982) relied upon by Respondents in their Answer Brief is not applicable to the Cage at bar. The issue was whether or not the claimant was entitled to psychiatric treatment when a prior order establishing MMI and a permanent disability award did not mention any entitlement to psychiatric care. There was no issue of whether or not the claimant was entitled to additional TTD benefits.

Again, in General Electric Co. v Osborne, 394 So.2d 1089 (1st DCA Fla. 1981), the issue was whether or not the claimant was entitled to a modification of a prior order by increasing his PPD rating from 50% to 75%. This case did not deal with a request for additional TTD benefits after a prior

order finding MMI.

Respondents argue that Claimant's argument that the claim was a new claim governed by F.S. 440.19(2)(a)(1979) and not a modification of a prior order governed by F.S. 440.28 is not a novel argument (AB-8). Respondents argue that in General Electric v Spann, 479 So.2d 289 (1st DCA Fla. 1985), the First DCA stated that such a claim was not a "new claim", but was one seeking modification of a prior order, at least insofar as it sought TTD benefits and an increase in the PPD previously awarded (AB-8). However, as noted previously, the Court in General Electric Co. v Spann, supra, University of Fla. v McLarthy, 483 So.2d 723 (1st DCA Fla. 1985), and Budget Luxury Inns. Inc. v Boston, 407 So.2d 997 (1st DCA Fla. 1981), the Court was dealing with a pre-1979 version of F.S. 440.19(1)(a), which incorporated the language "without an award". Thus, the cases relied upon by Respondents in their Answer Brief are not applicable to the case at bar, because the applicable statute in the case at bar is F.S. 440.19(2)(a)(1979), wherein the Legislature removed the words "without an award" from the statutory language. Thus, the statutory language applicable to the case at bar is different than the statutory language applicable in the previous cases cited by Respondents, and therefore those cases cited by the Respondents are not applicable to the case at bar.

Respondents next argue that in the instant case, for the JCC to have made a finding that Claimant was TTD subsequent to her earlier finding of MMI, would require a modification of the prior order pursuant to F.S. 440.28 (AB-10, 11).

Petitioner respectfully disagrees. F.S. 440.28 merely serves to allow modification, upon specified conditions, of compensation orders which would otherwise bar subsequent claims for Workers Compensation benefits under principles of res judicata, estoppel by judgment, or law of the case. Therefore, the existence of the requisites for application of one of these doctrines must be present before it becomes necessary for a claimant to resort to F.S. 440.28 for relief, Caron v Systematic Air Services, 576 So.2d 372 (1st DCA Fla. 1991). Thus, a resort to F.S. 440.28 is only required to reopen claims for benefits that have been explicitly or by necessary implication adjudicated in a previous order because they have become barred by principles of res judicata, collateral estoppel, or law of the case.

It is axiomatic that a premature claim not ripe for adjudication when a prior judgment or order was made is not subject to the doctrine of res judicata, because an unripe claim cannot meet the required elements of identity in the things sued for or identity of the cause of action, see 32 Fla.Jur. 2d Judgments and Decrees, Sec. 110-112 (1981).

Thus, as noted by The Honorable Judge Zehmer in his dissenting opinion:

> "... Reference to Section 440.28 is neither necessary nor appropriate in respect to the claim now under review because this claim for temporary disability compensation benefits was not, and could not have been, adjudicated by the 1980 order for the reason that it was not yet ripe for adjudication. This element essential to the application of res judicata has not been satisfied. That being so, Judge Housholder was correct in not looking to the statutory exception to that doctrine provided in Section 440.28." (App-24-25)

The Respondents argue that Petitioner's argument is an attempt to undermine the intent of the Legislature and the purpose of the statutes of limitations. The Respondents argue that the argument presented by the Claimant would serve to totally defeat Workers Compensation statutes of limitations and would result in a Workers Compensation claim that would never end by statutes of limitations or res judicata (AB-11).

To the contrary, the argument presented by Claimant does not serve to defeat statutes of limitations. Under the argument presented by Claimant, a claimant would still be required to file a claim for compensation benefits within 2 years from the date that the claimant received either a compensation benefit or medical treatment, as is set forth in the specific and clear statutory language of F.S. 440.19(2)(a)(1979) (now numbered F.S. 440.19(1)(a)(1991).

Furthermore, the arguments set forth by Claimant would not in any way undermine the purpose of F.S. 440.28. That statute would still be applicable to compensation orders which would otherwise bar subsequent claims for Workers Compensation benefits under principles of res judicata, estoppel by judgment or law of the case. This would involve many situations, including prior orders determining whether or not there is a permanent physical impairment, prior orders as to whether or not a certain condition is causally related to the industrial accident, etc.

Respondents argue that Claimant's argument overlooks several essential points. Respondents

contend that it overlooks the decades of Florida case law both from this Court and the First DCA consistently announcing that under these particular facts, F.S. 440.28 is the applicable provision (AB-12). However, as noted previously, those cases dealt with pre-1979 versions of F.S. 440.19(1)(a), all of which included the words "without an award". As noted previously, the phrase "without an award" was removed effective 7/1/79, and therefore all cases dealing with this issue under prior statutory language are not applicable to the case at bar.

Respondents next argue that the instant claim for TTD benefits, even if decided under the 1979 amendment to F.S. 440.19(1)(a) would still be inconsistent with the terms of the JCC's prior 1980 Order which made definitive findings of a date of MMI and permanent impairment rating (AB-12). There is nothing inconsistent with the award of TTD benefits in the case at bar, and the Judge's prior 1980 Order. When the Judge's 1980 Order was entered, Claimant had not undergone a total knee replacement on 4/1/88 (T-23, 36). Further, as noted previously, there are many cases which have held that a claimant is entitled to TTD benefits for a period of hospitalization and recuperation following curative procedures necessitated by a compensable injury, even after the claimant has already reached MMI, and even after an award of PPD has been made for the same injury, Lopez v Nabisco Brands, Inc., 516 So.2d 993 (1st DCA Fla. 1987), Palm Beach County Board of County Commissioners v Roberson, 500 So.2d 180 (1st DCA Fla. 1986), Delgado v LaQuinta Motor Inns, 467 So.2d 572 (1st DCA Fla. 1984), Adkins v Greenhut Construction Co., 447 So.2d 268 (1st DCA Fla. 1983), Emergency One, Inc. v Williams, 431 So.2d 261 (1st DCA Fla. 1983), Smitty's Coffee Shop v Fla Industrial Commission, 86 So.2d 268 (Fla. 1956).

As this Honorable Court explained in Smitty's, supra, the Fla. Workers Compensation Act defines various classes of disability, but does not prescribe that they must occur in any specific order. Clearly, this contemplates situations where TTD benefits will follow a prior order determining that the claimant has reached MMI.

The Respondents argue that the result sought by Claimant would effectively negate the legislative intent and design of F.S. 440.28 (AB-12). As previously argued hereinabove, an award to

Claimant of additional TTD benefits under the factual situation in the case at bar would not negate the legislative intent and design of F.S. 440.28.

Respondents next argue that the constitutionality of F.S. 440.28 is not part of the question put forth to this Court by the First DCA (AB-12, 13). Although the constitutionality of F.S. 440.28 has not been presented to this Honorable Court, it is nevertheless a necessary consideration by this Honorable Court in attempting to construe the statutory language of F.S. 440.19(2)(a)(1979) and F.S. 440.28(1979). As this Honorable Court has previously held, if a statute may reasonably be construed in more than one manner, this Honorable Court is obligated to adopt a construction that comports with the dictates of the Constitution, Vildibill v Johnson, 492 So.2d 1047 (Fla. 1986). It is respectfully submitted, as previously argued in Petitioner's Initial Brief, that if it is concluded that Claimant's claim for TTD benefits in this case is not a "new claim" and therefore governed by the provisions of F.S. 440.19(1)(a), but instead is a modification of a prior order and must proceed under the provisions of F.S. 440.28, then F.S. 440.28 is unconstitutional. To the contrary, if this Honorable Court accepts Claimant's arguments that the claim for TTD benefits is a "new claim" governed by the provisions of F.S. 440.19(2)(a)(1979), there would be no constitutional implications.

Respondents next argue that in Workers Compensation matters, all statutes of limitations serve to, in effect, bar claims before they ripen (AB-13). Respondents argue that a claim for medical benefits does not exist until the claimant receives the medical treatment (AB-13).

It is respectfully submitted that this is an improper interpretation of the Fla. Workers Compensation Law. A claimant's entitlement to medical benefits arises the instant that he suffers an industrial accident, whether or not he has actually received the medical treatment.

Respondents next argue that the legislative purpose of statutes of limitations to enforce the finality of decisions, would likewise be defeated if this legislative intent is not upheld. Respondents argue that a claimant who has not received compensation benefits 10 years, 20 years, 30 years or even 50 years later could come back and claim to have a need for some remedial treatment as a result of the original accident and claim additional benefits (AB-13).

To the contrary, a claimant may not claim a need for additional medical treatment or additional compensation benefits unless that claim is filed within 2 years from the date that the claimant last received a compensation benefit or remedial treatment.

The Petitioner respectfully submits that the certified question presented before this Court is one of great public importance. If this Honorable Court denies jurisdiction and/or affirms the ruling of the First DCA, then this Court would be entering an order which would cut off Claimant's right to make a claim for TTD benefits even before that right to make the *claim* accrues. Such *a ruling,* it is respectfully submitted, would render the provisions of F.S. 440.28 unconstitutional, Vilardebo v Keene Corp., 431 So.2d 620 (3rd DCA Fla. 1983).

As noted by the Honorable Judge Zehmer in his dissenting opinion:

> "The ... consequence of the holding in the majority opinion requiring modification of the MMI and PTD adjudications in the prior order, as predicate to considering any claim for temporary disability cornpensation thereafter filed, even though such *claim* was not ripe and could not be adjudicated at the time, is to place the claimant in a classic "catch 22" situation ... The inescapable dilemma here is that claimant's injury, although continuously recognized as likely to worsen and require a full knee replacement when the 1980 Order was entered, cannot serve as the basis for disability compensation benefits resulting from such operation in the future because this issue has not been ripe for adjudication; yet, when the surgery becomes necessary as predicted, a claim for disability compensation resulting therefrom is barred because the Order, which could not adjudicate his claim, must be modified within two years of the last payment of permanent compensation benefits before he *can* assert his claim. In other words, unless claimant fortuitously needs the operation within the two year time period specified in Section 440.28, he *can* never even assert the claim when it does arise ..." (The Honorable Judge Zehmer in his dissenting opinion at page 33, 34).

It is therefore respectfully submitted that Claimant's claim for TTD benefits in the case at bar constitutes a "new claim" governed by the provisions of F.S. 440.19(1)(a).

CONCLUSION

Claimant adopts and realleges the conclusion set forth in his Initial Brief (IB-29).

Wherefore, it is respectfully requested that this Honorable Court enter an Order finding that Claimant's claim constitutes a new claim governed by F.S. 440.19(2)(a)(1979) (now numbered F.S. 440.19(1)(a)(1991)), and enter an Order affirming the JCC's Order of 12/2/88.

Respectfully submitted,

Bill McCabe
Shepherd, McCabe & Cooley
1450 S.R. 434, Suite 200
Longwood, FL 32750
(407) 830-9191
Fla. Bar No: 167067
Co-Counsel for Petitioner/Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished by regular U. S. Mail to REX A HURLEY, ESQ. and JOHN C. BACHMAN, ESQ., P. O. Box 3000, Orlando, FL 32802, and EDWARD H. HURT, SR., ESQ., 1000 E. Robinson Street, Orlando, FL 32801, this 17th day of January, 1992.

Bill McCabe
Shepherd, McCabe & Cooley
1450 S.R. 434, Suite 200
Longwood, FL 32760
(407)830-9191
Fla. Bar No: 167067
Co-Counsel for Petitioner/Claimant