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IN THE SUPREME COURT OF FLORIDA

BENIGNO BRAVO,

Petitioner,

v.

GULP & WESTERN FOOD PRODUCTS, n/k/a OKEELANTA CORPORATION, and NATIONAL EMPLOYERS COMPANY,

Respondents.

CASE NO: 79,733

DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL, FIRST DISTRICT

ANSWER BRIEF OF RESPONDENTS

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This answer brief is filed on behalf of the respondents, GULF & WESTERN FOOD PRODUCTS, n/k/a OKEELANTA CORPORATION, and NATIONAL EMPLOYERS COMPANY, who were the employer and servicing agent at the trial level in a workers' compensation claim before a judge of compensation claims and then the appellees before the District Court of Appeal, First District. The petitioner is BENIGNO BRAVO (BRAVO), who was the employee/claimant at the trial level and the appellant before the District Court of Appeal, First District. The District Court opinion was filed February 14, 1992 and will be cited as Bravo v. Gulf & Western Food Products, 593 So.2d 1180 (Fla. 1st DCA 1992).

STATEMENT OF THE CASE AND FACTS

The basic statement of the case and the facts as stated in the main brief of petitioner are acceptable to the respondents. However, it should be noted that following the entry of the order August 2, 1984, which had determined that the claimant had reached maximum medical improvement on June 4, 1984 with no permanent impairment, the deputy commissioner who entered that order considered the claimant s motion for rehearing and clarification. (R-443-444). As a result of that motion, the August 2, 1984 order was modified. The determination of no permanent impairment was stricken. However, the deputy commissioner's conclusion that BRAVO had reached maximum medical improvement was reiterated and published in the order of August 27, 1984. (R-456-457). No effort to amend or modify the

determination of maximum medical improvement nor to appeal the determination of MMI was made prior to the August 15, 1989 filing of a claim for additional compensation benefits.

SUMMARY OF ARGUMENT

The facts in BRAVO are not disputed. In an order of August 2, 1984, the deputy commissioner concluded that the claimant had reached maximum medical improvement with no permanent impairment. (R-453). The claimant objected to the determination of no permanent impairment, arguing that the issue of permanent disability had not been presented appropriately to the deputy commissioner at the hearing that had resulted in the August 2, 1984 order, and he filed a timely motion for reconsideration. That motion was considered and as a consequence an amended order was entered August 27, 1984. (R-456-457). Specifically, the determination of no permanent impairment was stricken. (R-456). However, the order still concluded that the BENIGN0 BRAVO had reached maximum medical improvement on June 4, 1984. (R-457). Compensation benefits were paid pursuant to the order.

Nearly five years later, without any previous efforts to modify the August 27, 1984 order, a new claim was filed for additional temporary total disability benefits following a May, 1989 hospitalization. The employer argued that $440.28 two year limitations period applied, more than two years having lapsed since the last payment of compensation after the August 27, 1984 award, the new claims for TTD benefits were therefore barred. This contention is fully supported by $440.28 (1979) as it exists in Florida Workers' Compensation Law. This contention is fully

supported by this Court's holding in **Superior Home Builders v. Mass**, *70* So.2d 570 (Fla. 1954), which noted that $440.28 controls only where subsequent to the original award a claimant's seeks modification on the ground of a change in physical condition. Since this Court established the general principle that maximum medical improvement marks the end of temporary disability and the beginning of permanent disability, **Corral v. McCrory Corp**, 228 So.2d *900* (Pla. 1969), it was necessary for BRAVO to establish that he had a change of condition and was no longer at MMT.

The judge of compensation claims agreed with the employer and denied the claims fur additional temporary total disability. The First District Court after not only considering briefs submitted but also having heard oral argument concurred. **Bravo v. Gulf & Western** Food **Products**, 593 So.2d 1180 (Fla. 1st DCA 1992). Both the jcc and the District Court relied on the decision of **University of Florida v. McLarthy**, 483 So.2d 723 (Pla. 1st DCA 1985). That case clearly enunciated the different factual situations in which $440.28 should be applied as opposed to §440.19(1)(a). They concluded that where a prior order had determined maximum medical improvement, the claimant had the burden of coming in on a petition to modify under $440.28 within two years from the last payment of compensation pursuant to an award. That same conclusion was reached by the District Court in **Keller Kitchen Cabinets v. Holder**, 586 So.2d 1132 (Fla. 1st DCA 1991). However, after a petition for rehearing, that Court certified the question relating to a claimant with a prosthetic device to the Supreme Court. *The* statute itself establishes that

a claimant with a prosthetic device has no statute of limitations as it relates to medical benefits. Thus, even a reversal of the District Court's decision in Keller Kitchen Cabinets v. Holder. Supra, would not require a reversal of BRAVO.

The Legislature established $440.28 and it still is an integral part of Florida Workers' Compensation Law. To ignore it and accept BRAVO's arguments would be to effectively thwart the legislative intent of $440.28. Under the facts of this case, $440.28 was properly applied and the claims for further compensation appropriately denied first by the jcc and then by the First District Court. These decisions should be affirmed.

ARGUMENT

WHETHER THE JUDGE OF COMPENSATION CLAIMS ERRED IN APPLYING THE $440.28 LIMITATION TO A CLAIM FOR ADDITIONAL BENEFITS TIMELY UNDER §440.19(1)(a).

The petitioner contends that §440.19(1)(a) and not $440.28, applies to the facts of this case, and therefore, that the claimant is entitled to an award of additional temporary total disability benefits. That argument ignores the factual determination by the deputy commissioner in the August 2, 1984 and August 27, 1984 orders that BENIGN0 BRAVO had reached maximum medical improvement. (R-467). This Court has long established that maximum medical improvement (MMI) marks the end of temporary disability and the beginning of permanent disabi ity. Corral v. McCrory Corp, 228 So.2d 900 (Fla. 1969).

The dc, in the order of August 2, 1984, had concluded that the claimant had reached maximum medical improvement with no permanent impairment. (R-453). The claimant had objected to the

determination of no permanent impairment by filing a timely motion for reconsideration. That motion was given proper consideration and as a consequence, the August 2, 1984 order was amended by order of August 2'7, 1984. (R-456-457). The determination of nu permanent impairment was stricken from the order. (R-456). However, the deputy commissioner still concluded in the amended order:

> "12. I find from the testimony of Dr. Garcia and Dr. Orta that the claimant should not return to his previous employment with GULF & WESTERN PRODUCTS. I accept the medical testimony of Dr. Charles Tate, the leading expert in this case, that the claimant reached maximum medical improvement on June 4, 1984." (R-456-457). (emphasis added)

The August 27, 1984 order was never appealed. Therefore, the deputy commissioner's determination of MMI became the law of this case 30 days after that order was signed.

Nearly 5 years after the payment *of* compensation pursuant to the August, 1984 orders, BRAVO filed a claim for additional TTD 'benefits, "from May 25, 1989 to the present, penalties, interest, costs and attorney's fees." (R-8). However, in order for further TTD benefits to be awarded, the judge of compensation claims would necessarily have to determine a change of condition had occurred, or that the deputy commissioner made a mistake of fact, because the last order had determined that the claimant was at MMI.

In arriving at her decision, the judge of compensation claims relied on the decision in **University of Florida v. McLarthy, 483 So.2d 723 (Fla. 1st DCA 1985)**, which is most persuasive of the respondents' position. In McLarthy, the 1st DCA

stated:

> "Accordingly, once a compensation order has been entered and payments are made pursuant thereto, it makes no difference whether the original claim contained a request for both temporary or permanent compensation. The appropriate way to proceed for the modification of the original order is by $440.28. Because the claimant in the instant case suffered only one work related injury for which he received compensation benefits to an Order, any later claims seeking to alter the effect of such order was not an initial claim, but a request to modify the prior Order because of a change of condition." (483 at 726).

In McLarthy, the claimant was paid PPD benefits through April 25, 1982 pursuant to a January, 1981 order. A petition for modification had been filed and was denied in 1983. The claimant was thereafter admitted for surgery and the employer/carrier had voluntarily paid TTD benefits on July 25, 1984. Subsequently, the claimant filed a claim for additional TTD benefits for the time he was recuperating from surgery from August to October, 1984. The employer/carrier defended on the basis that MMI and permanency had been established by the January, 1981 order, that the last compensation benefits paid pursuant to that order had been paid in April of 1982, and that all further claims were barred by the two year limitation period set forth in $440.28. The First District Court rejected McLarthy's assertion that his claim for TTD benefits had never been considered by a deputy commissioner and found $440.28 applicable because of the "general rule -- that TTD benefits are not available to an injured claimant once an MMI date has been established." **(Id. 482 So.2d at 725).**

The facts in BRAVO are clearly analogous to McLarthy. The previous order had held BRAVO to be at MMI. While the claim was

for a new period of benefits not previously claimed, it was necessary for the jcc to modify the MMI date in order to award any additional TTD benefits. Just as McLarthy had been hospitalized and undergone surgery and yet was found not entitled to TTD benefits, so the jcc found BRAVO not entitled to TTD benefits following his hospitalization because it came so long after the determination of MMI.

This court has described the use of §440.19(1)(a) as being limited to the situation where payments are made without an award and the use of $440.28 as applicable when a determination of disability compensation becomes final unless modified within the specified time following the last payment of compensation. Jones v. Ludman Corp, 190 So.2d *760* (Fla. 1966). As further explained in Bassett's Dairy v. Thomas, 429 So.2d 1356 (Fla. 1st DCA 1983), §440.19(1)(a) and §440.28 are designed to be used in different situations, depending upon whether the benefits for a particular injury have been furnished entirely without an award or pursuant to a compensation order for a single injury, respectively. Once an order fixes the date of MMI and awards permanency, a later claim whether seeking additional temporary or permanent benefits must meet the limitation provisions of only $440.28. General Electric Company v. Spann, 479 So.2d 289, at *290* (Fla. 1st DCA 1985).

Petitioner relies on the Supreme Court decision in Boden v. City of Hialeah, 132 So.2d 160 (Fla. 1961). However, the facts in Boden are clearly and obviously distinguishable. In Boden, the prior order expressly concluded that whether the claimant had

permanent disability "could not be determined" and no finding was made as to MMI. The court concluded that the deputy cornmissioner had reserved jurisdiction to determine the question of permanent partial disability. However, in BRAVO, the deputy commissioner found MMI to have been reached. (R-457). He further concluded that the claimant would be precluded from a return to the same type of employment. (R-456-457). Other cases have held that this was tantamount to a determination of permanent partial impairment. Coq v. Fuch's Baking Company, 507 So.2d 138, at 140, (Fla. 1st DCA 1987) and Dayron Corporation v. Morhead, 480 So.2d 235 (Fla. 1st DCA 1985). Although the deputy commissioner did not make a determination of the degree of permanent residuals, by concluding that maximum medical improvement had been reached, the order of August 27, 1984 required a finding of unusual circumstances and hence, a change of condition to avoid the general rule that TTD benefits are not available to the injured claimant once a date has been established finding the claimant to have reached maximum medical improvement. University of Florida v. McLarthy, Supra. Thus, BRAVO unlike Boden had to comply with $440.28 by filing his claim and petition within two years of the last payment of compensation pursuant to the August, 1984 order.

Superior Home Builders v. Moss, *70* So.2d *570* (Fla. 1954) is even farther factually from BRAVO's situation, In Moss, the deputy commissioner awarded continuing temporary total disability benefits beyond the date of the order. That decision stated that "the statute ($440.28) controls only where subsequent to the original award the claimant seeks a modification of such award on

the ground of a change in physical condition caused by the accident." (Id. at 572). Moss was determined to have sought a continuation of benefits not based on a "supposed change in condition." (Id. at 572). BRAVO, however, is specifically contending that he should not be considered to be MMI as determined by the orders in 1984, but rather TTD, which necessarily requires a determination of a change in his physical condition. A situation in which the Court in Moss, (Id. at 572), would agree $440.28 controls.

Roe v. City Investing/General Development Corporation 587 So.2d 1323 (Fla. 1991) is materially distinguishable from the BRAVO case principally because it involves a prosthetic device. Florida Workers' Compensation Law has established that there is no statute of limitations applicable to the insertion or attachment of a prosthetic device. §440.19(1)(b). The certified questions specifically contained reference to the insertion or attachment of a prosthetic device. (Id. at 1324). Also distinguishing Roe from BRAVO is the lack of any prior order adjudicating MMI or the right to compensation benefits. Thus, the Court was not dealing with a prior adjudication of MMI as in BRAVO that would necessitate a modification to reinstate temporary total disability benefits.

Petitioner relies on the dissenting opinion in Keller Kitchen Cabinets v. Holder.. 586 So.2d 1132 (Fla. 1st DCA 1991). The holding of the majority opinion is in concert with University of Florida v. McLarthy, Supra. As stated by the Court in Commerce National Bank In Lake Worth v. Safeco Insurance Company, 284

So.2d 205 (Fla. 1973), at 207, "a dissent does not rise to a similar level of dignity and is not considered as precedent." The Keller Court did certify a question to the Supreme Court, but as in Roe v. City Investing/General Development Corporation, Supra, the certified question pertains to a factual situation involving a prosthetic device. Therefore, even a reversal of the First DCA decision would not require a reversal of BRAVO.

This Court noted in Dean v. H. W. McLeod, 270 So.2d 726 (Fla. 1972):

> "While it is the purpose of the Workman's (sic) Compensation Act to protect the worker and, while this court has ruled doubt should be resolved in favor of the working man [Thomas Smith Farms, Inc. v. Alday, 182 So.2d 405 (Fla. 1966)], this court has also ruled that the enactment is fair to both employer and employee and should be enforced so as to protect the legislative intent. Hughes v. B. F. Goodrich Company, 11 So.2d 313 (Fla. 1943)."

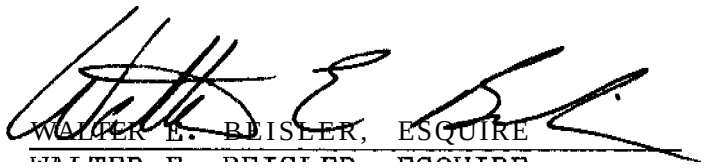
The Court held that Dean's arguments would effectively thwart the legislative intent of $440.28 and its limitation period. So the Court rejected those arguments and applied the $440.28 limitation. §440.28 is still an integral part of Florida Workers' Compensation Law. It has not been repealed nor amended. It does not create confusion, but rather clearly establishes the requirement that, "within two years after the date of last payment of compensation pursuant to any compensation order," action to modify that order must be taken. $440.28 (1979). Therefore, to accept BRAVO's arguments would no less thwart the legislative intent of $440.28 then would a contrary ruling in Dean.

The petitioner repeatedly seeks to make light of the finding in the August 27, 1984 order that the claimant had achieved maximum medical improvement by labeling the finding as "gratuitous" or "isolated." However, even after the claimant brought his motion for rehearing in 1984, the judge still concluded in the amended order of August 27, 1984, "that the claimant reached maximum medical improvement on June 4, 1984." (R-457). The District Court of Appeal, First District, concluded, "We are not free to revise that finding, which was supported by competent, substantial evidence of record at the time entered. Appellants remedy was by timely application for modification under $440.28, Florida Statutes," **Bravo v. Gulf & Western Food Products, 593 So.2d 1180 (Fla. 1st DCA 1992), at 1182.**

CONCLUSION

It is respectfully submitted that the order of the judge of compensation claims and that of the District Court of Appeal, First District, should be affirmed.

Respectfully submitted,



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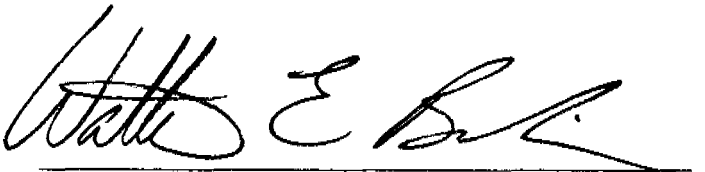
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Petitioner has been mailed this 29th day of September, 1992 to: Steven K. Deutsch, Esquire, Counsel for Petitioner, Deutsch & Blumberg, P.A., 2802 New World Tower, 100 North Biscayne Boulevard, Miami, Florida 33132; and James C. Blecke, Esquire, Counsel for Petitioner, Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130.



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