IN THE SUPREME COURT OF FLORIDA

CASE NUMBER *79,733*

BENIGNO BRAVO, :

Petitioner, :

vs. :

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

Respondents. :

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

JURISDICTIONAL BRIEF OF PETITIONER, BENIGNO BRAVO

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TABLE OF CONTENTS

INTRODUCTION 1

STATEMENTOFTHECASEANDFACTS 1

SUMMARYOFARGUMENT 2

JURISDICTIONAL ARGUMENT 3

I. JURISDICTION EXISTS WHEN A DISTRICT COURT OF APPEAL CITES AS CONTROLLING AUTHORITY A DECISION THAT IS PENDING REVIEW IN THE SUPREME COURT. 3

II. THE DECISION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH BODEN v. CITY OF HIALEAH, 132 So.2d 160 (Fla. 1961); SUPERIOR HOME BUILDERS v. MOSS, 70 So.2d 570 (Fla. 19540; AND ROE v. CITY INVESTING/GENERAL DEVELOPMENT CORPORATION, 587 So.2d 1323 (Fla. 1991). 5

III. STATEMENT WHY THIS COURT SHOULD EXERCISE ITS JURISDICTION AND ENTERTAIN THE CASE ON THE MERITS IF IT FINDS IT DOES HAVE JURISDICTION 8

CONCLUSION 9

CERTIFICATEOFSERVICE 10

TABLE OF AUTHORITIES

Cases

Boden v. City of Hialeah,
132 So.2d 150 (Fla. 1961) 5, 6

Hamman v. Worling,
549 So.2d 188 (Fla. 1989) 3

Jollie v. State,
405 So.2d 418 (Fla. 1981) 3

Keller Kitchen Cabinets v. Holder,
586 So.2d 1132 (Fla. 1st DCA 1991) 2-4, 7, 8

Roe v. City Investing/General Development Corporation,
587 So.2d 1323 (Fla. 1991) 5, 7, 8

Stupak v. Winter Park Leasing, Inc.,
585 So.2d 283 (Fla. 1991) 3

Superior Home Builders v. Moss,
70 So.2d 570 (Fla. 1954) 5, 6

University of Florida v. McLarthy,
483 So.2d 723 (Fla. 1st DCA 1985) 2, 7

Statutes

Section 440.19(1)(a), Florida Statutes (1989) 2, 3, 7-9

Section 440.28, Florida Statutes (1989) 2-9

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INTRODUCTION

This jurisdictional brief is filed on behalf of the employee appellant petitioner, Benigno Bravo ("Bravo"). Gulf & Western Food Products n/k/a Okeelanta Corporation and National Employers Company are the employer and servicing agent appellee respondents ("Gulf & Western"). The district court opinion is now reported at 593 So.2d 1180.

STATEMENT OF THE CASE AND FACTS

In December 1983, Bravo contracted an occupational disease. 593 So.2d at 1181. On August 2, 1984, the JCC awarded TTD benefits for the period February 9, 1984 through May 3, 1984, past medical expenses, and further medical care as the nature of the injury or process of recovery required. 593 So.2d at 1181. Compensation benefits were last paid in 1984. 593 So.2d at 1181. The parties stipulated, "there is no two-year period in which Mr. Bravo did not receive remedial treatment subsequent to the finding of compensability in the judge's order of August of 1984." (R 14).

On August 15, 1989, Bravo filed a claim for additional benefits seeking **TTD** from May **25,** 1989, to the present. 593 So.2d at 1181. Gulf & Western controverted the claim on the ground that Bravo reached **MMI** on June 4, 1984 with no permanent impairment per the August **2,** 1984 order. **593** So.2d at 1181. The original order found that "claimant had reached maximum medical improvement on June 4, 1984 with no permanent impairment." On motion for rehearing, however, the JCC struck the finding of no permanent impairment. 593 So.2d at 1181. Permanency has never been adjudicated.

The **JCC** denied benefits to Bravo holding:

> Thus, while the medical evidence would establish that the claimant has suffered a change of condition, as a result of which he has been temporarily and totally disabled since May 29, 1989 and remained **so** to the date of the hearing, June 19, 1990, the claim for reinstatement of compensation must be **denied** for lack of a timely filing of a petition for modification under the provisions of Section 440.28. [593 So.2d at 11811.

The district court affirmed, relying upon University of Florida v. McLarthy, 483 So.2d 723 (Fla. 1st **DCA** 1985) and Keller Kitchen Cabinets v. Holder, 586 So.2d 1132 (Fla. 1st **DCA** 1991) (review pending, Supreme Court case no. 78,891), two cases that involved claims for benefits made after a prior adjudication of permanent disability, and involved previous versions of Section 440.19(1)(a) containing the now deleted phrase "without an award" as a limitation on its application to claims for additional benefits.

SUMMARY OF ARGUMENT

A claim for "additional benefits" is necessarily predicated upon the "change in condition" that triggers the need for additional benefits. **A** change in condition does not,

however, automatically necessitate modification of pre-existing orders entered upon prior needs. The time limitations in Section 440.28 only apply when an employee **seeks** modification of an existing order because of a change in condition. Section 440.19(1)(a) limitations apply when additional benefits are claimed, as are claimed in this case.

The decision in this case reflects **(1)** a prior award of **TTD** without an application for permanent disability benefits or an adjudication of permanent disability; **(2)** continual remedial treatment subsequent to the initial award of TTD; **(3)** a change in condition resulting in a new period of temporary and total disability; and **(4)** an application for additional benefits predicated upon this change in condition. There is conflict with the decisions from this Court that hold such claims for additional benefits are not barred by Section 440.28, but are governed by Section 440.19.

JURISDICTIONAL ARGUMENT

I.

JURISDICTION EXISTS WHEN A DISTRICT COURT OF APPEAL CITES AS CONTROLLING AUTHORITY A DECISION THAT IS PENDING REVIEW IN THE SUPREME COURT.

This Court has accepted jurisdiction in Keller Kitchen Cabinets v. Holder, 586 So.2d 1132 (Fla. 1st DCA 1991), the district court opinion **upon** which the opinion below **is** based. **A** prima facie jurisdictional basis for further review exists when a district court of appeal cites as controlling authority a decision that is pending review in the Supreme Court. Jollie v. State, 405 So.2d 418 (Fla. 1981). See, e.g. Stupak v. Winter Park Leasing, Inc., 585 So.2d **283** (Fla. 1991); Hamman v. Worling, 549 So.2d 188 (Fla. 1989).

The Keller Kitchen decision presently under review by this Court focuses upon the continuing needs of an employee receiving remedial care after a determination of MMI *and* PPD benefits. The district court majority opinion raises the question whether the subsequent provision and receipt of remedial care effected a legal or equitable modification of the permanency adjudication, and the equitable accrual or waiver of Section 440.28 limitations. In a well reasoned dissent, Judge Zehmer expresses the opinion that Section 440.28 principles of res judicata should never have been reached, but should be limited to those circumstances where the essential elements of res judicata are present.

> 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.
>
> * * *
>
> 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. [586 So.2d at 1142].

A major distinction between Keller Kitchen and this case makes Bravo's claim all the more compelling. In Keller Kitchen, there was an adjudication of permanent disability in the original order, triggering principles of res judicata. Bravo has never litigated the question or extent of permanent disability. This Court should accept jurisdiction in this case to ensure resolution of Bravo's claim consistent with this Court's resolution of Keller Kitchen.

II.

THE DECISION BELOW IS IN EXPRESS AND DIRECT CONFLICT WITH BODEN v. CITY OF HIALEAH, 132 So.2d 160 (Fla. 1961); SUPERIOR HOME BUILDERS v. MOSS, 70 So.2d 570 (Fla. 19540; AND ROE v. CITY INVESTING/GENERAL DEVELOPMENT CORPORATION, 587 So.2d 1323 (Fla. 1991).

In Boden v. City of Hialeah, 132 So.2d 150 (Fla. 1961), the claimant received compensation until the latter part of 1951. On December 5, 1951, the Deputy Commissioner entered an order denying further Compensation but included in his order of denial the language, "Whether claimant will have any permanent disability cannot be determined at this time." 132 So.2d at 161. No modification was sought of the order within the time required by Section 440.28. Another claim was filed outside the Section 440.28 time limits, but no disposition was made of the second claim. In September 1959, still another claim was filed and the Deputy Commissioner ultimately awarded permanent partial disability benefits. 132 So.2d at 162. The record demonstrated that the employer/carrier furnished medical appliances from the December 1951 order through 1957. 132 So.2d at 162.

In Boden, as here, the employer/carrier was on notice of the continuance of the employee's claim and was in no position to assert that the original order disposed of each and every claim to be made on behalf of the employee. This Court held:

> We conclude that the claim of the employee filed more than one year subsequent to the original order of December 5, 1951, was for benefits not included in that order.

* * *

> . . . Section 440.28, Florida Statutes, **F.S.A.** did not bar an *additional claim* for permanent partial disability, for the employee did not **seek** relief under the statute. [132 So.2d at 162].

The parallels between Boden v. City of Hialeah, and this case are patent. **Only** the outcome is different. Here as in Boden, the first order did not determine permanent disability, one way or another. As the district court expressly says at **593** So.2d **1181,** five years after the first order, Bravo "filed a claim for *additional benefits* seeking TTD **....** (e.s.)" Bravo is not seeking any modification of the original order as amended. Bravo is seeking "benefits not included in that order." Boden, **132** So.2d at 162. Boden holds, "Section 440.28, Florida Statutes, F.S.A. did not bar an *additional claim* for permanent partial disability, for the employee did not seek relief under the statute." **132** So.2d at 162. Bravo's claim is timely and valid under Boden.

Superior Home Builders v. Moss, 70 So.2d 570 (Fla. **1954)** is of similar import. In Moss, the claimant was awarded temporary total disability. More than one year after termination of TTD benefits, the employee made another claim for "additional compensation and medical treatment." This Court held that Section **440.28** was inapplicable where the claimant did not **ask** for a modification of the original order, but merely sought additional compensation for a new period of temporary total disability. **70** So.2d at 572. Bravo seeks and is entitled to identical relief.

The district court's confusion and departure from this precedent was triggered by the JCC's isolated finding of MMI in the August 1984 order. It is isolated because the finding on permanency was expressly withdrawn on motion for rehearing. ***593*** So.2d at

1182, The prior determination of MMI may influence the determination of the merits of the present request for TTD, but it does not oust the JCC of its jurisdiction to hear the claim on the merits. As recognized in McLarthy and quoted in the decision here, under varying circumstances MMI may not mark the end of temporary disability or the beginning of permanent disability. McLarthy, 483 So.2d at 725; Bravo, 593 So.2d at 1181. It is factual not jurisdictional. Any doubt about the JCC's declination to determine the beginning date of permanency in this case is dispelled by the JCC's amendment of the August 1984 order expressly eliminating the finding on permanency.

There is conflict when a district court applies precedent to facts materially at variance with the facts in the precedent applied. The district court affirmed upon University of Florida v. McLarthy, 483 So.2d 723 (Fla. 1st DCA 1985) and Keller Kitchen Cabinets v. Holder, 586 So.2d 1132 (Fla. 1st DCA 1991) (review pending, S. Ct. Case No. 78,891). Both cases involve prior adjudication of permanent disability. McLarthy and Keller Kitchen also involve previous versions of Section 440.19 which included the phrase "without an award," a phrase deleted in the 1979 amendment to this section. The deletion of this phrase is significant, because Section 440.28 is no longer the "*only*" (McLarthy, 483 So.2d at 726) section applicable to a claim for further benefits after a written compensation order.

Both McLarthy and Keller Kitchen predate this Court's decision in Roe v. City Investing/General Development Corporation, 587 So.2d 1323 (Fla. 1991), the pendency of which is noted in the question certified in Keller Kitchen. 586 So.2d at 1146. In Roe, this Court says:

> The legislature has since removed that ["without an award"] language obviously in order to remove the limitation. Hence, the statute in its present form unambiguously states that a claimant is entitled to disability if a claim is filed within two years of the last remedial treatment. ***We therefore hold that a claim for disability is nut time-bared, despite a two-year gap between the injury and the claim,*** so *long as* ***the claim is jiled within two years after the*** *last* ***remedial treatment.*** [587 So.2d at 1325, e.s.].

As the parties stipulated, "there is no two-year period in which Mr. Bravo did not receive remedial treatment subsequent to the finding of compensability in the judge's orders of **August** of 1984." The district court decision is in conflict with this Court's interpretation of Section 440.19(1)(a), as amended in 1979, and as applicable to Bravo's claim for additional benefits.

III.

STATEMENT WHY THIS COURT **SHOULD** EXERCISE ITS JURISDICTION **AND** ENTERTAIN THE CASE ON THE MERITS IF IT FINDS IT DOES **HAVE** JURISDICTION.

Denial of needed benefits should not turn upon the confusion created between Section 440.19(1)(a) and Section 440.28 limitations upon applications for additional benefits and applications for modification of existing benefit. The present confusion and continued importance of these issues is well reflected in the extensive dissenting opinion of Judge Zehmer in Keller Kitchen, the certification of the question presently pending in Keller Kitchen, as well as this Court's recent resolution of the earlier certified question in Roe v. City Investing. This case is no less worthy of consideration by this court.

It should be very clear that Bravo's predicament is anything but clear. The JCC and **DCA** both recognize that the permanency of Bravo's disability has never been adjudicated – yet the **JCC** and **DCA** both recognize Bravo "has been temporarily and totally disabled since May 29, 1989." 593 So.2d at 1181. He is entitled to additional benefits timely sought under Section 440.19(1)(a).

The facts of this case are not in material dispute. Bravo has a work related progressive debilitating disease. MMI was reached in June 1984 and his condition has regressed thereafter. He has worked for as long and as hard **as** he can with his disability and without making unnecessary claims for compensation benefits. He has received medical and remedial treatment. He has never litigated the permanency of his disability or the degree of permanency of his disability. He should not be punished for continuing to work for his deserved "compensation," while enduring the slow deterioration of his physical well-being. His claim is timely under Section 440.19 and the denial of his claim, not upon the merits but upon a misapplication of Section 440.28, is a true miscarriage of justice and the antithesis of the legislative and judicial philosophy behind the compensation of injured workers.

CONCLUSION

This Court should exercise its jurisdiction, quash the district court decision and allow Bravo's meritorious claim for additional benefits to proceed on its merit.

By: _____
James C. Blecke

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served upon STEVEN K. DEUTSCH, ESQ., Deutsch & Blumberg, P.A., 2802 New World Tower, 100 North Biscayne Boulevard, Miami, Florida **33132** and WALTER **BEISLER, ESQ.,** 250 Eighth Street, West Palm Beach, Florida **33401,** this 30th day of **April, 1992.**

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