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IN THE SUPREME COURT OF FLORIDA

BENIGNO BRAVO, CASE NO: 79,733

Petitioner, :

v.

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

Respondents.

JURISDICTIONAL BRIEF OF RESPONDENTS

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INTRODUCTION

This Jurisdictional Brief is filed on behalf of the employer/respondent, GULF & WESTERN FOOD PRODUCTS n/k/a OKEELANTA CORPORATION, and its servicing agent, NATIONAL EMPLOYERS COMPANY. The petitioner is BENIGNO BRAVO, the employee/claimant at the trial level and Appellant before the First District Court of Appeal. The opinion which the Petitioner seek to have reviewed was filed February 14, 1992 and will be cited as Bravo v. Gulf & Western Food Products, 593 So. 2d 1180 (Fla. 1DCA 1992). The full opinion of the DCA is included in the Appendix to the Jurisdictional Brief of the Petitioner.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Respondents basically concur with Petitioner's Statement of the Case and the Facts. Additionally, the two cases cited by the DCA in its unanimous decision in the present case, the University of Florida v. McLarthy, 483 So. 2d 723 (Fla. 1DCA 1985) and Keller Kitchen Cabinets v. Holder, 586 So. 2d 1132 (Fla. 1DCA 1991), Review Pending, Supreme Court Case No. 78.891, involve prior adjudication of maximum medical improvement. So too does the present case. Because of that adjudication, any subsequent award of temporary compensation necessarily required the allegation of a change of condition and a Section 440.28 Petition for Modification within two years of the order determining MMI.

SUMMARY OF JURISDICTIONAL ARGUMENT

The Petitioner contends that the fact that the DCA cited Keller Kitchen Cabinets v. Holder, 586 So. 2d 1132 (Fla. 1DCA 1991), a case in which review is pending before the Supreme Court, Case No. 78.891, constitutes a grounds for acceptance of jurisdiction. The Petitioner cites three Supreme Court cases for the proposition. However, all three of the Supreme Court decisions cited involved DCA rulings that were per curiam affirmed without opinions and cited as the single controlling authority decisions which were pending review in the Supreme Court. Clearly, that scenario is not consistent with the present case.

The DCA in Bravo v. Gulf & Western, 593 So. 2d 1180 (Fla. 1DCA 1992), have unanimously affirmed the Judge of Compensation Claims' order, but in a written opinion in which they have discussed and explained their rationale. Additionally, the case pending review before the Supreme Court was not the main case cited by the DCA. That decision is a final order not pending review by the Supreme Court. Furthermore, the question certified in the case pending review is factually dissimilar and clearly not the issue presented for consideration to the DCA in the present case.

The Petitioner argues that the DCA's decision is in conflict with three Supreme Court decisions. However, the Supreme Court cases cited by the Petitioner include facts and circumstances

that make them clearly and obviously distinguishable. The Petitioner has failed to establish that express and direct conflict exists between the Bravo decision and the decision of another District Court of Appeal or of the Supreme Court on the same question of law.

In summary, since the Petitioner has failed to demonstrate a proper basis for review, the request that the Supreme Court take jurisdiction and consider review of the DCA's opinion filed February 14, 1992 should be denied.

JURISDICTIONAL ARGUMENT

I.

WHETHER JURISDICTION EXITS WREN A DISTRICT COURT OF APPEAL CITES AS AUTHORITY A DECISION THAT IS PENDING REVIEW IN THE SUPREME COURT.

The Petitioner contends that a prima facie jurisdictional basis for Supreme Court review exists when a District Court of Appeal cites as controlling authority a decision that is pending review in the Supreme Court. The Petitioner relies an Jollie v. State, 405 *So.* 2d 418 (Fla. 1981); Stupak v. Winter Park Leasing Service, 585 *So.* 2d 283 (Fla. 1991); and Hamman v. Worling, 549 *So.* 2d 188 (Fla. 1989). What he fails to comprehend is that in each of those cases, this Court accepted jurisdiction because the District Court of Appeal in an opinion had per curiam affirmed and cited as the single controlling authority decisions which were then pending in the Supreme Court. (Emphasis Supplied). Jollie v. State, 381 So. 2d 351 (Fla. 5DCA 1980); Stupak v. Winter Park Leasing, Inc., 563 So. 2d 1102 (Fla. 5DCA 1990); and

Hamman v. Worling, 525 So. 2d 933 (Fla. 3DCA 1988). The DCA in the present case, while issuing a unanimous opinion, issued a written opinion and cited other case law. Bravo v. Gulf & Western, 593 So. 2d 1180 (Fla. 1DCA 1992).

In the present case, in an extensive opinion explaining their decision, the First District Court of Appeal relies principally on the decision in University of Florida v. McLarthy, 483 So. 2d 723 (Fla. 1DCA 1985) and also cites Keller Kitchen Cabinets v. Holder, 586 So. 2d 1132 (Fla. 1DCA 1991), Review pending Supreme Court Case No. 78.891. Bravo at 1182. What the Petitioner fails to appreciate is that Keller Kitchen Cabinets involves a factually significantly different scenario. The claimant in that case underwent a total knee replacement and, AS a consequence, had a prosthetic replacement. Id. at 1133. It is that fact that resulted in the Court's ultimate decision on a motion for certification and/or rehearing, to certify the question that did include mention of the knee replacement surgery. Id. at 1146. The issue as framed by that Court and certified for review is not the issue present in Bravo. Id. at 1146. A further and very important distinction in Keller Kitchen Cabinets is that the original order made it clear that there was the possibility of future knee replacement surgery. Id. at 1133.

The Petitioner's reliance on the dissenting opinion of Judge Zehmer in Keller Kitchen Cabinets, Supra, is misplaced. As noted by the Supreme 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." In Jenkins v. State, 385 So. 2d 1356 (Fla. 1980), the Court concluded that "the language and expressions found in the dissenting or concurring opinion cannot support jurisdiction under Section 3(b)(3) because they are not the decision of the District Court of Appeal." Id. at 1359.

In summary, while Keller Kitchen Cabinets is cited in the DCA decision, it is not the sole basis for the DCA's decision. The DCA's opinion is adequately explained and consistent with the €acts of the case below. It is supported by the decision in University of Florida v. McLarthy, Supra, which is a final decision and as such clearly has precedent value. Therefore, the fact that this Court is considering a certified question in a case also cited by the DCA should not serve as a basis to invoke this Court's jurisdiction on a claim clearly factually dissimilar, and not involving the issue certified for review.

JURISDICTIONAL ARGUMENT

11.

WHETHER 'THE DECISION SELOW 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. 1954); AND ROE v. CITY INVESTING/GENERAL DEVELOPMENT CORPORATION, 587 So. 2d 1323 (Fla. 1991).

These issues were argued before the First District Court, first in the briefs of the parties and then at oral argument. The facts in Boden v. city of Hialeah, 132 So. 2d 160 (Fla. 1961) 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 commissioner had reserved jurisdiction to determine the question of permanent partial disability. In Bravo, the deputy commissioner found that MMI had been reached. He further concluded that the claimant would be precluded from a return to the same type of work. Other cases have held that that was tantamount to a determination of permanent partial impairment. Coq v. Fuch's Baking Company, 507 So. 2d 138 (Fla. 1DCA 1987) and Dayron Corporation v. Morehead, 480 So. 2d 235 (Fla. 1DCA 1985). However, the deputy commissioner did not make a determination of the degree of permanent residuals. Nonetheless, by concluding that maximum medical improvement had been reached, the 1984 orders required that the claimant establish a change of condition in order 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 MMI. University of Florida v. McLarthy, 483 So. 2d 723, at 725 (Fla. 1DCA 1985). Thus Bravo, unlike Boden, had to comply with Section 440.28 by filing his claim and petition within the statutory two year time period.

Superior Rome 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 (Section 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 he should not be considered to be MMI as determined by the orders entered in 1984, but rather TTD, which necessarily requires a determination of a change in his physical condition. In other words, rather than conflicting, the DCA's decision in Bravo is consistent with the above cited language from Moss, Id. at 572.

As the DCA has concluded, "On motion for rehearing, the JCC struck the finding of no permanent impairment. The claimant, however, did not seek, on rehearing, to strike the JCC's finding of MMI. We are not free to revise that finding, which was supported. by competent, substantial evidence of record at the time entered." Bravo, 593 So. 2d 1180 at 1181-82 (Fla. 1DCA 1992).

Roe v. City Investing/General Development Corporation, 587 So. 2d 1323 (Fla. 1991) is also materially distinguishable from the Bravo case, because it deals with the insertion or attachment of a prosthetic device. The certified question specifically contains reference to the insertion or attachment of a prosthetic device. Id. at 1324. The significance of the inclusion of a prosthetic device or attachment is obvious. Florida Workers' Compensation Law establishes that there is essentially no statute of limitations relating to the insertion or attachment of a prosthetic device to any part of the body. Section 440.19(1)(b).

As emphasized in Faotnote 3 of the Supreme Court's decision in Roe, "We address only the certified question." Id. at 1324. Further 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 facts, as in Bravo, of a prior adjudication of MMI that would necessarily require a modification of an order to reinstate temporary total disability benefits.

A review of the decisions that Petitioner alleges are in express and direct conflict with the DCA's holding in Bravo demonstrates that there is no conflict with any of those three decisions.

The Petitioner seeks to ignore the determination of maximum medical improvement by the deputy commissioner in the 1984 orders. The deputy commissioner initially concluded that the claimant had not only reached maximum medical improvement but had no permanent impairment. The claimant, as a consequence, filed a motion for reconsideration and/or rehearing. A hearing was conducted and based upon the arguments of counsel, the order was modified. However, the fundamental holding of MMI was nut disturbed. Considering the general rule that TTD benefits are not available to an injured claimant once the date of maximum medical improvement has been established, it was essential for Bravo to have modified the 1984 orders under the provisions of Section 440.28, within two years.

There were no dissenting opinions on the panel that arrived at this decision. Bravo, 593 So. 2d at 1182. The Petitioner has

failed to demonstrate that express and direct conflict exists between the Bravo decision and a decision of another District Court of Appeal or of the Supreme Court on the same question of law. As such, the Petitioner has not established the prerequisite to trigger the Supreme Court's discretionary jurisdiction under Article V, Section 3 of the Florida Constitution as amended April 1, 1980.

CONCLUSION

WHEREFORE, it is respectfully submitted that this Court should reject the request for discretionary review of the decision of the First District Court of Appeal, which was unanimously reached and does not conflict with another District Court opinion or a Supreme Court decision. The opinion of the District Court of Appeal filed February 14, 1992 and, therefore, the order of the Judge of Compensation Claims below should be affirmed.

Respectfully submitted,

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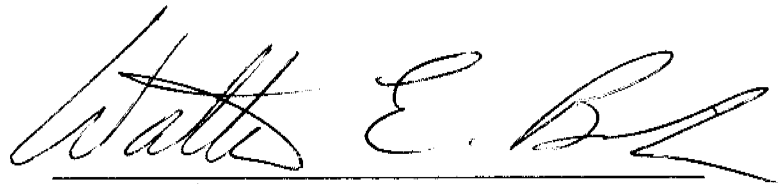
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief of Petitioner has been mailed this 22nd day of May, 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 Jamces C. Blecke, Esquire, Counsel for Petitioner, Biscayne Building, Suite 705, 19 West Flagler Street, Miami, Florida 33130.



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