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

MAIN BRIEF OF PETITIONER, BENIGNO BRAVO

Deutsch & Blumberg, P.A.
Counsel for Benigno Bravo
2802 New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 358-6329

James C. **Blecke**
Counsel for Benigno Bravo
Biscayne Building, Suite *705*
19 West Flagler Street
Miami, Florida 33130
(305) 358-5999

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INTRODUCTION

This main 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 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. The Deputy Commissioner conducted **a** hearing on July 19, 1984 and determined that the medical evidence, "overwhelmingly support[s] a causal relationship between the claimant's exposure to particulates at his employment and Mr. Bravo's asthma." (R. **451).** 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.

The original order dated August 2, 1984 found that "claimant had reached maximum medical improvement on June 4, 1984 with no permanent impairment." This prompted a motion for rehearing and clarification, asserting that the issue of permanent impairment was not scheduled to be heard and was contrary to the stipulation of the parties (R. 443-4). Bravo's counsel did not seek to elicit testimony concerning permanent impairment at the various depositions, and submitted no evidence on permanent impairment at the hearing (R. 443-4). The motion for rehearing and clarification concluded:

> In that the issue of permanent impairment was not tried by the Claimant at the subject hearing, nor scheduled to be tried, Claimant would respectfully submit that the finding made in paragraph 12 of the subject Order is premature and could very well prejudice the Claimant in the future. [R. 444].

The Deputy Commissioner agreed that the finding was premature, granted the motion, and struck the finding of no permanent impairment in a second order entered August 27, 1984 (R. 456-7). 593 So.2d at 1181. Permanency has never been adjudicated.

On August 15, 1989, Bravo filed a claim for additional benefits seeking TTD fi-om 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. Gulf & Western ignored the August 27, 1984 order striking the permanency language.

Gulf & Western stipulated that, from May 25, 1989 through the date of the hearing, Bravo was temporarily and totally disabled (R. 18). Medical bills from 1986

through June 1990 were acknowledged by Gulf & Western as either being paid or payable (R. 9-13). It was further stipulated that medical benefits had been paid on an ongoing basis from 1984 up to the present with no significant break (R. 13-14). Gulf & Western 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." (R. 14). It was also stipulated between the parties that the last temporary total disability benefits were paid to Bravo in 1984, and there have been no subsequent temporary total disability benefits, permanent total disability benefits, temporary partial disability benefits, or wage loss benefits paid within two years of the 1989 claim (R. 28).

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 1181].

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. This

Court has found jurisdictionally significant conflict and has accepted this case for merit review.

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.

The Judge of Compensation Claims erred in treating the August 1989 claim for benefits as an application for modification of the August 1984 orders, subject to the two year limitation in Section 440.28, Florida Statutes (1989). Boden v. City of Hialeah, 132 So.2d 160 (Fla. 1961) is controlling. In Boden, this Court first held that the Compensation Act is to be construed liberally and more favorably toward the claimant.

132 So.2d at 162. This Court also held that Section 440.28 "did not bar an *additional claim* for permanent partial disability," where there was a **prior** order denying compensation without a determination whether the claimant suffered any permanent disability. 132 So.2d at 162. This Court accepted the employee's contention that there was no adjudication af his right to disability benefits because the Deputy Commissioner did not consider or resolve the question of permanent disability in the first order entered.

Here, as reflected in the motion and order granting clarification, the Deputy Commissioner in 1984 did not adjudicate whether Bravo sustained permanent impairment, or determine future entitlement to disability benefits. The August 1989 claim for benefits is a claim for additional benefits governed by Section 440.19(1)(a), Florida Statutes (1983). ***As*** it is undisputed that Bravo received remedial treatment within two years immediately preceding the August 1989 claim, the claim is timely. Roe v. City Investing/General Development Corporation, 587 So.2d 1323 (Fla. 1991).

ARGUMENT

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

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 confusion and departure from this precedent was triggered by the DC'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. The Judge of Compensation Claims never reached the issue of whether this case is one of the exceptions to the general rule.

The episodic nature of Bravo's disability brought on by his occupational disease suggests that it is an appropriate exception. As such, the date of MMI as

determined in the August 1984 order need not be revisited nor modified in determining whether Bravo is entitled to disability benefits for the period of disability commencing in May 1989.

It is all too clear from the terms of the original order and the motion for rehearing that was granted, deleting the finding on permanent impairment, that the Deputy Commissioner was not intending a final adjudication of recovery or of permanency in the initial award of temporary benefits. Further remedial care was contemplated and provided. A permanency rating was premature - not because maximum medical improvement had not been reached - but because maximum medical impairment had not been realized. Bravo's occupational disease is both episodic and progressive. His condition continually worsens over time, with episodes of total disability. His occupational disease did not peak, stabilize, or plateau, but spirals ever downward.

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. Keller Kitchen 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].

In Keller Kitchen, there was an adjudication of permanent disability in the original order, triggering principles of res judicata. In University of Florida v. McLarthy, 483 So.2d 723 (Fla. 1st DCA 1985), there was a prior adjudication of permanent disability. Bravo has never litigated the question or extent of permanent disability. Res judicata is not a bar to this claim.

Keller Kitchen and McLarthy 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 Keller Kitchen and McLarthy 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 not time-bared, despite a two-year gap between the injury and the claim,*** so ***long as the claim is filed 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,

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.

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).

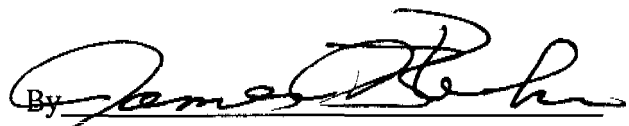
The facts of this case are not in material dispute. Bravo has a work related progressive debilitating disease. He has worked for as long and as hard as he can with his disability and without making unnecessary claims for compensation benefits. He has received medical and remedial treatment. He has never 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 quash the district court decision and allow Bravo's meritorious claim for additional benefits to proceed on its merit.

Deutsch & Blumberg, P.A.
Counsel for Benigno Bravo
2802 New World Tower
100 North Biscayne Boulevard
Miami, Florida 33132
(305) 358-6329

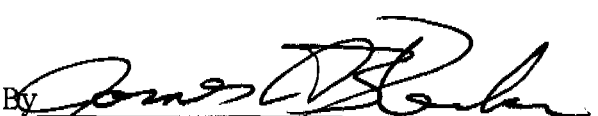
James C. Blecke
Counsel for Benigno Bravo
Biscayne Building, Suite 705
19 West Flagler Street
Miami, Florida 33130
(305) 358-5999

By 
James C. Blecke
Florida Bar No. 136047

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 4th day of September, 1992.

James C. Blecke
Counsel for Benigno Bravo
Biscayne Building, Suite 705
19 West Flagler Street
Miami, Florida **33130**
(305) 358-5999

By 
James C. Blecke
Fla. Bar No. 136047