

IN THE SUPREME COURT OF FLORIDA

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CASE NUMBER **79,733**
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BENIGNO BRAVO,

Petitioner, :

vs.

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

Respondents. :

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DISCRETIONARY REVIEW OF A DECISION
OF THE FIRST DISTRICT COURT OF **APPEAL**
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REPLY BRIEF OF PETITIONER,
BENIGNO BRAVO
=====

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REPLY ARGUMENT

Holder v. Keller Kitchen Cabinets, 17 FLW S601 (Fla. October 1, 1992), confirms that Section 440.19(1)(a), Florida Statutes (1983) is the applicable statute in this case. In Holder, this Court rejected the respondents' contention that, because Holder had previously been found to have reached MMI in a 1980 order, he could not obtain TTD benefits in 1988 without seeking modification of the 1980 order in accordance with Section 440.28, Florida Statutes.

In Holder, this Court recognized that Section 440.28 is, essentially, a limited statutory exception to the general principles of res judicata, estoppel by judgment, and law of the case. If res judicata, estoppel by judgment, or law of the case are not implicated, it is unnecessary for a claimant to resort to Section 440.28 for relief. In this case, there is a 1984 order with a finding that Bravo reached MMI on June 4, 1984. Bravo does not seek modification of the 1984 order or an avoidance of whatever res judicata, estoppel by

judgment, or law of the case principles may apply to this particular finding in the 1984 order.

Gulf & Western studiously avoids the significance of the JCC modification of the first 1984 order. 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, concluding:

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 JCC 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). Permanency has never been adjudicated. In Holder, as here, "the doctrines of estoppel by judgment and law of the case have no application to a Compensation claim that was premature at the time of the prior proceedings and therefore was not adjudicated."

17 FLW at S602.

In addressing the res judicata effect of workers' compensation orders, the First District in Caron v. Systematic Air Services, 576 So.2d 372, 375 (Fla. 1st DCA 1991) said:

The general rule, which accords with the res judicata principles discussed above, is that where several claims due at different times arise out of the same transaction, a judgment as to one or more of such claims will not bar a subsequent action on claims becoming due thereafter.

Here, the episodic and progressive nature of Bravo's occupational disease has, over time, triggered periods of disability, medical care, and remedial treatment. As noted in Hunt v. International Minerals and Chemical Corporation, 410 So.2d 640, 641 (Fla. 1st DCA 1982), "claims for various benefits may be treated *as they mature*, while determination of immature claims is necessarily postponed until they are ripe." As the issue of permanent impairment was not presented or decided in August 1984, claims for future disability benefits, whether temporary or permanent, are claims for additional benefits, timely if timely made under Section 440.19(1)(a).

The 1984 orders did establish the law of the case in one important respect. As of 1984, the question of Bravo's permanent impairment was premature and not then ripe for adjudication. If Gulf & Western **was** aggrieved by the JCC's decision in this regard, it was incumbent upon Gulf & Western to appeal from the 1984 order. Further proceedings were clearly contemplated by the 1984 order, as modified. As recognized in the district court opinion under review at 593 So.2d 1181, Bravo "filed a claim for *additional benefits* seeking TTD (e.s.)" Bravo is seeking additional benefits not included in the 1984 order. Boden v. City of Hialeah, 132 So.2d 160 (Fla. 1961) remains the controlling precedent, along with Holder v. Keller Kitchen Cabinets.

Holder's agreement with Judge Zehmer's dissent (17 FLW at S602) legitimates Bravo's main brief adoption of Judge Zehmer's dissent as a well reasoned expression of the principles of res judicata and the limited application of Section 440.28 (Bravo main brief at 8-9). Holder also reinforces Bravo's main brief argument on the significance of the 1979 amendment to Section 440.19 and the deletion of the phrase

"without an award." The amendment removed the limitation restricting the exception to situations where compensation or remedial treatment was voluntarily provided. Holder, 17 FLW at S602. See, also, Roe v. City Investing/General Development Corporation, 587 So.2d 1323, 1325 (Fla. 1991).


In this case, Bravo's 1989 claim for additional benefits was timely under Section 440.19(1)(a) because it was stipulated and uncontroverted that medical benefits had been paid on an ongoing basis from 1984 up to the present and, "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).

CONCLUSION

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

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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** 26th day of October, 1992.

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