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FILED
S J. WHITE

IN THE SUPREME COURT OF FLORIDA

JUR.

BENIGNO BRAVO,

CASE NO: 79,733

Chief Deputy Clerk

Petitioner,

FILED
S J. WHITE

v.

Nov 30 1992

GULF & WESTERN FOOD PRODUCTS
ETC., ET AL.,

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

Respondent.

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

RESPONDENT'S SUPPLEMENTAL BRIEF

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Section 440.28, Florida Statutes 1,2,3

SUPPLEMENTAL ARGUMENT

Holder v. Keller Kitchen Cabinets, 17 FLW S601 (Fla. 1992), does not invalidate the respondent's position. It does not hold that a claimant may obtain TTD benefits after he has reached maximum medical improvement, except "upon the unique facts presented in this case." at S602.

Holder does not even address this Court's holding in Corral v. McCrory Carp, 228 So.2d 900 (Fla. 1969), that maximum medical improvement marks the end of temporary disability. That fundamental concept is the essence of Judge Jacobson's decision to deny the claim for TTD benefits. (R-46-47). As the judge correctly notes, the previous orders in the case had concluded in 1984 that Bravo had reached maximum medical improvement June 4, 1984. (R-43). That ultimate finding of fact has not been disturbed nor modified, although other issues have been litigated. (R-43). The judge thus concluded that because the determination of maximum medical improvement had not been modified timely in accordance with §440.28, the claim for temporary total disability in 1989 must necessarily fail. (R-47).

The decision in Holder is limited to the unique facts of the case. This Court, states and then reiterates, at S601 and at S602. Those "unique" facts that distinguish Holder from Bravo are the prosthetic device in Holder's knee, and the doctor's contemplation of further surgery in the original order. Clearly, neither of those elements exists in Bravo.

In Holder, the Court emphasizes the fact that both the need for knee replacement surgery and temporary disability resulting therefrom were contemplated in the 1980 order that, found the claimant to be at MMI and determined the degree of disability. 17 FLW at S602. While petitioner makes numerous allegations of anticipated further medical problems for Bravo, it is clear from the language of the 1984 orders of the deputy commissioner that there was no such contemplation of future periods of disability. In fact, the deputy commissioner in his initial order did conclude that the claimant had no permanent impairment as a consequence of his industrial asthma. (R-453). While that conclusion was stricken on rehearing, there was no finding in either of the two 1984 orders suggesting anticipated future disability. (R-453,457).

The claim originally adjudicated was for temporary total disability benefits. (R-449). The dc concluded the claimant was entitled to TTD benefits, and also determined the claimant to have reached MMI on June 4, 1984. (R-453). That finding was not inconsequential, it was an integral part of the dc's decision. It was not disturbed by the claimant's motion in 1984. (R-457). It remained the law of the case. MMI was not appealed by the claimant. As the Supreme Court has established, MMI is the date of demarcation between temporary and permanent disability benefits. Corral v. McCrory Corp, Supra. Therefore, to subsequently claim TTD benefits, it was necessary for the claimant to establish a change of condition or that his claim is an exception to the general rule — no TTD after MMI.

The Florida Legislature in §440.28, P.S., provided a time limitation for modifying a judge's fundamental conclusions. This provision, §440.28, F.S., is still an integral part of Florida Worker's Compensation Law. This Court has recognized the purpose and the propriety of this provision. Dean v. H. W. McLeod, 270 So.2d 726 (Fla. 1972). Hopefully, the peculiar and "unique" facts of Holder will not thwart the legislative intent of §440.28 and its limitation period in the Bravo case.

In the second paragraph of his reply argument, the petitioner acknowledges that he does not seek modification of the 1984 order or avoidance of res judicata, estoppel by judgement or the law of the case principles that apply, Without modification, the 1984 determination of maximum medical improvement precludes an award of further temporary total disability compensation. The initial holding in Holder by the dc that he anticipated future surgery and further disability substantially differentiates the facts in Bravo and necessitates a contrary result. Just as the Court's concern for the potential "interminable series of litigation" caused it to limit its holding in Hughes v. Denny's Restaurant, et al., 328 So.2d. 830 at 838 (Fla. 1976), to the facts of that cause, that same concern should result in limiting its decision in Holder to those "unique" facts.

CONCLUSION

It is respectfully submitted that decision of the District Court of Appeal, **First District**, and the initial order of the judge of compensation claims that it upheld, should both be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent Supplemental Brief has been mailed this 25th day of November, 1992, to: Steven K. Deutsch, Esq., Counsel for Petitioner, Deutsch & Blumberg, P.A., 2802 New World Tower, 100 North Biscayne Boulevard, Miami, FL 33132; and James C. Blecke, Esq., Counsel for Petitioner, Biscayne Building, Suite 705, 19 West Flagler Street, Miami, FL 33130.



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