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W/APP

SUPREME COURT OF FLORIDA

FILED 7/13
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CLERK, SUPREME COURT
By _____
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ANDREW CASH,
Petitioner,

Case No. 79,896

vs .

District Court of Appeal,
1st District - No. 91-1927

UNIVERSAL RIVET, INC., ET AL.,

Respondent.

_____ /

AN APPEAL FROM DECISION OF THE
FIRST DISTRICT COURT OF APPEALS, APRIL 20, 1992,
CERTIFYING A QUESTION OF GREAT PUBLIC IMPORTANCE

INITIAL BRIEF OF PETITIONER

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ISSUE

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THAT TERM WAS USED IN SECTION 440.19(1)(b),
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INTRODUCTION

In this brief, the Petitioner, Andrew Cash, will be referred to as "Petitioner". The Respondents, Universal Rivet, Inc., will be referred to as the "Employer", and Nationwide Mutual Insurance Company, as the "Carrier."

Citations to the record from the Judge of Compensation Claims District "K" shall be (R - page number) and to the Opinion of the First District Court of Appeals as (O - page number).

City Investing\General Development Corp. v. Roe, 566 So.2d 258 (Fla.1st DCA, 1990) shall be referred to as "Roe I", and Roe v. City Investing\General Development Corp., 587 So.2d 1323 (Fla, 1991) as "Roe II".

STATEMENT OF THE CASE AND FACTS

Andrew Cash suffered an on-the-job shoulder injury on February **24, 1986** while lifting a full bucket of rivets (R-37). The insurance company accepted the claim as compensable and Petitioner received temporary total disability benefits from February **24, 1986** to March **9, 1986**. **At that time**, Petitioner returned to light duty work. He continued to have problems with his shoulder. The Petitioner received temporary partial disability benefits **from** March 10, **1986** to March **27, 1986**. On March **28, 1986** he **was** again put on a temporary total disability status and received commensurate benefits.

On March **4, 1986**, Dr. Steven Nadler, an orthopedic surgeon, diagnosed a recurrent dislocation of the petitioner's right shoulder. On March 31, **1986**, Dr. Robert Ennis performed an arthroscopic examination which revealed the detachment of the glenoid rim with an irregular tear. During the **course** of this arthroscopic surgery, Dr. Ennis inserted a long fixation staple to attach the glenoid labium **and** rim to the middle glenohumeral ligament to augment the healing process. This staple caused a previously unstable shoulder to become stable and the arthroscope revealed that the staple fixation was in a **good** position **and** firmly fixed to the internal bony structure (R-60). The Claimant received temporary total disability and temporary partial disability benefits until May 16, 1986, at which time he returned to work in a light duty status. Claimant was last treated for this shoulder

injury on July 15, 1986 (R-60,91).

On August 3, 1988 the Claimant returned to Dr. Ennis because he was having pain and limitation in the range of motion of his right shoulder (R-60). The Claimant filed a claim for payment of Dr. Ennis' bill which was denied by the Carrier on August 3, 1988 (R-75,86). The Carrier refused to authorize the treatment by Dr. Ennis claiming that the two-year statute of limitations **had** run on the claim (R-86).

On August 24, 1988, a formal claim **was** filed asking for further temporary total disability benefits and authorization for treatment by Dr. Ennis (R-4). The Employer/Carrier denied the claim stating that the statute of limitations had run on the claim and, in the alternative, if the staple was ruled a prosthesis, the statute of limitations barred all claims except for medical assistance with the staple. The Claimant then moved for an emergency conference which was held on February 7, 1989 (R-4). At the emergency conference the Claimant stated that the staple surgically placed in his shoulder on March 31, 1986 was a prosthetic device, consequently, the statute of limitations **had** not run for treatment for this prosthetic device pursuant to Fla.Stat. §440.19(1)(b) (R-5). The Judge of Compensation Claims ordered an evidentiary hearing on the Statute of Limitations issue (R-17).

An evidentiary hearing on the issue of the Statute of Limitations was held on May 11, 1989 (R-4). Testimony **was** presented by the Claimant, and the depositions of Dr. Ennis and

Carol Long, the claims adjuster, **were** admitted into evidence (R-57,103). On May 31, 1989 the Judge ruled that Florida Statute 440.19(1)(b), which exempts remedial attention relating to the insertion or attachment of **a** prosthetic device from the application of the Statute of Limitations, **was** applicable in this case (R-154). **The** Judge ruled that the Carrier must provide remedial attention relating to the staple inserted into the Claimant's shoulder, No other benefits were awarded in that order (R-154).

The Employer/Carrier appealed the order on May 31, 1989 (R-157,158). The 1ST **DCA** determined the order was interlocutory and dismissed the appeal for lack of jurisdiction, but without prejudice to bring the appeal again (R-63). **A full hearing** on the merits was held before the Judge of Compensation Claims on December 3, 1990 (**R-36**). **At** that hearing the Judge of Compensation Claims ordered a Court-appointed medical examination to **be** paid for **by** the Employer/Carrier (**R-43**). The Employer/Carrier, in **a** Motion for Rehearing, stated that the Judge had no authority to award **a** Court-appointed examination in the absence of conflict in medical evidence (R-166). The Claimant's attorney, at that time, **agreed** to bear the cost of the court ordered examination (R-52). Following the examination, the Judge of Compensation Claims, on May 23, 1991 found that the surgical staple in the Claimant's right shoulder was **a** prothesis. The Employer/Carrier, pursuant to Fla.Stat. 440.19(1)(b), was ordered to **provide** remedial **care** benefits related to the surgical staple (R-178). **The** Judge of Compensation Claims, however, found other claims for indemnity benefits, and medical

benefits not related **to** the staple, were barred by the Statute of Limitations (**R-178**). **The** Judge ordered **the** Employer/Carrier to pay interest, penalties, costs and fees.

Pursuant to **the** Court's order and agreement between the parties, Dr. Ennis evaluated the claimant on March **5, 1991** and **his** report and bills were placed into evidence by joint stipulation (**R-51**). **The** Judge **of** Compensation Claims, entered an order on **June 5, 1991** ordering the Employer/Carrier to pay for the medical bills of Dr. Ennis for the March 5, 1991 evaluation (**R-181,183**).

At the time of the June 5, 1991 order, there were no further issues pending before the Judge of Compensation Claims and **the** Employer/Carrier filed a Notice of Appeal on June **17, 1991** (**R-185,186**). The orders on appeal were: (1) **The** May **31, 1989** order **of the** Judge **of** Compensation Claims finding that **the two-year** statute **of** limitations did not relieve the **Employer/Carrier** from providing remedial attention, and finding that a metal staple is a prosthetic device; (2) **The** order **of** **May** 23, 1991 finding the Employer/Carrier responsible for remedial care and treatment relating to a metallic staple surgically placed in **the** Claimant's shoulder and other related benefits; **and** (3) **The** June **5, 1991** order finding the Employer/Carrier responsible for Dr. Ennis' bill for **his** examination **of** March 5, 1991 and ordering the Employer/Carrier to reimburse **the** Claimant fox **the** payment of that bill, **The** Employer/Carrier appealed all **Orders**.

The Appellants requested that the 1ST DCA grant oral argument on September **6, 1991**. Appellants initial **brief was** filed on

September 6, 1991. On September 24, 1991 Appellees requested oral argument **and** filed a motion for attorney's fees. The Appellees filed an amended answer brief on September 24, 1991 and Appellants replied on October 18, 1991.

Oral argument was granted by the **1ST** DCA and held on Thursday, February 13, 1992.

On April 20, 1992 an opinion was rendered by the 1ST DCA in which it reversed the order of the Judge of Compensation Claims. Universal Rivet, et al. v. cash, Case No. 91-1927. The 1ST DCA held that it was error to conclude that the staple which had been inserted into the Claimant's shoulder in 1986 was a "prosthetic device," requiring application to the claim for "remedial attention" of the two-year Statute of Limitations found in **§440.19(1)(b)**, Fla. Stat. (1985); and reversing the order requiring the Employer and Carrier to reimburse the Claimant for the costs of the March 5, 1991, examination by **Dr. Ennis**. The Court also held: "However, because we believe that this issue is one of considerable concern to the workers' compensation community, we certify to the Supreme Court as one of great public importance, the following question:

WAS THE FIXATION STAPLE INSERTED INTO CLAIMANT'S SHOULDER A "PROSTHETIC DEVICE," AS THAT TERM IS USED IN **§440.19(1)(b)**, FLA. STAT. (1985)?

At the same time, Appellees Motion for Attorney's Fees was denied.

On May 19, 1992, Claimant/Petitioner filed a notice in this Court to invoke its discretionary jurisdiction based upon the order

of the 1ST DCA passing upon a question certified to be of great public importance.

On May 26, 1992 this Court issued an order postponing a decision on jurisdiction and issuing a briefing schedule. This Petitioner's brief is in response to that order.

SUMMARY OF ARGUMENT

The question the 1ST DCA certified to this Court as one of great public importance should be answered in the affirmative, the **order** quashed and the Orders of the Judge of Compensation Claims affirmed. The question certified: "Was the fixation staple inserted into Claimant's shoulder **a** prosthetic device, as that term is used in **§440.19(1)(b)**, Fla.Stat. (1985)?" can only be answered in the affirmative. Whether one relies upon **a** dictionary definition of prosthesis, statutory interpretation, or common sense, the facts remain the same. An artificial device was inserted into the Claimant's body as a result of an injury arising out of and within the course and scope of his employment. This artificial device, in this case a metallic staple, was used to stabilize the Claimant's shoulder and allow it to heal. The implication in the treating physician's testimony, is that once the shoulder had healed there was no longer any need **for** the staple, however, leaving it in the Claimant's body could do no harm. If the shoulder healed, and there was no problem with the staple, it could remain in the Claimant's arm. However, if later on there was **a** problem, the staple should be removed.

The Florida Legislature in the statute excepting prosthetic devices from the Statute of Limitations, specifically used the words "insertion or attachment of a prosthetic device to any part of the body." The staple in question was "attached or inserted" into the Claimant's body during the time he was receiving treatment

for his industrial injuries. When his shoulder began to bother him again, the question arose as to whether the "insertion" of the staple was causing the problem, or whether the staple was still "attached". The question could only be answered by a doctor and testing.

The Judge of Compensation Claims gave the proper definition and scope to the word "prosthetic device". It is not defined in the statute. Here, the metallic staple, surgically implanted in Claimant's right shoulder to repair the torn glenoid ligaments, may need removal, replacement, or adjustment. The Judge of Compensation Claims found the use of a metallic staple in the present circumstance to be a prosthetic device within the scope of the exception of §440.19(1)(b) Fla.Stat. (1985).

The real question, when defining a prosthetic device, is whether it is logical to assume that a staple, or screw, or plate, or pin, inserted in the Claimant's, or anyone's body, to enhance the healing process would some day have to be given attention, replaced, or removed. The need for attention could be the working loose of the device, the deterioration of the device, a recurrence of the injury at the same site, or any number of reasons. Upon the occurrence of one of these events, the device would **have** to "removed" or "**detached**", the opposite of "inserted or attached."

It is evident that the intent of the legislature in this statute was: If because of an injury on the job, the Claimant had a prosthetic device inserted or attached into his body, and if it later needed attention, the Statute of Limitations would not run on

the attention needed for the prosthetic device. In the case before this Court, medical treatment and testing were necessary in order to determine if the staple in the Claimant's shoulder was causing his recurrent pain and needed attention.

A real conflict appears between the decision of the 1ST DCA in Universal Rivets v. Cash and the two Roe cases, City Investing/General Development Corp. v. Roe, 566 So.2d 258 (Fla.1st DCA 1990) and Roe v. City Investing/General Development Corp., 587 So.2d 1323 (Fla, 1991). In the Roe cases, Claimant was awarded both remedial medical treatment and disability payments for insertion of Steffee Plates after the two-year Statute of Limitations had run. Petitioner, Claimant in Universal Rivets v. Cash, was denied medical attention for a metallic staple inserted into his body before the Statute of Limitations had run. He was further denied disability payments during the course of this treatment.

Petitioner submits the results in the two **cases** are unequal and confusing and requests that this Court rule on both the medical and disability entitlement and the definition of a prosthetic device for purposes of Fla.Stat. 440.19(1)(b) to clarify issues for all parties.

ARGUMENT

ISSUE

WAS THE FIXATION STAPLE INSERTED INTO CLAIMANT'S SHOULDER A "PROSTHETIC DEVICE" AS THAT TERM IS USED IN **§440.19(1)(B)** FLA. STAT. (1985)?

Judge Ervin, in his concurring and dissenting opinion in Universal Rivet v. Cash (0-12) narrows the focus of this inquiry to the legal issue rather than the factual determination of the definition of a prosthetic device. Regardless of the dictionary definition accepted or rejected by the Judge of Compensation Claims or the 1ST DCA, there is full agreement that a prosthetic device is an artificial object placed into a human being's body. The various definitions of this artificial object are indeed questions of fact, however, the law of the case, and the intent of the legislature is clearly outlined by both Judge Ervin and his reliance on Justice McDonald's comments in Roe v. City Investing/General Development Corp., 587 So.2d 1323, (Fla. 1991), (McDonald, J., specially concurring).

Judge Ervin does not dispute the true question of the definition of a prosthesis, but, however, he stated:

Nor do I consider that the legislature reasonably contemplated that, in excepting from the Statute of Limitations the insertion or attachment of prosthetic devices as provided in **§440.19(1)(b)**, the exception would not apply as well to the maintenance or repair of such

devices required after the passage of more than two years. (0-14)

Judge Ervin then goes on to cite with approval the statement made by Justice McDonald in Roe 11:

It appears more possible that the legislature intended to provide compensation in a case in which the prosthetic device had been attached or inserted before the statute had tolled and subsequently, the prosthetic device became in need of maintenance or repair after the two-year statute of limitation have lapsed. In such **cases**, there is no question as to what caused the need for treatment. The lack of a causation issue provides a logical distinction between a prosthetic device and other medical treatments and appears to be a rational explanation for the exception.

Roe 11, 587 So.2d 1325, 1356. (Emphasis added)

The majority, in Roe 11, was answering another question certified **as** being of great public importance. In Roe I the question was:

IS CLAIM **FOR** DISABILITY BENEFITS UNDER CHAPTER **440** TIMELY WHEN IT IS FILED WITHIN TWO **YEARS** OF THE DATE THAT THE EMPLOYER/CARRIER PROVIDES REMEDIAL TREATMENT RELATING TO THE INSERTION OR ATTACHMENT OF THE PROSTHETIC DEVICE WHEN THERE PREVIOUSLY OCCURRED A TWO-YEAR PERIOD WHERE NO COMPENSATION BENEFITS WERE PAID OR MEDICAL TREATMENT FURNISHED

City Investing/General Development Corp. v. Roe, 566 So.2d 258, 260. (Fla, 1st DCA 1990)

In Roe 11, this Court, in footnote 3, added a disclaimer, "We address only the certified question and do not address the correctness of the District Court's determination that Steffee Plates are prosthetic devices."

The need for an exception to the two-year Statute of Limitations for prosthetic devices, especially internal ones, stems from

the frequent need for removal, adjustment, repair, or replacement, **and** the serious consequences when one malfunctions. Devices such **as** the metallic staple securing the Claimant's shoulder are subject to mechanical and physiochemical forces within the body. Selection of the proper metallic alloy minimizes the effects of these forces, but corrosion and breakage of an internal fixation device is always a concern. Moreover, the constant movement of a joint often causes such devices to work loose or develop stress cracks or fractures. See generally, Traumatic Medicine and Surgery for the Attorney, by Paul **Kanter**, vol I, page **544**: Attorneys' Text Book of Medicine, 3rd edition, Roscoe and Gray, Section **2.56**.

In the case at bar, the 1ST DCA denied the Claimant's claim for payment of the medical services of Dr. Ennis. When his shoulder became symptomatic again and there was no apparent cause **for** it, it became necessary for the Claimant to seek the services of Dr. Ennis to find out whether the artificial object, the metallic staple placed in his body **as** a result of his industrial injury, was causing the problem. **As** it happens, at this particular juncture, it does not appear that the staple is causing the problem, however, until there was an examination there was no way to know.

The Courts of Florida have consistently held that medical treatment or evaluations to determine a causal relationship between the symptomatology and an industrial accident is compensable. **See generally**: Hamilton v. Early Birds Stud Farms and INS/Etna, **540** So.2d 134 (Fla.1st DCA 1989) ("were tests are intended to better

ascertain the course of Claimant's symptoms and such symptoms may be related to treatment for a compensable injury, Claimant should be awarded diagnostic testing." Citing Sumner v. Gardinier, 526 So.2d 1068,1069 (Fla.1st DCA 1988) and Abbott v. Price Plumbing, Inc., 500 So.2d 698,699 (Fla.1st DCA 1987); Nealy v. City of West Palm Beach, 491 So.2d 585 (Fla.1st DCA 1986) ("where the purpose of the diagnostic test is to determine the cause of the Claimant's symptoms, which symptoms may be related to a compensable accident, the **cost** of the diagnostic test is compensable". Citing Boykin v. American Marine Products, Inc., 395 So.2d 1163 (Fla.1st DCA 1981)

Since the staple was inserted into the Claimant's body before the Statute of Limitations had run, surely the intent of the legislature was that in later years, if he had a problem, he was at least entitled to find out whether or not the cause of the problem was the artificial device.

As medical science develops, the exact definition of a prosthetic device will become broader and be deemed to include things which we are unable to imagine at this point in time. However, the fact of whether or not an artificial device of any sort was inserted or attached into the Claimant's body as **a** result of an industrial injury will not change. It either was or it was not. If it was, then the exception in the statute would apply to this artificial object in the Claimant's body. It would be **as** difficult for this Court to put a time limit on the deterioration of a metallic screw, the deterioration of the bone to which the screw is attached, or the effect of a subsequent accident on the

artificial object, as it was for the legislature. Consequently, the legislature, in the statute, provided an exception when an artificial object is inserted or attached to a body. If, after the Statute of Limitations has run from the date of the last remedial medical treatment and a question of a problem with the artificial device arises, the Statute of Limitations will not apply to remedial treatment for that artificial object only. This court does not have to broaden the statute to **say** that other medical attention is warranted more than two years after the date of the last remedial treatment. It merely must recognize that an artificial object inserted or attached to the Claimant's body may need maintenance, removal, or replacement more than two years after the date of the last remedial treatment.

In the opinions published in the two Roe cases, City Investing\General Development Corp. v. Roe, 566 So.2d 258 (Fla 1st DCA, 1990) and Roe v. City Investing\General Development Corp., 587 So.2d 1323 (Fla 1991) it is not clear whether the "Steffee Plates" were ever inserted into the Claimant's body. It appears that Roe, I and II, are distinguishable from the case at bar because in Roe there was no insertion or attachment of a prosthetic device, either during the initial treatment of the Claimant's injury or within a two-year time period after the date of his last remedial treatment for his injury. It appears that the ruling or decision **was** made upon the doctor's recommendation that a Steffee Plate be inserted into the Claimant's body, after the two-year Statute of Limitations had run. This Court found that the recommendation for insertion of

a prosthetic device was compensable and ordered the Carrier to **pay**. It further found, in answer to the certified question, that because the treatment involved the insertion of a prosthetic device, the Statute of Limitations also had not run upon the Claimant's entitlement to disability benefits.

In the case at bar, Andrew **Cash** did have a device inserted into his shoulder as treatment for his industrial injury. This insertion or attachment occurred fairly quickly after his industrial accident and he was returned to work. Two years after the date of his last remedial treatment, he returned to the doctor because his shoulder was bothering him. The doctor examined him and preliminarily determined that it appeared that the staple was not causing the problem, however, he required several other tests to make sure that the staple was in place and that it had not detached from the bone. There was no other way to find out whether the artificial object in the Claimant's body was the cause of his problem.

The Judge of Compensation Claims found that the staple qualified as a prosthetic device. Consequently the Statute of Limitations had not run for remedial treatment for **the** device, however, she found that the Statute of Limitations had run on entitlement to any disability payment.

On appeal, the 1ST **DCA** reversed, finding first that the staple was not a prosthetic device, but affirmed, even though it was not an issue on appeal, the Judge's denial of compensation disability benefits because the Statute of Limitations had run.

So, we have the following conflict: In Roe there was an injury, treatment, the passage of over two years without treatment, and then a recommendation for the insertion of ~~Steffee~~ Plates. The Claimant was found to be entitled to both the remedial treatment for the insertion of the plates and disability payments during the course of his treatment. In Cash, there was an injury, the insertion of **a** staple, return to work, the passage of **two** years from the date of the last remedial treatment, and a denial of both remedial treatment for the inserted staple and disability benefits. It would appear that if Mr. Roe is entitled to escape the Statute of Limitations and have a device inserted into his body after two years had passed, surely Mr. Cash, who did have an artificial device placed into his body, is entitled to remedial treatment for that artificial device.

Petitioner urges this Court to clarify: (1) the definition of **a** prosthetic device and (2) whether or not the statute refers to insertion and attachment of an artificial device during the treatment of a Claimant and before the Statute of Limitations has run, or whether it means at any time. Further, Petitioner urges this Court to quash the opinion of the 1ST DCA and affirm the Judge of Compensation Claims finding that the Claimant, Andrew cash, was entitled to be provided medical benefits relating to a metallic staple inserted into his body and attached to his arm.

Certainly, if the Claimant is entitled to remedial medical treatment, then under Roe, he should also be entitled to consequent disability compensation. The issue of compensation has not been

raised here and this argument is not a request for award of same, but in view of the broad award in Roe, a pronouncement by this Court on both the medical and disability entitlement, vis-a-vis the Statute of Limitations prohibition, would completely answer this question of great public importance.

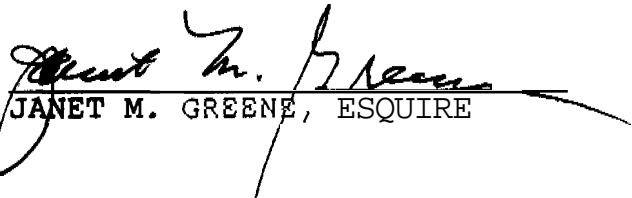
CONCLUSION

The plain meaning and logical reading of Fla.Stat. §440.19 (1)(b), (1985) mandates the conclusion that the Legislature recognized the potential problems inherent in a prosthetic device and provided an exception to the application of the Statute of Limitations for remedial treatment for these devices. A staple, plate, pin, screw, or like artificial device, placed in the body to "fix" it, should qualify for the exception.

If Roe, 11, allows a Claimant both remedial medical and disability benefits for insertion of a plate after the Statute of Limitations has run, no **less** should Cash, who had a staple attached to his body before the Statute of Limitations had run be entitled to medical treatment related to this artificial device.

The question certified by the 1ST DCA should be answered in the affirmative. The order of the 1ST DCA quashed, and the Order of the Judge of Compensation Claims affirmed.

Respectfully submitted this 18th day of June, 1992.


JANET M. GREENE, ESQUIRE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing document was mailed this 18th day of June 1992 to the following parties:

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By: 
JANET M. GREENE

APPENDIX

- I. Order of Judge of Compensation Claims of May 31, 1989
- 11. Order of Florida 1ST DCA of November 8, 1989
- III. Order of Judge of Compensation Claims of May 23, 1991
- IV. Order of Judge of Compensation Claims of June 5, 1991
- V. Order of Florida 1ST DCA of April 20, 1992
- VI. Order of Supreme Court of Florida of May 26, 1992

STATE OF FLORIDA
DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY

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OFFICE OF THE DEPUTY COMMISSIONER

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DISTRICT " K "

ANDREW CASH

Claimant

Claim No.: 267-85-5213

s.

D/A: 2/24/86

UNIVERSAL RIVET, INC. and
NATIONWIDE MUTUAL INSURANCE
COMPANY
Employer/Carrier

CARMEN J. BATTLE, MIAMI, FLORIDA, attorney for claimant.

H.B. YANDLE, WEST PALM BEACH, FL , attorney for employer/carrier.

ORDER

THIS CAUSE came before the undersigned Deputy
Commissioner for hearing on the Claim for Benefits filed
August 24, 1988.

Claim was made for:

(a) Temporary total disability compensation
benefits from February 24, 1986 to present and
continuing to date of maximum medical improvement.

(b) Wage loss benefits from date of maximum
medical improvement and continuing. In the alternative,
permanent total disability benefits from the date of
maximum medical improvement and continuing.

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(c) Determination of the average weekly wage, including all fringe benefits.

(d) Payment of all outstanding medical bills and authorization of remedial treatment, care and attendance, including, but not limited to, authorization of Dr. Robert Ennis.

(e) Future medical care.

(f) Rehabilitation.

(g) Reimbursement for prescriptions, medications and mileage to and from medical treatment and physical therapy.

(h) Attorneys' fees, costs, penalties, and interest based on Employer and Carrier's "bad faith," Claim was defended on the following grounds:

1. Employer and Carrier are not responsible for medical treatment and compensation after July 15, 1988, because the 2-year Statute of Limitations ran as of July 15, 1986. The last day of compensation was May 11, 1986, and the date of the last payment of compensation was May 19, 1986. The date of the last remedial treatment furnished by the Employer and Carrier was July 15, 1986.

2. In the alternative, if the shoulder pin is a prosthesis, then the Statute of Limitations bars all claims except for medical associated with the pin.

3. Apportionment for prior condition.

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At the time of the hearing, the parties stipulate to try the sole issue of the applicability of the Statute of Limitations in Fla. Stat. **Section** 440.19(1)(b) and reserve **all** other **issues** to be tried at a later hearing.

The undersigned **Deputy Commissioner** having considered all evidence presented, including the depositions of Dr. Robert **S. Ennis**, the deposition of the claims representative, **Carol Long**, and testimony of Claimant; having heard argument of counsel; considered memoranda **and** exhibits submitted; and being otherwise fully advised in **the premises**, **does** hereby make **the following findings of fact and** conclusions of law based thereon:

1. **The** Deputy Commissioner has jurisdiction of the parties **and** the subject matter of this claim.

2. The parties stipulate that on February 24, 1986, Claimant sustained a compensable job-related shoulder injury, while lifting a full bucket of rivets.

3. Claimant received temporary total disability **and** temporary partial disability benefits from February 24, 1986 to **May 19, 1986**.

4. On March 31, 1986, the Employer and Carrier authorized Dr. Robert Ennis to perform **an** arthroscopic evaluation and a procedure called staple capsulorrhapy on Claimant's right shoulder. Dr. Ennis' arthroscopic evaluation revealed a detachment of the glenoid rim or capsule with **an** irregular **tear**, wherein Dr. Ennis immediately remedied **this** condition by performing **a staple** capsulorrhapy. During **the** staple

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capsulorrhaphy, Dr. Ennis inserted a long fixation metallic staple to attach the torn glenoid labium and rim to the middle glenohumeral ligaments. Subsequently, a probe revealed that the previously unstable shoulder was made stable.

5. The date of the last authorized medical treatment furnished by the Employer and Carrier was July 15, 1986.

6. The staple was not removed and Claimant's right shoulder remained asymptomatic until August 3, 1988, when Claimant was examined in relation to the surgical implant for pain and decreased range of motion in the right shoulder.

7. The Employer and Carrier refused to authorized further medical treatment for Claimant's right shoulder. Notice to Controvert dated August 12, 1988 was filed and controverted all medical treatment and compensation after July 15, 1988.

8. Claim for Benefits was filed on August 24, 1988.

9. The sale issue to be determined is whether Fla. Stat. Section 440.19(1)(b), the 2-year Statute of Limitations, applies to the right for remedial attention and compensation relating to the insertion of a metallic staple in Claimant's right shoulder. I find that the 2-year Statute of Limitations does not apply to the right for remedial attention relating to the metallic staple inserted in Claimant's right shoulder. The insertion of a metallic staple is within the scope of the 1979 amendment to Fla. Stat. Section 440.19(1)(b), which states "...no Statute of Limitations shall apply to the right for remedial attention relating to the insertion or attachment of a prosthetic device to any part of the body".

ORIGINAL

Dr. Ennis testified **that** both a prosthetic device and an internal fixation device are similar in that each device is artificial, but theoretically, a distinction exists between the **purpose** of each device. The purpose of a prosthetic device is to substitute for a body **part** and remain in the body as a permanent **part** of the anatomy. The purpose of an internal fixation device is to enhance the healing **process** of the body and remain in the body without **further** consequence or removed from the body after **completion of the healing process without altering the body** function.

Since Fla. Stat. Section 440 and Florida case law do not give a definition of a prosthetic device, I accept the definition proffered by Claimant that a prosthesis or prosthetic device is a "replacement of a missing **part** by an **artificial substitute** or ... a device to augment performance of a **natural function**". Taber's Cyclopedic Medical Dictionary, 1392, 15th Ed.

I find that it is **not** within the legislative intent and **scope** of Fla. Stat. Section 440.19(1)(b) to **quibble** over words and narrowly construe "**prosthetic devices**." I do not accept the theoretical distinction of Dr. Ennis as controlling in the interpretation and application of Fla. Stat. Section 440.19(1)(b). The broad definition **above** of a prosthetic device is within the purview of the 1979 amendment of Fla. Stat. Section 440.19(1)(b) and the metallic staple securing Claimant's **shoulder** is within the **scope** of this definition. **Further**, I find the foregoing distinction of Dr. Ennis inconsistent with the application of Fla. Stat. Section 440.19(1)(b) in this case

ORIGINAL

because the metallic staple has impeded **the** healing process of Claimant's right shoulder; **the** metallic **staple** requires removal, replacement **or** adjustment; **and** the metallic **staple** remains permanently inserted **in** Claimant's shoulder **to** attach **the** torn glenoid labium and rim to the glenohumeral ligaments **in order** to **avoid** Further shoulder dislocation **and** crepitation. Today, **the presence of the staple** is no **less** critical to the function of Claimant's **right** shoulder than an **artificial** knee **or** hip would be to the function of **a** leg.

The need for **an** exception to the **2-year Statute of** Limitations for prosthetic **devices**, especially **internal ones**, stems from conclusive medical knowledge that **such devices**, while **reliable**, may need removal, adjustment **and** replacement with the passage **of** time. I find that **this is exactly the situation** above. Claimant testified **that the** present condition of his **right shoulder** with **the** inserted staple **has** continued to cause constant **pain** and limited **range of motion**. Claimant is unable to lift with **his right** arm **and he** overcompensates by using his left **arm and** body.

Although the requirement of **notice was** not raised by the Employer and Carrier **as** a defense, the Employer **and** Carrier defended that **the** last authorized medical care **was on** July 15, 1986; the last payment of compensation **was in** **May 1986**; **and the Claim was filed** "well over two years later ", This is incorrect. The Claim was not **filed** "well over two year later" but **was filed** only 5-1/2 **weeks after** the **2-year** period of **the** last authorized medical care authorized by the Employer and Carrier on **July 15, 1986**.

OR AL


The purpose of the notice requirement is to enable the Employer to protect itself by prompt investigation and treatment of the injury. The Employer makes responsible financial plans for medical costs or: for the Carrier to set up proper reserves. I find that Claimant notified the Employer and Carrier as soon as the right: shoulder with the inserted metallic staple began to malfunction. This is exactly the situation contemplated by the amendment to the statute which excludes prosthetic devices from the 2-year statutory period.

WHEREFORE, IT IS ORDERED by the undersigned Deputy Commissioner that:

1. Fla. Stat Section 440.19(1(b) provides that there is no 2-year Statute of Limitations which relieves Carrier, NATIONWIDE MUTUAL INSURANCE COMPANY, and Employer, UNIVERSAL RIVET, INC., of the responsibility for providing remedial attention in this cause.

2. Jurisdiction is reserved for a ruling on the balance of the issues which the parties stipulate will be tried at a later hearing.

DONE AND ORDERED THIS 31st day of May, 1989.



 JUDITH S. NELSON
 DEPUTY COMMISSIONER

ORIGINAL

THIS IS TO CERTIFY that the foregoing Order was entered on this 31st day of MAY, 1989, and that a copy thereof was sent to the following:

Claimant: ANDREW CASH
1210 N. 71st Terrace
Hollywood, FL 33024

Attorney for Claimant: CARMEN J. BATTLE, ESQUIRE
Underwood, Gillis & Karcher
44 W. Flagler St., PH Suite
Miami, FL 33130

Employer: UNIVERSAL RIVET, INC.
7590 W. 19th Court
Hialeah, FL 33014

Carrier: NATIONWIDE MUTUAL INS. CO.
P. O. Box 1781
Gainesville, FL 32608

Attorney for Employer/Carrier:
H. B. YANDLE, ESQUIRE
319 Clematis Street
Comeau Building, Suite 600
West Palm Beach, FL 33401-4620

Thetta Y Bonilla
Secretary to Deputy Commissioner

0 3 AL

RECEIVED

NOV 13 1989

Judges of
Compensation Claims
Miami, Florida

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Fl. 32301

Telephone (904) 488-61.51

DATE- November 8, 1989

LT 267-85-5213

CASE NO. 89-1743

UNIVERSAL RIVET ,INC. ,et al vs.
appellant/petitioner

ANDREW CASH
appellee/respondent

ORDER

The court has considered appellants' response to the show cause order of October 17, 1989. This appeal is dismissed for lack of jurisdiction. This dismissal is without prejudice to appellants' right to raise the statute of limitations issue on final appeal.

Appellee's motion for attorney's fees, filed September 19, 1989, is granted. The issue of the attorney's fee award is remanded to the lower tribunal for a determination of the assessment. The court notes that appellee failed to raise the jurisdictional issue which requires dismissal and filed an answer brief instead. If an appeal is taken from the final order, appellee's research on the statute of limitations will be considered then. The judge of compensation shall take these factors into consideration when the attorney's fee award is made.

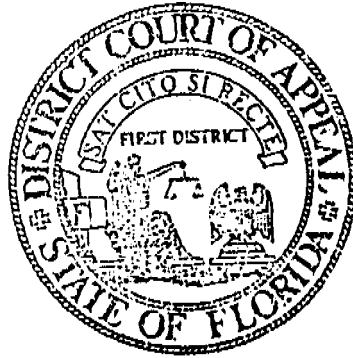
By order of the court
RAYMOND E. RHODES, CLERK

I HEREBY CERTIFY that a true and correct copy of the above was mailed this date to the following:

Kimberly Hill
Thomas W. Conroy
Henry T. Wihnyk
Judith S. Nelson
Shirley A. Walker

Carmen J. Battle
H. B. Yandle

Laurie Black
Deputy Clerk



100

1788-196
May 9, 1991

STATE OF FLORIDA
DEPARTMENT OF LABOR & EMPLOYMENT SECURITY
DIVISION OF WORKERS COMPENSATION
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
DISTRICT "K"

ANDREW CASH,
Claimant,

CLAIM NO. 267-85-5213

D/A: 2/24/86

vs.

JUDGE NELSON

UNIVERSAL RIVET, INC. AND
NATIONWIDE MUTUAL INSURANCE
COMPANY,

Employer/Carrier.

TO: KIMBERLY HILL, ESQ., Attorney for Employer/Carrier
2620 Hollywood Blvd., Hollywood, FL 33020

JAMES T. ARMSTRONG, ESQ., Attorney for Claimant
44 W. Flagler St., PH Suite, Miami, FL 33130

ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for hearing on the Claim for Benefits filed 8/24/88.

Claim was made for:

- a. Temporary total disability (TTD) compensation benefits from 2/24/86 to present and continuing to date of maximum medical improvement (MMI).
- b. Wage loss benefits from date of MMI and continuing. In the alternative, permanent total disability benefits from the date of MMI and continuing.
- c. Determination of the average weekly wage, including all fringe benefits.

~~173A~~

d, Payment of **a** 1 outstanding **medical bills** and authorization for remedial treatment, care and attendance, including but not limited to, authorization of Dr. Robert Ennis,

e. **Future medical care,**

f. Rehabilitation,

g. **Reimbursement for prescriptions, medications and mileage to and from medical treatment and physical therapy.**

h. Attorneys' **fees, costs,** penalties, **and** interest based on Employer and Carrier's "**bad faith.**"

The claim was defended on the following grounds:

1. Employer and Carrier are not responsible for medical treatment **and** compensation after **7/15/88 because** the two **year** statute of limitations ran as of **7/15/88. The last day** of compensation was **5/11/86, and the date of the last** payment of compensation was **5/19/86. The date of the last remedial** treatment furnished by **the** Employer and Carrier was **7/15/86.**

otherwise fully advised in the premises, does hereby make the following findings of **fact** and conclusions of law based thereon:

1. **The Judge of Compensation Claims** has jurisdiction of the parties and the subject **matter** of this claim.

2. The parties stipulate that on **2/24/86**, Claimant sustained a compensable job related **shoulder injury**, while lifting a full bucket of rivets.

3. The Claimant received TTD **and** TPD benefits from **2/24/86** to **15/19/86**,

4. On **3/31/86**, the Employer **and** Carrier authorized Dr. **Robert Ennis** to perform **an** arthroscopic evaluation **and** a **procedure** called staple capsulorrhaphy **on** Claimant's right shoulder, Dr. Ennis' arthroscopic evaluation revealed a detachment of the glenoid rim or /,capsule with an irregular tear, wherein Dr. Ennis immediately remedied this condition by performing a staple capsulorrhaphy. During the staple capsulorrhaphy, Dr. Ennis inserted a long fixation metallic staple to attach **the** torn glenoid labium and rim to the middle glenohumeral ligaments. Subsequently, a probe revealed that **the** previously unstable shoulder was made stable.

5. **The** date **of** the last authorized medical treatment furnished by the Employer **and** Carrier was **7/15/86**.

6. The staple was not removed **and** the Claimant did not **seek** authorized medical care again until **8/3/88**, **when** Claimant was examined in relation to the surgical implant **for** pain and decreased range of motion in the right shoulder.

~~N/A~~

7. The **Employer** and **Carrier** refused to authorize further medical treatment for Claimant's right shoulder. Notice to Controvert **dated 8/12/88** was filed and controverted all medical treatment compensation **after 7/15/88**.

8. Claim for Benefits **was** filed on **8/24/88**. Claim **for** Benefits **was** filed on **8/24/88** requesting TTD compensation benefits from **2/24/86** to present, **and** continuing to date of MMI; **wage loss** benefits from date of MMI **and** continuing; payment of past **and** future remedial treatment, care and attendance not relating to replacement or removal of the metallic staple securing Claimant's shoulder; rehabilitation; reimbursement for prescriptions, medications and mileage to **and** from medical treatment and physical therapy, not relating to the replacement or removal of the metallic staple securing Claimant's shoulder and, **future** medical care not relating to the replacement or removal of the metallic staple securing Claimant's shoulder, are barred by the Statute of Limitations, **and** that Claimant sought medical care on **8/3/88**, which is a period greater than two **bears** from 7/15/86.

9. I find that the two **year** Statute of Limitations does not **apply** to the **right for** remedial attention relating to the replacement or removal of the metallic **staple** inserted in Claimant's right shoulder. The insertion, replacement, or removal of the metallic **staple** is within the scope of **the 1979** amendment to the Fla. Stat. Section 440.19(1)(b), which states: "...no Statute of Limitations shall supply to the sight for remedial attention relating to the insertion or attachment of a prosthetic device to **any part of the body.**"

Dr. Ennis testified that both the prosthetic device and internal fixation device are similar in that each device is artificial, but theoretically, a distinction exists between the purpose of each device. The purpose of a prosthetic device is to substitute for a body part and remain in the body as a permanent part of the anatomy. The purpose of an internal fixation device is to enhance the healing process of the body and remain in the body without further consequence or removal from the body after completion of the healing process without altering the body function.

Since the Florida Statute Section 440 and Florida case law do not give a definition of a prosthetic device, I accept the definition proffered by Claimant that a prosthesis or prosthetic device is a "replacement of a missing part by an artificial substitute or ... a device to augment performance of a natural function." Taber's Cyclopedic Medical Dictionary, 1392, 15th Ed.

I find that it is not within the legislative intent and scope of Fla. Stat. Section 440.19(1)(b) to quibble over words and narrowly construe "prosthetic devices." I do not accept the theoretical distinction of Dr. Ennis as controlling in the interpretation and application of Fla. Stat. Sec. 440.19(1)(b). The broad definition above of a prosthetic device is with the purview of the 1979 amendment of Fla. Stat. Sec. 440.19(1)(b) and the metallic staple securing the Claimant's shoulder is within the scope of this definition. Further, I find the foregoing distinction of Dr. Ennis inconsistent with the application of Fla. Stat. Sec. 440.19(1)(b) in this case because the metallic staple has impeded the healing process

'of the Claimant's right shoulder; the metallic staple may require removal, replacement or adjustment; and the metallic staple remains permanently inserted in Claimant's shoulder to attach the torn glenoid labium and rim to the glenohumeral ligaments in order to avoid further shoulder dislocation and crepitation,

The need for an exception to the two year Statute of Limitations for prosthetic devices, especially internal ones, stems from the conclusive medical knowledge that such devices, while reliable, may need removal, adjustment and replacement with the passage of time. I find that this is exactly the situation of above. Claimant testified that the present condition of his right shoulder with the inserted staple has continued to cause constant pain and limited range of motion. Claimant is unable to lift his right arm and overcompensates by using his left arm and body.

Although the requirement of notice was not raised by the Employer and Carrier as a defense, the Employer and Carrier defended that the last authorized medical care was on 7/15/86; the last payment of compensation was in May, 1986; and the claim was filed "well over two years later." This is incorrect. The claim was not filed "well over two years later" but was filed only 5 1/2 weeks after the two year period of the last authorized medical care authorized by the Employer and Carrier on 7/15/86, with the Claimant first seeking medical care on 8/3/88.

The purpose of the notice requirement is to enable the Employer to protect itself by prompt investigation and treatment of the injury. The Employer makes responsible financial plans for medical

costs or for the Carrier to set up proper reserves. I find that Claimant notified the Employer and Carrier as soon as the right shoulder with the inserted metallic staple began to malfunction. This is exactly the situation contemplated by the amendment to the statute which excludes prosthetic devices from the, two year statutory period.

I find that the Statute of Limitations bars Andrew Cash's claim for disability benefits, wage loss benefits and medical benefits which are not related to replacement or removal of the surgical

1. Fla. Stat. 440.19(1)(b) provides that there is no two year Statute of Limitations which relieves Carrier, NATIONWIDE MUTUAL INSURANCE COMPANY, and Employer, UNIVERSAL RIVET, INC., of the responsibility for providing remedial attention in this cause for replacement or removal of the surgical staple in Andrew Cash's right shoulder, and that the Carrier shall provide such remedial care, attendance, and other benefits, related thereto; and, the Carrier shall pay for such remedial care, attendance, and other related benefits.

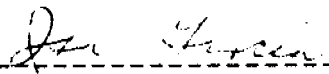
2. Claimant's attorney is entitled to a fee, and taxable costs, with jurisdiction being reserved for the determination of the amount of fees and costs at a later hearing.

DONE and ORDERED this 23d day of May, 1991.



JUDGE JUDITH NELSON

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of May, 1991, to thr above named addressees and to: ANDREW CASH, 1210 N. 71 Terrace, Hollywood, FL 33024 and UNIVERSAL RIVET, INC., 7.590 W. 19th Court, Hialeah, FL 33014, and NATIONWIDE MUTUAL INS. CO., P. O. Box 1781, Gainesville, FL 32608.



Secretary to Judge Judith Nelson

STATE OF FLORIDA
DEPARTMENT OF LABOR & EMPLOYMENT SECURITY
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS
DISTRICT "K"

ANDREW CASH,
Claimant

Claim No. 267-85-5213

D/A: 02/24/86

vs.

UNIVERSAL RIVET, INC., and
NATIONWIDE MUTUAL INSURANCE
COMPANY,

Employer/Carrier

James T. Armstrang, Esq., Miami, Florida, Counsel for Claimant
Kimberly Hill, Attorney-at-Law, Hollywood, Florida, Counsel for E/C

ORDER

THIS CAUSE came before the undersigned Judge of Compensation Claims for hearing on the Claim for Benefits filed April 3, 1991. Claim was made for (a) reimbursement of Dr. Ennis' exam of March 5, 1991; (b) attorney's fees, penalties, and interest.

The claim was defended on the following grounds:

1. The employer and carrier are not responsible for Dr. Ennis' examination of March 5, 1991, because the two-year statute of limitations ran as of 7/15/88. The examination of March 5, 1991, was a Court Ordered Medical Examination.

2. As a Court Ordered Medical Examination, the cost could not be charged to the employer/carrier unless there was a conflict in the medical evidence, which there was not in this case.

As the undersigned Judge of Compensation Claims, having

considered all the evidence presented, including **the** report of Dr. Ennis dated March **5**, 1991, and the bill of Dr. **Ennis** in **the** amount of **\$280**, and having **heard** argument of counsel, and being otherwise fully advised in **the** premises, **does** hereby make the following findings of fact **and** conclusions of law based thereon:

1. The Judge of Compensation Claims **has** jurisdiction of **the** parties and the subject matter of this **claim**.

2. That **Dr. Robert** Ennis' examination of **the** claimant on **March 5**, 1991, **was** ~~was~~ medical treatment relating to the replacement or removal of the surgical staple in **ANDREW CASH's** right shoulder.

3. I conclude **as** a matter of law that **the** Statute of Limitations is not **a** bar to **the** medical **care** rendered to **ANDREW CASH** on **March 5**, 1991, by Dr. Ennis.

4. I further find that claimant's attorneys are **entitled** to **fees**, based on the employer/carrier's bad faith.

WHEREFORE, it is ORDERED by the undersigned Judge of Compensation Claims **that**:

1. **The carrier, NATIONWIDE MUTUAL INSURANCE COMPANY**, and employer, **UNIVERSAL RIVET, INC.**, shall **pay for the** remedial **care** and attendance **rendered** by Dr. **Ennis** on **March 5**, 1991. **As** Dr. Ennis **has** been **paid by the** claimant, payment of **\$280** shall be made by the **Employer/Carrier** to **the** claimant.

2. Claimant's attorney is entitled to **a** fee to be **paid** by **the** employer/carrier, with jurisdiction being reserved for the

determination of the amount of fees and costs at a later hearing.

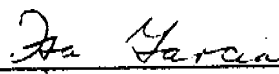
DONE AND ORDERED this 5th day of June 1991.



 JUDITH S. NELSON,
 Judge of Compensation Claims

THIS IS TO CERTIFY that the foregoing Order was entered on this 5th day of June 1991, and that a copy thereof was sent to the following:

Claimant:	Andrew cash 1210 North 71st Terrace Hollywood, Florida 33024
Claimant's Attorney:	James T. Armstrong, Esq. Underwood, Gillis & Karcher, P.A. 44 West Flagler Street, PH Suite Miami, Florida 33130
Employer:	Universal Rivet, Inc. 7590 West 19th Court Hialeah, Florida 33014
Carrier:	Nationwide Mutual Insurance Co. P.O. Box 1781 Gainesville, Florida 32608 Attn: Debra Keese
Employer/Carrier's Attorney:	Kimberly A. Hill Attorney-at-law 2620 Hollywood Boulevard Hollywood, Florida 33020



 Secretary to
 Judge of Compensation Claims

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

UNIVERSAL RIVET, INC, and
NATIONWIDE MUTUAL INSURANCE
COMPANY,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF *IF* FILED.

Appellants,

CASE NO.: 91-1927

v.

ANDREW CASH,

Appellee.

Opinion filed April 20, 1992.

An Appeal from an order of the Judge of Compensation Claims
Judith S. Nelson.

Kimberly A. Hill of Conroy, Simberg & Lewis, P.A., Hollywood, for
Appellants.

James T. Armstrong of Underwood, Gillis & Karcher, P.A., Miami,
for Appellee.

WEBSTER, J.

In this workers' compensation appeal, the employer and carrier challenge decisions of the judge of compensation claims holding that "remedial attention . . . for replacement or removal of [a] surgical staple in [claimant's] right shoulder" is not barred by the statute of limitations; and ordering the employer

and carrier to **pay** for an examination of claimant **by** a physician.
We reverse.

On February 24, 1986, claimant sustained a compensable job-related injury to his right shoulder. In March 1986, the employer **and** carrier authorized Dr. Robert S. Ennis, a board-certified orthopedic surgeon, to perform an arthroscopic evaluation of claimant's shoulder and, if necessary, a procedure called a staple capsulorrhaphy. Dr. Ennis' arthroscopic examination revealed that claimant **had** a torn glenoid ligament. Therefore, Dr. Ennis performed a staple capsulorrhaphy.

According to Dr. Ennis, the procedure involved placing the torn ligament in its proper **position and** then inserting what he referred to as an "internal fixation device," known as a "long fixation **staple,**" through the **ligament and into** the bone of the anterior portion of the shoulder joint. The purpose of the staple was to hold the ligament in its proper position until **the** normal healing process had occurred. Dr. Ennis **said** that one could think of the staple as "(e|ssentially . . . a metal stitch." He described the staple as "a very small metal device" "about the **size** of an eraser on a pencil." Normally, the staple remains permanently in place after the ligament has healed. At that point, however, it serves no further purpose.

Claimant's recovery was essentially uneventful. On May 8, 1986, claimant was permitted to return to light-duty work. (The employer and carrier paid claimant disability benefits from February 24 to May 19, 1986.) Dr. Ennis **last saw** claimant on July 15, 1986.

On August 3, 1988, claimant returned to Dr. Ennis' office, "complaining of ache and discomfort about his right shoulder." Claimant was seen **by** one of Dr. Ennis' associates, Dr. Dennis. According to Dr. Dennis, claimant reported that he **had** had some "mild difficulty" since Dr. Ennis had performed **the** staple capsulorrhaphy, but that the pain had recently become significantly more **severe**. Dr. Dennis had x-rays taken, from which he concluded that the shoulder appeared normal and that **the** staple was in **its proper** place. Medication and physical therapy **were** recommended.

Claimant **was** seen by Dr. Ennis or an associate on three additional occasions subsequent to **the August 3** visit. On **August 16**, 1988, Dr. Ennis noted:

(Claimant) relates **his** shoulder pain back approximately 18 months **ago** when he apparently had **an** injury **with** his motorcycle and states up until that time his shoulder **was** fine and pain free. Subsequently he began experiencing severe **pain** in the shoulder which gradually improved but over the last 8 months his shoulder has become increasingly painful until the point where he is unable to move it without considerable discomfort. . . . I have reviewed the x-rays taken by **Dr. Dennis** which **show** that the anterior glenoid staple remains in good position and **does not appear** to be impinging on the shoulder in any movement. However, because of the local discomfort in the shoulder, it is difficult to tell whether subluxation is present **and** whether the capsule may have been ripped from the **staple** capsulorrhaphy at the time of his injury 1 1/2 years **ago**. . . . I **think that he has rotator cuff** tendinitis at this point and an early capsulitis **as well**. I **am** not sure that an arthroscopic evaluation of the shoulder would be of benefit **at this time**

On September 27, 1988, claimant reported that he "**ha[d]** returned to his regular activities which he is able to **do**." **Finding that**

claimant "ha[d] regained the full range of motion in his right arm," Dr. Ennis released claimant, telling claimant to return should **any new problem arise.**

The **employer** and carrier **refused** to pay for claimant's visits to Dr. Ennis **and** his associates, or to authorize any further treatment, on the ground that the statute of limitations had run. Therefore, on August 24, 1988, claimant filed a claim, seeking **temporary total disability benefits from February 24, 1986, to the date of filing, and until the date of maximum medical improvement; wage loss benefits from the date of maximum medical improvement and continuing or, in the alternative, permanent total disability benefits from the date of maximum medical improvement and continuing; payment of outstanding medical bills; authorization of future medical care; and attorney fees, costs, penalties and interest.** The **employer and carrier responded** that claimant 'was not entitled to any benefits because the 2-year **statute** of limitations **had** run; or, "[i]n the alternative, if **the shoulder pin is a** prosthesis, then the (s)tatute of (l)imitations bars all claims except for medical associated with the pin."

To the extent **relevant** to this **appeal**, Section 440.19(1)(a), Florida Statutes (1985), provides that "[t]he right to compensation for disability, rehabilitation, impairment, **or wage loss . . . shall be** barred unless a claim therefor . . . **is filed . . . within 2** years after the date of the last payment of compensation or **after the date** of the last remedial treatment . . .

. furnished **by the** employer." Section 440.19(1)(b) provides, in relevant **part**, that "{a}ll **rights** for remedial attention . . . shall be barred unless a claim therefor . . . is filed . . . within **2 years after** the date of **the** last payment of compensation or . . . after the **date** of the last remedial attention . . . furnished **by** the employer." However, subsection(1)(b) also contains the following exception: "no statute of limitations shall **apply** to the right for remedial attention relating to the insertion or attachment of a prosthetic device to any part of the body."

On May 31, 1989, the judge of compensation claims entered an order in which she concluded that the **staple** inserted by Dr. Ennis into claimant's right shoulder in 1986 was a "prosthetic device," within **the** meaning of that term **as** used in Section 440.19(1)(b). **Therefore**, the judge of compensation claims held that "the 2-year (~~s~~)tatute of (l)imitations [found in Section 440.19(1)(b)] **does not apply** to the right for remedial attention relating to the **metallic staple inserted in [c]laimant's** right shoulder," Jurisdiction **was** reserved to address all of the remaining issues at a later date. The employer and carrier sought review in this court of the order of the judge of compensation claims. In an unpublished order, this court dismissed the **appeal** for lack of jurisdiction, "without prejudice to [**the** employer's and carrier's] right to raise the statute of limitations ~~issue~~ an final **appeal**."

A further hearing was held before the judge of compensation claims, to address all pending matters, on December 3, 1990. Because claimant's attorney represented that Dr. Ennis had suggested that "additional procedures or examinations might be in order" to determine whether the staple **was** causing claimant's complaints, the judge of compensation claims orally ordered the employer and carrier to pay the cost of "a one-time exam" by Dr. Ennis. (After **the** hearing, to induce the employer **and** carrier to withdraw **a** pending request for rehearing, the claimant agreed initially to bear ~~the~~ coat of the examination.)

Dr. Ennis examined claimant on March 5, 1991. Dr. Ennis reported that claimant **had** full **range** of motion in his right shoulder, although claimant complained "of some mild discomfort." The staple continued to appear ~~stable~~ in x-rays. While removal of the staple was an option should claimant's complaints continue, Dr. Ennis **was** of the opinion that, "in all probability," claimant's discomfort **was** attributable to **scar** tissue, rather than to the **staple**. Dr. Ennis concluded that claimant could "continue to work **at** his regular job activities without restriction." On April 1, 1991, claimant filed **a** claim for reimbursement of the **cost** of the examination.

On May 23, 1991, the judge of compensation claims entered a second order which ~~once~~ again held that the **staple** was **a** "prosthetic device," within the meaning of that term **as** used in Section **440.19(1)(b)**; and that, therefore, that Section's 2-year statute of limitations **did** "not apply to the right for remedial

attention relating to the replacement or removal of the metallic staple inserted in [c]laimant's right shoulder." The judge of compensation claims also hold that, because the date of the last authorized medical treatment furnished before claimant returned to Dr. Ennis on August 3, 1988, had been July 15, 1986 (and no compensation had been paid since May 19, 1986), all of the claims other than that for "medical benefits . . . related to replacement or removal of the surgical staple" were barred by the 2-year statute of limitations. (As the staple had not been replaced or removed, we assume that the judge of compensation claims was referring to potential future claims for such "medical benefits.")

On June 5, 1991, the judge of compensation claims entered a third order, in which she "conclude[d] as a matter of law" that the 2-year statute of limitations did not "bar . . . the medical care rendered to [c]laimant] on March 5, 1991, by Dr. Ennis" (i.e., the examination). Therefore, over objection by the employer and carrier, she ordered the employer and carrier to reimburse claimant for the cost of that examination. The employer and carrier now seek review of the orders of the judge of compensation claims concluding that the statute of limitations "does not apply to the right for remedial attention relating to the replacement or removal of the metallic staple"; and directing them to reimburse claimant for the cost of the examination by Dr. Ennis. (Claimant does not seek review of any of the rulings below which were adverse to him.)

Whether or not the staple inserted by Dr. Ennis into claimant's shoulder is a "prosthetic device" is, we believe, a mixed question of law and fact. First, the meaning of the term, **as** used in the statute, must **be** ascertained. Then, the facts, as developed below, must be analyzed to determine whether or not the **staple** fits within the statutory meaning.

The term "prosthetic device" is not defined in Chapter 440, Florida Statutes (1985). (Nor, for that matter, has it been defined in any of the succeeding versions of that Chapter.) "[I]f a term is not defined in a statute . . . , its common ordinary meaning applies." Department of Administration v. Moore, 524 So.2d 704, 707 (Fla. 1st DCA 1988).

"Prosthetic" is merely the adjectival **form of** the noun "prosthesis." "Prosthesis" is defined variously **as** "an artificial device to **replace** a missing part **of** the body," Webster's Third New International Dictionary 1822 (unabridged); "[a]n artificial replacement **for** a **part** of the body," XII The Oxford English Dictionary 672 (2d ed.); "a device, either external or implanted, that substitutes for or supplements a missing or defective **part** of the body," The Random House Dictionary of the English Language 1553 (2d ed. unabridged), The definitions found in medical dictionaries are consistent: "[a]n artificial part or substitute for a missing natural **part** of the body, **as** a limb, denture, eye, **etc.**," 3 J.E. Schmidt, M.D., Attorneys' Dictionary of Medicine P-345; "[a]n artificial substitute for a missing part, **as** denture, hand, leg, eye,"

Blakiston's New Gould Medical Dictionary 972 (2d ed.); "an artificial substitute for a missing body part, such as an arm or leg, eye or tooth, used for functional or cosmetic reasons, or both," Dorland's Illustrated Medical Dictionary 1369 (27th ed.). From these definitions (and in the absence of any suggestion to the contrary from the legislature), we conclude that the term "prosthetic device," as used in Section 440.19(1)(b), Florida Statutes (1985), was intended to refer to an artificial substitute or replacement, whether external or implanted, for a missing or defective natural part of the body. Applying this definition to the facts developed below regarding the staple inserted into claimant's shoulder, we conclude, further, that the staple does not fit within the definition; and, therefore, is not a "prosthetic device" for purposes of Section 440.19(1)(b).

The only evidence as to the purpose of the staple is found in Dr. Ennis' testimony: (There was no other medical evidence presented.) Dr. Ennis testified that the staple was an "internal fixation device," rather than a "prosthesis or prosthetic device." He described it as "(e)ssentially . . . a metal stitch." When asked to explain the difference between an "internal fixation device" and a "prosthesis or prosthetic device," Dr. Ennis explained that the latter "is a substitute for a normal body part"; once substituted, "you could not remove it without removing a specific important function." An "internal fixation device," on the other hand, may be either "artificial or naturally occurring." "It only has the limited function of

holding something in place while something is healing. After that, it's superfluous"

Because the **staple** is not a "prosthetic device" within the meaning of that term **as** used in Section 440.19(1)(b), Florida Statutes (1985), the exception to the 2-year statute of limitations, pertaining to "remedial attention relating to the insertion or attachment of a prosthetic device to any **part** of the body," is inapplicable. Therefore, like the other claims presented below, which the judge found to be **barred**; **so**, too, is the claim for remedial attention related to replacement or removal of **the staple**, including the claim for reimbursement of the cost of the 1991 examination by Dr. Ennis. Moreover, even if the staple **did** qualify **as** a "prosthetic device," the claim for reimbursement of the fee charged **by** Dr. Ennis for his 1991 examination would still **be** barred **by** the 2-year statute of limitations. This is true **because**, in our opinion, it is **clear** that the visit to Dr. Ennis in 1991 had nothing whatsoever to do with "the insertion or attachment **of**" **such a** "device."

Based upon **the** foregoing **analysis**, **we** hold that it **was** error to conclude that the **staple which had** been inserted into claimant's shoulder in 1986 **was a** "prosthetic device," precluding application to the **claim** for "remedial attention" of the 2-year statute of limitations found in Section 440.19(1)(b), Florida Statutes (1985); and to order the employer **and** carrier to

reimburse claimant for the cost of the March 5, 1991, examination by Dr. Ennis. Accordingly, we reverse. However, because we believe that this issue is one of considerable concern to the workers' compensation community, we certify to the Supreme Court, as one of great public importance, the following question:

WAS THE FIXATION STAPLE INSERTED INTO CLAIMANT'S SHOULDER A "PROSTHETIC DEVICE," AS THAT TERM IS USED IN SECTION 440.19(1)(b), FLORIDA STATUTES (1985)?

REVERSED.

ALLEN, J., CONCURS; ERVIN, J., CONCURS AND DISSENTS WITH WRITTEN OPINION.

ERVIN, J., concurring and dissenting.

The issue in this **case** is whether the judge of compensation claims erred by concluding that the metallic **staple** inserted in claimant's shoulder constitutes a prosthetic device within the meaning of Section 440.19(1)(b), Florida Statutes (1985), which thereby precluded application of the two-year statute of limitations to his claim for medical benefits. Initially, I agree that appellant correctly **states** our review standard, namely, that we must determine whether the judge's **award** of medical treatment is clearly erroneous, meaning unsupported by substantial evidence, contrary to the clear weight of evidence, or induced by an erroneous view of the law. See Black's Law Dictionary 251 (6th ed. 1990).

Upon consideration of the issue and the record on **appeal**, I **am of the same view** Justice McDonald expressed in his concurring opinion in Roe v. City Investing/General Development Corp., 587 So.2d 1323, 1325 (Fla. 1991) (McDonald, J., specially concurring), that is, **although** I am not positive that the internal fixation device¹ described by the treating physician qualifies **as a prosthesis, such** was a fact question and I cannot

¹As reflected in the majority's opinion, the operating physician, Dr. Ennis, described the metallic **staple** as an "internal fixation device." "Internal fixation" is defined as "[t]he surgical procedures of **fastening together the ends of a fractured bone by means of metal plates, wires, nails, or screws applied directly to the affected bone, under the soft tissues.**" 2 J.E. Schmidt, Attorneys' Dictionary of Medicine and Word Finder 1-83 (1992).

say that the judge's determination in this regard was clearly erroneous **based** on the evidence **below**.

The ordinary definition of prosthesis is , **as stated** in the majority's opinion, ante at 8-9, that it is an artificial device designed to replace a missing **part** of the body, typically a limb, denture, eye, etc. The judge **below**, however, accepted a definition somewhat different from those commonly used in defining the term. That definition, found in Taber's Cyclopedic Medical Dictionary 1392 (15th ed.) [hereinafter Taber's], states that prosthesis is a "replacement of a missing part by an artificial substitute or . . . a device to ausment performance of a natural function." (Emphasis **added**.) Moreover, one of the treatises **the** majority relies upon, Dorland's Illustrated Medical Dictionary 1369 (27th ed. 1988), is not necessarily supportive of a contrary view. While stating the common definition that a prosthesis is "an artificial substitute for a missing body part," it continues **by** listing **as one** of several examples therefor **an** ocular **prosthesis, with the** comment: "[A]ny other **aid** to vision, e.g., eyeglasses or occluders." (Emphasis **added**.) Although eyeglasses cannot **be** considered **as** an artificial substitute for a missing body **part**, they are obviously **designed** to augment or improve one's deficient vision.

I have no difficulty in accepting appellant's argument that the staple inserted in claimant's right shoulder does not fit the commonly accepted portion of Taber's definition of prosthesis, nevertheless neither appellant nor the majority **can muster** a

convincing case that the device **does** not **otherwise** "augment performance of a natural function." Indeed, the judge's implicit finding in such regard is fully supported by the record. Dr. Ennis testified that **the** device **was** "used to **fix** an injured part and to hold it in place while **the** normal **processes** of healing occur. At that point **the** fixation device can either be left in place permanently or can **'be** removed." Clearly both the record and the alternative definition found in Taber's supports the judge's determination that the metallic **staple** was a prosthetic **device**.

Nor do I consider that the legislature reasonably contemplated **that**, in excepting **from the** statute of limitations the insertion or attachment of **prosthetic** devices, as **provided** in section 440.19(1)(b), the exception would not **apply as** well to **the** maintenance or repair of such devices required **after** the passage of more than two years.² Indeed this view coincides precisely with the following statements made by Justice McDonald:

It appears more plausible that the legislature intended to provide compensation in cases in **which** the prosthetic device had been **attached** or inserted **before** the statute **had** tolled and subsequently, the prosthetic device became in need of maintenance or repair **after** the two-year limitations period had lapsed. In such cases there is no question **as** to what **caused** the need for

²The device was placed in claimant's right shoulder during his initial remedial treatment, and he did not seek medical attention therefor until **after** the expiration of the statutory two-year period.

treatment. The lack of a causation issue provides a logical distinction between prosthetic devices and other medical treatments and appears to be a rational explanation for the exemption.

Roe, 587 So.2d at 1325-1326 (McDonald, J., specially concurring) (emphasis added).

In that the remedial treatment furnished in the present case after the termination of the two-year limitation period was required in order to decide whether the pain in claimant's shoulder was caused by the prosthesis previously inserted, such treatment was, in my judgment, not barred by the statute of limitations. I would therefore affirm the orders on review in their entirety, but concur with the majority in certifying the question to the Florida Supreme Court.

Supreme Court of Florida

TUESDAY, MAY 26, 1992

ANDREW CASH,

**

Petitioner,

**

Case No. 79,896

vs.

**

District Court of Appeal,
1st District - No. 91-1927

UNIVERSAL RIVET, XNC., ET AL.,**

**

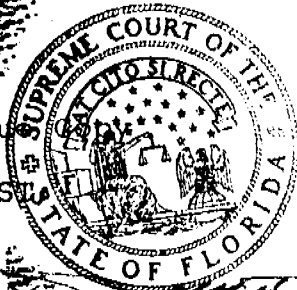
Respondent,

ORDER POSTPONING DECISION ON JURISDICTION AND BRIEFING SCHEDULE

Handwritten initials: J.S.

The Court has postponed its decision on jurisdiction. Petitioner's brief on the merits shall be served on or before June 19, 1992; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all briefs.

The Clerk of the District Court of Appeal, First District, shall file the original record on or before July 24, 1992.



A True
TESTE

KB

cc: Hon. Jon S. Wheeler, Clerk

Donald D. Gillis, Esquire
Kimberly A. Hill, Esquire

Handwritten signature: Sid J. White
Clerk Supreme Court