

047
SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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ANDREW CASH,

Petitioner,

vs.

UNIVERSAL RIVET, INC., ET AL.,

Respondent.

Case No. 79,896

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

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

REPLY BRIEF OF PETITIONER

✓
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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). Citations to the Petitioner's Initial Brief shall be (**PIB** - **page number**); citations to the Respondents' Answer Brief shall be (**RAB** - 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". Universal Rivet, et al. v. Cash, 598 So.2d 154 (Fla. 1st DCA 1992), shall be referred to as "Cash I."

STATEMENT OF THE CASE AND FACTS

The Petitioners stand on the Statement of the Case and Facts as stated in the Petitioner's Initial Brief, which has been accepted without discussion by the Respondents.

SUMMARY OF ARGUMENT

The construction of a statute by an administrative agency charged with its interpretation and application should not be overturned unless clearly erroneous. The definition of "prosthesis" accepted by the Judge of Compensation Claims was recognized by the First District Court of Appeal in a prior case and did not thwart the legislative intent manifested by the words of **§440.19(1)(b)**, Fla. Stat. (1985).

The obvious legislative intent behind the statutory exception to the application of the Statute of Limitations for remedial attention related to the insertion and attachment of prosthetic devices requires that this Court find that the fixation staple inserted into Mr. Cash's shoulder is a "prosthetic device," and that the question certified by the First **DCA** be answered in the affirmative. **The** language of the statute protected the nature or location of the device; i.e., devices which are "insert[ed] or attach[ed]." All other criteria, such as function, are excluded from the statute by implication, **and** the enumeration of terms upon which the statute operates prohibits its operation upon any other terms.

Finally, in order to completely answer the certified question, a resolution of the conflict created by the decisions in **Roe I**, **Roe II**, **Cash I**, and the statute, as to whether the insertion and attachment of an artificial device must occur before the Statute of Limitations runs, or whether benefits would be due for remedial treatment related to such devices inserted or attached after the initial two year period has expired.

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)?

In their Answer Brief, the Respondents merely present a rehash of dictionary meanings. The question is not which of the many available dictionary definitions of "prosthesis" one chooses but whether the Judge of Compensation Claims is supported by all of the evidence. If this Court examines the question in pari materia, looking at the legislative intent behind the statute, the meaning of the word "prosthesis", logic and common sense, medical reality, and the facts of this case, it is evident that this Court's answer to the certified question will be in the affirmative.

Section 440.19(1)(b), Fla. Stat. (1985), states, in pertinent part, that "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." Medical treatment or tests to determine a causal relationship between symptomatology and an industrial accident are compensable. Hamilton v. Early Birds Stud Farms and INS\Etna, 540 So.2d 134 (Fla.1st DCA 1989) (and cases cited therein), and it is absurd for the Respondents to argue that the Petitioner's medical visits were not related to the insertion or attachment of the staple. It is reasonable to foresee that the device would someday require attention, maintenance, replacement or removal. (0-14, dated 4/20/92). It is this remedial attention,

directly related to the compensable injury and insertion of the staple, which escapes the Statute of Limitations.

The emphasis on the definition of "prosthesis" is a clear misapprehension of the legislative intent to include those "devices" which are inserted or attached to the human body as a result of an industrial injury. The Petitioners agree wholeheartedly that "if a term is not defined in a statute or rule, its common ordinary meaning applies." Department of Administration v. Moore, 520 So.2d 704, 707 (Fla. 1st DCA 1988) and that "where the language of a statute clearly limits the application to a particular class of cases ... the statute may not be enlarged or expanded to cover cases not falling within its provisions." Barruzza v. Suddath Van Lines, 474 So.2d 861, 864 (Fla. 1st DCA 1985). Thus, despite Respondents' inapposite response to Petitioner's argument, the Petitioner does not seek to have the provision expanded to include "all artificial devices or medical implements" (RAB-8), but requests that this Court honor the afore-stated principles by finding that when the legislature said "the insertion or attachment of a prosthetic device to any part of the body," the plain meaning and legislative intent of "prosthetic device" does include staples, pins, screws and other internal fixation devices which the patient is unable to insert or remove without medical assistance. This is precisely consistent with the rules of statutory construction.

On May 24, 1991, the Judge of Compensation Claims accepted the definition of "prosthetic device" as a "replacement of a missing part by an artificial substitute or ... a device to auament performance of

a natural function,"¹ (emphasis added) She stated that "it is not within the legislative intent ... to quibble over words and narrowly construe 'prosthetic devices,'" rejecting the "theoretical distinction" between prostheses and internal fixation devices as controlling the interpretation and application of the statute. Yet the Respondents seize that distinction to argue that the "**function**" of the device controls the statute.

... the most important variable of all, if a prosthesis or prosthetic device "breaks down" there will be a loss of function until the prosthesis is replaced. Thus, the necessity for the one exception to the two year statute of limitations. **The** same does not hold true for a fixation device which can be surgically removed without altering normal bodily function.

(RAB-13)

The staple was initially inserted to hold the damaged parts of the shoulder in place until healing occurred. By the Respondents' definition, then, it was a prosthesis when inserted and before all healing took place. Is it reasonable to then conclude that it later ceased to be a prostheses? If the argument by the Respondent is accepted, then if an artificial eye, inserted as a result of a compensable injury and which has no effect on the function of vision, must be replaced, such remedial attention is not protected from the Statute of Limitations **by** the exemption of **§440.19(1)(b)**, Fla. Stat. (1985) and the patient must bear the financial and related burdens an

¹ see Trindade v. Abbey Road Beef 'N Booze, 443 So.2d at 1013, fn. 7 (Fla. 1st DCA 1013): "Dorland's [Medical Dictionary] includes the following definition of "prosthesis": "2. An artificial substitute for a missing part, such **as** an eye, leg, or denture; the term is also applied to any device by which performance of a natural function is aided or augmented, such **as** a hearing aid or eyeglasses," stating that "[they] tend to agree."

his own shoulders. Certainly that is not a reasonable interpretation of the Legislature's intent and the Respondents' argument should not stand.

The Florida legislature did not condition the prosthetic exemption on a "break down" in the function of the device but allows the exemption for any and all remedial attention "relating to the insertion or attachment" of a prosthetic device. It is beyond the authority of the court to limit a benefit extended by the legislature. Holly v. Auld, *supra*. See also Reed By and Through Lawrence v. Bowen, 503 So.2d 1265 (Fla. 2d DCA 1986) (when the language of a statute is clear **and** not unreasonable or illogical in its operation, the court may not go outside the statute to give it a different meaning); Escambia County Council on Aging v. Goldsmith, 465 So.2d 655 (Fla 1st DCA 1985) (the enumeration of several items upon which a statute either operates or forbids operation excludes from operation all things not expressly mentioned by it); Florida Legal Services, Inc. v. State, 381 So.2d at 1122 (Fla. 1st DCA 1979) (where the legislature creates specific exceptions to the language in a statute, the court may apply the rule 'expressio unius est exclusio alterius' to infer that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally).

Although the Respondents expect the legislature to have compiled a laundry list of "staples, pins [and other devices] commonly used in the medical profession," we look to legislative intent and, as the JCC stated, stop "quibbling" over the words. The statute cannot be said to impliedly exclude staples or pins where it **"defines"** the word

"prosthesis" by applying the term to inserted or attached devices. "The need for an acceptance [sic] 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 ..." (0-5, dated 5/23/91). The intent of the legislature in the statute was this: If a compensable injury results in the insertion or attachment of a device into the body, the Statute of Limitations would not run on remedial attention required by that device.

When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, ... the statute must be given **its plain and obvious meaning** ... [courts] are without power to construe an unambiguous statute in a way which would extend, modify, or limit its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power ... (emphasis supplied).

Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984)

Where the statute unambiguously refers to internally-affixed devices, for this Court to pick and choose a definition of "**prosthesis**" which excludes internally-affixed devices is "**an** abrogation of legislative power."

The "[a]dministrative construction of a statute by an agency responsible for its administration is entitled to great weight and should not be overturned unless clearly erroneous." (Department of Administration v. Moore, 524 So.2d 704, 707 (Fla. 1st DCA 1988). **See also** Summersport Enterprises v. Pari-Mutuel Commission, 493 So.2d 1085 (Fla. 1st DCA 1986); Shell Harbor Group, Inc. v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, 487

So.2d 1141 (Fla. 1st DCA 1986); Warnock v. Florida Hotel & Restaurant Commission, 178 So.2d 917 (Fla. 3rd DCA 1965). Because the definition accepted by the JCC in this case and the First District in Trindade, infra, is among those recited by the First DCA in Cash I, the First District was without authority to then supplant that definition with a new one of its own choosing where the JCC's selection was not "clearly erroneous." The JCC defined prosthesis as a "replacement of a missing part ... or a device to augment performance of a natural function." (0-5 dated 5/31/89); the 1st DCA defined prosthesis as a "replacement ... for a missing or defective natural part of the body." (0-9 dated 4/20/92). The JCC's decision was reasonable and the 1st DCA's analysis of the applicability of the statute as dependent upon "the purpose of the staple" (Id., p. 9) is unreasonable. Holly v. Auld, supra.

Respondents have not addressed to Petitioner's arguments that the inconsistencies between Roe I, Roe 11, Cash I, and the statute mandate that it be addressed in answering the certified question other than to suggest that the issue is outside the scope of this appeal. However, even Respondents would have to agree that the results are inconsistent, unfair and confusing. In Roe, there was a passage of two years without treatment before 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 treatment. In Cash, the insertion of the staple and a return to work occurred within the two year Statute of Limitations but Mr. Cash was denied both remedial

treatment for the inserted staple and disability benefits. The inconsistency is glaring and requires resolution. If the decision in Roe is found to be in error, the timeliness distinction alone demands that the Petitioner Cash be awarded benefits. The certified question cannot be answered without clarifying Roe I and Roe II and Cash I, squaring them with the statute.

CONCLUSION

The Florida Supreme Court has reserved a decision on jurisdiction to answer a question certified by the First District Court of Appeal as "one of considerable concern to the workers' compensation community." This Court is urged to consider the question,

The plain meaning and logical reading of Fla.Stat. S440.19 (1)-(b), (1985) is that prosthetic devices such as Mr. Cash's metallic staple, with their inherent potential problems, are exempt from the Statute of Limitations for purposes of securing remedial medical attention, with special consideration given to those devices which are internally inserted or attached.

This Court is also asked to resolve the issues raised by Roe I and Roe 11: whether the statute requires the insertion and attachment of an artificial device before the Statute of Limitations runs, or whether benefits would be due for remedial treatment related to devices inserted or attached after the initial two years have run.

The certified question should be answered in the affirmative. The Order of the 1ST DCA should be quashed and the Order of the Judge of Compensation Claims affirmed, awarding Petitioner medical benefits related to a metallic staple inserted and attached into his body.

Respectfully submitted.

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing document was mailed this 30th day of July 1992 to the following parties :

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