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EN THE SUPREME COURT OF FLORIDA

FIRST DISTRICT COURT OF APPEAL
CASE NO. : 91-00223
S.CT. CASE NO.: 79,930
CLAIM NO. : 267-34-2241
D/LOSS : AUGUST 30, 1971

JAY F. LEE,

Petitioner,

vs.

CITY OF JACKSONVILLE and
CNA INSURANCE COMPANY,

Respondents.

ANSWER BRIEF OF RESPONDENTS CITY OF JACKSONVILLE AND CNA INSURANCE COMPANY

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BROWN & OBRINGER
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STATEMENT OF THE CABE AND FACTS

This is an appeal of a question certified by the First District Court of Appeal as being one of great public importance. Petitioner, Jay F. Lee, will be referred to as either Mr. Lee or the Claimant, and the Respondents, the City of Jacksonville and CNA Insurance Company, will be referred to as the Employer and Carrier, respectively. Designations as to the Record on Appeal will be made by the letter "R" followed by the appropriate page number.

On August 30, 1971 (R-2), the Claimant was injured during the course and scope of his employment with the City of Jacksonville as a power linesman when he slipped, twisting his leg and bumping his knee. (R-4). The Claimant did not injure his back as a result of the August 30, 1971, accident. (R-4). His physical complaints following the incident were related solely to his left knee. (R-5). Following the August 1971, injury, the Claimant retired from his employment with the City of Jacksonville and has been receiving pension benefits from the City of Jacksonville since that time. (R-4, 5).

On December 2, 1971, Dr. James W. Dyer, the Claimant's treating physician, diagnosed that the Claimant was suffering from resolving synovitis of the left knee as a result of the August 30, 1971, injury. (R-141A). Synovitis is an irritation of the joint lining which causes swelling and pain. (R-142). On August 25, 1972, Dr. Dyer removed a torn medical meniscus from the Claimant's left knee. (R-143).

At the time that the Claimant began seeing Dr. Dyer, Dr. Dyer was practicing in partnership with Drs. Ethan Todd and Trave Brown. (R-141, 141A). These doctors sometimes saw each other's patients, which is what occurred in this case. (R-141, 141A). On September 24, 1974, Dr. Brown found that the Claimant had reached maximum medical improvement (R-149), sustaining a 50% permanent impairment to the lower extremity (R-148) as a result of severe degenerative arthritis of the left knee (R-176) which was directly attributable to the August 1971, job related injury. (R-155). The Claimant did not see his treating physician during the remainder of 1974.

The Claimant saw his treating physicians on only two occasions in 1975. (R-176, 178). The next time the claimant saw his treating physicians was approximately 18 months later on June 10, 1976. (R-178). At the time, Dr. Brown noted that the Claimant had advancing osteoarthritis, however, no specific treatment was warranted. (R-178). The Claimant had one more office visit in 1976. (R-178). In 1977, 1978, 1980, and 1981, the Claimant was seen on one occasion each year by either Dr. Brown, Dr. Dyer or Dr. Todd. (R-178, 179). The Claimant did not see Drs. Brown, Dyer or Todd at all during the years 1979 and 1982. (R-178, 179).

On March 29, 1983, the Claimant saw Dr. Brown for a check up on his knee. Dr. Brown found that the Claimant was still having pain from time to time, which although not severe, required pain medication. (R-179). Phenophen was prescribed. (R-179). Throughout the remainder of 1983 and June of 1984, the Claimant's pain medication prescriptions were renewed by his doctors. (R-

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179). On June 4, 1984, the Claimant had an office visit due to the fact that Dr. Todd would not prescribe any more pain medication over the telephone until the Claimant had been examined. (R-179).

After examining the Claimant and determining that his condition had not changed from the previous visit, Dr. Brown decided to take the Claimant off Phenophen, which contains Codeine, and put him on a Darvon compound supplemented with aspirin. (R-179). On this date, Dr. Brown also prescribed a TENS unit for the patient. (R-179). A TENS unit is a battery operated machine designed to interfere with pain impulses before they reach the brain, thereby reducing the amount of pain and consequently, the amount of medication, which a patient may require. (R-144).

A prescription requiring that the TENS unit be purchased for the Claimant's left knee was signed by Dr. Brown. (R-136). Despite the fact that the prescription constituted inadmissible hearsay, the Employer and Carrier stipulated to the admissibility of this document, and the document was entered into evidence. The prescription provided that the Claimant was suffering from chronic osteoarthritis of the left knee and that he should use the TENS unit and "[r]eturn as needed for follow up." (R-136). The prescription also provided that the TENS unit would be needed for an "undetermined" number of months, not an undetermined number of years.

From June 4, 1984, through February 20, 1989, a period of almost five years, the Claimant had 12 doctor's office visits with his treating physicians. (R-180 through R-183). During this

almost five-year period, the Claimant saw Dr. Brown on only two occasions, once in June of 1984, when the TENS unit was prescribed (R-180), and once in February of 1989. (R-183). Dr. Ethan Todd was the primary treating physician who saw the Claimant throughout the remaining ten visits. Dr. Todd did not prescribe the use of the TENS unit to the Claimant, nor did Dr. Todd have any actual knowledge, through any conversations with the Claimant during any of the Claimant's ten visits with Dr. Todd, that the Claimant was using the unit. During the period covering June of 1984 through February of 1989, none of the doctors' nates reflect that the Claimant was using his TENS unit. (R-180 through R-183). The Claimant testified that he did not use the TENS unit "a whole lot" from 1984 through 1986. (R-11). The Claimant further testified that he never wore his TENS unit on any of his office visits from the time the unit was prescribed in June of 1984 through January of 1989. (R-35). Notwithstanding these admissions, the Claimant testified that his treating physicians "should [have] known" that he was using the unit. (R-35).

During 1984, 1985, and 1986, CNA Insurance Company paid for parts for the TENS unit, however, there was no documented evidence that the Claimant purchased parts for the unit after April 17, 1986. (R-21). The Claimant maintains that from April of 1986 through the present date, he purchased a few parts for the TENS unit himself (R-21), but that he mostly borrowed and interchanged parts of TENS units loaned to him by his sister, Joann Hamlin (R-31, 32), and his sister-in-law, Cathy Hodge. (R-24).

Following the prescription for the TENS unit in June of 1984, the Claimant then saw Dr. Todd once in 1985 and twice in 1986. (R-182). On the first visit in 1986, which was May 6, 1986, Dr. Todd found that the Claimant's condition remained unchanged with respect to the knee, i.e. that the Claimant still had some pain, but that the Claimant was primarily concerned with some back pain which he had been experiencing for the last several years. (R-182, 147). The record reveals that the Claimant's back pain was not related to the August 1971, accident. Dr. Todd testified that the Claimant's back pain was caused by degenerative arthritis and spurring of the lumbar vertebrae, which are natural aging processes. (R-158). Dr. Todd also testified that there were no documented records indicating that Mr. Lee was limping, which would have explained a possible aggravation of the Claimant's back pain. (R-165).

On the second visit which occurred on May 19, 1986, Dr. Todd found that the Claimant's condition remained unchanged and that he would see the Claimant again in a few months. (R-182). Dr. Todd testified that had he known that the Claimant was continuing to use the TENS unit which was prescribed in June of 1984, "in all likelihood" he would have discouraged the Claimant from using the unit for a two-year period. (R-148).

The Claimant did not see any of his treating physicians again until approximately two and one-half years later, when on January 30, 1989, he saw Dr. Todd. (R-36). The Claimant did not tell Dr. Todd that he was wearing a TENS unit on this date. (R-39). Dr.

Todd testified that he believed that the almost three-year gap in office visits was due to the fact that the Claimant had "apparently been doing well" prior to January 30, 1989, with the exception of an increase in knee pain which occurred in the prior two months. (R-148).

Dr. Todd's records reflect that from May of 1986 through January 30, 1989, the Claimant did not request either pain medication or supplies for his TENS unit. (R-149). Had he known that the Claimant was using the TENS unit between May of 1986 and January of 1989, Dr. Todd would have instructed the Claimant not to *do* so, because such use would not be reasonably and medically necessary, since TENS units are generally only prescribed to be used for three to six months. (R-149, 150). Dr. Todd does not recommend TENS units for extended use due to the skin irritation which can be caused by the electrodes and the likelihood that a patient may become dependent on the unit. (R-152). Dr. Todd also testified that when he prescribes a TENS unit, he prefers to see his patients every six to eight weeks to check for dependency and wean the patient from the unit. (R-146). Dr. Todd testified that he would not want a patient to use a TENS unit for a six-year period such as was represented by the Claimant in this case. (R-150).

The last date that compensation was paid on the August 30, 1971, injury was August 23, 1976. (R-67). The last date of medical treatment, prior to the employer denying benefits, was the Claimant's May 19, 1986, visit with Dr. Todd. (R-67). The last

payment for medical care occurred on July 30, 1986. (R-67). Mr. Lee filed a Claim for Benefits on March 29, 1990. (R-131).

The Judge of Compensation Claims dismissed Mr. Lee's claim for workers' compensation benefits "in its entirety," finding that the claim was barred by Sections 440.13(3)(b) and 440.19(1)(a) Florida Statutes because

> the Claimant did not receive 'remedial attention furnished by the employer' within two years after the date of the last payment of compensation or the furnishing of remedial attention or treatment.

(R-234).

The Judge of Compensation Claims accepted "the Claimant's testimony that he used the prescribed TENS unit intermittently from the time he received it through the date the claim was filed." (R-235). However, the Judge of Compensation Claims found that the Claimant's use of the TENS unit from May 1986 through September 20, 1990, was not reasonably and medically necessary. (R-235). In addition, the Judge of Compensation Claims found that the Claimant's use of the TENS unit "after its initial prescription" was "without medical supervision, direction, or control." (R-235). In an opinion filed on May 15, 1992, the First District Court of Appeal affirmed the decision of the Judge of Compensation Claims that the limitations period was not tolled by the Claimant's use of the TENS unit after May of 1986. However, the appellate court certified the following question as being one of great public importance:

> WHETHER THE LIMITATIONS PERIOD OF SECTION 440.19(1)(a), FLORIDA STATUTES, IS TOLLED BY THE CLAIMANT'S ROUTINE USE OF A DEPENDENCY-INDUCING MEDICAL DEVICE FURNISHED BY THE EMPLOYER AND PRESCRIBED BY THE AUTHORIZED PHYSICIAN FOR AN INDEFINITE PERIOD OF TIME WITHOUT SUPERVISION, EVEN

THOUGH THE EMPLOYER DID NOT HAVE ACTUAL KNOWLEDGE THE CLAIMANT CONTINUED TO USE THE DEVICE BEYOND THE TIME THE PHYSICIAN SHOULD HAVE INSTRUCTED THE CLAIMANT TO DISCONTINUE USE OF THE DEVICE, AND NO SUCH INSTRUCTION WAS GIVEN.

(Order of First District Court of Appeal, May 15, 1992).

SUMMARY OF ARGUMENT

The question certified should be answered in the negative. The Judge of Compensation Claims correctly held and the First District Court of Appeal correctly affirmed that the Petitioner's Claim for Benefits is barred by the statute of limitations because the Claimant did not receive "remedial treatment furnished by the employer" as required to toll the statute. Although the Judge of Compensation Claims accepted the Claimant's testimony that he used the TENS unit intermittently from the time it was prescribed in June of 1984 through the date the Claim for Benefits was filed on March 29, 1990, the Judge found that such use was not "remedial treatment" as defined in the statute of limitations for two reasons. First, the Claimant's use of the TENS unit after its initial prescription was without medical supervision, direction or control. Second, the Judge of Compensation Claims accepted the Claimant's treating physician's testimony that the Claimant's use of the TENS unit from May of 1986 through 1990 was not reasonably and medically necessary. These findings are supported by competent substantial evidence in the record.

The Judge of Compensation Claims found that the Claimant's use of the TENS unit was not "furnished by the employer" because neither the Employer, the Carrier, nor the Claimant's treating physicians had actual knowledge of the Claimant's continued use of the unit. These findings are supported by competent substantial evidence in the record.

The statute of limitations should be enforced in this case for several reasons. First, as stated by this Court, claimants should be barred from pursuing unfresh claims against parties who are unable to shield themselves from liability due to the staleness of the claim. Second, neither the Employer, the Carrier, nor the Claimant's treating physicians had knowledge of the Claimant's continued use of the device. Third, if for the sake of argument, the prescription for a period of "months" is considered indefinite, such would not suspend the operation of the statute according to case law. Finally, the failure of the treating physician to instruct the Claimant not to use the unit after a number of months had expired should not toll the statute, since according to the evidence presented, neither the Employer, the Carrier, nor the claimant's treating physicians either knew or should have known that the Claimant was continuing to use the device.

Contrary to Petitioner's assertions, it is not burdensome to require that the Claimant report his use of the device to the Employer or the Carrier. According to the well established case law of Florida, the claimant has a duty to go through the form of receiving remedial care every two years in order to preserve the right to future benefits. If the employee receives such remedial care, the employer and/or the carrier will be notified through receipt of the bill for such remedial care; therefore, it is not necessary that the claimant report directly to either the carrier or the employer. Contrary to the assertions of the Petitioner and the First District Court of Appeal, the case law does not place a

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burden on the employee to prove what the employer actually knew. Rather, the employee must simply show that he received "remedial attention furnished by the employer" within the meaning of the statute.

If this Court permits the operation of the statute to be suspended in the instant case, the floodgates of litigation will open to ever-hopeful claimants who are either in a similar situation or would have the courts believe such. In such instances, there is no way for the employer or the carrier to defend themselves since they have been deprived the opportunity to either pay the claim promptly or investigate one they find questionable.

Finally, the statute is clear and unambiguous. The claim was not filed within two years of the last voluntary payment of compensation or dispensation of remedial treatment, therefore, it is not timely. If another exception is to be created within the framework of the statute, it must be accomplished by the legislature, not judicial construction.

It is respectfully requested that this Court affirm the decision of the First District Court of Appeal and answer the certified question in the negative.

ARGUMENT

I. THE LIMITATIONS PERIOD OF SECTION 440.19(1)(a), FLORIDA STATUTES, I8 NOT TOLLED BY THE CLAIMANT'S ROUTINE USE OF A DEPENDENCY-INDUCING MEDICAL DEVICE BURNISHED BY THE EMPLOYER *AND* PRESCRIBED BY THE AUTHORIZED PHYSICIAN, WHERE THE EMPLOYER DID NOT HAVE ACTUAL KNOWLEDGE THE CLAIMANT CONTINUED TO USE THE DEVICE.

At the outset, the Respondents contend that the question as presented by the First District Court of **Appeal is** not properly framed. First, the physician who initially prescribed the device, Dr. Brown, essentially stopped treating the Claimant in June of **1984**, when the unit was prescribed. Although the device was **initially** "prescribed by (an] authorized physician," the Claimant's primary treating physician during the time that the Claimant alleges that he was wearing the TENS unit was Dr. Ethan Todd, not Dr. Brown. Dr. Todd had no indication through any conversations with the Claimant at the time of his office visits following the prescription of the unit through the final office visit an January 30, 1989, that the Claimant was even using the unit; therefore, he had no method of regulating or even prohibiting the Claimant's use of the device. The Claimant's continued use of the device was knowledge to which neither the **Employer**, the Carrier, nor any of the Claimant's treating physicians were privy in this case. For this reason, the Respondents contend that the language in the certified question concerning the physician's failure to instruct the Claimant to discontinue use of the device is irrelevant and should be deleted from the question.

Second, the question contains language which appears to suggest that the prescription of the TENS unit was indefinite and perhaps such would justify tolling the statute. The prescription was not for an indefinite period of time. As the Record on Appeal clearly indicates, the prescription provided that the TENS unit would be needed for an "undetermined" number of months. Even if the prescription were for an indefinite period of time as suggested by the appellate court, Florida case law provides that such does not qualify as treatment furnished by the employer. In Devilling v. Rimes, Inc,, 591 So.2d 304, 305 (Fla. 1st DCA 1991), the appellate court affirmed the Judge of Compensation Claims' finding that a claimant's use of certain "modalities" prescribed for her use on a permanent basis did "not thereby become treatment furnished by the employer within the ambit of section 440.19(1)(a)." The "modalities" consisted of support hose, shoe inserts, a cane and medication for pain or inflammation. Based on Devilling, the assertion that the prescription may have been indefinite does not operate to toll the statute in the instant case; therefore, such language should be omitted fromthe certified question.

The proper standard of review in this case is to determine whether competent substantial evidence supports the findings of the Judge of Compensation Claims. Tradewinds Manufacturing Co. V. Cox, 541 So.2d 667 (Fla. 1st DCA 1989). with regard to the testimony presented by witnesses, the First District Court of Appeal has held that since the Judge of Compensation Claims has the opportunity to

observe the behavior and demeanor of witnesses, "he is in a better position to judge their credibility." Barnett v. Lakeland Construction Co., 417 So.2d 834 (Fla. 1st DCA 1982). Therefore, the reviewing courts "will not reweigh the evidence." Id. This Court should affirm the lower tribunal and the appellate court and not reweigh the evidence because the findings of fact are supported by competent substantial evidence.

I.A. THE CLAIMANT DID NOT RECEIVE REMEDIAL ATTENTIONFURNISHED BY THE EMPLOYER WITHIN TWO YEARS AFTER THE DATE OF THE LAST PAYMENT OF COMPENSATION OR REMEDIAL ATTENTION.

Before the Judge of Compensation Claims, the Claimant argued that he intermittently used the TENS unit, which was prescribed by his treating physician in June of 1984, through March 29, 1990, the time when he filed his Claim for Benefits. The Judge of Compensation Claims accepted this testimony and the Claimant, in Petitioner's Brief asserts that this finding, in and of itself, is sufficient to support the Petitioner's position that his claim is not time barred. The Employer and Carrier contend that the fact that the TENS unit was used intermittently over an almost six-year period is not sufficient to overcome the statutory requirements that the claimant receive "remedial attention furnished by the employer."

To determine whether a claim is barred by the statute of

limitations, a two fold inquiry must be made under Sections 440.13(3)(b) and 440.19(1)(a) Florida Statutes.[1] The first inquiry is whether the medical treatment qualifies as "remedial attention" under Florida statutory and case law. The second inquiry is whether the medical treatment was "furnished by the employer." In the instant case, the appellate court correctly affirmed the decision of the Judge of Compensation claims finding that the Claimant did not receive remedial attention furnished by the employer within the meaning of the statute.

1. THE CLAIMANT'S USE OF A TENS UNIT FROM MAY 19, 1986, THROUGH THE FILING OF THE CLAIM FOR BENEFITS ON MARCH 29, 1990, WAS NOT REASONABLY AND MEDICALLY NECESSARY; THEREFORE, THE CLAIMANT DID NOT RECEIVE "REMEDIAL ATTENTION" WITHIN THE MEANING OF THE STATUTE.

Several Florida cases have considered the issue of when medical treatment qualifies as "remedial attention" under Section 440.13 and 440.19, Florida Statutes. The rule of law gleaned from these cases is that "remedial treatment" is either a prescription of medication or a medical apparatus which is furnished for the alleviation of pain and is subsequently used by the employee under the direction of his treating physician, such that the employer has actual knowledge that the employee is using the device or medication prescribed.

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[1]Section 440.19(1)(a) deals with the right to disability compensation. Section 440.13(3)(b) "provides a parallel provision with identical exceptions for recovery of remedial attention." The two limitation provisions were combined in 1978. Daniel v. Holmes Lumber Co., 490 So.2d 1252, 1254 (Fla. 1986).

The Claimant asserts that the holding in Fuster v. Eastern Airlines, Inc., 545 So.2d 268 (Fla. 1st DCA 1988), dictates the conclusion that the Orders of the Judge of Compensation Claims and the First District Court of Appeal should be reversed, because the Claimant wore a TENS unit which constituted "remedial treatment" under the statute. Fuster is inapplicable to the facts of the instant case. In Fuster, the Deputy Commissioner found that an airline pilot's Claim for Benefits filed on October 12, 1984, relating to an alleged December 22, 1981, job related injury was not barred by the statute of limitations. On appeal, the First District Court of Appeal held that the pilot's wearing of a back brace constituted remedial treatment which tolled the statute of limitations. Following the 1981 injury, the pilot's treating physician, also the airline physician, prescribed a back brace to the employee, which the Claimant was required to wear while flying. Id. at 269, 270. The appellate court reasoned that the back brace qualified as remedial treatment for three reasons:

1. There was competent substantial evidence that the claimant's employer and immediate supervisor were "well aware that claimant was wearing a back brace while he continued to fly." Id.

2. The head physician at the airline clinic, who was also the claimant's treating physician who had prescribed the brace, knew the claimant was flying with a brace. Id.

3. The prescription of the brace was "medically necessary" as provided in Section 440.13(2)(a), Florida Statutes.

Id. at 274.

The Petitioner is correct in his assertion that in Fuster the First District Court of Appeal held that the wearing a back brace constitutes remedial treatment which tolls the statute of limitations, however, Fuster is distinguished from the instant case. First, as the Judge of Compensation Claims correctly noted the employer in Fuster had actual knowledae that the employee was wearing the prescribed back brace. In this case, the Claimant was not working at the time that the TENS unit was prescribed. He had retired and was receiving pension benefits from the City of Jacksonville. Further, he had no contact with his former employer regarding the use of the TENS unit. Therefore, the City of Jacksonville had no actual knowledqe that the Claimant was wearing the TENS unit. Similarly, the Carrier, had no actual knowledqe that the Claimant was using his unit after April 17, 1986, which is the last date that receipts for parts were submitted to the Carrier for reimbursement. (R-68).

In the Petitioner's Brief, the Claimant states that he began obtaining supplies on his own because CNA "never" reimbursed him for supplies or prescriptions. In addition, the Claimant incorrectly alleges that CNA failed to contradict Mr. Lee's statement that he sent prescriptions or receipts to the company for reimbursement after April 17, 1986. Id. The testimony of Cheryl Riley, a senior claims representative with CNA, directly contradicts these allegations. Ms. Riley testified that her file reflected that CNA reimbursed Mr. Lee for TENS unit supplies that were purchased on the following dates: October 3, 1984; March 7,

1984; October 9, 1985; and April 17, 1986. (R-68). Further, Ms. Riley testified that her file did not contain any receipts filed by Mr. Lee after April 17, 1986. (R-68).

The second way in which Fuster is distinguished from the instant case is that the Claimant's treating physicians had no knowledge that the Claimant was wearing the TENS unit. There is competent substantial evidence in the record to support this finding of the Judge of Compensation Claims. From June 4, 1984, through February 20, 1989, a period of nearly five years, the Claimant had 12 office visits with his treating physicians; two with Dr. Brown, who prescribed the TENS unit, and the remaining ten with Dr. Ethan Todd. (R-180 through R-183). Dr. Brown prescribed the device in 1984, however, Dr. Todd was the Claimant's treating physician during the period of time following the issuance of the prescription. During this period, none of the doctors' notes reflect that the Claimant was using his TENS unit. (R-180 through R-183). Dr. Todd testified that the claimant never told him that he was using the TENS unit on any of the ten visits which the Claimant had with him. (R-146 through 149). The Claimant, himself, testified that he never wore his TENS unit on any of his doctor visits. (R-35). Further, by physical examination, there was no medical evidence that the Claimant was wearing the TENS unit. There was absolutely no indication to Dr. Todd either through physical examination or conversations with the Claimant that Mr. Lee was continuing to use the device as alleged.

An important distinction between this case and Fuster is that the claimant in Fuster was only permitted to fly while wearing the brace; therefore, his medical status was monitored by both the airline physician and the claimant's supervisors. In this case, the Claimant had retired from his employment with the City of Jacksonville in 1971, therefore, his employer was precluded from monitoring his medical status, as the employer did in Fuster.

The third fact distinguishing Fuster from the instant case is that in Fuster, this Court found that the use of the back brace was "medically necessary" pursuant to the following statute:

> the employer shall furnish to the employee such medically necessary remedial treatment, care, and attendance by a health care provider and for such period as the nature of the injury or the process of recovery may require, including medicines, medical supplies, durable medical equipment, orthoses, prostheses, and any other medically necessary apparatus.

Section 440.13(2)(a)(1983) Florida Statutes.

In the instant case, based on Dr. Todd's testimony, the Judge of Compensation Claims found that the Claimant's use of the TENS unit from May 19, 1986, through the date of Dr. Todd's deposition on September 20, 1990, was not reasonably and medically necessary. In his Initial Brief, the Claimant asserts that "the sole basis for the Judge's [decision] is the retrospective and somewhat speculative testimony of Dr. Todd to the effect that if he had been asked he 'in all likelihood' would have recommended to Mr. Lee that he discontinue using the TENS unit." (Petitioner's Initial Brief, p. 8). The record is replete with evidence that neither the Claimant's treating physicians, nor the Employer/Carrier had actual

knowledge that the Claimant was even using the TENS unit after its initial prescription in June of 1984.

The Claimant has asserted that his use of the TENS unit was reasonably and medically necessary, because he was prescribed the unit, instructed on its use, and wore it intermittently from the time of purchase in June of 1984 through March 29, 1990. The Claimant's assertion that his use of the TENS unit was reasonably and medically necessary is based on speculation. The Claimant never presented any testimony of any of his treating physicians or evidence that his use of the unit was reasonably and medically necessary for continual use in 1986, 1987, 1988, 1989, and 1990. Further, at the time of the May 19, 1986, visit, the Claimant did not request either pain medication or supplies for his TENS unit, nor did he indicate to Dr. Todd that he had been intermittently using the TENS unit during the two and one-half year period prior to the January 30, 1989, office visit. (R-149). As the Judge of Compensation Claims correctly found, the Claimant's use of the TENS unit from May 19, 1986, through the date of Dr. Todd's deposition on September 20, 1990, was not reasonably and medically necessary. The Claimant did not introduce any medical testimony to contradict Dr. Todd's testimony.

The Petitioner, in his Initial Brief, asserts that it is unclear why the Judge chose May 19, 1986, as the last date on which the use of the TENS unit qualified as "remedial attention furnished by the employer," (R-236), however, it is clear. May 19, 1986, was the last time the Claimant visited his treating physicians prior

to a two and one-half year gap which preceded the Claimant's January 30, 1989, visit with Dr. Todd. (R-148). Prior to May 19, 1986, the Judge of Compensation Claims considered the Claimant's use of the TENS unit remedial attention, since the records indicate that the Claimant purchased parts for the unit through April 17, 1986. (R-21). However, the Claimant's use of the unit after May 19, 1986, was not reasonably and medically necessary because TENS units are generally only prescribed to be used for a three to six month period. (R-149, 150). Dr. Todd testified that had he known that the Claimant was using the TENS unit between May of 1986 and January of 1989, he would have instructed the Claimant not to do so, because such use would not be reasonably and medically necessary. (R-149, 150). Indeed, the document on which the Claimant relies for the purpose of asserting that the use of the TENS unit was reasonably and medically necessary, provides that the TENS unit is to be used for an "undetermined" number of months, not years. (R-136). TENS units are not recommended for extended use due to skin irritation which can be caused by the electrodes and the likelihood that a patient may become dependent on the unit. (R-152). Therefore, Dr. Todd prefers to see patients using TENS units every six to eight weeks to check for dependency and wean the patient from the unit. (R-146) Dr. Todd also testified that he would not want a patient to use a TENS unit for an almost six-year period, which is essentially what Mr. Lee claims to have done in this case. (R-150).

Although the Claimant, in Fuster, went a number of years without seeing his treating physician about the back brace which he continued to wear, Dr. Todd testified that a back brace could be used for a number of years without monitoring by a physician. (R-152). As Dr. Todd testified, a patient's use of a TENS unit must be monitored every two to three months. (R-154). City of Orlando v. Blackburn, 519 So.2d 1017 (Fla. 1st DCA 1987) and Thomas v. Jacksonville Electric Authority, 536 So.2d 310 (Fla. 1st DCA 1988) are two cases cited by the Claimant for the proposition that a claimant can still be receiving remedial attention even though the Claimant has not seen his treating physician within a two-year period.

In City of Orlando v. Blackburn, 519 So.2d 1017 (Fla. 1st DCA 1987), an employes filed a claim seeking payment of medical bills and prescriptions resulting from an industrial accident. The Deputy Commissioner ordered that the employer pay benefits and the employer appealed. The First District Court of Appeal held that the word "remedial" as used in Section 440.19:

> should be interpreted to include all medical treatment or attention which is reasonably necessary to treat a compensable injury or to mitigate its effects or conditions.

Id. at 1018.

In City of Orlando, the employee injured his ankle in a job related injury and although his treating physician did not see the employee for a period over two years, during that two-year period, the employee's doctor had prescribed eleven prescriptions of pain

medication to the employee for the employee's recurring ankle pain. Id. at 1018.

In Thomas v. Jacksonville Electric Authority, 536 So.2d 310 (Fla. 1st DCA 1988), an employee filed a claim for benefits after receiving medication for low back pain. The Deputy Commissioner denied benefits and the Claimant appealed. The First District Court of Appeal reversed the decision of the Deputy Commissioner, finding that the prescription of medication within the two-year period between doctor visits tolled the statute of limitations. Id. Although the facts in Thomas do not reveal the number of times the pain medication prescription was filled, the opinion provides that between February 18, 1985, and April 15, 1987, the prescriptions were refilled "a number of times." Id.

The Judge of Compensation Claims correctly concluded that both City of Orlando and Thomas were not applicable to the facts of the instant case, since the prescriptions in Thomas and City of Orlando "continued, at least impliedly, to be medically necessary by the treating physicians who prescribed them." (R-236). The Judge of Compensation Claims could not conclude that the single prescription of a TENS unit in June of 1984, merited the same conclusion. (R-236). The Judge of Compensation Claims' conclusion is based on competent substantial evidence in the record which reveals that although the Claimant maintains that he intermittently used his TENS unit for a period of almost *six* years, his doctors were not aware of this use, and the use was not within the direct control and supervision of his treating physicians. (R-147).

Under the reasoning of the First District Court of Appeal in Fuster, City of Orlando, and Thomas the Judge of Compensation Claims correctly held that the statute of limitations bars the present Claim for Benefits because the Claimant did not receive remedial attention within the time frame required by the statute. As the Judge of Compensation Claims provided, the Claimant used the TENS unit more as a "home remedy" than a medical apparatus administered under the direction, supervision and control of his treating physicians. (R-235). Gonzalez V. Allure Shoe Corp., 160 So.2d 703 (Fla. 1964). In Gonzalez, the Deputy Commissioner ordered that the employer pay benefits to the employee, finding that the Claimant's soaking of her arm in warm water, massaging the arm and taking aspirin as instructed by her treating physician qualified as "medical treatment furnished by the employer" which tolled the statute of limitations. In Gonzalez, the claimant had injured her wrist in the course and scope of her employment following the initial visit to her treating physician, the claimant returned for an unrecorded visit, at which time her treating physician advised her to "soak her arm." This Court reversed, finding, first, that the "prescription" did not qualify as medical treatment, as it could be obtained from any number of sources, not just a doctor; therefore, the claimant's "soaking of her arm" was not under the direction and supervision of a qualified physician. Id. at 705. Second, this Court in Gonzalez, reasoned that the claimant's second visit with her treating physician, of which the employer was unaware, could not be said to be "treatment furnished

by the employer." In this case, the initial prescription of the TENS unit was made by an authorized physician. Further, throughout the period that the claimant alleges that he wore the unit, the claimant testified that he "mixed and matched" parts of other units. In essence, the Claimant employed the TENS unit as a "home remedy" just as the claimant did in Gonzales. Analogizing Gonzales to the facts of this case, the treatment was "not furnished by the employer" within the meaning of the statute.

2. THE MEDICAL TREATMENT WAS NOT "FURNISHED BY THE EMPLOYER" WITHIN THE MEANING OF THE STATUTE.

The medical treatment in this case, the prescription of a TENS unit in June of 1984, qualified as "remedial treatment furnished by the employer" from June of 1984 through May of 1986 because the Carrier's records indicate that the employee purchased supplies for the unit during this time and that the Carrier reimbursed him for these supplies. (R-21). As the record reflects, because the Carrier had been reimbursing the Claimant for the TENS unit supplies through April 17, 1986, the Carrier had actual knowledse that the Claimant was apparently still using the TENS unit. However, when the Claimant began using parts of units from his relatives, the medical treatment lost the essential element of being "furnished by the employer." The Employer and Carrier no longer had knowledge that the Claimant was continuing to use the device. This knowledge is essential, because it provides the Employer and Carrier with the opportunity to investigate for the possibility of illegitimate claims. As this Court provided in

McLean v. Mundy, 81 So.2d 501 (Fla. 1955), the purpose of the statute of limitations is to protect the employer against claims too old to be successfully investigated and defended. See, also, City of Orlando v. Blackburn, 519 So.2d 1017, 1018 (Fla. 1st DCA 1987).

I.B. IT IS NOT BURDENSOME *TO* REQUIRE THAT THE CLAIMANT GO THROUGH TEE FORM OF RECEIVING REMEDIAL CARE EVERY TWO YEARS IN ORDER TO PRESERVE TEE RIGHT TO FUTURE BENEFITS.

The Claimant contends that the Judge of Compensation Claims' order places on the employee the burden of continuously reporting the use of any medical appliance to the Employer or Carrier. What the Petitioner fails to consider in making this argument is that if the employee is using medical equipment or medication under the direction, supervision and control of his treating physician, the employer will be made aware of the employee's use of such medical treatment through either the records of the treating physician or the receipts submitted by the employee to the carrier for reimbursement. In this case, the Carrier only had implied notice that the employee was using the unit through April 17, 1986. (R-21). Although the Claimant asserts that he used TENS units and parts of TENS units loaned to him by relatives (R-24, 31 and 32), such use does not qualify as medical treatment "furnished by the employer" under the statute because the Employer and Carrier had no notice that the Claimant was using the unit. Using the TENS unit as a "home remedy" did not inform either the Claimant's treating physicians or the Employer and Carrier that the Claimant was receiving some sort of medical treatment.

Failing to cite any case law for the following proposition, the Claimant then added in his brief that the Employer should be required to demonstrate that it has suffered some prejudice by not having notice of an employee's use of a medical device. The prejudice to the Employer in this or any other case is that the Employer, lacking notice, is denied the opportunity to successfully investigate and defend what will probably be an old claim by the time the Employer is made aware of it. According to this Court, such would defeat the purpose of the statute of limitations as explained in McLean v. Mundy, 81 So.2d 501 (Fla. 1955).

In Petitioner's Brief the Claimant argued that permitting an Employer and Carrier to

> be shielded from a valid claim by alleging an employee failed to regularly check in and specify how he is using a particular medical device which was provided by the carrier
>
> > . . .would be contrary to the intent of Chapter 440, which is to provide an injured worker with appropriate benefits which undisputedly are necessary.

(Petitioner's Brief, p.10).

According to Florida case law and contrary to Petitioner's assertions, however, the employee has a duty to "go through the form of receiving remedial care every two years in order to preserve the right to future benefits." Mahonev v. Sears, Roebuck, & Co., 438 So.2d 174 (Fla. 1st DCA 1983), rev. denied, 447 So.2d 887 (1984).

In Mahonev the appellate court affirmed the opinion of the deputy commissioner holding that he was without authority to extend

the two-year period for remedial attention under the statute, even though testimony established that medical care would be required at a time beyond the two-year limitations period. The court stated that

> [i]t is unfortunate that, although probable need for future medical care to alleviate the effects of claimant's industrial accident has been established, claimant must go through the form of receiving remedial care every two years in order to preserve the right to future benefits.

Id. (emphasis added).

The First District Court of Appeal asserts in its opinion that Devilling V. Rimes, Inc., 591 So.2d 304 (Fla. 1st DCA 1991) and Taylor v. Metropolitan Dade County, 596 So.2d 798, (Fla. 1st DCA 1992) "appear to place a burden on the claimant to prove what the employer actually knew." (Order, p. 3). In Devilling v. Rimes. Inc., 591 So.2d 304 (Fla. 1st DCA 1991), the claimant contended that her occasional use of support hose, shoe inserts, a cane and medication tolled the statute. Over two years after the last medical care was provided, the claimant filed a claim for additional benefits because she alleged that she was experiencing further problems with her ankle. In affirming the denial of the claim, the appellate court seemed to imply that the treatment was not the type of "remedial attention" to which the statute refers, and that it was not "furnished by the employer" since the employer did not have actual knowledge of the Claimant's continued use of the remedy, "even though the doctor indicated that the claimant

should use the shoe inserts on a permanent basis." Id. at 305 (emphasis added).

In Taylor v. Metropolitan Dade County, 596 So.2d 798 (Fla. 1st DCA 1992), the Judge of Compensation Claims failed to consider evidence that the Claimant had worn a prescribed back brace during the two-year period in which the statute would have been tolled. Citing Fuster v. Eastern Airlines, 545 So.2d 268 (Fla. 1st DCA 1988), the appellate court held that such was error and that the evidence of use should have been considered. The appellate court also stated that

> [i]n Fuster, however, it was clear that the employer had actual knowledge of the claimant's use of the brace, and it appears that such knowledge is essential for the brace to toll the statute. [Citations omitted].

Taylor V. Metropolitan Dade County, 596 So.2d 798, 800 (emphasis added.

The Respondents assert that according to the case law, there is not a burden on the claimant to prove knowledge on the part of the employer. Rather, there is a burden on the Claimant to somehow document that during the two-year period in which the statute may be tolled, he received remedial attention "furnished by the employer" within the meaning of the statute.[2] In Devilling v. Rimes, Inc., 591 So.2d 304 (Fla. 1st DCA 1991), there was no documentation or evidence, outside of the testimony of the claimant

[2]The mere fact of visiting the authorized physician during the two year period is insufficient to tall the statute. According to McNeilly v. Farm Stores, Inc., 553 So.2d 1279 (Fla. 1st DCA 1989), treatment may toll the limitations period where it is a reasonably necessary part of the claimant's care following the on-the-job injury.

that she actually used the "modalities" which had been prescribed to her. Further, in discussing Fuster v. Eastern Airlines, Inc., 545 So.2d 268 (Fla. 1st DCA 1988) the court indicated that there was no showing in Devilling V. Rimes, Inc., 591 So.2d 304 (Fla. 1st DCA 1991), of employer knowledge. In Taylor, prior to remand, the only evidence of use of the back brace was "claimant's testimony that a back brace had been prescribed early in the course of treatment and that the claimant wore the brace 'off and on' apparently during the critical two-year period.** The appellate court reversed the decision of the Judge of Compensation Claims and remanded for "findings" on the question of employer knowledge of the claimant's alleged use of the back brace. Fuster, Devilling, and Taylor stand for the proposition that the employee must somehow show, either through documented visits to his treating physician or the testimony of representatives of either the employer or the carrier, that the employer either knew or should have known that the claimant was continuing to receive remedial treatment. Such is completely in keeping with the employee's burden, according to Mahoney V. Sears, Roebuck & Co., 438 So.2d 174 (Fla. 1st DCA 1983), rev. denied, 447 So.2d 887 (1984), to go through the form of receiving remedial care every two years in order to preserve the right to future benefits.

II.A. THE ENFORCEMENT OF STATUTES OF LIMITATIONS IS SUPPORTED BY VALID PUBLIC POLICY CONSIDERATIONS.

There are a variety of public policy considerations which support the enforcement of statutes of limitations. For example,

in Nardone V. Revnolds, 333 So.2d 25, 36 (Fla. 1976), this Court stated that "[t]he purpose of the statutes of limitations [is] to protect defendants against unusually long delays in filing of lawsuits and to prevent unexpected enforcement of stale claims concerning which interested persons have been thrown off guard for want of reasonable prosecution." In Nardone, the United States Court of Appeals of the Fifth circuit certified questions to the Supreme Court of Florida regarding commencement of the statute of limitations applicable to a medical malpractice action brought by a father on behalf of his minor son. The action was brought over five years after the child had been released from the hospital after undergoing a procedure which may have resulted in irreversible brain damage and total bilateral blindness. Id. at 30. The applicable statute of limitations at the time for a medical malpractice action was four years. Id. at 32. The Court found that the statute of limitations commenced to run when the child was discharged from the hospital, and that the statute was not tolled by the doctors' failure to disclose the possible causes of the child's condition. Id. at 33. The doctors' failure to explain the possible causes did not amount to fraudulent concealment which would suspend the operation of the statute. Id. at 35. Quoting a Rhode Island Supreme Court case, this Court further delineated the public policy considerations supporting statutes of limitation:

> they afford parties needed protection against the necessity of defending claims which, because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutelv unfair it

> would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses. Indeed, in such circumstances, the quest for truth might elude even the wisest court. The statutes are predicated on the reasonable and fair presumption that valid claims are not usually left to gather dust or remain dormant for long periods of time. [Citations omitted]. To those who are unduly tardy in enforcing their known rights, the statute of limitations operates to extinguish their remedies; in effect, their right ceases to create a legal obligation and in lieu thereof a moral obligation may arise in the aid of which courts will not lend their assistance." (emphasis in original).

Id. at 36-7.

According to the testimony of Mr. Lee himself, he had been using the device for almost six and one-half years. Analogizing Nardone to the facts of the case at bar, Mr. Lee's claim had lain dormant for the last two and one-half years of that time and should therefore be barred.[3]

This Court has also addressed the purpose of statutes of limitations in the context of the administration of the estates of deceased persons. In Barnett Bank of Palm Beach Co. v. Estate of Read, 493 So.2d 447 (Fla. 1986), the personal representative of a decedent's estate failed to follow through on his promise to pay a promissory note of the decedent's, even though the personal representative had represented to the bank that the bank would not

[3]See also, Employers' Fire Ins. co, v. Continental Ins. Co., 326 So.2d 177, 181 (Fla. 1976), where this Court stated that "[s]tatutes of limitations are enacted to bar claims which have been dormant for a number of years and which have not been enforced by persons entitled to enforcement."

need to file a formal claim. After the bank filed the claim, it was disallowed by the Fourth District Court of Appeal because it was not filed within the time period required by the statute. Id. at 448. While recognizing the "strong public policy in favor of settling and closing estates in a speedy manner," this Court permitted the claim to stand since the estate failed to raise the affirmative defense of statute of limitations. Obviously, the statute of limitations has been raised as a defense in the case at bar.

In Bedenbaush v. Lawrence, 193 So. 74 (Fla. 1940), some 12 years after the administratrix of an estate had been discharged, the plaintiff sought to enforce payment of a $900 bank stock assessment against the estate. This Court held that the applicable two-year statute of limitations barred the plaintiff's claim for payment. Further, this Court found that

> [i]t is apparent that it is a matter of public policy in this State that estates of decedents shall be speedily and finally determined. To effect this policy, statutes of non-claim and of limitations have been set up. When these limitations have expired, any and all claims of whatsoever nature are barred forever." (emphasis in original)

Id. at 80.

In Bedenbaush, this Court, quoting itself in Fillyau v. Laverty, 3 Fla. 72, 104 (Fla. 1849), set out the policy reasons supporting the speedy administration of estates and statutes of limitations barring stale claims. If the estates are open for indefinite periods of time, "evil results" ensue due to the expenses of administration, detention of property from legitimate heirs, and

subsequent litigation. Id. at 79. With regard to the statutes of limitations, this Court stated that the statutes passed by the legislature are stringent and for that very reason, they should not be disregarded, because "if the law-making power prescribes a rigid rule, a corresponding rigid observance must follow." Id. at 79 (emphasis in original).

Other courts within this jurisdiction have also justified the existence of statutes of limitations with respect to the limitations' period for actions to quiet title. In both Foremost Properties, Inc. v. Gladman, 10 So.2d 669 (Fla. 1st DCA 1958) and Whalev v. Wotring, 225 So.2d 177 (Fla. 1st DCA 1969) the First District Court of Appeal addressed the application of a statute of limitations which simplifies and facilitates land title transactions by allowing persons to rely upon a deed which has been recorded for a period of years. In Foremost Properties, Inc. v. Gladman, 10 So.2d 669 (Fla. 1st DCA 1958), the period was 20 years, and in Whalev v. Wotring, 225 So.2d 177 (Fla. 1st DCA 1969), the period was 30 years. The court stated in Foremost Properties, Inc. v. Gladman, 10 So.2d 669 (Fla. 1st DCA 1958), that

> [s]tatutes of limitation are designed to prevent undue delay in bringing suit on claims and to suppress fraudulent and stale claims from being asserted to the surprise of parties or their representatives, when all the proper vouchers and evidence are lost, or facts have become obscure from lapse of time or defective memory or death or removal of witnesses.

Id. at 672.

In Whaley, the appellate court found that the plaintiffs had recorded their deed and asserted their interest in the property at

issue after the 30-year period had run, thereby precluding their claim.

Based on the policy considerations supporting the enforcement of statutes of limitations as announced by this Court and the First District Court of Appeal, the statute of limitations as presented in § 440.19(1)(a) should bar the Claimant from pursuing an "unfresh claim" against the Employer and the Carrier "who [are] left with nothing more than tattered or faded memories" with which to shield themselves from liability. The clear policy of this Court as gleaned from the administration of estates cases is that the statute of limitations will be enforced to ensure the speeding administration of estates, barring estoppel, fraud or failure to plead the statute of limitations as an affirmative defense. Likewise, there is, under the workers compensation chapter a need to ensure the speedy administration of workers! claims. If a claimant in Mr. Lee's position sits on his rights for over a two and one-half year period, the statute should operate to bar his claim, because it is stale.

II.B. PUBLIC POLICY CONSIDERATIONS SUPPORT THE ENFORCEMENT OF STATUTES OF LIMITATION WHERE CLAIMS ARE NOT FILED WITHIN TWO YEARS FOLLOWING THE PAYMENT OF COMPENSATION OR DISPENSATION OF REXEDIAL ATTENTION.

This court has addressed the issue of whether Employer or Carrier knowledge operates to toll the statute of limitations. The reasoning of this Court is substantially the same in all of the cases, whether the statute is tolled or not; knowledge is essential. As this Court stated in McLean v. Mundy, 81 So.2d 501,

(Fla. 1955), the purpose of the statute of limitations is to protect the employer against claims too old to be successfully investigated and defended. Further, quoting Bradford Electric Light Co. V. Clapper, 286 U.S. 145 (1932), this Court provided that the

> 'purpose of the workmen's compensation laws is to provide not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.'

Id. at 503 (emphasis in original).

In University of Miami v. Matthews, 97 So.2d 111 (Fla. 1957), this Court held that where the employer had no knowledge that an employee's absences were related to a compensable injury, the statute barred the employee's untimely claim for compensation. This Court found that although the employer knew

> of such absences, it had no knowledge that they were related directly or indirectly to the injuries suffered by the employee in 1951. All outward appearances indicated the claimant's disability had ceased. No demand was made upon petitioner during that period for the payment of medical benefits. Claimant did nothing to preserve whatever rights he had under the Workmen's Compensation Act as he could have done by simply notifying his employer of the continuance of his disability.

Id. at 114.

This Court found that the employee had the duty of putting his employer on notice that the absence was due to a continuance of the disability. Further, this Court found that if the employee could wait four and one-half years to assert a claim for compensation without the employer having knowledge that the employee continued to suffer from a disability, then the employee

"could wait for any longer period of time that might suit his convenience." Id. at 115. This Court specifically found that "[s]uch a situation would defeat the purpose which the statute of limitations is intended to serve." Id.

In Sherrill V. Fuchs Baking Co., 327 So.2d 22 (Fla. 1976), this Court held that the employer did not have such knowledge as would toll the statute of limitations. In addition, this Court held that where there was no plausible explanation for the employee's delay in seeking treatment, the "statute of limitations would not be loosely applied so as to avoid alleged hardship." Id. at 224. In Engle v. Deerborne School, 226 So.2d 681 (Fla. 1969), this Court found that where the employer and the carrier knew of the continued medical care furnished to the claimant, the statute of limitations was tolled.

In City of Orlando V. Blackburn, 519 So.2d 1017 (Fla. 1st DCA 1987), the First District Court of Appeal stated that the purpose of the statute of limitations is to "protect the employer against old claims that can no longer be successfully investigated and defended and to encourage prompt and non-adversarial payment of benefits." Id. at 1018. The case law illustrates that the courts have not enforced the statute in situations where either the employer or the carrier had knowledge that the claimant was continuing to receive medical attention. The reason for tolling the statute is clear; where the employer or carrier has knowledge, they have the opportunity to either pay the claim or investigate it. In Fuster v. Eastern Airlines, Inc., 545 So.2d 268 (Fla. 1st

DCA 1988), although the carrier did not have knowledge that the Claimant was continuing to wear the back brace, the Employer did; therefore, the operation of the statute was suspended. In City of Orlando v. Blackburn, 519 So.2d 1017 (Fla. 1st DCA 1987), and Thomas v. Jacksonville Electric Authority, 536 So.2d 310 (Fla. 1st DCA 1988), the Carriers were aware that the employees were continuing to receive medical attention, since the employees were receiving telephone prescriptions for which the carrier was providing reimbursement. The statutes were tolled in each case because, the carriers had the opportunity to pay the claims or investigate them.

According to the reasoning of this Court in Sherrill v. Fuchs Baking Co., 327 So.2d 22 (Fla. 1976), Engle v. Deerborne School, 226 So.2d 681 (Fla. 1969), University of Miami v. Matthews, 97 So.2d 111 (Fla. 1957), and McLean v. Mundy, 81 So.2d 501, (Fla. 1955), the statute of limitations should bar Mr. Lee's claim. In the case at bar, neither the Employer, the Carrier, nor the treating physician had knowledge that the Claimant was continuing to use the device as he has alleged. There was no opportunity for the Employer/Carrier to promptly pay any benefits to the Claimant or investigate the legitimacy of the claim because they had no idea that the Claimant was even using the unit. Aside from the initial prescription in June of 1984, the Claimant never requested any supervision or direction with regard to the use of the TENS unit from his treating physicians. (R-149). In addition, the medical records of Drs. Todd and Brown reflect that not once in the period

of almost six years following the prescription of the unit, did the Claimant mention to his doctors that he was even using the unit. (R-146, 147, 149 and 150). Finally, the record reflects that the Claimant did not request parts for the unit after April 17, 1986. (R-21).

In this case, the Employer/Carrier's obligations to the Claimant were fulfilled as of the passing of the two-year period following Mr. Lee's visit with Dr. Todd on May 16, 1986, since the Employer and the Carrier had no actual knowledge that the Claimant was continuing to use the device. In Tower Chemical Co. v. Hubbard, 527 So.2d 886 (Fla. 1st DCA 1988), the appellate court held that a worker's visit to an authorized orthopedic surgeon constituted "remedial attention" within the meaning of the statute. The Employer/Carrier contended that the visit was merely an examination and not "remedial attention." Commenting on the statute of limitations, the court stated that

> [w]e do not ascribe to the legislature any intention to create a statute of limitation that becomes operative purely by happenstance; it has clearly provided a two-year time limitation that only commences to run after the employer has completed fulfilling its obligation to provide benefits due the claimant under the law.

Id. at 890-91.

This is precisely what has occurred in the instant case. The Employer/Carrier had completed its obligation to the Claimant as of the passing of the two-year period following the Claimant's visit with Dr. Todd on May 16, 1986. As of May 16, 1988, the

Employer/Carrier's obligation to provide benefits due the claimant under the law had been fulfilled.[4]

III. ANSWERING THE CERTIFIED QUESTION IN THE AFFIRMATIVE WILL OPEN THE FLOODGATES OF LITIGATION TO CLAIMS SIMILAR IN NATURE TO TEE ONE AT BAR.

If this Court permits the operation of the statute to be suspended in the instant case, its "opinion will open a floodgate of liability never contemplated by the Legislature, employers, their insurance carriers, or employees." Jones v. Leon Co. Health Dept., 335 So.2d 269 (Fla. 1976). In Jones, the family of an employee who had contracted a work-related disease and later committed suicide was permitted to recover workers compensation benefits on the grounds that the employee's emotional stress was caused by his job-related injury. In a well-reasoned dissent, Justice Boyd postulated the following: "How could employers refute such claims?" Id. at 273. Analogizing to the instant case, how could an employer in the position of the City of Jacksonville refute Mr. Lee's claims? The Claimant has retired from his employment. He alleges that he has been using an electrical device (which can easily be concealed underneath his clothing) "off and on" for almost six and one-half years. It is not similar to a back brace, the use of which can be observed by disinterested third parties. The Claimant hasn't told any of his treating physicians

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[4]See Eagle Point Mobile Home Estates v. Smith, 475 So.2d 992 (Fla. 1st DCA 1985) which stands for the proposition that even missing the expiration of the two-year period by two days does not bring the claimant within the requirements of the statute. In this case, the claimant missed the tolling of the two-year period by approximately six months.

that he has continued to use the device, nor has he required that the Carrier reimburse him for parts. Further, when the Claimant's unit broke, by his own testimony, he did not go to the Carrier for a replacement, he merely borrowed parts from his relatives. There is no way that the Employer/Carrier can refute the Claimant's allegations of use of the device. There is no defense to these claims except that the Claimant did not go through the form of seeking remedial treatment in order to ensure his right to future benefits. Otherwise an untold number of other claimants may come forward with similar claims which the Employer/Carrier will be unable to refute.

IV. THE STATUTE IS CLEAR *AND* UNAMBIGUOUS ON ITS PACE; IT IS THE DUTY OF THE LEGISLATURE TO MAKE *ANY* EXCEPTIONS, SUCH AS THE ONE PROPOSED BY THE CLAIMANT IN THIS CASE.

The interpretation of the statute at issue in the instant case has been considered by this Court and the First District Court of Appeal in several cases. In each case, the courts concluded that if an exception was to be permitted within the factual scenario presented by each case, then it was the function of the legislature, not the courts to provide the claimant with a remedy. In Daniel v. Holmes Lumber Co., 490 So.2d 1252 (Fla. 1986), this Court held that the claim for benefits was timely filed within two years of the last payment of compensation or furnishing of remedial attention although a two-year gap when no compensation was paid or remedial attention was furnished had occurred. In so holding, this Court stated that

> Florida's workers' compensation laws are remedial in nature and the courts should resolve any doubts as to

> statutory construction in favor of providing benefits to injured workers. [Citations omitted]. Yet in the case of sections 440.13(3)(b) and 440.91(1)(a) no ambiguities exist. These statutes unequivocally state that so long as an employee files a claim within two years of the last voluntary compensation payment or dispensation of remedial treatment made without an award the claim is timely. [Citations omitted]. Neither statute contains any reference whatsoever to the relevance of a two-year gap in time. When the language of a statute is clear, courts may not look beyond the plain meaning of that language. [Citations omitted].

Id. at 1256.

In Dobbs v. Sea Isle Hotel, 56 So.2d 341 (Fla. 1952), this Court, in declining to overturn its decision in another case, stated that

> the legislature made one exception to the precise language of the statute of limitations. We apprehend that had the legislature intended to establish other exceptions it would have done so clearly and unequivocally. We must assume that it thoroughly considered and purposely preempted the field of exception to, and possible reasons for tolling the statute. We cannot write into the law any other exception, nor can we create by judicial fiat a reason, or reasons, for tolling the statute since the legislature dealt with such topic and thereby foreclosed judicial enlargement thereof.

Id. at 342.

In Mahoney V. Sears, Roebuck & Co., 438 So.2d 174 (Fla. 1st DCA 1983), the appellate court affirmed the opinion of the deputy commissioner holding that the deputy commissioner was without authority to extend the two-year period for remedial attention under the statute, even though testimony established that medical care would be required at a time beyond the two-year limitations period. The court stated that it was the duty of the legislature

to supply the appropriate remedy for claimants in a similar situation.

In the case at bar, the statute is clear an unambiguous. According to the reasoning of this Court and the First District Court of Appeal, since the claim was not filed within two years of the last voluntary payment of compensation or dispensation of remedial treatment, it is not timely. Further, according to the reasoning of this Court, one may not look beyond the plain meaning of the statutory language.

CONCLUSION

The Order of the Judge of Compensation Claims finding that the statute of limitations barred the Petitioner's Claim for Benefits should be affirmed. Based on competent substantial evidence, the Judge of Compensation Claims found and the First District Court of Appeal affirmed that the Claimant's use of the TENS unit was not reasonably and medically necessary, thus, the Employee did not receive "remedial attention furnished by the employer" as required by the statute. The question certified by the First District Court of Appeal should be answered in the negative.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail this 29th day of [illegible], 1992 to Douglas Daze, Esquire, 1660 Prudential Drive, Suite 402, Jacksonville, Florida 32207.

Attorney