SUPREME COURT OF FLORIDA

JAY F. LEE,

Petitioner,

vs.

CITY OF JACKSONVILLE

Respondent.

_____/

Case No. 79,930

District Court of Appeal,
1st District - No. 91-233

PETITIONER'S BRIEF

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STATEMENT OF THE CASE

A claim was filed on behalf of Jay Lee (R-132), which claims various benefits under the Workers' Compensation Act for an accident dated August 30, 1971. It was agreed that the employee was injured in the course and scope of this employment with the City of Jacksonville (R-134), but the claim was defended upon the grounds that the statute of limitations barred the claim. A hearing was held before the Honorable Wilbur W. Anderson October 16, 1990, (R-2), and the hearing was limited strictly to the threshold issue of the statute of limitations, the remaining balance of the claim being reserved until a ruling on that issue. Following those proceedings an order was entered January 2, 1991, (R-235), which found that the statute of limitations barred Mr. Lee's claim. From this order a timely Notice of Appeal was filed (R-240).

The Florida First District Court of Appeal issued an opinion dated May 15, 1992, in which it affirmed the Judge of Compensation Claims' finding that the statute of limitations barred Jay Lee's claim but specifically certified the issue to this court as being one of great public importance. Throughout the text of this brief Petitioner will refer to the record on appeal by use of the symbol (R-).

STATEMENT OF THE FACTS

The employee, Jay Lee, was injured by accident arising out of and in the course and scope of his employment August 30, 1971, (R-134), when he slipped and twisted his left knee (R-4). Mr. Lee came under the care of Dr. Trave Brown (R-5), who prescribed a TENS unit for him to use (R-5). A certificate of medical necessity prescribing the TENS unit was entered into evidence (R-136), and indicates that the doctor recommended the appliance should be purchased and will be needed for an undetermined amount of time. Mr. Lee still has the TENS unit and continues to use it (R-5). Mr. Lee went to St. Luke's Hospital on two occasions to be fitted with the TENS unit and to be instructed in its proper operation (R-6). He has never been told how often to use it and has never been told not to use it (R-6).

Mr. Lee indicates that the TENS unit helps relieve his pain although it does not do as much good as it used to (R-7). Mr. Lee also indicates that he had other TENS units available to him from time to time since his accident and that his sister-in-law allowed him to use her unit (R-7). The only supplies which Mr. Lee needs in regards to his TENS unit are a nine volt battery (R-8), and adhesive tape (R-9).

Mr. Lee acknowledge that there was a period of time between May of 1986 and January of 1989, where he did not see his authorized treating physician (R-10). However, Ms. Lee stated that during that period he has continuously used his TENS unit (R-11). Mr. Lee stated that the longest period of time he would go without using his TENS unit would be two weeks (R-11).

Also testifying was Mr. Lee's wife who stated that during the period between May 1986 and January 1989, Mr. Lee used the TENS unit and the longest period he would have gone without using the TENS unit would be two to three weeks (R-52).

Kathy Hodge, the employee's sister-in-law, testified that she used a TENS unit at one time and loaned it to Mr. Lee (R-74). She stated that Mr. Lee still has her TENS unit (R-76), and that he would wear the different units at different times (R-77).

Joann Hamlin, another relative of the employee, also uses a TENS unit (R-97), and from time to time would provide him with parts for a TENS unit (R-100).

Testifying on behalf of the employer/carrier were Cheryl Riley (R-67), who stated that she is the adjuster for CNA Insurance assigned to this file. Ms. Riley testified to the dates that payments were made by the carrier on behalf of this claim, those facts not being in issue.

Also testifying on behalf of the employer was Robert Gut (R-88), who ia the Claims Administrator for the City of Jacksonville in workers' compensation. Mr. Lee initially contacted Ms. Gut when CNA had refused to pay benefits based upon the statute of limitations defense (R-89). Mr. Gut said he did not recall any dealings with Mr. Lee in regards to his claim since at the time Mr. Lee was injured the City was insured with CNA and any calls would have been referred to CNA Insurance (R-91). Mr. Gut has no knowledge about any of the facts of this claim since he did not adjust this claim because the City was insured (R-92).

POINT ON APPEAL

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.

SUMMARY OF THE ARGUMENT

It is the contention of the employee, Jay Lee, that the statute of limitations does not bar his claim as these was never a two year period which expired without his using a medical appliance, here a TENS unit, which had been prescribed by his authorized treating physician and paid for by the carrier. Although the carrier may have attempted to imply that Mr. Lee did not use his TENS unit during this period, there is no evidence of that presented at the hearing and in fact the Judge did not find that Mr. Lee failed to use the TENS unit for a two year period. Instead, the issue upon which this claim was decided was the Judge's finding that Mr. Lee's using the TENS unit was not reasonable and necessary under the circumstances and for the length of time used by Mr. Lee.

ARGUMENT
POINT ON APPEAL

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.

A careful analysis of the Judge's order must be made in order to determine exactly why the claim was denied based upon the statute of limitations defense as well as to understand why the Judge's reasoning is incorrect. The Judge specifically found that Mr. Lee's physician prescribed a TENS unit, that the carrier purchased the TENS unit, and that Mr. Lee continued to use the TENS unit from the time he received it through the date the claim was filed (R-236). These specific findings in and of themselves are sufficient to support the employee's position that this claim is not time barred. This was the specific holding of this court in Fuster v. Eastern Airlines, **545** So.2d **268** (Fla. 1st DCA 1988). There as here, the employee was provided with a medical appliance and continued to use it even though he did not actually see a doctor for a two year period. This court there held that such use of a medical appliance constituted remedial care for purposes of tolling the statute of limitations.

Other cases have also held that it is not necessary for an employee to actually be seen by a physician during a two year period if he continues to receive remedial care in the form of

medication or other treatment. The City of Orlando v. Blackburn, 519 So.2d 1017 (Fla 1st DCA 1987), Thomas v. Jacksonville Electric Authority, 536 So.2d 310 (Fla 1st DCA 1988). However, the Judge distinguished all of the foregoing cases from the instant cause for two specific reasons. Each will be dealt with separately.

First, the Judge found that continuing use of a TENS unit by Ms. Lee was not medically necessary. The Judge stated that although Dr. Brown, Mr. Lee's authorized treating physician, had issued a certificate of medical necessity indicating the TENS unit would be needed for an undetermined period of time, that such a certificate is not as clear an implication as a continuing prescription of medicine. The certificate of medical necessity entered into evidence at (R-136), prescribes a TENS unit and supplies for an undetermined number of months for chronic problems related to Mr. Lee's industrial accident. It also indicates that the equipment should be purchased and not rented. The testimony of Dr. Todd apparently forms the basis for the Judge's deviation from this courts holding in the above cases. Dr. Todd saw Mr. Lee from time to time following his industrial accident although Dr. Brown, Dr. Todd's partner, was the initial authorized treating physician. In his deposition Dr. Todd stated that he did not even know Mr. Lee had a TENS unit (R-148). He stated that in retrospect if he had been asked he would "in all likelihood" have told Mr. Lee not to use the TENS unit (R-148). However, Dr. Todd further stated that the issue of Mr. Lee's wearing a TENS unit was never brought up during any of his examinations (R-136). Thus, the Judge and this court are faced with a situation wherein Mr. Lee was prescribed a

TENS unit, was provided a TENS unit by the carrier, was instructed to use the TENS unit, and was never asked about it again. Mr. Lee testified that he was never told by the doctors how often to use his TENS unit (R-6), and was also never told not to use it (R6,7). Thus, there is no evidence of record indicating that Mr. Lee was ever advised by his physicians, the employer, or the carrier to do anything other than use his TENS unit. The sole basis for the Judges's deviation from the above cases 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. This speculative testimony is insufficient to demonstrate that Mr. Lee's use of a TENS unit was not reasonable and necessary and is further insufficient to justify the Judge's departure from the above cases.

The Judge in his order further acknowledged that although the provision of the TENS unit to Mr. Lee was initially remedial attention furnished by the employer (R-237), the use of the TENS unit ceased to be such attention by May 19, 1986, at the latest. It is unclear why the Judge chose this date as being the last date upon which use of the TENS unit was appropriate remedial care. Mr. Lee testified that the TENS unit was provided, and continues to provide relief from his pain. This was the purpose of the prescription of the TENS unit. The Judge is apparently attempting to make a distinction which under the reasoning of this court in the above cases cannot be made. The Judge's logic would provide that use of any medication, medical appliance, or other non-physician medical care must have an end. Thus, a prescription for

pills according to the Judge's logic, would have a definite time in which to be used regardless of whether the patient was actually told this. Therefore, if an individual were prescribed thirty pills but used them sparingly so as to make them last longer, or if pain medication were not needed as often for this individual, the Judge would have this court hold that if the pills were not taken on some regular schedule then the statute of limitations would not be tolled. This is certainly not the logic that this court has set forth on this topic.

The second point used by the Judge in denying this claim and departing from this court's decisions in this area is based upon his finding that the employer and the carrier had no notice of Mr. Lee's continuing use of a TENS unit. The Judge specifically found that following the prescription for and purchase of the TENS unit the employer and carrier were unaware that the employee continued to use the device. This finding is not supported by the facts. Indeed, the employer/carrier continued to furnish supplies for the TENS unit through at least April 17, 1986. Thus, the employer and carrier were aware that Mr. Lee had utilized the TENS unit for at least two years following its purchase. The Judge however makes an important point of fact that the carrier was not asked to furnish gel, paid, or electrodes for the unit after April 17, 1986. When asked about this particular topic Mr. Lee indicated that he had been obtaining these supplies at the coat of CNA where he could charge the supplies directly to the carrier (R-12). However, when he had to purchase these items and forward the prescriptions to CNA he would never be reimbursed and therefore discontinued requesting

them. He never discontinued using the TENS unit but would obtain the supplies on his own. The adjuster who testified by telephone indicated at (R-68), that there is no indication in her file that any prescriptions were forwarded by Mr. Lee. It is interesting to note that she did not contradict Mr. Lee's statements that he sent in the prescription but only stated they were contained within her file. It is therefore apparent that Mr. Lee was permitted to use his TENS unit without any restriction by his physician or the insurance carrier and was never requested to return the TENS unit, discontinue its use, or in any way account for its use. By his finding the Judge would place the burden of continuously reporting the use of a TENS unit, and presumably any other medical appliance upon the employee. Admittedly the statute of limitations is designed to benefit an employer in cases where it would be unfair to permit an employee to proceed with a claim which cannot be investigated by the carrier. However, in such cases the burden must be upon the employer/carrier to demonstrate some prejudice. Here, none has been shown. To permit an employer/carrier as here 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 is grossly unfair and not in conformity with this court's decision. As this court stated in The City of Orlando v. Blackbusn, to permit such a result:

> "...would be contrary to the intent of Chapter 440, which is to provide an injured worker with appropriate benefits which undisputedly are necessary." (at 1018).

The remedial nature of the Workers' Compensation Act is to

ensure that individuals such as Jay Lee are provided with all benefits which are appropriate and which the nature of the injury may require. Mr. Lee in using the TENS unit followed all instructions he was given and acted as a reasonable and prudent person would. The self-executing nature of the Workers' Compensation Act should not place the burden on Mr. Lee to ensure that CNA Insurance Company is continuously aware of the dates and times he uses his TENS unit so as to prevent stale claims. The unit and supplies were purchased for him by CNA and the carrier's knowledge of its use spanned at least two years. The self-executing nature of the Act places upon CNA the duty to continuously investigate the claim, not only to ensure that appropriate benefits are provided to the employee, but also to ensure that it is able to investigate any claim and ensure that stale claims are not presented. The Judge's attempt to shift the burden of investigation and monitoring of the claim to Mr. Lee is inappropriate and achieves an unfair and unjust result in cases such as the present. Because the Judge's reasons for deviation from this court's holdings are not supported by competent substantial evidence and are contrary to the current state of the law the order must be reversed with instructions to the Judge to determine benefits due to Jay Lee.

Clearly, policy considerations both for Mr. Lee and those people similarly situated who will be affected by this court's decision are significant in addressing the certified question posed by the District court of Appeal. At the District of Appeal in its decisions in Devilling v. Rimes, Inc., 591 So.2d 304 (Fla. 1st DCA

1991), and Taylor v. Metropolitan Dade County, 17 FLW D949 (Fla. 1st DCA 1992), specifically note that use of a medical appliance such as that found in Fuster, did involve knowledge on the part of Eastern Airlines that the employee was using the brace. However, in many cases such as the present it may be difficult if not impossible for an employee to prove employer knowledge. In the present case, Mr. Lee retired from the City of Jacksonville following his industrial accident and had no further contact with them regarding his claim. To impose upon Mr. Lee and those similarly situated the requirement that he periodically report to his employer or the carrier that he continues to use a particular device or schedule upon which he continues to use it, would be an unreasonable and perhaps impossible burden. Indeed there may be situations wherein an employer has gone out of business or otherwise ceases to exist in which case it would be impossible for an employee to demonstrate continuing knowledge of his use of a medical appliance.

An additional point that must be addressed is whether or not Fuster or any other cases require continuing knowledge of the use of a device or how much knowledge on the part of an employer is necessary in order to toll the statute of limitations. In the present case, the employer and carrier presumably knew that Mr. Lee was using a TENS unit for some period of time since the employer and carrier purchased the unit for him to use and never requested that it be returned or that its use be discontinued. This knowledge would seem sufficient to satisfy the Fuster test of employes knowledge unless employer knowledge is to be defined as

regular, continuing knowledge of the specific use of a medical appliance. Such an interpretation would require that all employees regularly report to their employer/carrier continuing use including frequency and duration, of any appliance in order to toll the statute of limitations. Although the District Court of Appeal in Taylor v. Metropolitan Dade, stated specifically that employer knowledge of the use of the medical appliance is essential to toll the statute, it has never been held by any court that the employer must be regularly advised of continuing use in order to toll the statute of limitations, Indeed, it would seem more appropriate that under the Workers' Compensation Act, the notice requirement should instead provide that once the employer has actual knowledge or constructive knowledge that a medical device or appliance is being utilized by the employee, then the employer or carrier should be responsible for monitoring at whatever intervals it feels are appropriate, the employee's use of the device not only to be able to document such use for statute of limitations purposes, but also to ensure that the employee is promptly provided with whatever benefits are appropriate under the Workers' Compensation Act. To interpret the notice requirement any other way would be to shift the burden to the employee to monitor the employer/carrier and ensure that benefits are timely provided. Such is not the intent of a self-executing Workers' Compensation Act and place an unnecessary and unreasonable burden on the injured worker.

CONCLUSION

The cert fied question posed by the First District Court of Appeal must be answered in such a way as not to place an additional and potentially impossible burden on Jay Lee to demonstrate actual continuing knowledge of the employer/carrier that Mr. Lee was using a medical appliance, To do so would not only be contrary to the philosophy of the Workers' Compensation Act but could place potentially insurmountable burdens on employees to not only continuously report use of appliances but be able to document by direct affirmative evidence what an employer or carrier actually knew. Instead, under these circumstances this court should either find that initial actual knowledge that an employee had access to a medical appliance would suffice for purposes of the statute of limitations, or, should place the burden on the employer/carrier to monitor the employee's use of such appliances to ensure proper use as well as to avoid problems with the statute of limitations.

APPENDIX

IN THE DISTRICT COURT OF **APPEAL**

FIRST DISTRICT, **STATE** OF **FLORIDA**

JAY F. LEE,	)	NOT **FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND**
Appellant,	)	**DISPOSITION** THEREOF' **IF FILED**
vs.	)	**CASE NO. 91-223**
CITY OF **JACKSONVILLE,**	)	
Appellee.	)	

Opinion filed **May** 15, **1992.**

An Appeal from an Order of Wilbur W. Anderson, Judge of compensation Claims.

Douglas E. Daze, of Harris, Guidi, Rosner, Ceballos, **Daze** & Whitman, Jacksonville, for Appellant.

William J. Spradley III and M. Allison Hunnicutt, of Osborne, **McNatt, Shaw, Ohara,** Brown & Obringer, **P.A., Jacksonville, for** Appellee.

SHIVERS, Judge.

This appeal is from **a** workers' compensation order dismissing a claim in its entirety on the ground the claim is barred by the statute of limitations. We affirm.

The claimant suffered a knee injury requiring surgery in 1971. The authorized doctors prescribed a 'TENS unit' in 1984. The Certificate of Medical Necessity indicated the unit "will be needed for undetermined months." The employer/carrier purchased the unit for the claimant.

A TENS (transcutaneous electrical nerve stimulation) unit is a battery powered machine designed to interfere with pain impulses by applying controlled, low-voltage pulses of electricity through electrodes attached to the skin. One of the doctors testified that use of the unit requires close monitoring, partly because the user can easily become dependent on the device. However, the doctors did not inquire about or take steps to supervise the claimant's use of the TENS unit after it was prescribed and purchased.

The claimant did not visit the doctors from May 1986 to January 1989, but he continued to use the TENS unit on a regular basis. He filed a claim for benefits in March 1990, and a hearing was conducted to determine whether the claim was barred by the two year limitations period of section 440.19(1)(a), Florida Statutes. The statute provides that a claim must be filed within two years of the time of injury, the date of the last payment of compensation, or "the date of the last remedial treatment furnished by the employer."

The claimant's position was that the limitations period had not run because of his continuous use of the TENS unit from May 1986 through January 1989, and the doctors placed no limitation on the duration of his use of the device. He argued that his ongoing use of the TENS unit was remedial treatment furnished by the employer. The judge of compensation claims found that the limitations period was not tolled by the claimant's use of the machine after May 1986. The claim was dismissed.

The claimant relies on Fuster v. Eastern Airlines, 545 So. 2d 268 (Fla. 1st DCA 1988), where the claimant's use of a back brace prescribed by the employer's physician for a back injury constituted remedial treatment which tolled the statute of limitations. However, in Fuster the employer had actual knowledge that the back brace was being used. In the case at bar, the employer did not know the claimant continued to use the TENS unit. We are therefore compelled to affirm on the authorities of Devilling v. Rimes, Inc., 591 So. 2d 304 (Fla. 1st DCA 1991), and Taylor v. Metropolitan Dade County, 17 F.L.W. 949 (Fla. 1st DCA April 8, 1992). In those cases this court held that Fuster requires that an employer have actual knowledge of a claimant's use of a prescribed medical device to toll the statute of limitations.

Devilling and Taylor appear to place a burden on the claimant to prove what the employer actually knew, even if the claimant has had no contact with employer for years. We therefore certify the following question as one of great public importance:

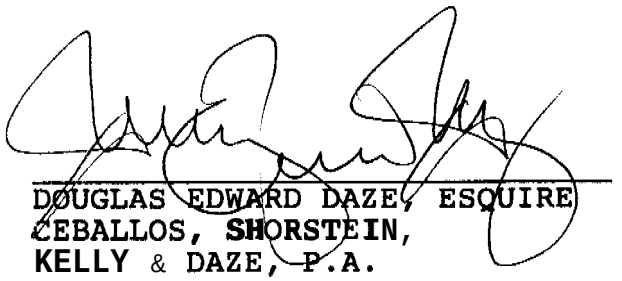
> WHETHER THE LIMITATIONS PERIOD OF SECTION 440.19(1)(a), FLORIDA STATUTES, IS TOLLED BY THE CLAIMANT'S ROUTINE USE OF A DEPENDENCY-INDUCING MEDICAL DEVICE FURNISHED BY THE EMPLOYER AND PRESCRIBED BY THE AUTHORIZED PHYSICIAN FOR AN INDEFINITE PERIOD OF TIME WITHOUT SUPERVISION, EVEN THOUGH THE EMPLOYER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

AFFIRMED.

BOOTH and MINER, JJ., CONCUR.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 7th day of July, 1992, to: William J. Spradley, Esquire, 225 Water Street, Suite 1400, Jacksonville, Florida 32202, Hon. Jon S. Wheeler, Clerk, First District Court of Appeals, Tallahassee, Florida. Shirley Walker, Workers' Compensation, Tallahassee, Florida.



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