

DISTRICT COURT OF APPEAL
FIRST APPELLATE DISTRICT
TALLAHASSEE, FLORIDA

PHYLLIS A. CRISPIN,

CASE NO.: 1D19-863

Appellant,

OJCC NO.: 12-009053MES

vs.

D/A: 4/18/2011

ORLANDO REHABILITATION GROUP D/B/A
CLERMONT NURSING AND REHAB CENTER and
GALLAGHER BASSETT SERVICES, INC.,

Appellees.

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This is an Appeal from a Final Order from the State of Florida, Division of Administrative Hearings, Office of the Judges of Compensation Claims, Orlando District Office, dated February 20, 2019.

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PRELIMINARY STATEMENT

The Appellant, PHYLLIS A. CRISPIN, shall be referred to herein as the "Claimant".

The Appellees, ORLANDO REHABILITATION GROUP D/B/A CLERMONT NURSING AND REHABILITATION CENTER and GALLAGHER BASSETT SERVICES, INC., shall be referred to herein as the "Employer/Carrier" (E/C) or by their separate names.

References to the Record on Appeal shall be referred to by the letter "R" followed by the applicable page number.

The transcript of the Final Hearing held on February 12, 2019, which is the second volume consisting of 29 pages, shall be referred to by the letters "RT" (record/transcript) followed by the applicable page number.

The Judge of Compensation Claims shall be referred to by the letters "JCC".

STATEMENT OF THE CASE

On September 14, 2018 (R-7-9) and December 4, 2018 (R-11-13), the Claimant, PHYLLIS A. CRISPIN, filed Petitions for Benefits for injuries sustained in a compensable accident occurring on April 18, 2011.

Thereafter, on February 12, 2019 a Final Hearing on the aforementioned PFB's was held before the Honorable Judge of Compensation Claims, Margaret E. Sojourner (RT-1). At that hearing Claimant sought the following benefits:

1. Reclassification of PTD to TTD/TPD for the period of October 22, 2014 to January 4, 2015, the date Claimant reached MMI following her right shoulder surgery.
2. Continued payment of PTD benefits from the date of suspension of May 26, 2017 to on or about August 6, 2017 until the full 5 years of PTD has been paid.
3. Penalties, interest, costs and attorney's fees (R-20,25,26,139, RT-5).

The E/C defended the claim on the following grounds:

1. All indemnity benefits have been paid at the correct rate.
2. No penalties, interest, costs or attorney's fees are due (R-20,36,139, RT-6).

Thereafter, on February 20, 2019 the Honorable JCC, Margaret E. Sojourner, entered her "**FINAL COMPENSATION ORDER**"

which is the subject of this appeal (R-139-143). In that order the JCC found Claimant was injured in the course and scope of her employment on April 18, 2011 (R-140). The JCC found Claimant was accepted as permanently and totally disabled on May 26, 2012 (R-140). At the time of the accident the Claimant was 73 years old (R-140).

Subsequently on October 22, 2014 Dr. Nowicki performed a right shoulder surgery (R-140). He rescinded MMI from the date of the surgery until January 4, 2015 (R-140). The E/C paid PTD benefits continuously until May 25, 2017 which was 5 years from the date of acceptance (R-140).

The JCC observed Claimant maintained the PTD benefits should have been suspended and temporary benefits paid during the period MMI was rescinded by Dr. Nowicki (R-140). The Claimant argues PTD benefits should have been reinstated after MMI was reached on January 4, 2015 and then paid for a period which when added to the weeks paid prior to October 22, 2014 would equal 5 years, or until August 6, 2017 (R-140). In other words, Claimant views PTD as a bank of benefits to be used while in a PTD status not to exceed a total of 5 years, while E/C views PTD to be paid for 5 calendar years from PTD acceptance (R-140).

The JCC found the language restricting the payment of PTD to a period of 5 years after PTD acceptance is clear and limits

payment of PTD to 5 calendar years rather than to 5 cumulative years of benefits.

The JCC found F.S.440.15(1)(b) provides in part:

"If the accident occurred on or after the employee reaches age 70, benefits shall be payable during the continuance of permanent total disability, not to exceed 5 years following the determination of permanent total disability." (R-140)

The JCC found that where a statute's words are clear and unambiguous, the words should be given their plain and ordinary meaning and it is not necessary to resort to the rules of statutory construction (R-140).

The JCC found the language setting forth the eligibility for PTD benefits when PTD occurs after age 70 is restrictive in nature as it terminates eligibility 5 years after the happening of a specific event - the determination of MMI. The JCC found this restriction is akin to the limiting language regarding payment of psychiatric TTD and wage loss benefits restricted to a period of weeks after the Claimant reaches MMI. The JCC found it is different from the general grant of eligibility found in the sections setting forth eligibility for temporary total benefits and wage loss benefits not tied to a specific period after MMI (R-141).

Based upon the foregoing the JCC ordered and adjudged:

1. The claim for reclassification of PTD benefits and payment of PTD benefits on a cumulative basis is denied.

2. The claim for penalties, interest, costs and attorney's fees is denied. (R-141)

On February 22, 2019 Claimant filed her "**MOTION FOR REHEARING**" (R-144-147).

On February 28, 2019 the JCC entered her "**ORDER DENYING MOTION FOR REHEARING**" (R-148). In that order the JCC found:

". . . The Claimant argues that the language which states that PTD benefits are payable 'not to exceed 5 years following the determination of permanent total disability' simply means there must be a determination of PTD. If this were correct the language could simply read that PTD benefits were payable following a determination of PTD without the limiting language of 5 years. This language, as stated in the Final Order, is similar to the provisions which terminate the right to wage loss within a specific number of weeks after MMI. Those cases found that the limiting language meant that the weeks were calendar weeks and not a bank of weeks to be used as needed by Claimant. The Motion for Rehearing is denied." (R-148)

Thereafter, on March 7, 2019 Claimant timely filed her Notice of Appeal (R-152,153). Claimant is appealing the JCC's Final Compensation Order of February 20, 2019.

STATEMENT OF THE FACTS

The Claimant, PHYLLIS A. CRISPIN, was employed with the employer herein as an LPN (R-7, RT-9).

On April 18, 2011 Claimant was involved in a compensable accident which is the subject of this appeal (R-17). On that

date Claimant tripped over a cord by a patient's bed injuring her right shoulder and right hip (R-7,18). At the time of her accident, Claimant was 73 years old (R-66,140, RT-14).

Following Claimant's compensable accident, Claimant came under the care of Dr. Kevin Nowicki, orthopedist (R-59,60). Dr. Nowicki initially saw Claimant in the emergency room on the date of Claimant's accident (R-60). Claimant had fractures to the humerus in the right shoulder and to the femur head in the right hip (R-60).

On April 19, 2011 Dr. Nowicki performed surgery on Claimant's right hip and right shoulder (R-60,61). The right hip surgery involved a percutaneous pinning of a femoral neck hip fracture (R-61). The right shoulder surgery involved an open reduction internal fixation of a three-part proximal humeral fracture in the right shoulder (R-61).

On June 15, 2011 Dr. Nowicki performed a second surgery to Claimant's right shoulder to remove a screw that was backing out at the time (R-61,62).

Eventually, Claimant had a non-union of her femoral neck hip fracture necessitating a future hip surgery and a total hip replacement (R-62). Dr. Nowicki does not perform total hip replacements and when the fracture failed he referred Claimant through workers' comp to Dr. McCutchen for a total hip replacement (R-62).

On September 21, 2011 Dr. McCutchen performed a total right hip arthroplasty (R-62).

On February 9, 2012 Dr. Nowicki placed Claimant at MMI for her right shoulder with a 12% permanent physical impairment (R-62).

On May 25, 2012 Dr. McCutchen placed Claimant at MMI for Claimant's right hip injury with a 12% permanent impairment (R-19).

Claimant's restrictions were that on a continuous basis she could not perform any of the tasks (R-70). On a frequent basis Claimant was able to sit, stand, alternate sit to stand (R-70). On an occasional basis Claimant is able to balance, crawl, bend and climb stairs (R-70). Claimant can sit for 30 minutes, stand for 20 minutes and walk for 20 minutes (R-70). Claimant demonstrates poor tolerance for bilateral lifting greater than 12 pounds, unilateral lifting with the right upper extremity greater than 5 pounds and tasks which require lifting, carrying, pushing, kneeling, squatting and climbing ladders (R-70,71). Claimant functions best at heights between 18 and 40 inches (R-71). She walks with a straight cane and cannot walk for any distance without difficulty with her balance (R-71).

The E/C accepted Claimant as PTD and began paying Claimant permanent total disability benefits on May 26, 2012 (RT-8). The

E/C paid Claimant PTD for 5 consecutive years through May 25, 2017 (RT-8).

In September 2014 and again on October 9, 2014 Claimant was complaining of increasing pain the right shoulder (R-63).

On October 22, 2014 Dr. Nowicki performed additional surgery on Claimant's right shoulder because of Claimant's persistent ongoing pain and discomfort (R-62,63). Dr. Nowicki explained the bone kind of collapsed around the hardware that was still in Claimant's right shoulder so the hardware became more prominent and often times can cause symptoms (R-63). Once the fractures are healed, the removal of the hardware is a reasonable option (R-63).

Dr. Nowicki explained the surgery he performed on Claimant was designed to perform two things (R-64). Number one, to reduce pain which can be considered to be palliative (R-64). However if the hardware becomes prominent it could cause further damage (R-64). In this case there was a definite medical reason to remove it (R-64). The third reason to remove the hardware in this case is that Claimant obviously is developing osteoarthritis of her shoulder (R-64). If a shoulder replacement would be required in the future, the hardware would have to be removed prior to placement of the implant (R-64).

Dr. Nowicki testified that typically the recovery period after this removal of hardware should be within 8 to 12 weeks

after surgery (R-65). Dr. Nowicki testified he placed Claimant back at MMI following the October 22, 2014 surgery on January 4, 2015 (R-65).

Dr. Nowicki explained Claimant would have been disabled following the surgery during the recovery period like anyone would be after a recent surgery (R-65). Dr. Nowicki explained Claimant had been on narcotics and may perhaps required physical therapy and until these issues were resolved, she would be disabled (R-65). Dr. Nowicki explained Claimant had a temporary relapse of her condition following the October 22, 2014 surgery until she recovered from the surgery on January 4, 2015 (R-71). For the period of time following surgery Claimant was totally disabled beyond her prior restrictions (R-71).

On January 4, 2015 Claimant was placed back on the same restrictions she had prior to surgery (R-71).

As previously indicated, the E/C stopped Claimant's PTD benefits on May 25, 2017 (RT-8).

POINTS ON APPEAL

POINT I

THE JCC ERRED IN CONCLUDING THE 5 YEAR LIMITATION ON PTD BENEFITS IN F.S. 440.15(1)(b)(2011) FOR A CLAIMANT WHOSE ACCIDENT OCCURS AFTER THE EMPLOYEE REACHES AGE 70 IS LIMITED TO 5 CALENDAR YEARS AFTER ACCEPTANCE OF PTD, AS OPPOSED TO A 5 YEAR BANK OF BENEFITS.

POINT II

THE JCC ERRED IN DENYING CLAIMANT'S REQUEST FOR RECLASSIFICATION OF PTD TO TTD/TPD FOR THE PERIOD OF OCTOBER 22, 2014 TO JANUARY 4, 2015 AND THEREFORE ERRED IN DENYING CLAIMANT'S REQUEST FOR CONTINUED PAYMENT OF PTD BENEFITS FROM THE DATE OF SUSPENSION ON MAY 26, 2017 TO AUGUST 6, 2017, PLUS PENALTIES, INTEREST, COSTS AND ATTORNEY'S FEES.

SUMMARY OF ARGUMENT

I

F.S.440.15(1)(b)(2011), which first went into effect on October 1, 2003, provides:

"If the accident occurred on or after the employee reaches age 70, benefits shall be payable during the continuance of permanent total disability, not to exceed 5 years following the determination of permanent total disability. . ."

Claimant's accident in the case at bar occurred on April 18, 2011 (R-60) when Claimant was 73 years old (R-66). Therefore the above referenced provision applies to Claimant.

Claimant submits that when a statutory limitation on entitlement to a class of benefits begins when the claimant becomes eligible for that class of benefits, the limitation on those benefits is calculated on a cumulative basis (bank of benefits). To the contrary, when a statutory limitation on

entitlement to a class of benefits begins on the occurrence of an event, such as MMI or the date of the accident, regardless of whether Claimant is entitled to those benefits at the time, the limitation on those benefits is calculated on a calendar basis (consecutively).

Claimant submits the above referenced language set forth in F.S.440.15(1)(b)(2011) entitles a claimant whose accident occurred on or after the employee reaches age 70 to a bank of benefits of 5 years of PTD benefits (calculated cumulatively).

The language in F.S.440.15(1)(b)(2011) is akin to the language in F.S.440.15(2)(a)(2011) which entitles a claimant to TTD benefits "during the continuance thereof, not to exceed 104 weeks. . .". This Honorable Court has interpreted that statutory language to provide the 104 week limitation is calculated cumulatively, as opposed to a calendar limitation of 104 weeks of TTD after the claimant is initially determined to be TTD, Wright v. City of Rockledge, 813 So.2d 283(Fla.1st DCA 2002).

The statutory language in F.S.440.15(1)(b)(2011) is similar to the statutory language in F.S.440.15(3)(b)4.d(III)(1991) wherein this Honorable Court concluded the 78 week limitation on wage loss eligibility applies only as a cumulative limitation on the total number of weeks which claimant may be entitled to wage loss benefits, as opposed to an uninterrupted consecutive

manner, Winn Dixie v. Resnikoff, 659 So.2d 1297(Fla.1st DCA 1995).

Claimant submits F.S.440.15(1)(b)(2011) does not contain language limiting Claimant's entitlement to PTD to a calendar based period of time after Claimant becomes MMI such as exists in F.S.440.093(3)(2003), School Board of Lee County v. Huben, 165 So.2d 865(Fla.1st DCA 2015)(a claim for psychiatric TTD benefits marks the date on the calendar, or starts a clock that stops six months to the day after the date of physical MMI). Claimant would note the language limiting entitlement to psychiatric TTD in F.S. 440.093(3)(2003) begins the day after Claimant reaches physical MMI, regardless of whether Claimant is entitled to psychiatric TTD benefits at that time, Kneer v. Lincare, F.L.W. D879 (Fla. 1st DCA 2019).

In the case at bar, Claimant was accepted as PTD on May 26, 2012 (R-140). However, on October 22, 2014 Claimant underwent additional right shoulder surgery under the direction of Dr. Nowicki (R-62,63), who rescinded MMI from the date of surgery until January 4, 2015 (R-140). Claimant was in a TTD status between October 22, 2014 and January 4, 2015 (R-71). As such, Claimant should have received TTD benefits between October 22, 2014 and January 4, 2015, Smitty's Coffee Shop v. Florida Industrial Commission, 86 So.2d 268(Fla. 1956), Orange County School Board v. Melman, 721 So.2d 1183(Fla.1st DCA 1998),

instead of receiving PTD benefits. This would leave Claimant entitled to an additional 10 weeks, 4 days of PTD benefits.

The JCC found the language in F.S. 440.15(1)(b)(2011) is restrictive in nature as it terminates eligibility 5 years after the happening of a specific event-the determination of MMI (R-141). However, that statute makes no mention of the determination of MMI and does not limit entitlement to a period of time after MMI. Claimant submits the JCC erred in concluding the 5 years of entitlement to PTD benefits under F.S.440.15(1)(b) is to be construed as a calendar based restriction beginning 5 years from the date Claimant is initially accepted as PTD, as opposed to a cumulative bank of benefits entitling this claimant to a total of 5 years of PTD benefits.

II

Since the JCC erred in concluding F.S.440.15(1)(b)(2011) limits Claimant to a 5 year calendar of time of PTD benefits commencing on the date the Claimant reaches PTD (as opposed to a bank of time of 5 years) the JCC erred in denying Claimant's request for reclassification of PTD to TTD/TPD for the period of October 22, 2014 to January 4, 2015, the date Claimant reached MMI following her right surgery, and denying Claimant's claim for PTD benefits from the date of suspension May 26, 2017 to August 6, 2017 until the full 5 years of PTD has been paid.

ARGUMENT

POINT I

THE JCC ERRED IN CONCLUDING THE 5 YEAR LIMITATION ON PTD BENEFITS IN F.S. 440.15(1)(b)(2011) FOR A CLAIMANT WHOSE ACCIDENT OCCURS AFTER THE EMPLOYEE REACHES AGE 70 IS LIMITED TO 5 CALENDAR YEARS AFTER ACCEPTANCE OF PTD, AS OPPOSED TO A 5 YEAR BANK OF BENEFITS.

The standard of review on statutory interpretation is de novo, Hardee County v. Finr II, Inc., 221 So.3d 1162(Fla.2017). This case involves statutory interpretation of F.S.440.15(1)(b)(2011) and thus the standard of review is "de novo".

The JCC found:

"I find that the language restricting the payment of PTD to a period of 5 years after PTD acceptance is clear and limits payment of PTD to 5 calendar years rather than to 5 cumulative years of benefits for the following reasons."
(R-140)

The JCC went on to state:

"The language setting forth the eligibility for PTD benefits when PTD occurs after age 70 is restrictive in nature as it terminates eligibility 5 years after the happening of a specific event - the determination of MMI. This restriction is akin to the limiting language regarding of payment of psychiatric TTD and wage loss benefits restricted to a period of weeks after the claimant reached MMI. It is different from the general grant of eligibility found in the sections setting forth eligibility for temporary total benefits and wage loss benefits not tied to a specific period after MMI." (R-141)

Based on the foregoing the JCC ordered and adjudged:

"1. The claim for reclassification of PTD benefits and payment of PTD benefits on a cumulative basis is denied."
(R-141)

Claimant respectfully submits the JCC has erred in finding the language in F.S. 440.15(1)(b)(2011) restricting the payment of PTD to a period of 5 years after PTD acceptance limits payment of PTD to 5 calendar years rather than to 5 cumulative years of benefits.

Claimant's accident in the case at bar occurred on April 18, 2011 (R-17). Claimant was 73 years old at the time of her accident (R-66, RT-14).

F.S.440.15(1)(b)(2011), which first went into effect on October 1, 2003, and which applies to Claimant's case, provides inter alia as follows:

"If the accident occurred on or after the employee reaches age 70, benefits shall be payable during the continuance of permanent total disability, not to exceed 5 years following the determination of permanent total disability."

This statute has been held to be constitutional, Berman v. Dillard's, 91 So.3d 875(Fla.1st DCA 2012).

Claimant submits the plain language of F.S.440.15(1)(b)(2011) entitles Claimant up to 5 years of permanent total disability benefits, calculated on a cumulative basis (bank of benefits), as opposed to limiting Claimant to entitlement to just 5 calendar years of PTD beginning upon the date the Claimant reaches PTD.

When confronted with a question of statutory interpretation, the reviewing court must first look to the

statute's actual language, Metropolitan Casualty Insurance Company v. Tepper, 2 So.3d 209 (Fla.2009), Williams v. State, 244 So.3d 356 (Fla.1st DCA 2018). If the statutory language is clear and unambiguous, the court will apply that meaning without resorting to the rules of statutory construction, Metropolitan Casualty Insurance Company v. Tepper, Supra, Hardee County v. Finr II, Inc., Supra, Hinzman v. Winter Haven Facility Operations LLC, 109 So.3d 256 (Fla.1st DCA 2013). In addition, courts are not at liberty to add words to statutes that were not placed there by the Legislature, Esposito v. State, 891 So.2d 525 (Fla.2004), Hinzman v. Winter Haven Facility Operations LLC, Supra.

Claimant submits that when a statute, such as the statute in the case at bar, provides a claimant is entitled to a certain amount of benefits following the date in which claimant first becomes entitled to those benefits, those benefits are calculated as a bank of benefits to be used cumulatively while the claimant is in the status in question. Claimant is entitled to receive those benefits, as long as she is otherwise qualified to do so, until she has exhausted her entitlement to those benefits.

To the contrary, those statutes that limit a claimant's entitlement to benefits to a certain period of time following a specific event, such as claimant attaining MMI, or the date of

the accident, regardless of whether Claimant is entitled to those benefits at the time the triggering date occurs, limit entitlement to those benefits to the end date of the period, even if claimant has not exhausted the total amount of those benefits she would otherwise be entitled to.

For example, this Honorable Court in Auman v. Leverocks Seafood House, 997 So.2d 476(Fla.1st DCA 2008), Cooper v. Buddy Freddy's Restaurant, 889 So.2d 125(Fla.1st DCA 2004), and Wright v. City of Rockledge, 813 So.2d 283(Fla.1st DCA 2002), held the 104 week limit to eligibility for temporary disability benefits is measured in terms of cumulative payments received, rather than consecutive weeks from the date of the claimant's accident. The statutory language in effect when this Honorable Court first addressed this issue as it relates to TTD benefits, in Wright v. City of Rockledge, Supra, was F.S.440.15(2)(a)(1997) which provided:

"(2) TEMPORARY TOTAL DISABILITY. -

(a) In case of disability total in character but temporary in quality, 66 2/3% of the average weekly wages shall be paid to the employee **during the continuance thereof, not to exceed 104 weeks . . .** Once the employee reaches the maximum number of weeks allowed, or the employee reaches the date of maximum medical improvement, whichever occurs earlier, temporary disability benefits shall cease and the injured worker's permanent impairment benefits shall be determined." (Emphasis mine)

The language in the TTD statute that states "shall be paid to the employee during the continuance thereof, not to exceed 104 weeks" is nearly the same as the language in the statute at issue, which is "shall be payable during the continuance of permanent total disability, not to exceed 5 years following the determination of permanent total disability".

Claimant would note this Honorable Court in Wright v. City of Rockledge, Supra, based its opinion to a certain extent on the interpretation by the Department of Labor and Employment, Division of Workers' Compensation at the time. Claimant would note the current agency, The Department of Financial Services, Division of Workers' Compensation, has not made any interpretation of the particular portion of the statutory provision at issue, see Fla.R.Admin.P.69L-3.01945.

In Winn Dixie v. Resnikoff, 659 So.2d 1297(Fla.1st DCA 1995), this Honorable Court interpreted the 78 week limitation on wage loss eligibility under F.S.440.15(3)(b)4.d(III)(1991) as a cumulative period, not an uninterrupted consecutive calendar period. The statutory language involved in Winn Dixie v. Resnikoff, Supra, provided as follows:

- "(3) PERMANENT IMPAIRMENT AND WAGE LOSS BENEFITS. -
 . . .
 (b) Wage - Loss Benefits. -
 . . .
 4 The right to wage loss benefits shall terminate upon the occurrence of the earliest of the following:

. . . .
b. For injuries occurring on or before July 1, 1980, 350 weeks after the injured employee reaches the date of maximum medical improvement.

c. For injuries occurring after July 1, 1980, but before July 1, 1990, 525 weeks after the injured employee reaches maximum medical improvement.

d. For injuries occurring after June 30, 1990, the employee's eligibility for wage loss benefits shall be determined according to the following scheduled:

. . . .
(III) 78 weeks of eligibility for permanent impairment ratings greater than 6 and up to and including 9%

In determining this section was a cumulative period, not an uninterrupted consecutive calendar period, this court in Winn Dixie v. Resnikoff, Supra, stated as follows:

"The employer/servicing agent argue that the 78 weeks of eligibility under section 440.15(3)(b)4.d(III) should commence immediately upon the attainment of maximum medical improvement and expire 78 calendar weeks thereafter, without interruption and without regard to whether the claimant was otherwise entitled to wage loss benefits for that entire period of time. In declining to adopt this interpretation of the statute, the judge contrasted the general grant of eligibility in section 440.15(3)(b)4.d with the more specific language in section 440.15(3)(b)4.b and c, which expressly terminates the right to wage loss benefits upon the expiration of a certain number of weeks after maximum medical improvement. Based on this difference in the statutory language, the judge properly applied section 440.15(3)(b)4.d as a cumulative limitation on eligibility which is not confined to an uninterrupted period immediately after maximum medical improvement. The employer/servicing agent's alternative argument that this may be an uninterrupted period commencing when the claimant first seeks wage loss benefits is likewise without merit,

as section 440.15(3)(b)4 contains no language to warrant such a restrictive interpretation. Instead, the eligibility schedule under section 440.15(3)(b)4.d applies only as a cumulative limitation on the total number of weeks for which the claimant may be entitled to wage loss benefits." Winn Dixie v. Resnikoff, Supra at 1298,1299.

To the contrary, this court has held a statute sets forth a calendar based limitation on receipt of certain benefits, as opposed to a cumulative calculation of benefits, when a statute specifically sets forth an event that marks a date on the calendar, or starts a clock that stops the entitlement to benefits a certain period after the occurrence of the specific event, such as the attainment of MMI, or the date of the accident, regardless of, and even if, Claimant is not entitled to those benefits on the date the triggering event occurs.

For example, in Kneer v. Lincare, 44 F.L.W. D879(Fla.1st DCA 2019), Utopia Home Care v. Alvarez, 230 So.2d 72(Fla.1st DCA 2017), and School Board of Lee County v. Huben, 165 So.3d 865(Fla.1st DCA 2015), this Honorable Court held the 6 month period of time to which a claimant is entitled to psychiatric temporary total disability benefits under F.S.440.093(3)(2003) should be calculated as a calendar based limitation and not calculated cumulatively. The specific language this Honorable Court interpreted in School Board of Lee County v. Huben, Supra, was as follows:

"440.093 Mental and Nervous Injuries -

. . . .
(3) Subject to the payment of permanent benefits under s.440.15, in no event shall temporary benefits for a compensable mental or nervous injury be paid for more than 6 months after the date of maximum medical improvement for the injured employee's physical injury or injuries, which shall be included in the period of 104. . . ."

The court in School Board of Lee County v. Huben, Supra, stated:

"In contrast to the JCC's understanding, we read section 440.093(3) to set a strict deadline after which no TTD benefits are payable on psychiatric injuries. The plain language of the statute marks a date on the calendar, or starts a clock that stops 6 months to the day after the date of physical MMI." School Board of Lee County v. Huben, Supra at 867.

It should be noted the clock starts on entitlement to psychiatric TTD when Claimant reaches physical MMI, even if Claimant is not entitled to receive psychiatric TTD benefits at the time Claimant reaches physical MMI, Kneer v. Lincare, supra

Similarly, in A & J Highbeam Service v. Kendle, Jr., 511 So.2d 653(Fla.1st DCA 1987) and Occidental Chemical Company v. Howard, 508 So.2d 466(Fla.1st DCA 1987), this Honorable Court held catastrophic loss benefits under F.S.440.15(2)(b) entitles an injured worker to 6 months of catastrophic loss benefits based on a calendar basis from the date of the claimant's injury. The statutory language in effect in F.S.440.15(2)(b) (1979) when this Honorable Court first

encountered this argument in Occidental Chemical Company v. Howard, Supra, was as follows:

"(2) TEMPORARY TOTAL DISABILITY. -

. . . .

(b) Notwithstanding the provisions of paragraph (a), an employee who has sustained the loss of an arm, leg, hand, or foot, or total loss of use of such arm, leg, hand, or foot, or total loss of use of such member because of organic damage to the nervous system, or has lost the sight of both eyes shall be paid temporary total disability of 80% of his average weekly wage until such employee has completed his training in the use of artificial members or appliances as necessary and completed training or education under a rehabilitation program pursuant to s.440.49, if provided. **In no event should the increased temporary total disability compensation provided for in this paragraph extend beyond 6 months from the date of injury.. . .**(Emphasis mine)

In Occidental Chemical Company v. Howard, Supra, this Honorable Court stated:

"However, we find that this claimant is not entitled to catastrophic loss benefits under section 440.15(2)(b), Florida Statutes (1979), because the statute specifically provides that this increased temporary total disability compensation may in no event extend beyond 6 months from the date of injury. The claimant returned to work the day after the accident and continued to work for the employer for more than 2 years, later becoming permanently totally disabled by complications resulting from the initial injury. The language of the statute does not indicate that the Florida Legislature intended it to be applied in such a case. . . ."

Again, the clock begins to tick on catastrophic benefits on the date of the accident, even if Claimant is not entitled to

catastrophic benefits on that date, Occidental Chemical Company v. Howard, Supra

In Wood v. McTyre Trucking Company, Inc., 526 So.2d 739 (Fla.1st DCA 1988), this Honorable Court held F.S.440.15(3)(b)3.a(1981), the wage loss statute in effect at the time, established the length of time that wage loss benefits may be paid. The applicable statute in question, F.S.440.15(3)(b)3.a(1981) provided:

"3. The right to wage loss benefits shall terminate:

a. As of the end of any 2 year period commencing at any time subsequent to the month when the injured employee reaches the date of maximum medical improvement, unless during such two year period wage loss benefits shall have been payable during at least 3 consecutive months;"

In Wood v. McTyre Trucking Company, Inc., Supra, this Honorable Court stated:

"Normally, wage loss benefits will terminate at a date 2 years from the date of MMI. However, if wage loss benefits are payable during at least 3 consecutive months during that 2 year period, i.e. the amount of income received by the worker is less than his pre-injury earnings, then the right to wage loss benefits will not terminate under section 440.15(3)(b)3.a." Wood v. McTyre Trucking Company, Inc., Supra.

In Holl v. United Parcel Service, 140 So.3d 1062 (Fla. 1st DCA 2014) this Honorable Court held the 401 week time period restriction on temporary benefits was a calendar based restriction that precluded receipt of temporary benefits after 401 weeks from the date of the injury. The language of the

statute in effect, F.S. 440.15(3)(c)(2002) (the statute was in effect from 1/1/1994 through 9/30/2003) provided:

"(3) PERMANENT IMPAIRMENT AND WAGE-LOSS BENEFITS-

(c) Duration of temporary impairment and supplemental income benefits-

The employee's eligibility for temporary benefits, impairment income benefits, and supplemental benefits terminates on the expiration of 401 weeks after the date of injury."

The issue in Holl v. United Parcel Service, supra, was whether the above statute applied to temporary disability benefits, since it is found in the Permanent Disability Benefits section of F.S. 440.15. This court held it did. As it relates to the issue in the case at bar, this Court in Holl made it clear a claimant was not entitled to temporary benefits 401 weeks after his injury, even if he had not exhausted his eligibility for 104 weeks (at the time) of Temporary Disability benefits.

There is no such language in F.S.440.15(1)(b)(2011) that states a date after which claimant cannot receive PTD benefits. It entitles Claimant to PTD benefits "during the continuance of permanent total disability" not to exceed 5 years following the determination of permanent total disability. Continuance is defined in Merriam-Webster Online Dictionary as "1: Continuation; 2: the extent of continuing: duration". Claimant submits the use of the word "continuance" in F.S. 440.15(1)(b)

means claimant should receive PTD benefits during the time period she remains PTD, which shall not exceed 5 years, just as a TTD Claimant is entitled to receive TTD benefits during the "continuance" or period she remains TTD not to exceed 104 weeks (now 260 weeks). In other words Claimant is entitled to up to 5 years of permanent total disability benefits during the time period that she is permanently totally disabled, just as a TTD claimant is entitled to TTD benefits during the time period she is TTD up to 260 weeks. It does not mean claimant is entitled to PTD benefits only during the next 5 consecutive years from PTD acceptance.

In the case at bar, Claimant initially reached overall MMI on May 25, 2012 (R-19). The E/C began paying Claimant PTD benefits on May 26, 2012 (RT-8).

However, on October 22, 2014, following additional right shoulder surgery under the direction Dr. Nowicki (R-62,63), Claimant's MMI date of May 25, 2012 was rescinded and Claimant reverted to a TTD status (R-71,140). Both the Florida Supreme Court, Smitty's Coffee Shop v. Florida Industrial Commission, 86 So.2d 268(Fla.1956), and this Honorable Court, Orange County School Board v. Melman, 721 So.2d 1183(Fla.1st DCA 1998), Lopez v. Nabisco Brands, Inc., 516 So.2d 993(Fla.1st DCA 1987), Delgado v. LaQuinta Motor Inns, 457 So.2d 572(Fla.1st DCA 1984), and Atkins v. Green Hut Construction Company, 447 So.2d

268(Fla.1st DCA 1983), have held that surgery or other remedial or curative procedures performed after the date a claimant reaches MMI may entitle a claimant to temporary total disability benefits. Claimant herein remained in a TTD status from October 22, 2014 through January 4, 2015 at which time Dr. Nowicki again placed Claimant at MMI following Claimant's 10/22/14 right shoulder surgery (R-140).

Thus, between October 22, 2014 and January 4, 2015 Claimant was not in a permanent total disability status. Claimant was in a TTD status.

In Auman v. Leverocks Seafood House, Supra, this Honorable Court, discussing the 104 week limitation of TTD benefits as discussed hereinabove, stated:

"A temporarily disabled claimant who has been able to return to work but who then suffers a relapse may be entitled to temporary disability benefits more than two years after the industrial accident, so long as temporary benefits have not actually been paid for 104 weeks. Otherwise stated, 'the 104 week limitation period is calculated cumulatively'." Auman v. Leverocks Seafood House, Supra at 478,479.

Similarly in cases such as the one herein, a claimant, who becomes PTD may, under certain circumstances, no longer be PTD (perhaps the claimant has returned to work temporarily, or as in the case at bar Claimant relapses into a TTD status while undergoing surgery). In such cases, the claimant would no longer be entitled to PTD benefits, but would be entitled to TTD

benefits. Once Claimant reverts back to the PTD status, the claimant would be entitled to additional PTD benefits as long as PTD benefits have not actually been paid for the full 5 years.

The JCC, in concluding F.S.440.15(1)(b)(2011) should be calculated on a calendar basis, states:

"The language setting forth the eligibility for PTD benefits when PTD occurs after age 70 is restrictive in nature as it terminates eligibility 5 years after the happening of a specific event - the determination of MMI. This restriction is akin to the limiting language regarding payment of psychiatric TTD and wage loss benefits restricted to a period of weeks after the claimant reached MMI." (R-141)

Claimant submits there is nothing in F.S.440.15(1)(b)(2011) that terminates eligibility 5 years after the determination of MMI. The statute does not mention MMI, and as previously indicated, it is improper for a court to place words in the statute that were not placed there by the Legislature.

In the case at bar, Claimant was accepted as PTD on the date that she reached overall MMI, May 25, 2012, but not all claimants are accepted as PTD or are in fact PTD when they reach MMI, Diana v. HLS Companies, 670 So.2d 125 (Fla. 1st DCA 1996), Townsend & Bottom v. Bonds, 610 So.2d 619 (Fla. 1st DCA 1992), Marvin v. Rewis Roofing, 553 So. 2d 314 (Fla. 1st DCA 1989). Thus when the JCC interprets F.S.440.15(1)(b) to be calculated on a calendar basis for 5 years following the happening of a specific

event - the determination of MMI, the JCC is inserting language in F.S.440.15(1)(b) that does not exist.

The JCC held:

"The First District Court has held that eligibility for 104 weeks of temporary benefits found in section 440.15 was cumulative in nature rather than limited by a calendar, Wright v. City of Rockledge, 813 So.2d 283(Fla.1st DCA 2002). The language at issue in the Wright case is found in section 440.15(2)(a) and stated benefits would be paid during the continuance of disability 'not to exceed 104 weeks. . .' The court held that this language, like the language regarding the 78 weeks of eligibility in Winn Dixie v. Resnikoff, was a general grant of eligibility rather than a restrictive grant tied to the happening of a calendar event." (R-141)

Claimant respectfully submits the language in F.S.440.15(1)(b) (2011) regarding the 5 years of eligibility for PTD benefits is a general grant of eligibility rather than a restrictive grant tied to the happening of a calendar event.

Claimant would submit permanent total disability benefits were historically payable over an injured employee's lifetime and in 2003 the Legislature limited PTD benefits to age 75. Claimant submits it is clear the intent of the Legislature to allow PTD benefits to be payable for at least 5 years if the employee was over 70 at the time of the accident since these benefits were already being severely curtailed from a possible lifetime of benefits. Claimant submits that if the Legislature intended to limit PTD benefits for claimants such as the

Claimant at bar to simply 5 years from the date of MMI, they could have said so.

As such, Claimant respectfully submits the JCC erred in concluding the 5 year time period set forth in F.S.440.15(1)(b)(2011) is a calendar based time period as opposed to a cumulative based time period (bank of benefits).

POINT II

THE JCC ERRED IN DENYING CLAIMANT'S REQUEST FOR RECLASSIFICATION OF PTD TO TTD/TPD FOR THE PERIOD OF OCTOBER 22, 2014 TO JANUARY 4, 2015 AND THEREFORE ERRED IN DENYING CLAIMANT'S REQUEST FOR CONTINUED PAYMENT OF PTD BENEFITS FROM THE DATE OF SUSPENSION ON MAY 26, 2017 TO AUGUST 6, 2017, PLUS PENALTIES, INTEREST, COSTS AND ATTORNEY'S FEES.

The standard of review as to factual matters is the CSE standard, Mylock v. Champion International, 906 So.2d 363(Fla.1st DCA 2005).

The JCC found:

- "1. The claim for reclassification of PTD benefits and payment of PTD benefits on a cumulative basis is denied.
2. The claim for penalties, interest, costs and attorney's fees is denied." (R-141)

Claimant submits the JCC erred in concluding the language restricting the payment of PTD to a period of 5 years after PTD acceptance is limited to 5 calendar years rather than to 5 cumulative years of benefits and Claimant adopts and re-alleges the arguments set forth under Point I hereinabove.

Since the JCC erred in concluding the benefits were based on a calendar year as opposed to cumulative, the JCC erred in denying Claimant's request for reclassification of PTD to TTD/TPD for the period of October 22, 2014 to January 4, 2015, the date the Claimant reached MMI following her right shoulder surgery. The JCC also erred in denying Claimant's request for continued payment of PTD benefits from the date of suspension of May 26, 2017 to on or about August 6, 2017 until the full 5 years of PTD has been paid.

The JCC also erred in denying Claimant's claim for penalties, interest, costs and attorney's fees.

CONCLUSION

The JCC erred in finding the language of F.S.440.15(1)(b) restricting the payment of PTD to a period of 5 years after PTD acceptance limits payment of PTD to 5 calendar years rather than to 5 cumulative years of benefits.

Wherefore, Claimant respectfully requests this Honorable Court enter an order reversing the JCC's Final Compensation Order of February 20, 2019, that this Court find the language in F.S.440.15(1)(b) restricting payment of PTD to a period of 5 years after PTD acceptance is calculated on a cumulative basis and that this matter be remanded to the JCC for further proceedings consistent therewith.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by email on this 14 day of May, 2019 to: William G. Berzak at WilliamBerzak@Aol.com, William H. Rogner at wrogner@HRMCW.com and Scott B. Miller at SMiller@HRMCW.com.

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CERTIFICATE OF TYPE FACE COMPLIANCE

I hereby certify that this Initial Brief for Appellant was computer generated using Courier New twelve font on Microsoft Word, and hereby complies with the font standards as required by Fla.R.App.P 9.210 for computer-generated briefs.

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