176 So.3d 1006
District Court of Appeal of Florida,
First District.

Esad BABAHMETOVIC, Appellant,

v.

SCAN DESIGN FLORIDA INC./
Zenith Insurance Company, Appellees.

No. 1D14–2986.
|
Oct. 8, 2015.

Synopsis

Background: Claimant sought review of an order of the Judge of Compensation Claims (JCC), Ellen H. Lorenzen, J., denying his request for a one-time change of authorized treating physician on the ground that his workplace accident was not the major contributing cause (MCC) of his injury or his need for medical care.

[Holding:] On rehearing, the District Court of Appeal held that claimant's work-related back strain was a compensable injury, regardless of whether it was the MCC of his need for treatment.

Reversed and remanded with instructions.

Benton, J., filed an opinion concurring in the judgment.

West Headnotes (4)

[1] **Workers' Compensation** Effect of predisposing physical condition

Workers' Compensation Enforcement or Preservation of Right to Expenses

Claimant's work-related back strain was a compensable injury, and thus claimant was entitled to a one-time change of authorized treating physician, despite finding by the Judge of Compensation Claims (JCC) that the back strain was not the major contributing cause (MCC) of claimant's need for treatment, but rather that such need was 60% caused by claimant's preexisting degenerative disk disease; fact that the workplace injury combined with the preexisting injury to produce the need for treatment did not preclude compensability, but merely implicated the possible availability of particular medical and indemnity benefits. West's F.S.A. §§ 440.13(2)(f), 440.15(5)(b).

2 Cases that cite this headnote

[2] **Workers' Compensation** Periodic or lump sum payments

There must first be a compensable accident and injury before an employee is entitled to any benefit allowed in the Workers' Compensation Law, with one single exception: an advance payment. West's F.S.A. § 440.20(12).

1 Case that cites this headnote

[3] **Workers' Compensation** Injuries Arising Out of and in Course of Employment in General

Workers' Compensation Construction and application of statutory provisions in general

"Compensability" is a concept used to convey the idea that the Workers' Compensation Law applies; it requires the presence of certain elements described throughout the Law by terms of art such as accident, injury, arising out of work performed in the course and the scope of employment. West's F.S.A. § 440.01 et seq.

2 Cases that cite this headnote

[4] **Workers' Compensation** Necessity of accident and causal connection

Workers' Compensation Remote and Proximate Consequences

Causation, in workers' compensation, is established by major contributing cause (MCC), and MCC is a concept that can potentially apply at two different stages of a determination of entitlement to benefits; work must be the MCC of a compensable injury, and also, where there is

a preexisting condition, the compensable injury must be the MCC of the need for treatment. West's F.S.A. §§ 440.02(36), 440.09(1)(b).

4 Cases that cite this headnote

Attorneys and Law Firms

***1007** Michael J. Winer of the Law Office of Michael J. Winer, P.A., Tampa, for Appellant.

William H. Rogner of Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A., Winter Park, for Appellees.

ON MOTION FOR REHEARING

PER CURIAM.

This cause is before us on Appellees' motion for rehearing and rehearing en banc. We grant the motion for rehearing, withdraw our prior opinion issued May 1, 2015, and substitute this opinion in its place. We deny the motion for rehearing en banc.

In this workers' compensation case, Claimant appeals an order of the Judge of Compensation Claims (JCC) denying him a one-time change in authorized treating physician, as permitted by section 440.13(2)(f), Florida Statutes (2013). For the reasons set forth herein, we reverse the ruling.

Background

Claimant lifted a heavy box at work on October 9, 2013. His low back hurt, so the Employer/Carrier (E/C) sent him to Fast Track Urgent Care and authorized Fast Track to treat him. The provider at Fast Track diagnosed radiculitis and checked the boxes on a Uniform Medical Treatment Status Reporting Form (Form DWC–25) that indicated the "injury/illness for which treatment is sought" was "work-related." Fast Track also referred Claimant to Dr. Delgado, who first saw Claimant on November 15, 2013. Dr. Delgado concluded Claimant had both a resolving lumbar muscle sprain and, as a condition preexisting the date of the work accident, degenerative disk disease. Dr. Delgado checked the same "work-related" boxes on his DWC–25, but the same day he sent a letter to the E/C indicating the cause "regarding the lumbar spine" was 60% the preexisting condition and only 40% the "workplace injury."

On November 27, 2013, the E/C issued a Notice of Denial (Form DWC–12) stating, under the heading "denied benefits," "total claim denied," and, under the heading "reason for denial of benefits," that the "industrial accident" is not the major contributing cause (MCC) of the need for treatment. Both parties agree that this form was intended to be a denial of compensability—that is, a statement that there was never a compensable injury here.

The instant claim

Despite the Notice of Denial, Claimant asked for a one-time change in authorized treating physician. The E/C denied the one-time change, giving the same reasoning given in the Notice of Denial: that the industrial accident was not the MCC of the need for treatment. When the matter came before the JCC, the parties asked the JCC to consider whether the work accident was the MCC of not only the need for treatment, but also the "injury"—in other words, to determine compensability. They also asked the JCC to consider whether Claimant was entitled to the one-time change despite the E/C's denial of compensability—in other words, whether a claimant can receive a one-time change where there was never a compensable injury.

The JCC drew several conclusions. The JCC stated, "[t]here must first be a compensable accident and injury before an employee is entitled to any benefit allowed in Chapter 440"—thus rejecting Claimant's argument that he is entitled to a one-time change without first having to prove he had suffered a compensable injury of any sort. The JCC found that "Dr. Delgado identified an injury from the accident (a ***1008** sprain) as well as a pre-existing condition (degenerative disc disease) which *combined* to produce the potential need for medical care," and that Dr. Delgado opined the sprain was less than half of the cause of the "injury and need for care." (Emphasis added). The JCC then found both that "the accident was not the [MCC] of the injury" and that "the accident was not the [MCC] of claimant's need for medical care." Based on all of this, the JCC denied the one-time change.

Analysis

[1] **[2]** **[3]** The JCC is correct that "[t]here must first be a compensable accident and injury before an employee is entitled to any benefit allowed in Chapter 440"—with one single exception: an advance payment under section 440.20(12), Florida Statutes. *See Lopez v. Allied Aerofoam/ Specialty Risk Servs.,* 48 So.3d 888, 889 (Fla. 1st DCA 2010). But the JCC erred in not recognizing the existence of a compensable injury in this case. This error came about by the JCC's conflating the existence and cause of the *injury*—compensability—with the existence and cause of the *need for treatment.* Compensability is a concept used to convey the idea that the Florida Workers' Compensation Law applies; it requires the presence of certain elements described throughout chapter 440 by terms of art such as *accident, injury, arising out of work performed in the course and the scope of employment. See generally Checkers Rest. v. Wiethoff,* 925 So.2d 348, 350 (Fla. 1st DCA 2006) (en banc) (explaining concept of compensability as "the occurrence of an industrial accident resulting in injury").

[4] Causation, in workers' compensation, is established by MCC, and MCC is a concept that can potentially apply at two different stages of a determination of entitlement to benefits: work must be the MCC of a compensable injury, and also—where (as here) there is a preexisting condition—the compensable injury must be the MCC of the need for treatment.[1] *Compare* § 440.09(1), Fla. Stat. (2013) (requiring employer to pay compensation or furnish benefits if employee suffers accidental compensable injury "arising out of work performed in the course and the scope of employment"), *and* § 440.02(36), Fla. Stat. (2013) (defining "arising out of" by stating that injury "arises out of employment if work performed in the course and scope of employment is the major contributing cause of the injury"), *with* § 440.09(1)(b), Fla. Stat. (2013) (providing that if compensable work injury "combines with a preexisting disease or condition to cause or prolong disability or need for treatment," employer need provide compensation or benefits only to extent injury "is and remains more than 50 percent responsible for the injury as compared to all other causes combined and thereafter remains the major contributing cause of the disability or need for treatment"). Only the first of these MCC analyses factors into a determination of compensability of the original injury.

Here, the JCC found the sprain (the workplace injury) and the degenerative disk disease combined to produce the need for treatment. But such facts do not preclude compensability—they merely implicate the possible availability of particular ***1009** medical and indemnity benefits. *See* § 440.15(5)(b), Fla. Stat. (2013) ("If a compensable injury, disability, or need for medical care, or any portion thereof, is a result of aggravation or acceleration of a preexisting condition, or is the result of merger with a preexisting condition, only the disabilities and medical treatment associated with such compensable injury shall be payable under this chapter...."). On the facts present in this case, it was not disputed that the sprain otherwise met the requirements of compensability (e.g., an injury by accident arising out of and in the course of employment). Given these facts, the JCC should not have applied an MCC analysis to determine the existence of a compensable injury, because there is no evidence (nor allegation) that the *sprain* was *caused by* degenerative disk disease or anything other than work.

Because Claimant suffered a compensable injury and received treatment therefor, he is entitled to a one-time change in treating physician as "an absolute right" if he made a written request for such during the course of treatment. *Providence Prop. & Cas. v. Wilson,* 990 So.2d 1224, 1225 (Fla. 1st DCA 2008). The E/C concedes that Claimant properly requested a one-time change; thus, he is entitled to the one-time change he requested. We distinguish *Falcon Farms v. Espinoza,* 79 So.3d 945 (Fla. 1st DCA 2012), where this court reversed the award of a one-time change, because in *Falcon Farms* there was no work-related injury at all, only a finding that the claimant "presented no 'persuasive medical evidence' that an injury arose out of employment," which was not challenged on appeal. 79 So.3d at 946.

For the foregoing reasons, we reverse the order on appeal and remand to the JCC for the award of a one-time change under section 440.13(2)(f).

REVERSED and REMANDED with instructions.

WOLF and RAY, JJ., concur.

BENTON, J., concurs with opinion.

BENTON, J., concurring in the judgment.

"When an E/C becomes aware that a claimant has medical needs [of which a compensable injury is the purported major contributing cause], it should either pay for them, pay and investigate under section 440.20(4), or deny compensability." *Bynum Transp., Inc. v. Snyder,* 765 So.2d 752, 754 (Fla. 1st DCA 2000). In the present case, the employer or its insurance carrier accepted the injury as compensable, without

reservation. This election was binding. The statutory "pay and investigate rule" requires:

> Upon commencement of payment as required under subsection (2) or s. 440.192(8), the carrier *shall provide written notice* to the employee that it has elected to pay the claim pending further investigation, and *that it will advise the employee of claim acceptance or denial within 120 days.*

§ 440.20(4), Fla. Stat. (2013) (emphasis added). In order to invoke the benefits of the pay and investigate rule, an employer or its carrier must give notice it is relying on the pay and investigate provision at or before "commencement of payment." *Id.* "A carrier that does not deny compensability *in accordance with s. 440.20(4)* is deemed to have accepted the employee's injuries as compensable...." § 440.192(8), Fla. Stat. (2013) (emphasis added).

In short, I join the judgment of the court on grounds the notice of denial contesting the injury's compensability came too late.

All Citations

176 So.3d 1006, 40 Fla. L. Weekly D2274

Footnotes

1 This is the rationale underlying case law holding that "[o]nce compensability is established, an E/C can no longer contest that the accident is the MCC of the injuries at issue. It can only contest the connection between a claimant's need for specific treatment or benefits, and the industrial accident." *Engler v. Am. Friends of Hebrew Univ.*, 18 So.3d 613, 614 (Fla. 1st DCA 2009); *see also City of Pembroke Pines v. Ortagus*, 50 So.3d 31, 32 (Fla. 1st DCA 2010) (holding E/C must pay for treatment as long as compensable condition remains MCC of need for treatment).

KeyCite Yellow Flag
Distinguished by Churchill v. DBI Services, LLC, Fla.App. 1 Dist., May 31, 2023

765 So.2d 752
District Court of Appeal of Florida,
First District.

BYNUM TRANSPORT, INC., and Liberty Mutual Insurance Company, Appellants,
v.
Douglas SNYDER, Appellee.

No. 1D99-2785.
|
June 5, 2000.

Synopsis
Employer and carrier (E/C) sought review of a decision of the Judge of Compensation Claims that claimant's hepatitis C was compensable. The District Court of Appeal, Ervin, J., held that E/C's failure to deny compensability within 120 days after initiating payment of benefits for hepatitis C constituted its acceptance of compensability.

Affirmed.

West Headnotes (2)

[1] Workers' Compensation Estoppel Of, or Waiver By, Employer, or Insurance Carrier

Workers' compensation statutory provision in which employer and carrier must deny compensability of claim within 120 days after initiating payment of benefits or otherwise be deemed to accept compensability of claim applies to any claim following an industrial accident. West's F.S.A. § 440.20(4).

16 Cases that cite this headnote

[2] Workers' Compensation Estoppel Of, or Waiver By, Employer, or Insurance Carrier

Employer and carrier's (E/C) failure to deny compensability within 120 days after initiating payment of benefits for hepatitis C constituted its acceptance of compensability, and E/C could not evade its obligation to investigate and decide either to continue making payments or to deny compensability, by simply ceasing to pay and remaining silent; doctor's letter stating that there were several ways claimant could have contracted hepatitis C should have alerted the E/C to necessity of investigating cause of claimant's illness. West's F.S.A. § 440.20(4).

17 Cases that cite this headnote

Attorneys and Law Firms

***753** Laura L. Ferrante of Warpinski, Kellogg & Ferrante, Jacksonville, for Appellants.

Richard A. Kupfer, of Richard A. Kupfer, P.A., West Palm Beach; Louis P. Pfeffer, Lake Worth, for Appellee.

Opinion

ERVIN, J.

Appellants, Bynum Transport, Inc., and Liberty Mutual Insurance Company, respectively the employer and carrier (E/C), appeal an order in which the judge of compensation claims (JCC) concluded that under section 440.20(4), Florida Statutes (1997), the E/C waived the right to deny compensability of hepatitis C contracted by claimant, Douglas Snyder, by failing to do so within 120 days after it had commenced providing such benefits. We affirm.

Snyder was driving a truck for Bynum Transport on November 11, 1997, when he lost control and crashed. The carrier paid benefits for head, neck, and back injuries. The E/C authorized treatment beginning February 9, 1998, with internist Dr. Bruce M. Grossman, who diagnosed Snyder as infected with hepatitis C. In a letter dated March 23, 1998, Dr. Grossman said he could not determine whether Snyder had contracted the disease from tattoos, prior blood contact, prior hepatitis C contact, or lying with open wounds after the truck accident in mud that might have been infected.

The carrier paid for some of the treatment related to the hepatitis C and then stopped payment. Snyder filed a petition for benefits on July 22, 1998, seeking a determination of the compensability of his hepatitis C condition, as well as for past

and future care and treatment of hepatitis C by Dr. Grossman. The E/C never controverted the claim.

The JCC found that claimant's hepatitis C was compensable, because the E/C failed to deny compensability within 120 days after initiating payment of benefits therefor, pursuant to section 440.20(4), which provides:

> If the carrier is uncertain of its obligation to provide benefits or compensation, it may initiate payment without prejudice and without admitting liability. The carrier shall immediately and in good faith commence investigation of the employee's entitlement to benefits under this chapter and shall admit or deny compensability within 120 days after the initial provision of compensation or benefits. Upon commencement of payment, the carrier shall provide written notice to the employee that it has elected to pay all or part of the claim pending further investigation, and that it will advise the employee of claim acceptance or denial within 120 days. A carrier that fails to deny compensability within 120 days after the initial provision of ***754** benefits or payment of compensation waives the right to deny compensability, unless the carrier can establish material facts relevant to the issue of compensability that it could not have discovered through reasonable investigation within the 120-day period.

The JCC acknowledged that the E/C had not informed claimant in writing that it was invoking the 120-day pay-and-investigate period, and that there was evidence that Snyder's infection was not related to his industrial accident. Nevertheless, he continued, the carrier could have discovered this information within 120 days after first providing treatment by Dr. Grossman, after it had received Dr. Grossman's letter of March 23, 1998, or after claimant had filed the petition for benefits. In contrast, the JCC observed, the E/C would not have lost the right to deny compensability if it had simply controverted the claim by either filing a denial or not paying the benefits.

[1] The E/C first contends that section 440.20(4) applies only to the first claim following an injury ("initial provision of benefits"), rather than to any claim following an industrial accident. We cannot agree. Nothing in the statute limits its application in this manner. *See, e.g., Eastern Indus., Inc. v. Burnham,* 750 So.2d 748 (Fla. 1st DCA 2000) (E/C could have avoided penalty for failing to pay permanent, total disability benefits within seven days after they became due, which claimant contended was one and one-half years after industrial injury, by commencing payment of such benefits and undertaking investigation during the 120-day period required by section 440.20(4)).

[2] The E/C's central argument is that the pay-and-investigate period cannot be commenced without an overt decision on the part of the carrier to invoke it by paying benefits *and* issuing written notice to the claimant. Again we disagree. When an E/C becomes aware that a claimant has medical needs, it should either pay for them, pay and investigate under section 440.20(4), or deny compensability.[1] If the E/C is not sure whether to provide compensation or benefits, the pay-and-investigate provision offers a limited window of time in which to explore the question of compensability without being locked into a fixed position. Dr. Grossman's letter should have alerted the E/C to the necessity of investigating the cause of Snyder's illness. Once it began paying benefits to Snyder relating to his hepatitis C, the E/C could not evade its obligation to investigate and decide either to continue making payments or to deny compensability, by simply ceasing to pay and remaining silent. Therefore, its failure to deny compensability within 120 days from the provision of benefits constituted its acceptance of compensability.

AFFIRMED.

WOLF and WEBSTER, JJ., CONCUR.

All Citations

765 So.2d 752, 25 Fla. L. Weekly D1396

Footnotes

1 We make no determination as to whether doing nothing could be construed as a denial under section 440.20(4). *Cf. Russell Corp. v. Brooks,* 698 So.2d 1334, 1335 (Fla. 1st DCA 1997) (failure to file a notice of denial in response to a petition for benefits operates as a denial of every allegation therein under section 440.192(8)).

25 Fla. L. Weekly D1396

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272 So.3d 885 (Mem)
District Court of Appeal of Florida, First District.

Marie **LAFLEUR**, Appellant,

v.

The **ARBOR HOLDING** COMPANY LLC d/b/a Barrington Terrace of Fort Myers and United Wisconsin Insurance Company, Appellees.

No. 1D18-0381
|
June 12, 2019

On appeal from an order of the Judge of Compensation Claims. Frank Clark, Judge.

Date of Accident: November 23, 2014.

Attorneys and Law Firms

Cory J. Pollack, Fort Myers, and Bill McCabe, Longwood, for Appellant.

Robert C. Barrett and McKensey M. Sims of Rissman, Barrett, Hurt, Donahue, McLain & Mangan, P.A., Orlando, for Appellees.

Opinion

Ray, J.

In this workers' compensation case, Claimant appeals an order of the Judge of Compensation Claims (JCC) denying Claimant the right to select the doctor who would serve as her one-time change of physician available under section 440.13(2)(f), Florida Statutes (2014). We reverse on the authority of *Myers v. Pasco County School Board*, 246 So. 3d 1278 (Fla. 1st DCA 2018),* because the record does not contain sufficient evidence to support the JCC's finding that the Employer/Carrier's authorization of an anesthesiologist, although made within five calendar days of Claimant's request for a one-time change, satisfied their statutory obligation to provide a physician in the "same" specialty as the previously authorized physician who specializes in physical medicine and rehabilitation. Section 440.13(2)(f) contemplates that the originally authorized physician be "in the same specialty as the changed physician." *Myers* **held** that "[a] physician who provides similar services in a *different* specialty does not qualify as a doctor in the 'same specialty' because—quite simply—'same' is different than 'similar.' " *Id.* at 1279.

Reversed and Remanded for further proceedings in accordance with this opinion.

Roberts and Winsor, JJ., concur.

All Citations

272 So.3d 885 (Mem), 44 Fla. L. Weekly D1540

Footnotes

* The JCC did not have the benefit of the *Myers* opinion before rendering the order under review.

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238 So.3d 906
District Court of Appeal of Florida, First District.

RING POWER CORPORATION and United Self Insured Services, Appellants,

v.

Andrew MURPHY, Appellee.

No. 1D17–1316
|
February 23, 2018
|
Rehearing Denied March 27, 2018

Synopsis

Background: Employer appealed decision of the Judge of Compensation Claims, Thomas W. Sculco, rejecting its statute-of-limitations defense to workers' compensation claimant's petition for benefits.

[Holding:] The District Court of Appeal held that having rods and screws attached indefinitely did not mean that claimant was "furnished medical treatment" indefinitely.

Reversed.

West Headnotes (1)

[1] **Workers' Compensation** Time for proceedings and limitations

Having rods and screws attached indefinitely did not mean that workers' compensation claimant was "furnished medical treatment" indefinitely and, thus, placement of rods and screws to stabilize claimant's back in surgery after accident did not toll limitations period for claimant's petition for benefits by which he sought additional treatment, where rods and screws were used for a temporary purpose but had served no function for years. Fla. Stat. Ann. § 440.19(2) (2006).

1 Case that cites this headnote

***907** On appeal from an order of the Judge of Compensation Claims. Thomas W. Sculco, Judge.

Date of Accident: July 24, 2006.

Attorneys and Law Firms

Hayley Lewis Folmar and Caitlin W. Beyl of McConnaughhay, Coonrod, Pope, Weaver & Stern, P.A., Jacksonville, for Appellants.

Kelli B. Hastings of Law Office of Kelli B. Hastings, PLLC, Orlando; and Sean P. McCormack of Colling, Wright & Carter, Orlando, for Appellee.

Opinion

Per Curiam.

The issue in this appeal is whether the statute of limitations barred Andrew **Murphy's** petition for workers' compensation benefits. The relevant facts are undisputed: **Murphy** had a spinal-fusion surgery a few months after his 2006 accident. Doctors used rods and screws to stabilize **Murphy's** spine while the bone grew back together. After less than a year, **Murphy's** fusion was solid. The rods and screws no longer performed any function, but they remained attached, inside **Murphy**.

Murphy's employer last provided worker's compensation benefits in 2013. In 2016, **Murphy** filed a petition for benefits, seeking additional treatment. Because the petition was filed long after the last treatment, the employer asserted a statute-of-limitations defense. *See* § 440.19, Fla. Stat. (2006) (establishing general two-year limitations period). **Murphy** responded by asserting that section 440.19(2) applied, making his petition timely. That provision "acts to toll [the] statute of limitations for a period of one year from the payment of compensation or furnishing of remedial treatment." *Gore v. Lee Cty. Sch. Bd.*, 43 So.3d 846, 848 (Fla. 1st DCA 2010); *accord Lee v. City of Jacksonville*, 616 So.2d 37, 39 (Fla. 1993) (noting that based on § 440.19(2), claimant must receive periodic remedial care "[i]n order to preserve the right to future benefits").

The judge of compensations claims agreed with **Murphy**, concluding that because rods and screws remained inside him, **Murphy** was continually furnished remedial treatment, meaning the limitations period never ran. The JCC therefore rejected the employer's defense, and the employer appeals. Our review is de novo. *Gilbreth v. Genesis Eldercare*, 821 So.2d 1226, 1228 (Fla. 1st DCA 2002) (JCC's legal conclusions are reviewed de novo).

[1] This appeal turns on statutory interpretation. We must decide whether having rods and screws attached indefinitely means a claimant is "furnish[ed] remedial treatment" indefinitely. *See* § 440.19(2), Fla. Stat. (2006). We hold it does not. It is undisputed that the pins and screws no longer serve any purpose, and we cannot conclude their remaining attached falls within the tolling provision's reach. *See* ***908** *Whitney Bank v. Grant*, 223 So.3d 476, 479 (Fla. 1st DCA 2017) (noting obligation to rely on statute's plain language).

Murphy cites *Gore v. Lee County School Board*, in which we held that the "continued use" of a medical apparatus *will* toll the statute of limitations. *See* 43 So.3d at 849. In *Gore*, the claimant continually used a knee prosthesis that had a limited life span. *Id.* at 847. We concluded this continual use counted as continual remedial treatment, so we held it tolled the statute of limitations. *Id.* at 849–50. But *Gore* does not apply here. Unlike the claimant in *Gore*, **Murphy** is not "using" the rods and screws. *Cf. also Fuster v. E. Airlines, Inc.*, 545 So.2d 268, 273 (Fla. 1st DCA 1988) (concluding statute of limitations tolled while claimant continued to use back brace). The rods and screws were used for a temporary purpose, but for years they have served no function at all. Their placement does not toll the statute of limitations.

Reversed.

B.L. Thomas, C.J., and Wetherell and Winsor, JJ., concur.

All Citations

238 So.3d 906, 43 Fla. L. Weekly D448

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KeyCite Red Flag
Superseded on Rehearing by Ortiz v. Winn-Dixie, Inc., Fla.App. 1 Dist., December 23, 2024

361 So.3d 889
District Court of Appeal of Florida, First District.

Annalie **ORTIZ**, Appellant,
v.
WINN-DIXIE, INC., Travelers Insurance, and Sedgwick CMS, Appellees.

No. 1D21-0885
|
Date of Accident: September 28, 2003.
|
May 31, 2023

Synopsis

Background: Claimant sought review of decision of the Judge of Compensation Claims. Frank J. Clark, J., denying as time barred petition for benefits for visits to authorized provider 16 years after workplace injury.

[Holding:] The District Court of Appeal, Tanenbaum, J., held that one-year tolling period was not reset by the visits and had expired by time of petition for benefits.

Affirmed.

Bilbrey, J., concurred in result with opinion.

West Headnotes (10)

[1] **Workers' Compensation** Medical and hospital services

"Toll" means to extend or suspend in workers' compensation statute stating that two-year limitations period is tolled for a year if employer's carrier furnishes remedial treatment, care, or attendance upon being notified of the injury or receiving a petition for benefits. Fla. Stat. Ann. § 440.19(2).

[2] **Workers' Compensation** Payment of Compensation or Agreement Therefore

Workers' Compensation Commencement and Prosecution of Action

Once employee files a petition for workers' compensation benefits, two-year limitations period is stopped with respect to the claim or claims raised therein as they await administrative disposition, but master timer for the limitations period continues counting down with respect to any later claim arising out of the same accident and then stops counting down each time the employer furnishes a benefit pursuant to the original petition for benefits; when that happens, a separate timer for one-year tolling period starts counting down instead. Fla. Stat. Ann. §§ 440.19(1), 440.19(2).

[3] **Workers' Compensation** Computation, Tolling, and Accrual

As timer for one-year tolling period is running on petition for workers' compensation, the timer for two-year limitations period is stopped with whatever time was remaining when the tolling timer started. Fla. Stat. Ann. §§ 440.19(1), 440.19(2).

[4] **Workers' Compensation** Computation, Tolling, and Accrual

When the one-year tolling period reaches zero and has not been reset by employer's furnishing of another workers' compensation benefit, the master time for two-year limitations period starts counting down again from where it left off. Fla. Stat. Ann. §§ 440.19(1), 440.19(2).

[5] **Workers' Compensation** Computation, Tolling, and Accrual

Until a point is reached where both timers for two-year limitations period and one-year tolling period reach or remain at zero together, the one-year period can continue to be reset and run

for as long as the employee continues under an award of workers' compensation benefits. Fla. Stat. Ann. §§ 440.19(1), 440.19(2).

[6] **Workers' Compensation** Effect of failure to timely file

Once time for two-year limitations period reaches zero, the right to file a petition for workers' compensation benefits is extinguished and cannot be recaptured by a tolling event occurring after extinguishment of the right. Fla. Stat. Ann. §§ 440.19(1), 440.19(2).

[7] **Workers' Compensation** Claim for compensation

Workers' compensation carrier claiming statute of limitations defense bears initial burden to produce evidence establishing a greater-than-two-year gap between the date of injury and the date the petition for benefits is filed. Fla. Stat. Ann. § 440.19(1).

[8] **Workers' Compensation** Claim for compensation

Workers' compensation carrier's evidence that two-year limitations period had run to zero by the time claimant filed petition for benefits 17 years after workplace injury shifted burden to claimant to demonstrate time remaining on the master two-year limitation timer or a petition for benefits within one-year tolling period after carrier furnished remedial treatment and care. Fla. Stat. Ann. §§ 440.19(1), 440.19(2).

[9] **Workers' Compensation** Medical and hospital services

Workers' compensation carrier did not furnish treatment or care for claimant when she saw authorized provider for urinary burning, frequency, and dysuria 16 years after workplace injury required removal of kidney, and, thus, one-year tolling period was not reset by the visits and had expired by time of petition for benefits; authorizing provider was not same as furnishing treatment or care, claimant failed to present any evidence that tied the treatment or care she received during the visits to treatment plan approved by carrier, and provider requested that private insurance be billed. Fla. Stat. Ann. §§ 440.13(2)(a), 440.13(2)(e), 440.19(1), 440.19(2).

[10] **Workers' Compensation** In general; questions of law or fact

Workers' Compensation Competent evidence

District Court of Appeal reviews factual findings of Judge of Compensation Claims (JCC) for competent evidence, and his legal conclusions de novo.

***890** On appeal from an order of the Office of the Judges of Compensation Claims. Frank J. Clark, Judge.

Attorneys and Law Firms

Richard A. Sicking and Mark A. Touby, Touby, Chait & Sicking, P.L., Coral Gables, for Appellant.

William H. Rogner, HR Law, P.A., Winter Park, for Appellees.

Opinion

Tanenbaum, J.

[1] **Winn-Dixie**, Inc. had been furnishing medical care to Annalie **Ortiz** as her employer for years under Florida's workers' compensation system in connection with a work-related injury.[1] Sedgwick notified **Ortiz** that it was terminating the authorization of care because the two-year limitation period set out in ***891** section 440.19, Florida Statutes, for filing a new petition for benefits ("PFB") had run. *See* § 440.19(1), Fla. Stat. (barring any PFB that is not "filed within 2 years after the date on which the employee knew or should have known that the injury" was caused by the work). **Ortiz** nevertheless tried to challenge this termination by filing a new PFB. Her contention was that the period had been tolled under the same statute. *See* § 440.19(2), Fla. Stat. (providing that if the employer's carrier "furnish[es]remedial treatment,

care, or attendance" upon being notified of the injury or receiving a petition for benefits, the two-year limitations period is tolled for a year).[2]

After an evidentiary hearing, the judge of compensation claims ("JCC") dismissed the PFB as barred. That order now is on review via **Ortiz's** appeal. As we will explain, we reject her argument that a visit to a carrier-authorized provider by itself—without proof that the particular visit was in connection with care for a compensable injury—is enough to demonstrate tolling unless the carrier proves to the contrary. Simply stated, **Ortiz's** position conflicts with the text of the statute and the reasonable gloss that decisions of both this court and the supreme court have given to the text of that statute over time. Upon our review of the record and a proper application of the statutory text, we can say that because **Ortiz** failed to offer evidence to establish tolling in avoidance of the prima facie case demonstrating the limitation defense, the JCC was correct.

I

While working at **Winn-Dixie** in Naples in 2003, **Ortiz** tripped and fell, causing the box she was carrying to hit her right side. The injury ultimately resulted in the removal of her right kidney, and the carrier did not dispute compensability. **Ortiz** received medical treatment and care related to her nephrectomy—managed by the servicing agent—for many years, and in 2015, she began treating with a new authorized physician, Dr. Young. Between September 2015 and January 2019, **Ortiz** attended eight appointments with Dr. Young, all of which were authorized by Sedgwick and paid for by the carrier. The last authorized visit occurred on January 29, 2019, when **Ortiz** was seen for a six-month follow-up. Sedgwick received correspondence regarding that appointment on February 18, 2019, and it issued payment for the visit on March 6, 2019.

Not having received any communication from Dr. Young's office since the contact about the January 2019 appointment, Sedgwick initiated contact with the office in May 2020—that is May ***2020***, not May 2019. Sedgwick inquired about any recent dates of service and requested accompanying notes. The doctor's office responded by sending records regarding an appointment **Ortiz** attended on April 7, 2020, more than a year following the January 2019 visit that Sedgwick had last authorized and covered. The following month, Sedgwick requested information related to any additional appointments **Ortiz** may have had, ***892** and Dr. Young's office advised that **Ortiz** had also been seen on August 1, 2019, and August 12, 2019—appointments that Sedgwick previously had not been aware of, authorized, or paid for.

Two months later, on August 7, 2020, Sedgwick filed a notice of denial of benefits, effectively deauthorizing Dr. Young. On August 26, 2020, **Ortiz** filed a PFB seeking authorization, provision, and scheduling of an appointment with Dr. Young. Sedgwick responded, asserting in part that the PFB was barred by section 440.19. At the final evidentiary hearing, the employer presented a prima facie case regarding the statute of limitation: it established the date of accident (September 28, 2003) and the fact that the August 26, 2020, PFB was quite a bit more than two years from that accident date.

Ortiz attempted to avoid the defense by demonstrating tolling of the limitation period based almost entirely on proof of Dr. Young's continued status as her authorized provider when she saw him in August 2019 and April 2020. She also presented office notes from those visits in order to show the visits were connected to a urinary tract infection ("UTI") from which she continued to suffer, which she assumed was related to her lost kidney. She did not present any testimony from Dr. Young or any other medical expert that linked those visits to her underlying compensable injury, and she conceded that no doctor had told her the UTI was related to her workplace injury. Indeed, she testified she was told that Dr. Young had instructed the visits were to be billed to her private health insurance rather than her workers' compensation carrier and that there was no authorization for those visits.

The JCC denied the claim and dismissed the PFB as barred by the limitation set out in section 440.19. He concluded that a prima facie case for application of the limitation defense had been made, and he looked to the claimant to prove that the limitation period had not run by application of the tolling provided for in section 440.19(2). Relying on the claimant's own testimony, the JCC found that she had shown nothing more than that the three visits were with Dr. Young while he was still an authorized provider, which was not enough. According to the JCC, "[t]he only evidence before me is that those visits were *not* related to her compensable accident or injuries."

II

As we already noted, **Ortiz** takes issue in this appeal with the JCC's determination that to avoid the defense, she needed to prove more than the fact her August 2019 and April 2020 visits were with Dr. Young while he was still an authorized provider. She argues, essentially, that her merely seeing an authorized provider should have given rise to a presumption that the carrier had "furnished" care and treatment at those visits, as the term is used in section 440.19(2). That is not a correct reading of the law. To explain, we need to go over how the limitation and tolling provisions of section 440.19 work together.

A

To begin, we should be clear that the application of the limitation is to the PFB being referenced in the carrier's affirmative defense—the one filed on August 26, 2020. The long-term workers' compensation benefits **Ortiz** was receiving presumably came about after she advised **Winn-Dixie** and filed a PFB within two years of the date of her injury. *See* § 440.19(1), Fla. Stat. That she did so originally, of course, is not in dispute; as we noted at the beginning, she had been receiving a benefit for a long period of time. The limitation period ***893** we are talking about here does not relate to her original claim.

The two-year period established by this statute, however, applies equally to any *subsequent* PFB. In turn, even though **Ortiz's** original notification to her employer and claim for benefits quite obviously occurred within the two-year period, the limitation period still runs with respect to any PFB she may have wanted to submit *in the future* regarding benefits to which she could become entitled under chapter 440 in connection with the same workplace injury. The August 26, 2020, PFB was just such a "future" PFB, and it was subject to the same two-year limitation period that started running from the date of the accidental injury. In a case involving an extended period of benefits like we have here, it might seem like an open-and-shut case regarding a bar against subsequent PFBs regarding the claim. It is not, though, because the running of this two-year period is tolled for a year each time the employer furnishes medical treatment or care pursuant to the claim set out in the original PFB. *See* § 440.19(2), Fla. Stat.

[2] We will explain how this works in figurative terms. Imagine a two-year master countdown timer starting to run on the date of the accidental injury, as we just described. Once the employee files a petition (like **Ortiz** presumably did in 2003), that two-year timer is stopped with respect to the claim or claims raised therein as they await administrative disposition. Consider that stoppage, though, as if it were a split time—stoppage only with respect to that original PFB. The master timer nevertheless continues counting down with respect to any later claim arising out of the same accident. The master timer then stops counting down each time the employer furnishes a benefit pursuant to the original PFB. When that happens, a separate *tolling* timer *starts* counting down instead. If, while the tolling timer is running, the employer furnishes another benefit (either an indemnity payment or some care or treatment), the timer resets to one year and starts counting down again.

[3] **[4]** **[5]** **[6]** By the very nature of tolling (defined above in the margin), the limitation timer and the tolling timer run in opposition to each other: They cannot both run at the same time. That means as the tolling timer is running, the limitation timer is stopped with whatever time was remaining when the tolling timer started. When the one-year tolling timer reaches zero and has not been reset by the employer's furnishing of another benefit, the master two-year limitation timer starts counting down again from where it left off. Until a point is reached where both timers reach or remain at zero together (that is, time has run out on both timers simultaneously), the one-year timer can continue to be reset and run for as long as the employee continues under an award of benefits. Once the two-year timer reaches zero, however, the right to file a PFB is extinguished and cannot be recaptured by "a tolling event occurring after the extinguishment of the right." *Medpartners*, 23 So. 3d at 206.

B

[7] With this construct set up, we turn to **Ortiz's** argument for setting aside the JCC's final compensation order. The carrier, as it was required to do, asserted the statute of limitations found in section 440.19(1) as a defense in its initial response to **Ortiz's** August 26, 2020, PFB. *See* § 440.19(4), Fla. Stat. The carrier then bore the initial burden to produce evidence establishing a greater-than-two-year gap between the date of injury and the date the PFB was filed. *See Palmer v. McKesson Corp.*, 7 So. 3d 561, 563 (Fla. 1st DCA 2009) ("Because running of the statute of ***894** limitations is an affirmative defense, the employer ... had the burden of raising that defense and proving that the petitions for benefits were untimely pursuant to section 440.19(1)."). Put in terms of our

illustration in the previous sub-part, the carrier had to present evidence that indicated the two-year timer had run down to zero by the time the PFB was filed. The carrier obviously did this.

[8] And once the carrier did, the burden shifted to **Ortiz** to avoid the statute of limitations with proof demonstrating that there, in fact, was still time remaining on the master two-year limitation timer. *See* § 440.19(2), Fla. Stat.; *Palmer*, 7 So. 3d at 563–64 (stating that "where a workers' compensation claimant seeks to extend or avoid the statute of limitations by operation of section 440.19(2), he or she bears the burden of establishing the exception"). One way **Ortiz** could have done this was to present sufficient evidence to show that there still was time left on the master limitation clock, even if the tolling timer had hit zero. Because **Ortiz's** last indisputably authorized visit occurred on January 29, 2019, and less than two years had run between the January 29, 2019, visit and the August 26, 2020, PFB, it was at least possible to prove that the two-year limitation period had not yet run because of an accumulation of tolling periods. Under this approach, she would have had to present evidence to enable the JCC to perform some basic math, adding up how much time had elapsed in the following intervals: 1) between the date of accident and the date the initial claim was filed; 2) during every period between the expiration of one tolling period and the start of another; and 3) from the putative expiration of the last tolling period to August 26, 2020, when the PFB was filed. If that sum ended up being under two years, then the limitation period would not have run yet, and the PFB would not have been barred. She did not pursue this form of avoidance before the JCC.

[9] **Ortiz** instead pursued the other way of avoiding the limitation defense: by presenting evidence that the tolling timer had reset and was still running (such that the limitation timer could not yet have reached zero). With **Ortiz** choosing this tack, the burden was on her to present evidence showing that the carrier "furnished" the remedial treatment and care she received at one or the other of her August 2019 visits (as the April 2020 visit came after the limitation timer would have expired). She fell short of satisfying even her burden of production on this.

There is no doubt that at the time of the August 2019 appointments, Dr. Young continued to be **Ortiz's** authorized provider of care for her compensable injury. Authorizing Dr. Young, however, is not the same as "furnishing" treatment or care under section 440.19(2). A carrier's authorization of a provider just means that the carrier has approved a course of treatment through that provider as appropriate to the compensable injury. *Cf.* § 440.13(2)(e), Fla. Stat. (requiring the employer to review a proposed course of medical treatment "to determine whether such treatment would be recognized as reasonably prudent"); *id.* (2)(f) (providing for a one-time change of authorized physician, after which "the originally authorized physician in the same specialty as the changed physician shall become deauthorized upon written notification by the employer or carrier").

Before it can be said that the employer has "furnished" care in order to trigger the tolling of section 440.19(2), either the carrier must have authorized the specific treatment, or the authorized provider must have treated the employee pursuant to the previously approved treatment plan. *Cf.* § 440.13(2)(a), Fla. Stat. (requiring the employer to "furnish to the employee such ***895** medically necessary remedial treatment, care, and attendance for such period *as the nature of the injury or the process of recovery may require*, which is in accordance with established practice parameters and protocols of treatment as provided for in this chapter" (emphasis supplied));[3] *see Taylor v. Metropolitan Dade County*, 596 So. 2d 798, 799 n.2 (Fla. 1st DCA 1992) ("We reject the claimant's argument that the mere fact of visiting the authorized physician, regardless of the purpose or motive for the visit, is sufficient to toll the two-year limitations period."); *Bell v. Com. Carriers*, 603 So. 2d 683, 685 (Fla. 1st DCA 1992) (stating that to determine whether "remedial treatment" has been furnished for the purpose of the limitation period, "the critical question" is whether the previously authorized provider administers care or treatment "causally related to a compensable injury"); *McNeilly v. Farm Stores, Inc.*, 553 So. 2d 1279, 1280–81 (Fla. 1st DCA 1989) (noting that "so long as a doctor is authorized to provide follow-up care, and visits to the doctor for continuing supervision and evaluation for possible change in treatment *are reasonably necessary from a medical standpoint*, such visits" will satisfy the "furnished" care requirement to restart the limitation period under the prior version of the statute (emphasis supplied)).

Sedgwick's representative testified that Dr. Young was authorized to treat **Ortiz** for "her kidney follow-ups on a yearly basis" and added that **Ortiz** could be seen more frequently if needed. But **Ortiz** then failed to present any evidence that tied the treatment or care she received during the August 2019 visits to this treatment plan approved by Sedgwick. *Cf. Sol Dale Bldgs., Inc. v. Schweickert*, 656 So. 2d 606, 609 (Fla. 1st DCA 1995) (approving the JCC's

finding that the employer "furnished" medical care within the limitation period because there was competent substantial evidence showing that the provider treated the claimant "for injuries sustained as a result of" the compensable accident); *Bell*, 603 So. 2d at 685 (determining that the claim was not barred by the statute of limitations because "medical testimony" indicated that the care rendered was "remedial" to a particular compensable injury). Again, **Ortiz** did not present testimony from Dr. Young that might have made that connection. The office notes she submitted showed no more than the fact that she treated with Dr. Young while he was still an authorized provider. Those visits easily could have been to receive care and treatment independent of the work injury. Notes from the August 2019 visits indicate that **Ortiz** saw Dr. Young for urinary burning, frequency, and dysuria—not an annual follow-up. Other evidence demonstrated that Dr. Young specifically requested that **Ortiz's** *private insurance* be billed for those appointments because there was not workers' compensation authorization. Not only did the evidence fail to establish even a prima facie avoidance of the employer's limitation defense, but it also significantly undercut that avoidance by supporting the opposite proposition: that the care and treatment by Dr. Young in August 2019 did *not* relate to **Ortiz's** compensable injury and, consequently, were *not* "furnished" by the employer.

***896** The employer's evidence put zeroes on the master limitation timer. **Ortiz** failed to present any evidence of facts that could have supported putting time back on. Under the law as we have explained it, there was ample support in the record for the JCC's conclusion that the PFB was barred.

III

[10] We review the JCC's factual findings for competent evidence, and his legal conclusions de novo. *See Borneisen v. Home Depot*, 917 So. 2d 361, 362 (Fla. 1st DCA 2005); *McBride v. Pratt & Whitney*, 909 So. 2d 386, 387 (Fla. 1st DCA 2005). Based on the foregoing legal analysis and assessment of the evidence presented before the JCC, we can find no legal basis for setting aside the JCC's final compensation order dismissing the August 26, 2020, PFB.

Affirmed.

Roberts, J., concurs; Bilbrey, J.,[4] concurs in result with an opinion.

Bilbrey, J., concurring in result.

Since the judge of compensation claims correctly found that Claimant had not met her burden to show that the statute of limitations was tolled, we are correct to affirm. *See* § 440.19(2), Fla. Stat. (2003); *Palmer v. McKesson Corp.*, 7 So. 3d 561, 563–64 (Fla. 1st DCA 2009) (holding that after an employer has carried its burden to prove that the statute of limitations has run, the burden then shifts to the claimant to prove tolling of the statute).

All Citations

361 So.3d 889, 48 Fla. L. Weekly D1107

Footnotes

1 In addition to **Winn-Dixie**, we have two other appellees: Travelers Insurance, which served as **Winn-Dixie's** carrier to satisfy its statutory obligation to provide benefits under chapter 440; and Sedgwick CMS, which managed the claim as Traveler's servicing agent. *See* § 440.13(2)(a), Fla. Stat. ("Subject to the limitations specified elsewhere in this chapter, the employer shall furnish to the employee such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require ...."); *see also* § 440.09(1), Fla. Stat. (requiring the employer to "pay compensation or furnish benefits" as set out in chapter 440 "if the employee suffers an accidental compensable injury ... arising out of work performed in the course and the scope of employment"); § 440.38(1), Fla. Stat. (requiring the employer to "secure the payment of compensation under this chapter"); § 440.41, Fla. Stat. (providing for the regulation of the discharge by the employer's carrier of the employer's "obligations and duties" regarding the liability imposed by chapter 440, treating notice to and knowledge of the employer as notice to and knowledge of the carrier, and providing that "any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer").

2 "Toll" here means "to extend or suspend." *Medpartners/Diagnostic Clinic Med. Group, P.A. v. Zenith Ins. Co.*, 23 So. 3d 202, 206 (Fla. 1st DCA 2009). The 1994 amendments to chapter 440 changed the effect "the provision of benefits" had on the running of the statute. *See id.* at 205 (noting that with the 1994 amendments to chapter 440, "the provision of

benefits pursuant to a PFB or notice of injury, rather than creating an independent point of reference from whence a claim may be filed, only operates to 'toll' or extend the initial statute of limitations"). The current statute "envisions a potentially continuous extension (tolling) of the original statute of limitations predicated on the timely receipt of benefits pursuant to a PFB or notice of injury, or the filing of a PFB." *Id.* at 205–06.

3 In the light of section 440.13(2)(a), it makes no sense to equate "authorization" with the "furnishing" of care. "Authorized" just means that the provider will be reimbursed by the carrier when he or she treats the employee for a workplace injury. *See id.* (3)(a) ("As a condition to eligibility for payment under this chapter, a health care provider who renders services must receive authorization from the carrier before providing treatment."). That same provider of course could also serve as the employee's personal doctor, providing non-injury related care and treatment as well. Non-reimbursable care and treatment could not reasonably be said to still be care and treatment furnished by the employer.

4 Judge Bilbrey substituted for Judge Makar, who was recommissioned as a judge of the Fifth District Court of Appeal. Judge Bilbrey has viewed the digital recording of oral argument.

402 So.3d 301
District Court of Appeal of Florida, First District.

Annalie **ORTIZ**, Appellant,

v.

WINN-DIXIE, INC., Travelers Insurance, and Sedgwick CMS, Appellees.

No. 1D2021-0885
|
Date of Accident: September 28, 2003
|
December 23, 2024
|
Rehearing Denied February 13, 2025
|
Rehearing Denied December 30, 2024

Synopsis

Background: Claimant sought review of decision of the Judge of Compensation Claims. Frank J. Clark, J., denying as time barred petition for benefits for visits to authorized provider 16 years after workplace injury.

Holdings: On rehearing, the District Court of Appeal, Tanenbaum, J., held that:

[1] claimant's three visits to authorized provider to address urinary tract infection (UTI) and dysuria complaints constituted the furnishment of remedial treatment and care that tolled limitations period for filing claim for benefits, and

[2] authorized provider's decision to bill workers' compensation claimant's personal insurance, and not workers' compensation carrier, for three office visits did not alter the determination of whether provider had furnished remedial treatment and care that tolled limitations period for filing claim for benefits.

Judgment set aside.

Bilbrey, J., filed a concurring opinion.

Tanenbaum, J., filed a specially concurring opinion.

Opinion, 361 So.3d 889, superseded.

West Headnotes (4)

[1] Workers' Compensation Conclusiveness of administrative findings in general

The vantage point on appeal in a workers' compensation case is not inferior to that of the Judge of Compensation Claims (JCC) in assessing the evidence and its probity.

[2] Workers' Compensation Claim or petition for compensation and time for institution of proceedings

Appellate review of the judge of compensation claims (JCC) application of the statute of limitations to facts of the case is de novo. Fla. Stat. Ann. § 440.19.

[3] Workers' Compensation Time for proceedings and limitations

Workers' compensation claimant's three visits to authorized provider to address urinary tract infection (UTI) and dysuria complaints, 16 years after workplace injury required removal of kidney, constituted the furnishment of remedial treatment and care that tolled one-year limitations period for filing claim for benefits; workers' compensation carrier had accepted compensability of claimant's kidney injury, carrier treated injury as permanent by authorizing follow-up visits with urologist as needed, carrier previously paid for claimant's visits to urologist to treat UTI and dysuria complaints, the contested visits constituted the same furnishment of medically necessary remedial treatment and care that carrier previously had paid for, and carrier failed to submit evidence showing "a break in causation" between claimant's compensable kidney injury and the three medical visits. Fla. Stat. Ann. § 440.19.

[4] **Workers' Compensation** Time for proceedings and limitations

Authorized provider's decision to bill workers' compensation claimant's personal insurance, and not workers' compensation carrier, for three office visits did not alter the determination of whether provider had furnished remedial treatment and care that tolled one-year limitations period for filing claim for benefits, in workers' compensation action where claimant filed a petition for benefits 16 years after workplace injury resulting on the removal of a kidney; who received a bill for treatment had no bearing on the tolling question. Fla. Stat. Ann. § 440.19.

1 Case that cites this headnote

***302** On appeal from an order of the Office of the Judges of Compensation Claims. Frank J. Clark, Judge of Compensation Claims.

Attorneys and Law Firms

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William H. Rogner of HR Law, P.A., Orlando, for Appellees.

On Motion for Rehearing

Tanenbaum, J.

The court grants the appellant's motion for rehearing and substitutes this opinion for the original. We originally affirmed the final compensation order. Now we set it aside.

* * *

Winn-Dixie, Inc., for years furnished follow-up medical supervision to Annalie **Ortiz** under the Florida workers' compensation statutory regime upon **Ortiz's** suffering a compensable work-related injury; the injury requiring removal of one of her ***303** kidneys; the remedial care that followed having been provided through an authorized urologist to monitor her resultant permanent medical condition.[1] Upon noticing that it had not received a bill from the urologist in over a year, Sedgwick (the servicing agent) concluded that the tolling of the limitation period—tolling that would have started from her last visit to the urologist—had expired, meaning (in Sedgwick's view) the limitation period had run for filing a petition for benefits ("PFB") regarding care for her injured urinary tract. *See* § 440.19(1), Fla. Stat. (barring any PFB that is not "filed within 2 years after the date on which the employee knew or should have known that the injury" was caused by the work). Sedgwick eventually notified **Ortiz** that it was terminating the authorization of care based on this statute of limitation.

Ortiz challenged this termination of care by filing a PFB. Rather than question up front whether the previously tolled two-year limitation period had run at all—let alone whether there was still time remaining in the limitation period when she filed her PFB[2]—she focused on the position Sedgwick was taking: that more than a year had passed since the last day it provided her medical care, in which case the tolling period would have expired and, according to Sedgwick, the statute of limitation at that moment would have completely run with it. In opposition to this position, **Ortiz** contended she had visited the urologist three more times following the last visit billed to Sedgwick; and, despite those subsequent visits having been billed to her private health insurance, the services provided still fell within the scope of care that had been authorized—each one restarting the one-year tolling period, obviating Sedgwick's basis for terminating the promised medical care supplied on **Winn-Dixie's** behalf. *See* § 440.19(2), Fla. Stat. (providing that if the employer's carrier "furnish[es] ... remedial treatment, care, or attendance" upon being notified of the injury or receiving a PFB, the two-year limitation period is tolled for a year).

Following a final hearing, the judge of compensation claims ("JCC") dismissed the PFB as time-barred. The JCC found that **Winn-Dixie**, Travelers, and Sedgwick had "met their prima facie case to establish the Statute of Limitations defense," the JCC basing that determination entirely ***304** on the appellees' statement in response to the PFB that the "[c]laim is barred by the statute of limitations," presumably because it was obvious that more than two years had passed between when **Ortiz** suffered her workplace injury in 2003 and when **Ortiz** filed her PFB in 2020. It also was undisputed, though, that **Winn-Dixie** had provided medical care in connection with that injury, but the JCC did not assess to what extent the limitation period had been tolled because of that provision of care—instead simply assuming

that when the tolling period expired—the limitation period necessarily would have run to the end along with it, making any PFB on the kidney injury time-barred. Holding aside the extent to which the original two-year period might have been tolled—a question we need not reach for this disposition—**Ortiz** irrefutably established, through the medical and billing records, that her three subsequent visits counted as **Winn-Dixie's** provision of care, further extending the one-year tolling period. **Winn-Dixie's** limitation defense having been conclusively avoided, the JCC failed to draw the correct legal conclusion from that evidence. The JCC's dismissal is unsupported by the record and the law, so we must set it aside.

I

While working at a Naples **Winn-Dixie** in 2003, **Ortiz** tripped and fell, the box she was carrying hitting her right side, causing internal injury. Emergency medical services treated her on site and then transported her to the emergency room at a hospital known at the time as Cleveland Clinic, where she was further treated. She was sent home but received follow-up care through doctors at Cleveland Clinic, her injury ultimately requiring the removal of her right kidney (a procedure known as a nephrectomy) later that same year. **Winn-Dixie** did not dispute compensability for this injury and authorized long-term remedial care in the form of annual "kidney follow-ups" with a urologist, more frequent visits being allowed if **Ortiz** needed them.[3] *Cf.* § 440.13(2)(a), Fla. Stat. (requiring an employer to "furnish to the employee such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require"); *Tower Chem. Co. v. Hubbard*, 527 So. 2d 886, 889–90 (Fla. 1st DCA 1988) (agreeing that "follow-up visits" to provide "ongoing medical supervision for a permanent medical condition caused by [an] industrial accident," authorized and paid for by the employer, constituted the provision of "remedial attention" that restarted the two-year statute of limitation under the pre-1994 version of section 440.19, Florida Statutes); *McNeilly v. Farm Stores, Inc.*, 553 So. 2d 1279, 1280–81 (Fla. 1st DCA 1989) (noting that "so long as a doctor is authorized to provide follow-up care, and visits to the doctor for continuing supervision and evaluation for possible change in treatment are reasonably necessary from a medical standpoint, such visits constitute 'remedial attention' under the [prior version of the] limitations statute" (citing *Tower Chem. Co.*, 527 So. 2d at 890)).

It could be inferred from **Ortiz's** testimony (and Sedgwick's willingness to consistently pay for her medical care with a ***305** urologist over the years) that she was under continuous long-term medical monitoring with the doctors at Cleveland Clinic until she switched to Dr. Marvin Young, **Ortiz's** authorized provider for this remedial care starting in 2015. By January 2019, **Ortiz** had attended eight appointments with Dr. Young, all paid for by Sedgwick. The reason for each visit varied slightly, those reasons including the authorized annual check-ups; but also including visits as needed to address complaints for her recurrent urinary tract infections ("UTIs"), dysuria (painful urination),[4] and cystitis (bladder inflammation).[5] Indeed, the January 2019 appointment was a follow-up to July 2018 visits that had led to her being monitored for both the recurrent UTIs and dysuria. She was asymptomatic by the January 2019 appointment but nevertheless told by Dr. Young to continue with probiotics. According to the medical and billing records submitted to the JCC, between 2015 and January 2019, those earlier appointments consistently included treatment or follow-up for UTIs—or assessment of symptoms consistent with a UTI.

When **Ortiz** visited Dr. Young on August 1, 2019, she again was complaining of burning urination, expressing concern that a prior UTI still had not fully resolved (presumably, not having resolved since her prior appointment, which itself was a follow-up on her recurrent UTI). **Ortiz** provided further explanation for this in her testimony, stating: "I was having a urinary tract infection that was not getting better, and I thought something was wrong with [her remaining] kidney." During this August 1 visit, Dr. Young told her to continue taking the medication he had previously prescribed her for UTIs, a problem, according to her testimony, **Ortiz** did not have until after the 2003 work accident at **Winn-Dixie**. Dr. Young billed this encounter—like he had in the past for similar complaints going back to 2015 (and paid for by Sedgwick)—as an office visit and urinalysis, yet he sent the bill this time to **Ortiz's** personal health insurance.

Ortiz's deposition testimony described her interaction with the office this way:

> Q And why did you use your health insurance?
>
> A Because they told me it has to be submitted to my health insurance, not to my workman's comp.
>
> Q Who told you that?
>
> A The front desk. They said the doctor had instructed that.

> Q Did they tell you why other than the doctor instructed you?
>
> A No, not really. They just said it has to be -- has to go through private insurance.
>
> Q Was this the first time they ever said that to you?
>
> A Back in 2019, I would say so.
>
> Q Okay. So you said that happened again in March of this year?
>
> A Yes. They billed my private insurance again in March of this year.
>
> Q And did you ask them at that time, why they were billing your primary care?
>
> A They said the workman's comp authorization was not done ... by the time.

Like the August 1, 2019, visit, during the next two visits, **Ortiz** received an evaluation or treatment from her authorized provider for a condition or issue for which Sedgwick previously had paid as part of the care being provided for the lost kidney. ***306** On August 12, 2019, she presented with the same complaint, and the encounter was billed once again as an office visit and urinalysis. Then, on April 7, 2020, **Ortiz** returned to discuss the "renal ultrasound and basic metabolic panel" that had been ordered based on her history of recurrent UTIs. This encounter also was billed as an office visit, with an indication that an antibiotic was prescribed for **Ortiz's** UTI history.

Not having received any communication from Dr. Young's office since the contact about the January 2019 appointment, Sedgwick initiated contact with the office in May 2020. Sedgwick inquired about any recent dates of service and requested accompanying notes. The doctor's office responded by sending records regarding an appointment **Ortiz** attended on April 7, 2020, more than a year following the January 2019 visit that Sedgwick had last covered. The following month, Sedgwick requested information related to any additional appointments **Ortiz** may have had, and Dr. Young's office advised that **Ortiz** had also been seen on August 1, 2019, and August 12, 2019—appointments that Sedgwick previously had not paid for. Notably, the adjuster for Sedgwick testified in a deposition that she did not ask Dr. Young for his notes of **Ortiz's** visits in August to see what she had been treated for.

If the adjuster had asked for those notes, she would have seen the same treatment that the E/C had been paying for since 2015—recurrent UTIs and dysuria. Indeed, the records make clear that as of January 2019, Sedgwick had considered visits in connection with **Ortiz's** complaints about her urinary tract—of which her remaining kidney was a part, the tract itself no longer fully intact because one kidney had been removed following the accident—as part of the permanent care it had accepted as related to her permanent injury. Note that before and after the January 2019 appointment, Dr. Young routinely evaluated and treated **Ortiz** for both dysuria and UTIs, the latter having been acknowledged by Dr. Young in his notes as being recurrent for years. All three of the appointments that ***Ortiz's*** insurance paid for—appointments Sedgwick later refused because of the statute of limitation—appeared in the record to be nearly identical to the previous ones just described that Sedgwick authorized and paid for nearly a decade.

Despite all this, more than two months later, on August 7, 2020, Sedgwick filed a notice of denial of benefits, effectively deauthorizing Dr. Young, claiming the limitation period expired on January 29, 2020. On August 26, 2020, **Ortiz** filed a PFB seeking authorization, provision, and scheduling of an appointment with Dr. Young. Sedgwick responded, asserting in part that the PFB was barred by the time limitation set out in section 440.19.

At the final hearing, only **Ortiz** testified in person. Medical and billing records and depositions otherwise were simply submitted for consideration by the JCC, the medical records including narratives of why **Ortiz** was seeing Dr. Young and the evaluations or treatments that were provided in response; the billing records showing what both Sedgwick and private insurance paid for from 2015 through 2020. Denying **Ortiz's** claim, the JCC concluded **Winn-Dixie** had sufficiently demonstrated a limitation defense, focusing exclusively on the question whether the one-year tolling period provided by section 440.19(2) (ostensibly running from the January 29, 2019, visit) had expired before **Winn-Dixie** provided further care again through Dr. Young—in essence equating the expiration of the one-year tolling period with the running of the entire two-year limitation period.

The JCC blamed **Ortiz**:

> ***307** I find [**Ortiz**] knew [**Winn-Dixie**] did not "furnish" the care she received on August 1, 2019, August 12, 2019, or April 7, 2020 because she provided Dr. Young's office

> with her health insurance information and *confessed* she was told the doctor had "instructed" his staff to use the health insurance as opposed to billing [Sedgwick].

(emphasis supplied). According to the order, **Ortiz** was "aware that Dr. Young billed her health insurance for those visits, and she *facilitated* it by providing the doctor's office with her health insurance information *without questioning their need for it*." (emphases supplied). The JCC concluded **Ortiz** "cannot now argue those visits were compensable, nor that they should have been compensable, in light of the fact that she was *content* to allow the charges to be covered by her health insurance at the time." (emphasis supplied).

[1] **[2]** **[3]** For the most part, the JCC conducted a record review in determining whether **Ortiz's** PFB was time-barred —**Ortiz** having testified in person only briefly, and not with respect to any fact in dispute; the rest of the evidence having been medical records and depositions. Our "vantage point" on appeal, then, "is not inferior to that of the JCC" in assessing the evidence and its probity. *Hidden Harbor Boatworks v. Williams*, 566 So. 2d 595, 596 (Fla. 1st DCA 1990); *Severini v. Pan Am. Beauty Sch., Inc.*, 557 So. 2d 896, 897 (Fla. 1st DCA 1990) (same); *cf. Mendivil v. Tampa Envelope Mfg. Co.*, 233 So. 2d 5, 6 (Fla. 1970) ("It should be noted that All evidence was submitted by deposition. The industrial judge did not personally see any of the witnesses. The Full Commission was, therefore, in as good a position to evaluate the credibility of witnesses and weigh the evidence as was the industrial judge."). The pertinent facts also are not in dispute. Our review of the JCC's application of section 440.19 to those facts is *de novo*. *See McBride v. Pratt & Whitney*, 909 So. 2d 386, 387 (Fla. 1st DCA 2005) ("The outcome of this appeal turns on our interpretation of the applicable statute of limitations, found in section 440.19, Florida Statutes (Supp.1994). Accordingly, our standard of review is *de novo*."); *Airey v. Wal–Mart,* 24 So. 3d 1264, 1265 (Fla. 1st DCA 2009) (reviewing JCC's dismissal of PFB as time-barred *de novo* where the pertinent facts were not in dispute, making the issue "one purely of law"); *see also McKenzie v. Mental Health Care, Inc./Summit Claims Ctr.*, 43 So. 3d 767, 768 (Fla. 1st DCA 2010) (noting that review is *de novo* when an issue requires interpretation and application of a statute). We conclude the JCC misapplied the limitation and tolling provisions found in section 440.19, as we now explain.

II

Typically, and as with any statute of limitation, under the one found in section 440.19(1), the employer or its carrier bears the burden of raising the statute of limitation as a defense, indeed waiving the defense unless it "advances the defense ... in its initial response to the petition for benefits." § 440.19(4), Fla. Stat.; *see Palmer v. McKesson Corp.*, 7 So. 3d 561, 563 (Fla. 1st DCA 2009) ("Because running of the statute of limitations is an affirmative defense, the employer ... had the burden of raising that defense and proving that the petitions for benefits were untimely pursuant to section 440.19(1)."). Also, like with any statute of limitation, the employee—as proponent of the claim—bears the burden of proving avoidance of that defense. *See Palmer*, 7 So. 3d at 563–64 (stating that "where a workers' compensation claimant seeks to extend or avoid the statute of limitations by operation of section 440.19(2), he or she bears the burden of establishing the exception"). The limitation ***308** defense being properly and timely raised; **Ortiz** having argued tolling as an avoidance; there being records and testimony in evidence before the JCC that indicate some manner of tolling; the facts material to the question of tolling not being in apparent dispute—this essentially being a record-review case before the JCC—whether one side's burden or the other's was met is not the legal question we must address in this appeal. Instead, we look at how the JCC applied the law to those facts before he concluded **Ortiz's** PFB was time-barred.

We conclude from this record that the August 2019 and April 2020 visits constituted the furnishing of remedial treatment and care, each one further tolling the limitation period up to the point when the PFB was filed. We also reject the appellees' argument that it was ***Ortiz***, and not they, who bore the burden of proving "compensability" of her UTI —of showing that her compensable injury was the major contributing cause of it. Yes, **Ortiz's** claim focused on the tolling of the statute, but even in that context, she did not have to raise or "re-prove" compensability.

There are a few facts we cannot overlook. First, the carrier long ago accepted compensability of **Ortiz's** kidney injury, even stipulating to that compensability in this case. Second, the carrier indisputably treated that injury as permanent—the carrier authorizing follow-up visits, for an indeterminate duration, with a urologist as needed to monitor for changes in her condition that may necessitate further treatment related to the compensable injury. Third, Sedgwick in the past paid for, and essentially accepted, **Ortiz's** visits to Dr. Young with UTI and dysuria complaints, as well as follow-up visits to assess his prescribed treatment for those complaints. With these facts

as the backdrop, we see no meaningful difference between the visits with Dr. Young in August 2019 and April 2020 that Sedgwick *did not* pay for and the years' worth of visits that it did.

Bear in mind the point we made in the margin at the beginning. The kidneys are part of the urinary tract. While the appellees stipulated to the compensable injury as being the surgically removed right kidney, there realistically would be no need to medically monitor something that is no longer there. The ongoing medical attention with a urologist that Sedgwick authorized had to have been focused, then, on the permanent medical condition of the remaining components of the urinary tract the kidney loss left behind. That authorization comported with the policy behind the Workers' Compensation Law: "to indefinitely preserve on a continuing basis the employer's obligation to provide reasonably necessary remedial treatment for permanent medical conditions," which "most assuredly can ... consist of continuing medical supervision involving the physician's examination from time to time, evaluation of claimant's condition, and recommendations for continuing or changing" existing treatment or activities. *Tower Chem. Co.*, 527 So. 2d at 889–90 (explaining that "seeing [an authorized doctor] as part of his ongoing medical supervision for a permanent medical condition caused by the industrial accident" is "remedial attention," as the term was used in a predecessor statute). Sedgwick's payment of the UTI and dysuria visits before 2019 constituted its furnishing of care for **Ortiz's** compensable injury, in the process accepting those types of visits as "reasonably necessary to [Dr. Young's] on-going medical attention" that Sedgwick had agreed to provide. *Id.* at 889; *cf. City of Orlando v. Blackburn*, 519 So. 2d 1017, 1018 (Fla. 1st DCA 1987) (construing "remedial treatment, care and attendance" to treatment that "is not curative but which nevertheless mitigates the conditions or effects of ***309** the injury"); *McNeilly*, 553 So. 2d at 1280–81 (noting "that, so long as a doctor is authorized to provide follow-up care, and visits to the doctor for continuing supervision and evaluation for possible change in treatment are reasonably necessary from a medical standpoint, such visits constitute 'remedial attention' under the limitations statute [under its former iteration]" (citing *Tower Chem. Co.*, 527 So. 2d at 890)).

As in *Tower Chemical Company v. Hubbard*, here Sedgwick "knew [Dr. Young] would provide remedial attention from time to time, for it had authorized [him] to do so," including visits to Dr. Young for complaints of conditions pertaining to the remainder of **Ortiz's** urinary tract; and Sedgwick had done nothing (at least not on the record) to "deauthorize" Dr. Young for those types of visits by the time of **Ortiz's** August 2019 and April 2020 visits. *Tower Chem. Co.*, 527 So. 2d at 890. There is no evidence in the record that Sedgwick had communicated any such deauthorization or limitation to **Ortiz** before any of those visits. We can infer from the medical records showing **Ortiz's** at-least-once-a-year visits that she thought doing so was necessary to renew the one-year tolling period and "preserve the right to future benefits." *Cf. Mahoney v. Sears, Roebuck & Co.*, 438 So. 2d 174, 174 (Fla. 1st DCA 1983). So the tolling question in this case is not a matter of whether **Ortiz** failed to visit Dr. Young at all within a year's time, or whether she visited a new, unauthorized physician, or whether she sought treatment for a new body part (*i.e.*, a new injury, the compensability of which being undetermined).

The contested visits in 2019 and 2020 constituted the same furnishment of "medically necessary remedial treatment [and] care" that Sedgwick previously had paid for. The stipulation to compensability of the surgically removed kidney (and the permanent condition of the urinary tract implicitly acknowledged by the carrier to have been left behind in the kidney's absence) "does little in limiting [the carrier's] area of responsibility, nor does it give [**Ortiz**] guidelines as to what treatment [s]he should be requesting from" Sedgwick. *See Jackson v. Merit Elec.*, 37 So. 3d 381, 383 (Fla. 1st DCA 2010); *see also Meehan v. Orange Cnty. Data & Appraisals*, 272 So. 3d 458, 462 (Fla. 1st DCA 2019) (noting that "the conditions and symptoms for which the E/C accepted responsibility continue to be experienced by the Claimant"). The appellees did not limit their acceptance of compensability for the kidney to any set of symptoms or diagnoses. This is significant, especially given Sedgwick's payment for evaluations and care for a variety of symptoms and diagnoses tied to the urinary tract generally. *Cf. Meehan*, 272 So. 3d at 462 (noting "legal significance" of "broad stipulation" of compensability, which was for illness stemming from the workplace and did not "specify [particular] conditions," and not allowing the carrier to "escape its acceptance of compensability with an argument of misdiagnosis," where the "symptoms have not substantially changed since the" accidental injury, symptoms "for which the E/C accepted responsibility").

The burden before the JCC in this case, then, was on the appellees "to provide medical evidence that the causal connection between" **Ortiz's** "compensable [kidney] injury

and the requested treatment [in August 2019 and April 2020] was broken"—"that the requested treatment was due to a condition unrelated to the injury which [the appellees] had accepted as compensable." *See Jackson*, 37 So. 3d at 383 (explaining that because the parties stipulated to a back injury as being compensable, the claimant "met his initial burden of proof to establish entitlement to the requested treatment, as it was not disputed that the treatment was for the back"); ***310** *Sanchez v. YRC, Inc.*, 304 So. 3d 358, 362 (Fla. 1st DCA 2020) (observing that "[a]lthough a specific diagnosis *could* establish the parameters of an injury accepted as compensable, the E/SA presented *no evidence of the acceptance of a specific diagnosis for this admittedly compensable injury*"; and evidence of a later diagnosis did not prove that the diagnosis was not part of the injury accepted as compensable, the carrier failing to present "medical evidence suggesting that the degenerative condition here did not exist [at the time of the stipulation] or could not be the natural progression of the accepted injury" (emphases supplied)); *see generally Engler v. Am. Friends of Hebrew Univ.*, 18 So. 3d 613, 614 (Fla. 1st DCA 2009) ("Once compensability is established, an E/C can no longer contest that the accident is the MCC of the injuries at issue. It can only contest the connection between a claimant's need for specific treatment or benefits, and the industrial accident."); *Meehan*, 272 So. 3d at 461 (explaining that once compensability of an injury is accepted, the carrier has the burden of demonstrating "the requested treatment was due to a condition unrelated to the injury which the E/C had accepted as compensable").

That the relationship between the later requested care and the compensable injury arises as an issue in a statutory limitation context does not alter this burden. Otherwise, the carrier could shift this burden simply by citing the statute of limitation as the basis for deauthorizing care it once provided, as Sedgwick did here. *Cf. Meehan*, 272 So. 3d at 461 ("By the E/C's stipulation of compensability, the Claimant was excused of the burden to reestablish causation."). Because **Ortiz** submitted evidence demonstrating the similarity between the care Sedgwick had paid for through January 2019 and the care she sought in August 2019 and April 2020, the appellees had to submit evidence showing "a break in causation"—that the evaluation and treatment of **Ortiz's** UTIs and dysuria no longer were related to the loss of her kidney, the injury itself having been accepted as compensable. *See Sanchez*, 304 So. 3d at 363. No such evidence appears in the record that was before the JCC.[6]

[4] Dr. Young's decision to bill **Ortiz's** personal insurance for the three contested visits does not alter this analysis. It was not for Dr. Young to decide whether the visits for evaluation of **Ortiz's** UTI or dysuria complaints fit within Sedgwick's authorization. This court repeatedly has held that who gets billed has no legal bearing on the tolling question. *See Seamco Labs., Inc. v. Pearson*, 424 So. 2d 898, 900 (Fla. 1st DCA 1982) ("It is the remedial treatment that tolls the statute, not the report [or billing] of the treatment."); *McNeilly*, 553 So. 2d at 1280–81 ("The fact that McNeilly paid for the visit personally is also irrelevant, in that the significant event is the rendition of remedial treatment before the expiration of the two year period, and not the payment of the bill therefor."); *Sol Dale Bldgs., Inc. v. Schweickert*, 656 So. 2d 606, 609 (Fla. 1st DCA 1995) ("This responsibility cannot be shifted to the claimant. We reiterate, as we held in *McNeilly* and *Seamco,* that it is the furnishing of the treatment, not the billing or reporting, that tolls the statute."); *Gilbert v. Pinellas Suncoast Transit Auth.*, 674 So. 2d 818, 822 (Fla. 1st DCA 1996) (holding that because the employee was authorized to return for follow-up care for his compensable injuries, the "continuing evaluation and treatment" for compensable injuries ***311** tolled the statute "despite the claimant's failure to request the E/SA to pay for the hospital's services under workers' compensation").

Simply put, it was legal error for the JCC to conclude the three contested visits did not constitute the furnishment of care that tolled the statute regarding **Ortiz's** kidney injury. The evidence showed all three were of a piece with the care Sedgwick had authorized for years. The appellees failed to present evidence showing something had changed such that **Ortiz's** recurring complaints *no longer* related to her compensable injury. And the fact that Dr. Young suddenly stopped billing Sedgwick—without any apparent communication to **Ortiz** from Sedgwick about deauthorization—cannot support the JCC's looking past that failure and dismissing the PFB as time-barred anyway.

* * *

The question before us is whether the three contested visits sufficiently restarted an applicable tolling period. The undisputed record demonstrates that they did, so **Ortiz's** PFB filed in August 2020 was *not* time-barred. The JCC's final order is not supported by the evidence in the record and is contrary to the law.

Set Aside.[7]

Roberts, J., concurs; Bilbrey,[8] J., concurs with an opinion; Tanenbaum, J., specially concurs with an opinion for himself.

Bilbrey, J., concurring.

I join the majority opinion in full. I write to emphasize that, like this concurring opinion, Judge Tanenbaum's concurring opinion that follows is not the opinion of this court. These concurrences have no precedential value. *See Scott v. Trotti*, 283 So. 3d 340, 345 (Fla. 1st DCA 2018). So, for instance, Judge Tanenbaum's conclusion that certain language in *Orange County School Board. v. Best*, 728 So. 2d 1186, 1188 (Fla. 1st DCA 1999), and *Sanchez v. American Airlines*, 169 So. 3d 1197, 1197 (Fla. 1st DCA 2015), about tolling ***312** is dicta is not binding on JCCs or a panel of this court considering the issue in the future. His reasoning may be found to be persuasive or may be discarded. The majority opinion correctly does not reach issues that do not need to be decided to resolve the appeal.

Tanenbaum, J., specially concurring.

The conclusion in the compensation order regarding the claim's being time-barred is legally wrong for another reason, one this panel does not formally reach in this case (if only because **Ortiz** did not assert it before the JCC or here); but one that nevertheless deserves being addressed. Simply put, mathematically, the two-year limitation period could not have expired—thereby barring **Ortiz's** claim, as the JCC concluded it did—because, based on the JCC's own factual determination, the period *would not have even started*, at the earliest, until January 2019—a period amounting to less than two years before **Ortiz** filed her PFB.

I

Notwithstanding what has been the common practice (or preference) among counsel and JCCs, here is what the *law* (read: the statute) mandates for the determination of whether a workers' compensation claim is time-barred, given the plain meaning of the term "toll" as it is used in section 440.19, Florida Statutes.

A

The Workers' Compensation Law gives an employee two years to file a petition seeking a benefit stemming from a compensable injury, the two years running from "the date on which [he or she] knew or should have known that the injury or death arose out of work performed in the course and scope of employment." § 440.19(1), Fla. Stat.; *cf.* § 440.192(1), (3), Fla. Stat. (allowing an employee to file "a petition for benefits" to seek "any benefit that is ripe, due, and owing" and permitting a PFB to "contain a claim for past benefits and continuing benefits in any benefit category," provided the benefits are "in default and ripe, due, and owing on the date the petition is filed"). Section 440.19(1) undoubtedly is a "statute of limitation" for workers' compensation claims. *Cf. Roe v. City Investing/Gen. Dev. Corp.,* 587 So. 2d 1323, 1324 (Fla. 1991) (treating the predecessor provision as a "two-year statute of limitations"); *Cash v. Universal Rivet, Inc.*, 616 So. 2d 446, 447–48 (Fla. 1993) (same); *Medpartners/Diagnostic Clinic Med. Grp., P.A. v. Zenith Ins. Co.*, 23 So. 3d 202, 205 (Fla. 1st DCA 2009) (referencing the Legislature's 1994 revision of section 440.19 to implement "significant substantive changes to the statute of limitations in workers' compensation cases"); *see generally Gaines v. Orange Cnty. Pub. Utils.*, 710 So. 2d 139, 140 (Fla. 1st DCA 1998) (treating revised section 440.19 as a statute of limitation).

There, however, also is a tolling provision, which states as follows:

> Payment of any indemnity benefit or the furnishing of remedial treatment, care, or attendance pursuant to either a notice of injury or a petition for benefits *shall toll the limitations period set forth above for 1 year from the date of such payment*. This tolling period does not apply to the issues of compensability, date of maximum medical improvement, or permanent impairment.

§ 440.19(2), Fla. Stat. (emphasis supplied). "[W]hether a cause of action is time-barred," then, turns on the determination of "the separate and distinct issues of when the action accrued and whether the limitation period was tolled." *Hearndon v. Graham*, 767 So. 2d 1179, 1184 (Fla. 2000). ***313** The supreme court continued this point as follows:

> We extrapolate, therefore, that while accrual pertains to the existence of a cause of action which then triggers the running of a statute of limitations, *tolling* focuses directly on limitation periods and *interrupting the running thereof*. That both *accrual and tolling* may be employed to postpone the running of a statute of limitations so that an action would not become time-barred should not cause confusion between these *distinct concepts*.

Id. at 1185 (emphases supplied).

The supreme court has been clear on what statutory tolling means: It "*suspend[s] the running of the statute of limitations time clock* until the identified condition is settled." *Hankey v. Yarian*, 755 So. 2d 93, 96 (Fla. 2000) (emphasis supplied); *cf. Hearndon*, 767 So. 2d at 1185 n.2 (noting how this mirrors federal law, tolling being concerned "with the point at which the limitations period begins to run and with the circumstances in which the running of the *limitations period may be suspended*" (emphasis supplied) (internal citations omitted)). In other words, "a tolling provision *interrupts* the running of the statutory limitations period," so the statutory time provided "is not counted against the claimant during" the tolling period. *Hankey*, 755 So. 2d at 97 (emphasis supplied) (quoting *Rothschild v. NME Hosps., Inc.*, 707 So. 2d 952, 953 (Fla. 4th DCA 1998)). Each time a tolling period starts, the statutory limitation "clock stops until the tolling period expires and then begins to run again." *Id.* (quoting *Rothschild*, 707 So. 2d at 953).

And this understanding of what "toll" means is not endemic to its use in one statute; it is the "plain meaning" of the term. *Id.* at 96. Not just that, "the word 'toll' has been *consistently* used by the Legislature and interpreted by the courts to mean 'suspend' when used in a statutory limitation[ ] context." *Id.* at 97 (emphasis supplied) (looking to meaning of "toll" in the general limitations statute—section 95.051, Florida Statutes—and concluding the Legislature intended for the term "to have the same meaning in section 766.106(4)"); *Hearndon*, 767 So. 2d at 1184–85 (considering the meaning and application of "toll" as used in section 95.051). "Toll," then, must carry the same meaning wherever it appears in a limitation statute, including its usage in section 440.19(2). *Cf. Goldstein v. Acme Concrete Corp.*, 103 So. 2d 202, 204 (Fla. 1958) (assuming that the Legislature "intended certain exact words or exact phrases to mean the same thing" in "both the mechanics' lien statutes ... and the Workmen's Compensation Act," such that "to the extent that an understanding of one may aid in the interpretation of the other, [the two should] be read and considered together"); *State v. Hearns*, 961 So. 2d 211, 217 (Fla. 2007) ("We have held that where the Legislature uses the exact same words or phrases in two different statutes, we may assume it intended the same meaning to apply." (citing *Goldstein*, 103 So. 2d 202)).

B

There is nothing unique about how the term "toll" appears in the limitation provision of section 440.19—no special definition provided. As the supreme court directs, the term's application to a time-bar determination should be as straightforward in the workers' compensation context as it is in any civil context. The first question to be answered, then, is when did the claim accrue. In clear terms, the two-year limitation period for a workers' compensation claim runs from "the date on which the employee knew or should have known that the *injury* [ ] arose out of work performed ***314** in the course and scope of employment." § 440.19(1), Fla. Stat. (emphasis supplied); *cf. Solar Pane Insulating Glass, Inc. v. Hanssen*, 727 So. 2d 961, 963 (Fla. 1st DCA 1998) ("The limitations period does not begin to run, however, until an injured employee is aware that he or she may be entitled to compensation benefits."). That is the accrual date, and the two-year "time clock" (the metaphor used by the supreme court in *Hankey v. Yarian*) starts running from there.[1]

Relevant to this case, section 440.19(2) tolls this running for a period of one year each time the carrier "furnish[es] remedial treatment [or] care" in response "to either a notice of injury or a petition for benefits."[2] As the supreme court has directed with respect to other statutory tolling provisions, the JCC must count the days between accrual and the day a tolling period starts (*i.e.*, when qualifying treatment or care was furnished) and add to that sum each number of days that elapse between the end of one tolling period and the beginning of another. If the carrier provides a benefit tied to the compensable injury before a one-year tolling period expires, the period restarts without anything being added to the sum of those elapsed days. ***315** The final sum of all these elapsed days represents the amount of the statutory limitation period that has run, so subtracting this sum from two years (730 days) yields the number of days remaining in the limitation period for the employee to file a timely PFB.

Next, to determine whether a PFB is time-barred, the JCC easily can figure out the date when the statutory limitation period expires "by adding [the] days ... remaining in the original two-year limitations period [at the time the last tolling period began] to [ ] the date when the limitations period [last] began to run again." *Hankey*, 755 So. 2d at 100 n.7; *cf. Tanner v. Hartog*, 618 So. 2d 177, 183–84 (Fla. 1993) (referring to the length of the "remainder of the statute of limitations" when tolling began and adding those remaining days to the end after the tolling expires to determine by when the party had to file suit (internal quotation and citation omitted)); *Hankey*, 755 So. 2d at 99 (referring to times when the limitation

period is suspended and when it begins "running again" after expiration of a tolling period); *id.* at 100 n.7 (same).[3] As long as the employee files the PFB related to the injury triggering the limitation period before the new date, the PFB is not time-barred. This approach ensures an employee is "given the entire two-year period [he or she was] entitled to under the statute to file suit, *not counting the period[s] of suspension*." *Hankey*, 755 So. 2d at 98 (emphasis supplied); *id.* at 100 n.7.

Practitioners and JCCs must bear in mind the distinction the supreme court makes between a statutory *extension* of a limitation period and a statutory *tolling* period—the former time being "tacked on to the end of the limitations period," the latter having the effect of *suspending* the running of that period, regardless of how long it is. *Id.* at 98; *see also Tanner*, 618 So. 2d at 182 (noting how an extension of a limitation period "is separate and additional to any other tolling period"). This distinction here is key to understanding the significance of the Legislature's addition of the current tolling provision to section 440.19 in 1994.

Before 1994, section 440.19 did not contain an express tolling provision; it used language that effectuated an extension. *Cf.* § 440.19(1)(a), (b), Fla. Stat. (1993) (using the term "toll" only to prohibit any tolling and referring to rights to compensation and remedial care under the law being "barred" if a claim is not filed within two years of the injury *or* within two years of the last payment of compensation or provision ***316** of care). The statute allowed a claim to be "filed within two years of the last remedial treatment ... so long as the claim is filed within two years after the last remedial treatment," even if the original two-year limitation period had run. *Roe*, 587 So. 2d at 1325; *cf. Bell v. Com. Carriers*, 603 So. 2d 683, 685 (Fla. 1st DCA 1992) (reading section 440.19 as allowing for "revival" of the limitation period); *Ellis v. Galloway's Inc.*, 794 So. 2d 710, 711 (Fla. 1st DCA 2001) (same). *This all changed* with the Legislature's 1993–94 reforms, which included adding the term "toll" in a new subsection two (quoted above), thereby creating a true tolling period in place of the old extension period recognized and applied by this court. *See* ch. 93-415, § 23, Laws of Fla. With this addition, our court, JCCs, and practitioners are not at liberty to carry on with the practice of considering only whether the one-year tolling period has run and ignoring whether there is still time left in the statutory limitation period. We are all bound to give the term "toll," as it appears in section 440.19, the same meaning and application the supreme court did in *Tanner v. Hartog* and *Hankey*—because that is what the supreme court has directed must happen whenever the term appears in a statutory limitation context. *See Hoffman v. Jones*, 280 So. 2d 431, 434 (Fla. 1973) (noting that district courts "are [ ] bound to follow the case law set forth by" the supreme court).[4]

II

Under this straightforward approach to tolling dictated by the supreme court, the finding of the JCC about the appellees' continuous provision of care, by itself, points to a rejection of their time-bar defense. The entire paragraph of the order on this point is as follows:

> There is no dispute regarding the compensability of Claimant's accident. As a result of her work accident Claimant underwent a nephrectomy; her right kidney was removed. EC agrees Marvin Young, M.D., a urologist in Lake Mary, Florida was an authorized treating physician until they denied the claim based on the statute of limitations. *EC furnished Claimant with authorized medical treatment from the date of her accident until January 29, 2019*.

(emphasis supplied). The highlighted text should have been the end of the matter ***317** regarding the limitation period. This determination by the JCC meant that under the plain meaning of "toll" as used in section 440.19(2)—and under the supreme court's application of the term in a limitation context—*no days* on the limitation clock could have ticked off before the initial one-year tolling period began, and *no days* could have ticked off due to breaks between one-year tolling periods, by the January 2019 provision of care by Dr. Young.[5] If January 29, 2019, marked the beginning of the last one-year tolling period, **Ortiz** would still have had a full two years remaining in her statutory limitation period to file a PFB when that period expired a year later. By the time she filed the PFB on August 26, 2020,[6] then, only 210 days would have run on the statute, leaving 520 days remaining in the limitation period.[7] On the face of the JCC's own order of dismissal—with its determination, essentially, that there was continuous tolling until January 29, 2020—**Ortiz's** PFB was not time-barred.

Despite this determination that there had been no break in care for sixteen years—meaning continuous tolling for that length of time—the JCC seemingly dismissed the whole two-year limitation period from consideration as if it had already run: noting it was "axiomatic[:] that [**Ortiz's**] August 26, 2020 PFB was not filed within two years after her September

28, 2003 accident." I explain above why this approach is not consistent with the law. The panel does not utilize this line of analysis, though—not because it is not valid, but because **Ortiz** did not raise it. We cannot reach the issue as an alternate (and more direct) basis for setting the order aside. *See Rosier v. State*, 276 So. 3d 403, 406 (Fla. 1st DCA 2019) (en banc) ("For an appellant to raise an issue properly on appeal, he must raise it in the initial brief. Otherwise, issues not raised in the initial brief are considered waived or abandoned." (collecting authority from the supreme court)).

To be fair to the JCC, **Ortiz** also did not argue the two-year limitation period at the final hearing as a basis for rejecting the time-bar defense. And, as it turns out, practitioners have not been seeking an application of the tolling provision in section 440.19(2) the way statutory tolling provisions have been applied nearly everywhere else in Florida civil litigation—indeed, the way the supreme court described in *Tanner* and *Hankey*. Practitioners across the spectrum of the workers' compensation bar seem to have hewed to the one-year-extension approach for quite some time—which the appellees, oddly enough, characterize as "decades of settled law"—despite the 1994 amendment that added the word "toll" in a new section 440.19(2), and despite the supreme court decisions going the other way.

Holding aside the plain meaning of "toll" and the supreme court analysis described above, for a moment; not only is this old approach contrary to the plain meaning of the term "toll"; but it also simply does not make sense. The one-year-extension approach necessarily presumes that the two-year limitation period already has run, so no further inquiry on the amount of time ***318** remaining in that period would be warranted. Section 440.19(2), however, *literally* refers to "toll[ing] the limitations period." If the two-year period already has run, what is still being tolled? By the clear terms of this statutory provision, it is the limitation period being *tolled*—nothing else—and an *expired* period obviously could not be tolled, there being nothing left to suspend. Section 440.19(2) does not use the language of extension, so it cannot be read to operate as a reanimation of the moribund period. Logically speaking, then, if the limitation period in fact has *not* expired (because it at varying points has been tolled), it behooves practitioners and JCCs to inquire how much time is left in the period. After all, it is not the tolling period that bars the PFB in the end, but the expiration of the two-year limitation period.

With this being said, the obvious has been ignored for too long. According to supplemental authority submitted by the appellees, JCCs fortunately have been engaging in the tolling-limitation analysis described above since this court's original opinion (which the appellees describe as dicta anyway). Even with the more limited holding now set out by the panel, there is no good reason for the practitioners or JCCs to revert to their old, erroneous ways. No one needs an opinion from this court to know what the law requires in the limitation space. All involved in fact have something better: a statutory term with a plain, well-understood legal meaning in this context, plus supreme court decisions that describe in mathematical detail how that clear term operates in practice.

These supreme court decisions may have been overlooked by the workers' compensation bar and JCCs previously. My hope is that, going forward, practitioners and JCCs will feel empowered by the supreme court decisions I have discussed to continue with their approach of analyzing tolling the way it plainly is meant to be; and was meant to be, starting in 1994: as a suspension of the limitation period—requiring an assessment of the stops and starts impelled by the provision of benefits—before making the final determination of whether the statutorily established *two-year limitation period* has run, rather than just the one-year tolling period.

All Citations

402 So.3d 301, 50 Fla. L. Weekly D57

Footnotes

1 In addition to **Winn-Dixie**, we have two other appellees: Travelers Insurance, which served as **Winn-Dixie's** carrier to satisfy its statutory obligation to provide benefits under chapter 440, Florida Statutes; and Sedgwick CMS, which managed the claim as Travelers's servicing agent. *See* § 440.13(2)(a), Fla. Stat. ("Subject to the limitations specified elsewhere in this chapter, the employer shall furnish to the employee such medically necessary remedial treatment, care, and attendance for such period as the nature of the injury or the process of recovery may require ...."); *see also* § 440.09(1), Fla. Stat. (requiring the employer to "pay compensation or furnish benefits" as set out in chapter 440 "if the employee suffers an accidental compensable injury ... arising out of work performed in the course and the scope of employment"); § 440.38(1), Fla. Stat. (requiring the employer to "secure the payment of compensation under this

chapter"); § 440.41, Fla. Stat. (providing for the regulation of the discharge by the employer's carrier of the employer's "obligations and duties" regarding the liability imposed by chapter 440, treating notice to and knowledge of the employer as notice to and knowledge of the carrier, and providing that "any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer").

2 In the concurring opinion that follows, the majority author writes for himself to explain how, in his view, this practice of not addressing the two-year limitations period overlooks the supreme court's clear direction on how to apply "tolling" in any statute-oflimitation context—including this one.

3 The kidneys, two organs part of the urinary tract, filter the blood and excrete "end-products of body metabolism in the form of urine." W.A. Newman Dorland, Dorland's Illustrated Medical Dictionary 943, 1860 (29th ed. 2000) (defining "kidney" and "urinary tract"); *cf. id.* 1781 (defining "urinary system" in terms of "the organs concerned in the secretion of urine"). The workplace injury, then, was to one of **Ortiz's** kidneys *as part of* her urinary tract or system, the removal of one then leaving the tract or system in a permanently diminished, but still functional, condition.

4 *See* W.A. Newman Dorland, Dorland's Illustrated Medical Dictionary 560 (29th ed. 2000) (defining "dysuria").

5 *See id.* at 449 (defining "cystitis").

6 In fact, the only evidence on the subject came from **Ortiz**, who testified she returned to see Dr. Young for the same type of care she had received before—**Ortiz** not having suffered UTIs before her injury.

7 This disposition, upon issuance of our mandate, renders the order of dismissal a nullity, thereby reopening **Ortiz's** claim before the JCC. It has the same meaning as "vacate." We use this disposition, rather than "reversed," to reflect our separate authority to review orders of JCCs and other administrative hearing officers. The Office of the Judges of Compensation Claims being in the executive branch, the orders issuing out of that office are matters of administrative law, having effect only within the branch of which it is a part. Unlike our authority to review judgments and other final orders of trial courts within our branch (which otherwise do have legal effect outside the branch), our authority to review orders of administrative tribunals is purely a function of statute, our review being "judicial review" of administrative action. *See* Art. V, § 4(b)(2), Fla. Const. The Legislature in turn has separately authorized this court to hear "appeals" from JCC orders. *See* § 440.271, Fla. Stat. Even though the Administrative Procedure Act ("APA") does not apply in workers' compensation proceedings, we see no reason not to treat our dispositions in appeals from those proceedings any differently than the dispositions authorized by the Legislature for "judicial review" generally in appeals from administrative proceedings. *See* § 120.68(7), (8), Fla. Stat. (referring to "affirm," "set aside," "remand," "modify," and "ordering" further action as authorized remedies). There are many historical examples of the use of "set aside" found in federal statutes governing judicial review of administrative action, which is probably the genesis of the term as it appears in the Florida APA. *See Developments in the Law: Remedies against the United States and Its Officials*, 70 Harv. L. Rev. 827, 903–04 & n.524 (1957) (listing examples).

8 Judge Bilbrey substituted for Judge Makar, who was recommissioned as a judge of the Fifth District Court of Appeal. Judge Bilbrey has viewed the digital recording of oral argument.

1 The limitation period, then, is tied to the employee's injury, which makes sense—the accidental injury being the unit of compensability under chapter 440. *Cf.* § 440.09(1), Fla. Stat. (requiring employer to "pay compensation or furnish benefits required by this chapter if the employee suffers an *accidental compensable injury* or death arising out of work performed in the course and the scope of employment," and requiring that "the *accidental compensable injury* must be the major contributing cause of any resulting injuries" (emphases supplied)); § 440.192(8), Fla. Stat. (providing that a carrier's failure to deny compensability under section 440.20(4) "is deemed to have accepted the employee's *injuries as compensable*" (emphasis supplied)); § 440.20(4), Fla. Stat. (requiring an employer to "admit or deny compensability within 120 days after the initial provision of compensation or benefits"); *Checkers Rest. v. Wiethoff*, 925 So. 2d 348, 349–50 (Fla. 1st DCA 2006) (distinguishing between compensability (defined as "the occurrence of an industrial accident resulting in injury") and "[o]ther issues concerning the worker's entitlement to benefits ... including the extent of the compensable injury and the causal relationship between the compensable injury and the condition for which the worker seeks benefits"); *Jackson v. Merit Elec.*, 37 So. 3d 381, 383 (Fla. 1st DCA 2010) ("Confusion is also generated by the inexact and conflated use of the terms 'accident' and 'injury.' An accident results in injuries which require treatment. Generally, treatment is not

furnished for an accident, but for an injury. Thus, it is not the accident that the treatment must relate to; it is the injury."); *Babahmetovic v. Scan Design Fla. Inc.*, 176 So. 3d 1006, 1008 (Fla. 1st DCA 2015) ("Compensability is a concept used to convey the idea that the Florida Workers' Compensation Law applies; it requires the presence of certain elements described throughout chapter 440 by terms of art such as *accident, injury, arising out of work performed in the course and the scope of employment*." (internal citation omitted)); *id.* ("The JCC is correct that '[t]here must first be a compensable accident and injury before an employee is entitled to any benefit allowed in Chapter 440.' "); *Sierra v. Metro. Protective Servs.*, 188 So. 3d 863, 867 (Fla. 1st DCA 2015) ("Importantly, because medical treatment is usually provided for an injury, not an 'accident,' a declaration that the need for specific medical treatment is not caused in major part by the workplace 'accident' evades *the essential determination of the identity of the compensable injury*." (emphasis supplied)).

There is only one injury relevant to the issue at hand, but it nevertheless stands to reason—based on section 440.19's injury-centric limitation period—that a subsequently discovered or arising injury would carry with it a separate two-year limitation period during which PFBs could be filed (for the determination of entitlement to benefits related to that subsequent injury), the new limitation period running from when the employee knew or should have known of the new injury's causal link with the compensable accident or a previously compensable injury.

2 "Payment of any indemnity benefit" also starts the tolling period. § 440.19(2), Fla. Stat.

3 This methodology tracks the "calculation method" set out by the Fourth District, which the supreme court approved in *Hankey*:

> On December 16, 1993, when the alleged medical malpractice occurred, the statute of limitations started to run. On July 7, 1995, when the appellant filed the notice of intent to initiate litigation, 161 days remained until the expiration of the limitations period on December 16, 1995. However, on July 7th, the statute was tolled for 90 days until October 7, 1995. On October 7, 1995, the statute began to run again, and 161 days still remained until the expiration of the statute of limitations period.
>
> On October 30, 1995, the appellant "purchased" a ninety-day extension under section 766.104(2). The statute had run 23 days from October 7, 1995, and the 138 days remaining, plus the ninety-day extension, meant that as of October 30th, 228 days remained in the statutory period. On November 17, 1995, when the appellee served the notice to terminate, the remaining time in the limitations period was 228 days less eighteen days from October 30th, or 210 days. Thus, when the appellant filed the complaint on February 6, 1996, some eighty days later, it was well within the statute of limitations period.

Rothschild, 707 So. 2d at 953, *approved by Hankey*, 755 So. 2d at 94, 100.

4 Twice in the past, by my count, this court has (erroneously) referred to section 440.19(2) as an extension of the two-year period, rather than as the true tolling provision that it clearly is. *See Orange Cnty. Sch. Bd. v. Best*, 728 So. 2d 1186, 1188 (Fla. 1st DCA 1999) (referring to subsection two as having "no practical effect until after the two-year period provided for in section 440.19(1) expires," because the "[p]rovision of medical treatment or indemnity benefits can *extend* the limitations period but cannot shorten it" (emphasis supplied)); *Sanchez v. Am. Airlines*, 169 So. 3d 1197, 1197 (Fla. 1st DCA 2015) ("Subsection (1) of section 440.19 provides generally that a PFB must be filed within two years after the date of injury or it will be barred, and subsection (2) provides that the only events that will *extend* the statute of limitations are the payment of indemnity benefits or the furnishing of medical treatment." (emphasis supplied)). Of course, these statements cannot be reconciled with the distinction the supreme court made between tolling and extensions in *Tanner* and *Hankey*. At all events, though, these statements are dicta. *See Best*, 728 So. 2d at 1186 ("The question is whether the statute bars a petition for benefits *filed within two years* of an industrial accident where more than a year has elapsed since 'the furnishing of remedial treatment' " (emphasis supplied)); *Sanchez*, 169 So. 3d at 1197 (framing "the narrow question presented in this case [as] whether the payment of attorney's fees to Claimant's counsel—with *no other medical or disability benefits being paid* simultaneously to Claimant and *no PFBs pending*—is sufficient to extend the statute of limitations under subsection 440.19(2)"(emphases supplied)).

5 This assumes the two-year limitation period for **Ortiz's** kidney injury triggered the day of her accident, not an unreasonable assumption given the nature of the accident and the blow to her right side, requiring emergency treatment.

6 This year was a leap year.

7 The PFB "tolls the statute of limitations as long as it remains pending." *Airey v. Wal-Mart/Sedgwick*, 24 So. 3d 1264, 1265 (Fla. 1st DCA 2009); *see* § 440.19(3), Fla. Stat. (requiring that a PFB meet statutory specificity requirements to toll the limitation period).

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