IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DONNA CHILDERS,

Appellant,

v.

CLAY COUNTY BOARD OF COUNTY COMMISSIONERS/ SCIBAL ASSOCIATES

Appellees.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D13-1072

Opinion filed December 10, 2013.

An appeal from an order of the Judge of Compensation Claims.
Ralph J. Humphries, Judge.

Date of Accident: August 2, 2007.

Holley N. Akers and John J. Rahaim, II, of Rahaim Moore, P.A., Jacksonville, for Appellant.

Kimberly G. Matthews of Saalfield, Shad, Stokes, Inclan, Stoudemire & Stone, P.A., Jacksonville, for Appellees.

MARSTILLER, J.

In this workers' compensation appeal, Claimant challenges a final order denying her two petitions for benefits ("PFB") as barred by the statute of limitations. Claimant's last date of service for medical treatment related to her compensable injury was April 28, 2011. The PFBs, filed on June 13, 2012, and October 15, 2012, were outside the two-year limitations period. *See* § 440.19(1), Fla. Stat. (2007); § 440.19(2), Fla. Stat. (2007) ("[p]ayment of any indemnity benefits or the furnishing of remedial treatment . . . shall toll the limitations period . . . for 1 year from the date of such payment."). In its initial response to the June 13, 2012, PFB, the Employer/Carrier ("E/C") asserted the statute of limitations defense. However, the E/C failed to assert the defense in its initial response to the October 15, 2012, PFB, waiting, instead until the January 24, 2013, hearing before the JCC.

Section 440.19(4), Florida Statutes (2007), provides that, "the failure to file a petition for benefits within the periods prescribed is not a bar to the employee's claim unless the carrier advances the defense of a statute of limitations *in its initial response to the petition for benefits*." (Emphasis added.) The E/C timely asserted the statute of limitations defense against the June 13, 2012, PFB, in which Claimant sought authorization for continued medical treatment, and Claimant failed to establish that the E/C should be estopped from raising the defense. *See*

Deere v. Sarasota County Sch. Bd., 880 So. 2d 825, 826 (Fla. 1st DCA 2004) (setting out the elements for estoppel). Accordingly, the JCC correctly denied the June 13, 2012, PFB as time-barred.

However, because the E/C failed to raise the defense in its initial response to the October 15, 2012, PFB, it waived the defense relative to the claim therein for impairment benefits. *See Certain v. Big Johnson Concrete Pumping, Inc.*, 34 So. 3d 149, 151 (Fla. 1st DCA 2010). Citing *Palmer v. McKesson Corporation*, 7 So. 3d 561 (Fla. 1st DCA 2009), the E/C argues that it perfected the defense by raising it in response to the June 12, 2012, PFB, and therefore, did not need to assert the defense when initially answering the October 15, 2012, PFB. *Palmer* simply does not stand for that proposition. Indeed, there was no argument in *Palmer* that the employer/carrier failed to raise the statute of limitations defense. Rather, the claimant in that case had filed three PFBs, and the employer/carrier filed individual denials based on the statute of limitations. *Palmer*, 7 So. 3d at 562. We stated that to establish a prima facie case that limitations period had run, the employer/carrier only had to show the first petition was untimely. *Id.* at 563. Nothing we said in *Palmer* affects the operation of section 440.19(4) or has any bearing on the outcome of this case. Claimant's October 15, 2012, PFB is not time-barred because the E/C did not raise the defense until the hearing. The JCC erred in ruling otherwise.

Based on the foregoing, we AFFIRM that portion of the JCC's order denying Claimant's June 13, 2012, PFB as barred by the statute of limitations. However, we REVERSE that portion of the order denying Claimant's October 15, 2012, PFB, and REMAND for further proceedings.

VAN NORTWICK, J, CONCURS and ROWE, J, CONCURS WITH OPINION.

ROWE, J., concurring.

The majority properly resolves this case by applying the plain language of section 440.19(4), Florida Statutes, concluding that the employer/carrier waived the statute of limitations defense by failing to raise the defense in its initial response to the PFB at issue. As a consequence of the stringent pleading requirement imposed by the statute, an employer/carrier must remain ever vigilant to avoid the harsh results of failing to raise the statute of limitations each time it initially responds to a newly-filed PFB.

Workers' compensation cases, by their very nature, involve multiple claims over an extended period of time. The claimant in this case sustained a compensable injury to her right shoulder on August 2, 2007. The employer/carrier provided the claimant with indemnity and medical benefits related to the compensable injury. The employer/carrier made the last indemnity payment to the claimant on March 2, 2011, and last furnished the claimant with remedial care on April 28, 2011. It is undisputed that the claimant filed two PFB's outside of the two-year limitations period. The employer/carrier raised a statute of limitations defense in its initial response to the first PFB, but failed to reference the statute of limitations in its initial response to the second PFB. Consequently, under the

authority of section 440.19(4), the second PFB is not time-barred. See Certain v. Big Johnson Concrete Pumping, Inc., 34 So. 3d 149, 151 (Fla. 1st DCA 2010).

Previously, this Court has held that the limitations period under section 440.19, once expired, cannot be revived by the furnishing of remedial care. See Medpartners/Diagnostic Clinic Med. Group P.A. v. Zenith Ins. Co., 23 So. 3d 202, 204 (Fla. 1st DCA 2009) (holding that use of word "toll" in section 440.19(2) requires that there must be some viable period to extend or prolong). The question here, however, is not one of reviving an expired limitations period as in Medpartners, but rather one of the right to maintain an otherwise viable statute of limitations defense that was not properly advanced in the initial response as required by statute. The plain language of section 440.19(4) provides that the limitations period is not a bar "unless the carrier advances the defense of a statute of limitations in its initial response to the [PFB]." (Emphasis added.)

The pleading requirement of section 440.19(4) is petition-specific. The result here is that the employer/carrier successfully raised a statute of limitations defense with regard to the first PFB filed by the claimant after the limitations period had run, but based on failure to comply with the pleading requirement of section 440.19(4), the employer/carrier could not rely on the same defense with regard to a subsequently-filed PFB. The risk, of course, is that section 440.19 will cease to function as a true limitations period. Instead, a claimant whose PFB has

been barred on statute of limitations grounds may continue to file PFB's hopeful that an employer/carrier will let its guard down and fail to raise the defense in its initial response to every subsequently-filed PFB. Such "gotcha" tactics appear inconsistent with the concept of a self-executing system of workers' compensation. The remedy, however, lies with the Legislature and not with this Court.