

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

CASE NO. 1D09-2991

JACKSONVILLE SHERIFF'S OFFICE
and CITY OF JACKSONVILLE,

Appellants,

v.

L.T. Case No. 07-030990SLR

JERRY R. STRICKLAND,

Appellee.

**ON APPEAL FROM THE STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGE OF COMPENSATION CLAIMS
JACKSONVILLE DISTRICT**

ANSWER BRIEF

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STATEMENT OF THE CASE AND FACTS

In this workers' compensation appeal, the Appellants, Jacksonville Sheriff's Office and the City of Jacksonville (the "Employer"), appeal a final order of the Judge of Compensation Claims ("JCC") determining that the statute of limitations does not relieve the Employer of its duty to continue providing the Appellee/Claimant Jerry Strickland with necessary medical treatment for a work-related injury he suffered in a 1999 accident.

On January 21, 1999, Mr. Strickland filed a notice of injury after he injured his left knee on the job. (R.1:75.) The Employer accepted the claim and began providing medical treatment. (R.1:41-42.) After one of the physicians the Employer had provided notified Mr. Strickland that the Employer would not pay for more treatment for his knee, he filed a petition for benefits claiming he was entitled to further treatment. (R.1:30, 67-70.) In its notice of denial, the Employer did not contest that further treatment was necessary to treat the January 1999 knee injury. (R.1:72.) Its sole defense was that the statute of limitations had expired. (*Id.*)

The JCC conducted a trial and issued an order determining that Mr. Strickland's claim was not barred by the statute of limitations. (R.3:600-04.) The JCC found that the Employer had been providing remedial treatment for the knee

injury during the year before Mr. Strickland filed his petition, which made his claim timely. (R.3:603.) This appeal followed. (R.3:607-08.)

The evidence, viewed in the light most favorable to Mr. Strickland, established that during his 33 years as a law enforcement officer with the Employer, he suffered at least two work-related injuries: (1) the 1999 injury to his knee and (2) a 2000 injury to his back. (R.1:14, 17, 67.)

In June 2005, Dr. William G. Pujadas performed a total knee replacement and treated Mr. Strickland's follow up complaints of continued pain in his knee and leg. (R.2:347.) On October 26, 2005, Dr. Pujadas began to suspect that the continued pain might be related to the back injury. (R.2:347, 368.) When Mr. Strickland's knee pain had not improved by June 7, 2006, Dr. Pujadas concluded that, other than prescribing medication to manage the pain, the best course was to await the results of further treatment to the back. (R.2:367.) He therefore deferred further treatment to Dr. Arnold Graham Smith, the surgeon who was treating Mr. Strickland's 2000 back injury. (R.1:30; 2:347, 349.) The last treatment provided by Dr. Pujadas was writing a 30-day prescription for pain medication in July 2006. (R.2:367.) Dr. Pujadas instructed Mr. Strickland that he could not help him further until the back issues were resolved. (R.1:27.) The Employer, through its adjuster, monitored and paid for all of this treatment. (R.1:41-42.)

Mr. Strickland repeatedly raised his complaints of knee and leg pain with Dr. Graham Smith. (R.1:171-81.) Dr. Graham Smith refilled Dr. Pujadas' prescription for pain medicine and proceeded to treat all of Mr. Strickland's complaints of pain. (R.1:138, 135-42.) Because the medication treated the pain in both his knee and back, Mr. Strickland did not go back to Dr. Pujadas to get more medicine for his knee. (R.1:23-24.) Dr. Graham Smith performed spinal surgery in June 2007, which he thought would resolve the knee pain. (R.1:111-12.) As with Dr. Pujadas' treatment, the Employer monitored and paid for all of Dr. Graham Smith's treatment. (R.1:113-14.)

When his knee pain continued after the surgery, Mr. Strickland attempted to return to Dr. Pujadas. (R.1:30.) Dr. Pujadas then informed him that the Employer would no longer pay for treatment of the knee injury, and Mr. Strickland filed the petition for benefits that led to the trial below. (R.1:67.)

Both doctors testified that it was difficult to determine whether the knee and leg pain was attributable to the 1999 knee injury or the 2000 back injury. (R.1:114; R.3:350, 352.) Mr. Strickland testified that he was aware of the statute of limitations and had intended to at least check in with Dr. Pujadas every year, but he also made clear that Dr. Pujadas had told him that he needed to wait until the conclusion of the back treatment and surgery before Dr. Pujadas could provide further care for the knee pain. (R.1:26-27.)

Following the hearing, the JCC “carefully considered and weighed all of the evidence presented.” (R.3:601.) He “accepted the testimony of claimant that he was aware of the statute of limitations time limit. I also accept the testimony [of] the claimant that he understood Dr. Pujadas to be ready, willing, and able to treat the claimant for his left knee after July, 2006 but was waiting for the outcome of the back treatment and recovery from surgery before offering the claimant anything more remedial or palliative than medication.” (R.3:602.)

The JCC also found:

12. There is no indication that Dr. Pujadas had any course of treatment planned for the claimant except for pain medication as of June, 2006. At that time, the claimant underwent back surgery through Dr. Graham Smith and during his recovery was also given pain medication. It is not honest, cost-effective, or legal that the claimant would attempt to obtain a dual prescription for pain medication from Dr. Pujadas at the same time he is receiving pain medication from Dr. Graham Smith. In fact, Dr. Pujadas “deferred” treatment to Dr. Graham Smith in 2006 and testified that the pain medication he may have prescribed the claimant for his knee would also work on his back and that the pain medication Dr. Graham Smith may have prescribed for his back would also help the claimant’s knee.

13. The testimony of the authorized physicians makes clear to the undersigned that they were having difficulty ascertaining whether the claimant’s problems were coming from his back or his knee. The law does not intend to penalize a conscientious claimant who is caught between treatment for two separate accidents and injuries that have become so intertwined that treatment for either can benefit both.

14. I find that because the claimant was receiving treatment for an injury (back) from an authorized physician (Graham Smith) to whom treatment was deferred by the authorized physician (Pujadas) for another injury (knee) with the same self insured employer, the inextricable intertwining of the physician's opinions, medications, and the lack of clarity in medically determining the cause of the claimant's pain leads to the inescapable logical conclusion based on competent substantial evidence that the statute of limitations has not run on the accident of January 21, 1999 to the claimant's left knee.

(R.1:603.)

Based on these findings, the JCC ordered the Employer to "furnish treatment by Dr. Pujadas for the claimant's left knee that is medically necessary as a result of the January 21, 1999 accident" and to pay the claimant's attorney "a reasonable attorney's fee and reimbursement of taxable costs." (R.3:604.)

SUMMARY OF THE ARGUMENT

The Employer raises two bases for reversal in this case: (1) that the JCC incorrectly interpreted and applied the statute of limitations and (2) that there is no competent substantial evidence to support the JCC's findings. Neither contention has merit and the JCC's final order should be affirmed.

First, the JCC correctly interpreted and applied the statute of limitations for worker's compensation cases. The statute states that the limitations period is tolled so long as a claimant receives remedial care or treatment for a compensable injury within the year prior to seeking benefits. After considering all of the evidence, the

JCC properly found that because Mr. Strickland's back and knee injuries were inextricably intertwined, the treatment he received from an authorized back doctor also constituted remedial care for his knee injury. In no way did the JCC invent a new exception to the running of the statute of limitations. Rather, he correctly concluded, based on competent substantial evidence, that Mr. Strickland had received remedial treatment for his knee pain sufficient to trigger the statutorily-prescribed tolling provision.

Second, the JCC's findings are supported by competent substantial evidence. The record is replete with testimony (both live and deposition), as well as doctor's charts and notes, supporting all of the JCC's findings. That the Employer can point to some contrary evidence, which the JCC was free to disregard or weigh as he saw fit, does not erase the substantial evidence supporting the JCC's conclusions. Because the record is not devoid of any evidence that could support the JCC's findings, competent substantial evidence necessarily existed.

Accordingly, the JCC's final order should be affirmed.

ARGUMENT

I. THE JCC CORRECTLY INTERPRETED AND APPLIED THE STATUTE OF LIMITATIONS CONTAINED IN SECTION 440.19(2), FLORIDA STATUTES.

Standard of Review. When this Court interprets the applicable statute of limitations found in section 440.19, Florida Statutes, the standard of review is *de novo*. *McBride v. Pratt & Whitney*, 909 So. 2d 386, 387 (Fla. 1st DCA 2005).

Contrary to the Employer's argument on appeal, the JCC did not purport to create any new exceptions to the worker's compensation statute of limitations. The JCC did not apply any "good faith" or "conscientious claimant" exception as the Employer argues. The JCC simply found that Dr. Graham Smith's treatment of Mr. Strickland in 2006 and 2007 constituted remedial treatment not only of the back injury, but also of the knee injury, which means the statute of limitations was tolled during this period.

The JCC's finding is in perfect accord with the statute. Section 440.19 provides as a general matter that a petition for benefits must be "filed within 2 years after the date on which the employee 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. (1999). The two-year period is not absolute, however, as the statute provides a tolling mechanism:

[T]he 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.

§ 440.19(2), Fla. Stat. (1999).

Although the JCC correctly noted the unique aspects of this case and the patent unfairness that would result from barring Mr. Strickland's claim, the JCC's ruling was clearly bottomed on the plain language of this provision. The JCC essentially concluded that the remedial treatment of Mr. Strickland's injury did not end when Dr. Pujadas referred him to Dr. Graham Smith until the back injury was fully treated. After all, Dr. Pujadas sent Mr. Strickland away with a prescription for medication that would treat the knee pain. The JCC simply found that Dr. Graham Smith then took over the remedial treatment for both the knee and back injuries until it became clear that the knee pain continued after the back injury treatment was complete.

The Employer cites no case for its apparent proposition that a claimant cannot go back and forth between two providers to receive remedial treatment that will toll the statute of limitations, and the plain language of the statute would not allow such a construction. In fact, the law is to the contrary. *See e.g., Sauer Indus. Contracting Inc. v. Ditch*, 547 So. 2d 276, 277 (Fla. 1st DCA 1989) (physician-recommended exercise program constituted remedial treatment; claimant did not have to return to treating physician to toll statute). And while it is true that both doctors may have at times erroneously thought that Mr. Strickland's knee pain was

solely caused by the back injury, they continued to offer remedial treatment for that knee pain.

Finally, the Employer's argument that statutory tolling does not apply pursuant to *Lee v. City of Jacksonville*, 616 So. 2d 37 (Fla. 1993), because it did not have actual knowledge that Mr. Strickland was receiving remedial treatment for his knee from Dr. Graham Smith is wrong as a matter of fact and law.

As a matter of fact, the Employer did have knowledge because its adjuster was monitoring and authorizing the treatment by both doctors. (R.1:41-42.) Thus, this case is nothing like *Lee*, where the supreme court held that the limitations period is not tolled during the time that a claimant is using a medical device without the knowledge of either his doctors or employer. *Id.* at 38.

And as a matter of law, this Court has held that *Lee* is limited to the medical device context and that as long as the claimant is receiving remedial treatment from a doctor authorized by the employer, the limitations period is tolled. *Sol Dale Bldgs., Inc. v. Schweickert*, 656 So. 2d 606, 609 (Fla. 1st DCA 1995). In *Sol Dale*, a claimant received consistent treatment for a work-related injury from an authorized physician, but the physician erroneously billed the claimant's automobile insurer for his services. *Id.* at 607. Thus, the employer had no knowledge that its employee was receiving remedial treatment. *Id.* When the

claimant filed a new claim several years after the initial injury, the employer denied the claim based on the statute of limitations. *Id.*

In affirming the JCC's finding that the receipt of medical treatment tolled the statute of limitations, this Court found that "[i]t is the remedial treatment that tolls the statute, not the report of the treatment." *Id.* at 608. Because the physician was authorized by the employer to treat the claimant and the claimant actually received treatment during the limitations time period, the statute was tolled. *Id.* Moreover, the Court rejected the employer's argument that it had not "furnished" the treatment, citing the fact that the physician was authorized and treating work-related injuries, even though another insurer paid the bills. *Id.* at 609; *see also Sauer*, 547 So. 2d at 277 (claimant who obtained care recommended by authorized physician received remedial treatment even though employer did not pay for it). Thus, the employer was required to continue providing medical treatment for a claimant who diligently received authorized treatment even though the employer had no knowledge of the treatment. Likewise, because Mr. Strickland received remedial treatment for his knee pain from an Employer-authorized physician – to whom the authorized knee doctor had deferred – that treatment tolled the statute of limitations regardless of whether the Employer knew of it.

For all these reasons, the JCC did not invent a new exception to the statute of limitations. Rather, it correctly interpreted section 440.19(2) as tolling the

limitations period so long as the claimant is receiving remedial treatment authorized by the employer.

II. THE JCC'S FINDINGS ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE AND SHOULD NOT BE REVERSED ON APPEAL

Standard of Review. “[T]he standard of review in worker's compensation cases is whether competent substantial evidence *supports* the decision below, *not* whether it is possible to recite contradictory record evidence which supported the arguments rejected below.” *Mercy Hosp. v. Holmes*, 679 So. 2d 860 (Fla. 1st DCA 1996) (emphasis original). “A JCC’s findings are to be sustained if it is permitted by any view of the evidence and its possible inferences.” *Strickler v. Fla. Power Corp.*, 667 So. 2d 239, 240 (Fla. 1st DCA 1995) (citing *Gomez v. Neckwear*, 424 So. 2d 106 (Fla. 1st DCA 1982)).

As an initial matter, the Employer appears confused on how to apply the competent substantial evidence standard of review. The Employer states in the conclusion to its initial brief: “The evidence that the back doctor prescribed Tramadol and that it did the same thing for Claimant’s back and left knee is susceptible to so many different inferences that a reasonable mind could differ about the correctness of the final order’s conclusion that treatment by the back doctor and ‘the inextricable intertwining’ of the two claims ‘led to the inescapable logical conclusion based on competent substantial evidence that the statute of

limitations has not run on the accident of January 21, 1999 to the claimant's left knee.'" (I.B. at 30-31) (emphasis added). If, as the Employer concedes, reasonable minds could differ on the correctness of the JCC's findings, then there *must have been* competent substantial evidence to support the findings.

This concession aside, the record is replete with competent substantial evidence supporting the JCC's findings that Mr. Strickland received remedial treatment for his knee pain.¹ Specifically, the JCC ruled:

I find that because the claimant was receiving treatment for an injury (back) from an authorized physician (Graham Smith) to whom treatment was deferred by the authorized physician (Pujadas) for another injury (knee) with the same self insured employer, the inextricable intertwining of the physician's opinion, medications, and lack of clarity in medically determining the cause of the claimant's pain leads to the inescapable logical conclusion based on competent substantial evidence that the statute of limitations has not run on the accident of January 21, 1999 to the claimant's left knee.

(R.3:603.)

This finding is supported by the following competent substantial evidence:

* June 7, 2006: Dr. Pujadas deferred treatment to Dr. Graham Smith after determining that the knee replacement components appeared fine. He also wrote Mr. Strickland a thirty-day prescription for pain medication. (R.1:26-27; R.2:347,

¹ The JCC did not base his opinion on Mr. Strickland's argument that his knee replacement was the equivalent of a prosthetic device. (Init. Br. at 25-26.) Mr. Strickland does not pursue this basis for statutory tolling on appeal.

349, 367.) The JCC accepted Mr. Strickland's testimony "that he understood Dr. Pujadas to be ready, willing, and able to treat the claimant for his left knee after July, 2006 but was waiting for the outcome of the back treatment and recovery from surgery before offering the claimant anything more remedial or palliative than medication." (R.3:602; *see* R.1:27) The JCC also accepted Dr. Pujadas' testimony that he "'deferred' treatment to Dr. Graham Smith in 2006 and ... that the pain medication he may have prescribed the claimant for his knee would also work on his back and that the pain medication Dr. Graham Smith may have prescribed for his back would also help with the claimant's knee." (R.3:603; *see* R.2:357.)

* December 2006: Mr. Strickland's chief complaint to Dr. Graham Smith is pain in his left knee. Dr. Graham Smith refilled Mr. Strickland's prescription for pain medication. (R.1:138.)

* January 24, 2007: Dr. Graham Smith prescribed another pain medication for Mr. Strickland's left thigh and knee pain. (R.1:137.)

* March 14, 2007: Dr. Graham Smith refilled the pain medication prescription. (R.1:136.)

* June 18, 2007: Dr. Graham Smith performed an Employer-authorized laminectomy to take pressure of the L4 nerve. (R.1:26, 112; R.3:602.) The JCC accepted Mr. Strickland's testimony "that the medication prescribed by Dr.

Graham Smith after the low back surgery in June of 2007 was also helping the claimant's left knee." (R.3:602; *see* R.1:23.)

All of these remedial treatments from Dr. Graham Smith fell within one year of Mr. Strickland's petition for benefits. (R.1:67-70.) Furthermore, in the depositions entered into evidence (R.1:3), Dr. Graham Smith acknowledged difficulty in determining the cause of Mr. Strickland's left knee pain (R.1:114). Dr. Pujadas similarly testified that it can be difficult for physicians to determine where a patient's problems are coming from when they have multiple symptoms. (R.3:350, 325.) The JCC apparently accepted the testimony of both doctors when it found a "lack of clarity in medically determining the cause of the claimant's pain." (R.3:603.)

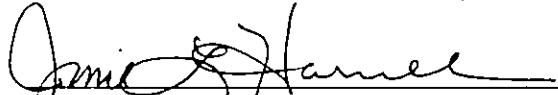
Thus, because there is competent substantial evidence in the record to support the JCC's findings on the inextricable intertwining of the treatment, medications and causes of Mr. Strickland's knee pain, the final order should be affirmed. *See e.g., Sol Dale*, 656 So. 2d at 609 (where competent substantial evidence supported JCC's findings, decision was affirmed).

CONCLUSION

For the foregoing reasons, the Court should affirm the Order, which requires the Employer to authorize Dr. Pujadas to continue treating Mr. Strickland's left knee and to pay Mr. Strickland's costs and attorney's fees.

Respectfully submitted,

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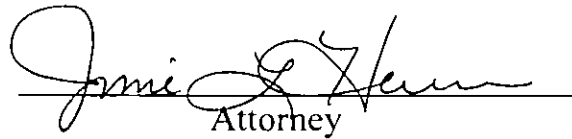
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to **Michael J. Arington**, Assistant General Counsel, 117 W. Duval Street, Suite 480, Jacksonville, FL 32202, by U.S. Mail, this 10th day of September, 2009.


Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief is in Times New Roman 14-point font and complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.


Attorney