

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D19-3441

DECA MANUFACTURING
CORPORATION and SOUTHERN
OWNERS INSURANCE CO./AUTO-
OWNERS INSURANCE CO.,

Appellants,

v.

FAYE O. BECKETT,

Appellee.

On appeal from an order of the Judge of Compensation Claims.
Stephen L. Rosen, Judge.

Date of Accident: February 24, 1990.

April 8, 2021

PER CURIAM.

In this workers' compensation case, the Employer/Carrier (E/C) appeal an order of the Judge of Compensation Claims (JCC) rejecting their statute of limitations defense. For the reasons that follow, we reverse.

Claimant was injured in early 1990, and is subject to the 1989 version of the Workers' Compensation Law. That version contained an exemption from its statute of limitations: "However,

no statute of limitations shall apply to the right for remedial attention relating to the insertion or attachment of a prosthetic device to any part of the body.” § 440.19(1)(b), Fla. Stat. (1989); see *City Investing/Gen. Dev. Corp. v. Roe (Roe I)*, 566 So. 2d 258, 259 (Fla. 1st DCA 1990) (characterizing it as “exemption”), affirmed in relevant part by *Roe v. City Investing/Gen. Dev. Corp. (Roe II)*, 587 So. 2d 1323 (Fla. 1991).

As a result of Claimant’s injury, the authorized surgeon inserted “screws and rods,” which the doctor testified was to “[s]tabilize the cervical spine” and was “the only way to preserve the anatomy.” The JCC found that these screws and rods were “placed in the cervical spine to allow for a discectomy and laminectomy surgery to join 2 vertebral bodies in the cervical spine” to treat her compensable injury. Based on these findings—which the record evidence supports—the JCC found Claimant had a prosthetic device. Thus, Claimant argues that the statute of limitations does not apply to her, and that the E/C did not meet their burden to show that it does apply.

But it is not clear that the benefits Claimant requested “relate to” the prosthesis. She sought pain management and a replacement mechanical bed without establishing that either had anything to do with the screws and rods in her spine. The fact that she may have a prosthetic device is not, standing alone, sufficient to prevent the statute of limitations from accruing. In that respect, this case stands in contrast to *Peo v. Maas Brothers*, 634 So. 2d 1130 (Fla. 1st DCA 1994), where bursitis treatment was not barred by the statute of limitations because the medical evidence showed that it was related to the claimant’s hip replacement as a result of his compensable work injury.

Here, unlike in *Peo*, there is no evidence that either the prosthesis—or the surgery required to insert it—is causing the need for the requested treatment and the benefits as opposed to the underlying condition that necessitated the prosthesis in the first place. It follows that the Employer/Carrier encounter no obstacle to application of section 440.19 in this case.

Moreover, the “tipsy coachman” doctrine will not permit affirmance here, on either of two theories. First, although the Employer/Carrier paid for some medications on dates that could

potentially have rendered Claimant's petition timely, we read the JCC's order as indicating that those payments were a mistake, and thus implicitly finding that Dr. Gerges was properly deauthorized. Although the JCC declined to address the legal significance of those findings and instead focused on the presence of the prosthesis, the legal significance is that mistaken payments do not toll the statute. *Cf. Cole v. Fairfield Cmty.*, 908 So. 2d 1105 (Fla. 1st DCA 2005) (holding that mistaken payment of single chiropractic bill did not estop employer from denying compensability of neck injury). Claimant cannot now challenge that finding because Claimant did not cross-appeal the order. *See Cespedes v. Yellow Transp., Inc.*, 130 So. 3d 243, 249 (Fla. 1st DCA 2013) ("A cross-appeal is an appellee's exclusive method of obtaining relief from error in an order."). And even if she could, her challenge would fail because the record supports the finding; the adjuster testified that those payments were a mistake.

Second, although continued use of a prosthetic will toll the current version of the statute of limitations, it does not toll the 1989 version of the statute, given its inapplicability to remedial treatment "relating to" the prosthesis. *Cf. Gore v. Lee Cty. Sch. Bd.*, 43 So. 3d 846 (Fla. 1st DCA 2010) (holding "continued use" of a prosthesis constitutes remedial treatment that tolls the statute of limitations so long as the employer/carrier has actual knowledge of the treatment). The exclusion was not removed from the statute of limitations until 1994. *See* Ch. 93-415, § 23, Laws of Fla. (substantially rewording section 440.19); Ch. 93-415, § 112, Laws of Fla. (making the legislative act effective January 1, 1994). Therefore, the JCC erred by denying the E/C's statute of limitations defense.

REVERSED.

OSTERHAUS and JAY, JJ., concur; KELSEY, J., concurs in result with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

KELSEY, J., concurring in result.

I agree with the majority's disposition, but for different reasons. I would not find that the rods and screws used in Claimant's cervical fusion surgery qualify as a "prosthetic device" for purposes of exempting claims from the statute of limitations under section 440.19(1)(b), Fla. Stat. (1989).

We have defined a "prosthetic device" as follows:

[A]n artificial substitute or replacement, whether external or implanted, for a missing or defective natural part of the body.

Universal Rivet, Inc. v. Cash, 598 So. 2d 154, 157 (Fla. 1st DCA 1992), *approved*, 616 So. 2d 446 (Fla. 1993) (finding that a surgical staple used to hold a ligament in place during post-surgical healing was not a prosthetic device); *cf. Peo v. Maas Bros.*, 634 So. 2d 1130, 1132 (Fla. 1st DCA 1994) (holding left total hip replacement constitutes a prosthetic device).

We have similarly defined the phrase as follows:

[A]n artificial substitute or replacement, whether external or implanted, for a missing or defective natural part of the body, and requires a relatively permanent functional or cosmetic purpose.

Mullins v. 7-Eleven, Inc., 5 So. 3d 35, 37 (Fla. 1st DCA 2009) (finding that a breast implant ruptured in a compensable accident qualified as a prosthetic device).

Whether any given object or device satisfies the definition of "prosthetic device" is a question of fact that must be supported by

competent, substantial evidence. *Mullins*, 5 So. 3d at 37. As the party claiming entitlement to the exemption from the E/C's statute of limitation defense, Claimant had the burden to establish that the exemption applied. *Palmer v. McKesson Corp.*, 7 So. 3d 561, 563 (2009). This included the burden to plead the exemption timely and with specificity. Claimant did not meet her burden as to either pleading or proof.

The E/C timely asserted a statute of limitations defense, but Claimant did not assert her reliance on the prosthetic-device exemption until she filed her amended pretrial summary just two days before trial. This was untimely. *See* § 440.25(4)(h), Fla. Stat. (2018) (requiring all "issues, defenses, and witnesses" to be asserted, served, and filed by fifteen days before hearing).

As a practical matter, Claimant's untimely focus on the exemption meant that the evidence did not support the exemption. The surgeon who performed Claimant's surgery did not testify by deposition or at trial, nor did any other surgeon. Claimant's authorized pain management physician provided the only medical testimony, by deposition filed as a trial exhibit. He explained that the surgeon would have inserted "screws and rods" to "[s]tabilize the cervical spine" as "the only way to preserve the anatomy." Neither this witness nor any other or more qualified specialist testified as to whether the screws and rod met the statutory definition of "prosthetic device." Although the JCC found that the exemption statute applied, his findings were not supported by the appropriate competent, substantial evidence.

Our decision in *Ring Power Corp. v. Murphy*, 238 So. 3d 906, 907 (Fla. 1st DCA 2018), is informative. We were interpreting a newer statute and addressing whether the mere existence of pins and screws in a claimant's body constituted ongoing treatment such that the statute of limitations was tolled. There, the JCC had before it competent medical evidence as to the function of the pins and screws, which by then were serving no medical purpose connected to the claimant's earlier spinal fusion surgery. Thus, we were able to conclude, "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." 238 So. 3d at 907. Here, in contrast, there is simply no record evidence

sufficient to support the JCC's conclusions that Claimant's surgical screws and rod constitute prosthetic devices so as to allow her to take advantage of statutory tolling.

Regardless of theory, I agree with reversal.

Therese A. Savona of Cole, Scott & Kissane, P.A., Orlando, for Appellants.

Michael J. Winer of Winer Law Group, Tampa, for Appellee.