

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

MARSHA DURRUA,

Case No. 1D23-1561

Appellant,

v.

HCBOCC and ACE USA, BAYLESS  
INSURANCE AGENCY, INC., and  
TRAVELERS INSURANCE

Appellees.

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On Appeal from an order of the Office of the  
Judges of Compensation Claims

**REPLY BRIEF OF APPELLANT**

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## **ARGUMENT OF REPLY BRIEF**

Bayless essentially concedes that the JCC erred in applying collateral estoppel, a defense not raised by the E/C, to deny Claimant's undisputedly meritorious claim for permanent total disability (PTD) supplemental benefits (AB 9, 13-14), but argues that the FCO should nevertheless be affirmed based on meritless jurisdictional and "tipsy coachman" arguments. (AB 10-21). The E/C first make a novel argument that Claimant's timely appeal of the JCC's May 23, 2023, Final Compensation Order (FCO) should be dismissed for lack of jurisdiction because claimant did not appeal JCC Vocelle's 1993 FCO. (AB 10-13). Contrary to the E/C's erroneous and misguided conception of appellate jurisdiction, Claimant did not appeal the 1993 FCO, nor is she attempting to do so. Rather, Claimant timely filed an appeal of the JCC's 2023, Final Compensation Order (FCO) that incorrectly interpreted the 1993 FCO and erroneously gave collateral estoppel effect to that incorrect interpretation. (R 22-23). Clearly, this Court has jurisdiction over Claimant's timely-filed appeal of the May 23, 2023, FCO. The E/C's argument is simply an improper attempt to preclude judicial review of that erroneous order and should be rejected by this Court.

The E/C's "tipsy coachman" arguments are similarly unavailing. The E/C argue that "Appellees properly pleaded waiver, and Claimant waived her

right to appeal by not timely filing an appeal or otherwise timely challenging the 1993 FCO” (AB 16), and that “[l]aches provides another basis to affirm the Order denying additional PTD Supplemental benefits. (AB 17). To the contrary, it is well settled that an appellate court should not employ the “tipsy coachman” rule to affirm the trial court’s ruling where the trial court has not made the necessary factual findings on the issue. *Mendota Ins. Co. v. At Home Auto Glass, LLC*, 346 So. 3d 96, 99 (Fla. 5th DCA 2022). Indeed, in *Bryant v. Florida Parole Commission*, 965 So. 2d 825 (Fla. 1st DCA 2007) this Court expressly refused to apply the tipsy coachman doctrine to affirm the trial court’s ruling based on laches:

We decline the Parole Commission’s invitation to employ the “tipsy coachman” rule and affirm on grounds that appellant’s claim is nonetheless barred by the doctrine of laches. The circuit court made no factual findings concerning the equitable considerations inherent in resolving a laches claim, and it would be inappropriate for us to do so in the context of this appeal.

*Id.*

Moreover, the tipsy coachman doctrine “is inapplicable when it appears the court misconceived a controlling principle of law applicable to the cause, and based thereon entered a judgment prejudicial to a party due to such error.” *Aronson v. Siquier*, 318 So. 2d 452, 454 (Fla. 3d DCA 1975) n.2. And the harmful error test recently reaffirmed by the Supreme Court precludes affirmance unless the beneficiary of the error proves that there is no

reasonable possibility that the error complained of contributed to the result. See *Seadler v. Marina Bay Resort Condo. Assn., Inc.* 2023 WL 8817327, Supreme Court of Florida (December 21, 2023); *Special v. West Boca Med. Ctr.*, 160 So. 3d 1251 (Fla. 2014).

Applying these principles, neither waiver nor laches can support affirmance of the 2023 FCO under the tipsy coachman doctrine. The defense of waiver requires (1) the existence of a right which may be waived; (2) actual or constructive knowledge of the right; and (3) the intent to relinquish the right. *LeNeve v. Via S. Fla., L.L.C.*, 908 So. 2d 530, 535 (Fla. 4th DCA 2005). The JCC made no findings in the 2023 FCO as to whether claimant intentionally relinquished a known right. (R 24-34). Indeed, the word “waiver” is nowhere to be found in the 2023 FCO. (R 24-34). The E/C’s claim that the JCC “implicitly” recognized the defense of waiver in denying benefits (AB 17) is not supported by the record and is irrelevant in any event.

Tipsy coachman is unavailable where the JCC fails to make necessary findings on an issue. *Mendota Ins., supra*. The JCC made no findings as to whether the E/C proved the elements of the defense of waiver. Tipsy coachman is also unavailable where the JCC misconceives a controlling principle of law applicable to the cause, as the JCC did here by improperly invoking and applying collateral estoppel to deny benefits. See *Aronson*,

*supra*. Furthermore, tipsy coachman is not available unless the beneficiary of the error proves that there is no reasonable possibility that the error complained of contributed to the result, which the E/C did not and cannot do. *See Seadler, supra; Special, supra*.

The E/C's waiver argument fails on the merits in any event. Waiver requires the intentional relinquishment of a known right. *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009). The E/C's sole basis for their "waiver" argument is that Claimant failed to timely appeal the 1993 FCO. (AB 7). But as explained in Claimant's Initial Brief, Claimant had no reason to appeal the 1993 FCO that granted her claim for medical benefits and determined contribution actions between competing E/Cs – contribution actions which could not, as a matter of law, affect Claimant's entitlement to disability benefits. *Cruise Quality Painting v. Page*, 564 So. 2d 1190, 1197 (Fla. 1st DCA 1990) (holding that "section 440.42(3) can be applied only when each of the contending employer/carrier's liability for the benefits in question has been determined under other provisions of chapter 440.").

Neither Claimant's failure to appeal an order she had no reason to appeal nor her passive receipt of benefits<sup>1</sup> can support the JCC's denial of

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<sup>1</sup> While also without merit, the E/C never argued waiver based on Claimant's passive receipt of benefits. Consequently, waiver based on Claimant's receipt of benefits after 1993 cannot support affirmance of the

statutorily required benefits based on waiver. See *Wishart v. Laidlaw Tree Serv., Inc.*, 573 So. 2d 183, 184 (Fla. 2d DCA 1991) (“Acceptance of the payments constitutes no election of remedies and no bar to this action, whether based on waiver or estoppel); see also *Jones v. Martin Elecs., Inc.*, 932 So. 2d 1100, 1105-06 (Fla. 2006).

The E/C’s waiver argument is merely a rehash of their meritless claim that Claimant’s failure to appeal the 1993 FCO somehow precludes this Court’s review of the JCC’s incorrect interpretation of that order and erroneous application of collateral estoppel to that incorrect interpretation. Indeed, the E/C’s waiver argument is nothing but a thinly veiled attempt to give collateral estoppel effect to findings in the 1993 FCO without raising or proving the defense of collateral estoppel. *Every* application of the defense of collateral estoppel addresses, by definition, the preclusive effect of findings in an earlier final order that was not timely appealed.<sup>2</sup> The E/C’s

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1993 FCO for an additional reason—it would violate Claimant’s right to due process. *Teco Energy, Inc. v. Williams*, 234 So. 3d 816, 823 (Fla. 1st DCA 2017) (“Waiver and estoppel are affirmative defenses which must be plead carefully or forever waived”).

<sup>2</sup> If the earlier order had been timely appealed, any preclusive effect of the earlier order would come from the defense of “law of the case” rather than collateral estoppel. See *Morris v. Winbar LLC*, 273 So. 3d 176 (Fla. 1st DCA 2019) (holding that the “law of the case” doctrine bars consideration only of those legal issues that were actually considered and decided in a former appeal).

erroneous conception of waiver would eliminate the burden of a party arguing for the preclusive effect of findings in an earlier order from raising collateral estoppel as a defense and proving its elements. Indeed, it would eviscerate the defense entirely. Why would anyone bother to raise and prove the defense of collateral estoppel when they could avoid any challenge to their *ipse dixit* assertions as to the meaning and preclusive effect of a prior order by simply pointing out that the order was not appealed? See *Universal City Dev. Partners, Ltd. v. Pupillo*, 54 So. 3d 612, 617 (Fla. 5th DCA 2011) (Sawaya, J., concurring in part) (recognizing that burden of party seeking to invoke work product immunity to establish all elements of that immunity cannot be satisfied by mere conclusory or *ipse dixit* assertions).

Of course, the E/C's waiver argument is wrong. It is collateral estoppel, not waiver, that bars re-litigating issues or findings determined in a prior proceeding. But collateral estoppel is an affirmative defense that must be pled and proven by the party asserting it. *Teco Energy, supra*. As addressed thoroughly in Claimant's Initial Brief, Bayless neither raised nor proved that defense. The JCC made no findings on any claim of waiver. And the JCC's erroneous application of collateral estoppel precludes affirmance based on the tipsy coachman doctrine in any event.

The E/C's tipsy coachman argument for affirmance based on laches

suffers the same defects—the JCC “made no factual findings concerning the equitable considerations inherent in resolving a laches claim,” *See Bryant, supra*, and the E/C’s laches argument fails on the merits. But the E/C’s laches argument suffers a more fundamental flaw. As the Appellee, the E/C cannot challenge the JCC’s finding that laches did not apply to bar Claimant’s claims. *See DECA Mfg. Corp. v. Beckett*, 317 So. 3d 1164, 1166 (Fla. 1st DCA 2021) (holding that because the claimant did not cross-appeal the JCC’s order she could not challenge the JCC’s finding that mistaken payments do not toll the statute of limitations); *Land & Sea Petroleum Holdings, Inc. v. Leavitt*, 321 So. 3d 810, 813 n.1 (Fla. 4th DCA 2021) (stating that appellee cannot challenge any findings favorable to appellant). As this Court recognized in *Cespedes v. Yellow Transportation, Inc.*, 130 So. 3d 243 (Fla. 1st DCA 2013):

The order on appeal awarded contested benefits to Claimant, and was therefore not wholly favorable to the E/C. Because the E/C neither appealed nor cross-appealed the findings of fact favorable to Claimant, *these favorable findings cannot be challenged by the E/C in this appeal.*

*Id.* at 249. This Court went on to hold that “[a] cross-appeal is an appellee’s exclusive method of obtaining relief from error in an order, and absent a cross-appeal, an appellee may not seek affirmative relief from any part of the order; the appellee may only defend the order.” *Id.*

Here, the 2023 FCO specifically denied the E/C's laches defense to

Claimant's claims for additional PTD and PTD supplemental benefits:

A laches defense does not apply here, because the benefits sought are benefits provided in the workers' compensation statutes. In such statutes, there is no "allowance for the avoidance of the rights and obligations of the parties by a showing of ... laches," so "the presence or absence of" any "equitable considerations ... will have no effect on the parties' substantive legal rights." *Jackson v. Comput. Science Raytheon*, 36 So. 3d 754, 757 (Fla. 1st DCA 2010). "Because issues relating to an employee's entitlement to benefits and a carrier's right to various offsets are founded on statutory and legal bases, there is no occasion (or allowance) for this court to graft onto an otherwise coherent statutory scheme, general equitable principles so as to permit non-legal (equitable) permutations of such rights. Equity will not act when there is a remedy at law." *Id.* at 756. Florida Statute section 440.19(1) (1987)9 provides that the Claimant can bring a claim filed by the latest of the following: 2 years after the injury, 2 years after the payment of lost wage benefits or 2 years after the furnishing of remedial medical treatment. Here, there is clearly a statute of limitations that applies to the claims for statutory benefits at issue.<sup>10</sup> Thus, the equitable defense of laches does not apply.<sup>11</sup> "Generally it is well recognized that statutes of limitations apply to law actions and the doctrine of laches applies to equity cases." *Reed v. Fain*, 122 So. 2d 322, 325 (Fla. 2d DCA 1960).

(R 29). The 2023 FCO awarded Claimant PTD benefits of \$70.56 per year based on the JCC's denial of the E/C's laches defense (R 33) and therefore was not wholly favorable to the E/C. *See Cespedes, supra*. Consequently, to challenge the JCC's denial of their laches defense, the E/C was required to cross-appeal that denial. *See id.* Because the E/C did not file a cross-appeal of the JCC's order, they cannot challenge the JCC's unfavorable

finding that laches did not apply to bar Claimant's claims for statutorily required PTD and PTD Supplemental benefits. See *DECA Mfg. Corp., Leavitt, and Cespedes, supra*.

But even if the E/C's failure to cross-appeal does not preclude their tipsy coachman argument for affirmance based on laches (which it clearly does), the argument still fails for the reasons discussed above. The only finding the JCC made regarding laches was his determination that laches did not apply to bar statutorily required benefits based on this Court's decision in *Jackson v. Comput. Science Raytheon*, 36 So. 3d 754, 757 (Fla. 1st DCA 2010). (R 29). Just as in *Bryant, supra*, the lack of "factual findings concerning the equitable considerations inherent in resolving a laches claim" in the 2023 FCO precludes affirmance based on the tipsy coachman doctrine. So does the JCC's erroneous belief that he could apply collateral estoppel *sua sponte* to deny Claimant benefits disability based on findings made in the 1993 FCO in contribution actions between competing E/C's. See *Aronson, supra; Seadler, supra*.

And regardless of whether the tipsy coachman doctrine applies, the JCC correctly determined that laches did not apply to bar Claimant's claims.

As this Court held in *Jackson*:

Because issues relating to an employee's entitlement to benefits and a carrier's right to various offsets are founded on statutory

and legal bases, there is no occasion (or allowance) for this court to graft onto an otherwise coherent statutory scheme, general equitable principles so as to permit non-legal (equitable) permutations of such rights. Equity will not act when there is a remedy at law.

*Jackson, supra*, at 756. The JCC correctly applied *Jackson* in determining that the equitable defense of laches could not bar claimant's statutory claims for PTD and PTD Supplemental Benefits under section 440.15(1)(e), Florida Statutes (1988). Consequently, this Court should reject the E/C's tipsy coachman arguments for affirmance based on waiver and laches and reverse the JCC's erroneous denial of Claimant's claim for statutorily required PTD Supplemental benefits.

Bayless' argument that *Zaldivar v. Okeelanta Corp.*, 877 So. 2d 927, 931 (Fla. 1st DCA 2004) supports the application of laches to this case was properly rejected by the JCC. (AB 18); (R 29). As noted by the JCC:

A laches defense can apply, in workers' compensation cases, but only when the right being asserted is an equitable right, such as a charging lien. *Zaldivar v. Okeelanta Corp.*, 877 So. 2d 927, 931 (Fla. 1st DCA 2004) ("Florida courts have consistently defined a charging lien as an equitable right."); *Zaldivar v. Florida Transp. 1982, Inc.*, 19 So. 3d 1093, 1095 (Fla. 1st DCA 2009) (A charging "lien is an equitable right.").

(R. 29, n.11). But if Bayless disagreed with the JCC's ruling denying their Laches defense, their Answer Brief is not the appropriate place to make that argument. Rather, as discussed above, they were required to cross-appeal

the JCC's ruling, which they failed to do. See *DECA Mfg. Corp., Leavitt, and Cespedes, supra*.

And while Bayless' tipsy coachman arguments are precluded as a matter of law, Bayless' repeated assertions that they were properly paying Claimant's benefits under the 1993 FCO, that Claimant is improperly attempting to appeal the 1993 FCO, and that Bayless would unfairly be prejudiced by having to pay Claimant benefits she was due under the statute, are a complete mischaracterization of the case and require a response. Relying on findings made by the JCC in determining contribution claims between competing E/C's in the 1993 FCO, Bayless wrongly interpreted that order as capping Claimant's annual PTD Supplemental Benefits at \$3.53 even though Claimant never filed a claim for those benefits. See (IB 18-41). Claimant did not appeal the 1993 FCO because that order was fully favorable to her, awarding her the medical benefits and attorney's fees she had claimed. (R 98-99).

But rather than recognizing that the 1993 FCO did not and could not affect Claimant's entitlement to PTD Supplemental Benefits because those benefits were already being provided and were not at issue in the case, Bayless chose to wrongly pay Claimant PTD Supplemental Benefits based on their aggressive and erroneous interpretation of the 1993 FCO. Under

Florida's self-executing workers' compensation law, Bayless, not Claimant, had the obligation to ensure that proper benefits were paid. See *Gauthier v. Florida Intern. University*, 38 So. 3d 221 (Fla. 1st DCA 2010). Bayless failed their duty and is not the victim here, Claimant is. And Bayless' claim that they would be prejudiced by the "burden" of properly calculating the benefits they should have paid all along lacks merit, as this calculation can be easily made on any calculator or benefit calculation software program used throughout the industry. And in any event, whether the JCC's denial of Bayless' laches defense was correct or not is merely an academic question because Bayless was required to cross-appeal that denial and they did not do so. See *Cespedes, supra*.

In sum, Claimant did not and has no desire to appeal the 1993 FCO notwithstanding the E/C's repeated and incorrect claims to the contrary. Rather, Claimant has appealed the 2023 FCO that erroneously interpreted and applied the 1993 FCO (R 22-23), and Bayless cannot avoid this Court's review of the 2023 FCO through meritless jurisdictional and tipsy coachman arguments. (R 22-23). As argued extensively in Claimant's Initial Brief, the JCC's *sua sponte* application of collateral estoppel to deny Claimant's claim for PTD Supplemental Benefits denied Claimant due process. See *Teco Energy, supra*. The JCC erred in applying collateral estoppel because JCC

Vocelle lacked jurisdiction in the 1993 FCO to determine Claimant's entitlement to PTD Supplemental Benefits in the absence of a petition or claim by Claimant requesting those benefits *Hamm ex rel. Hamm v. PMI Emp. Leasing*, 134 So. 3d 1150 (Fla. 1st DCA 2014); *Dept. of Agriculture and Consumer Servs. v. Anderson*, 132 So. 3d 900 (Fla. 1st DCA 2014), and because the E/C failed to prove the five elements of that defense. *Goodman v. Aldrich & Ramsey Enterprises, Inc.*, 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002). And regardless of collateral estoppel, the JCC erred by illogically interpreting the 1993 FCO as barring Claimant from receiving statutorily required annual cost of living increases to her benefits from Bayless while permitting her to receive those increases from the other responsible E/C. (R 99). Consequently, this Court should reverse the 2023 FCO and remand this case to the JCC to award Claimant the requested PTD Supplemental Benefits, penalties, interest, costs, and attorney's fees.

## **CONCLUSION**

This Court should reverse the 2023 FCO that denied Claimant PTD Supplemental Benefits from September 16, 1995, to present and continuing, in accord with section 440.15(1)(e) Florida Statutes (1988), and remand this case to the JCC to award Claimant PTD Supplemental Benefits from September 16, 1995 to present and continuing, in accord with section 440.15(1)(e), Florida Statutes (1988), plus penalties, interest, costs, and attorney's fees related to such benefits.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I CERTIFY that the foregoing was e-filed pursuant to Florida Rule of General Practice & Judicial Administration 2.525 and that the foregoing was served by email in compliance with Florida Rule of General Practice & Judicial Administration 2.516(b)(1)(A), on this 2<sup>nd</sup> day of February, 2023 on:

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**CERTIFICATE OF COMPLIANCE**

I CERTIFY that this brief was prepared in Arial 14-point font in compliance with the requirements of Florida Rule of Appellate Procedure 9.045(b), and the word count total complies with Florida Rule of Appellate Procedure 9.210(a)(2)(B).

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