STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
SEBASTIAN/MELBOURNE DISTRICT OFFICE

Irwin Douglas,
Employee/Claimant,

vs.

Sunryse Construction Services, Inc., Progressive Employer Services, Inc./Sunz Insurance, and North American Risk Services, Inc.,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 08-011400RLD

Accident date: 2/17/2007

Judge: Robert L. Dietz

FINAL COMPENSATION ORDER

THIS CAUSE was heard before the undersigned in Sebastian, Indian River County, Florida on June 16, 2016, upon the Claimant's claims for authorization of a primary care physician, continued authorization of Dr. Rossario, authorization of a pain management specialist in St. Lucie County, Florida, compensability of the February 17, 2007, accident, attorney fees and costs (Petition for Benefits (PFB) #4) (Docket Number (DN) 38) and temporary total disability (TTD)/ temporary partial disability (TPD) benefits from February 17, 2007, to December 11, 2015, and continuing (PFB #5) (DN 40).

PFBs #4 and #5 were filed by Claimant's prior counsel on December 14, 2015 (DN 38 and 40). The Response to Petition for Benefits was filed December 31, 2015 (DN 44). Mediation occurred on March 23, 2016, the Claimant's Pretrial Compliance Questionnaire was filed on April 22, 2016 (DN 65), and the Employer/Carrier's Pretrial Compliance Questionnaire was filed on April 19, 2016 (DN 64). The Claimant did not file a Trial Summary. The Employer/Carrier filed a Trial Memorandum on June 14, 2016 (DN 92). Irwin Douglas appeared *pro se*. Anthony Amelio, Esq. was present on behalf of the Employer/Carrier.

The following pleadings were identified as relevant to this hearing:

Judge's Exhibits

Exhibit #1: Outgoing Correspondence – Letter from Judge Dietz to Claimant entered March 9, 2016 (DN 56)

Exhibit #2: Order on Employer/Carrier's Motion to Dismiss/Motion to Compel Deposition of Claimant entered March 23, 2016 (DN 61)

Exhibit #3: Order on Pretrial, Employer/Carrier's Motion to Compel Deposition of Claimant; and Employer/Carrier's Second Motion to Dismiss entered April 22, 2016 (DN 66)

Exhibit #4: Order on Amended Notice of Change of Third Party Administrator entered June 9, 2016 (DN 79)

Exhibit #5: Order on Motion to Strike Pleadings, Motion to Quash Subpoenas, Motion to Amend Pretrial, and Motion to Block entered June 10, 2016 (DN 80)

Exhibit #6: Order on Witness Nubia Burry's Request for Telephonic Appearance at Final Hearing entered June 15, 2016 (DN 92)

Exhibit #7: Order Granting Motion to Withdraw as Counsel and Impress Lien entered January 12, 2009 (DN 29)

The following documentary items were received into evidence:

Joint Exhibits

Exhibit #1: Mediation Conference Report filed on March 23, 2016 (DN 60)

Exhibit #2: Uniform Statewide Pretrial Stipulation filed April 22, 2016 (DN 65)

Claimant's Exhibits

Exhibit #1: Petition for Benefits #4 filed December 14, 2015 (DN 38)

Exhibit #2: Medical/Exempt Records attachment to PFB #4 filed December 14, 2015 (DN 39)

Exhibit #3: Petition for Benefits #5 filed December 14, 2015 (DN 40)

Exhibit #4: Medical/Exempt Records attachment to PFB #5 filed December 14, 2015 (DN 41)

Exhibit #5: Incoming Correspondence – Letter from Claimant filed March 9, 2016 (DN 55)

Exhibit #6: Claimant's Uniform Pre-Trial Stipulation filed on April 22, 2016 (DN 65)

Exhibit #7: Claimant's Motion to Block/Exclude Personal Communications Between Dr. Benjamin and Other Parties filed on May 12, 2016 (DN 69)

Exhibit #8: Claimant's Motion to Amend the Pre-Trial Stipulations to Include Witnesses filed on May 12, 2016 (DN 70)

Exhibit #9: Claimant's Answer to E/Cs Latest Amendment to Pretrial Stipulation filed on May 26, 2016 (DN 73)

Exhibit #10: Motion to Quash Motion for Protective Order filed on June 14, 2016 (DN 86)

Exhibit #11: Medical Records of Johnny Benjamin, M.D. dated November 12, 2009, and January 6, 2010

Exhibit #12: Letter from Attorney Gluckman to Dr. Benjamin dated October 28, 2009

Exhibit #13: Letter from Attorney Gluckman to Dr. Benajmin dated January 7, 2010

Exhibit #14: Letter from Dr. Benjamin to Attorney Gluckman dated January 27, 2009

Exhibit #15: Letter from Claimant to Ms. Burry dated June 17, 2009

Exhibit #16: Employee Separation Notice dated April 3, 2007

Exhibit #17: Letter from Sunz to Claimant dated July 10, 2007

The Employer/Carrier objected to Claimant's Exhibits 11-13 and 14-16 on hearsay and authenticity grounds and not being listed on the pretrial. The objections are overruled.

Employer Carrier's Exhibits

Exhibit #1: Response to Petition for Benefits filed December 31, 2015 (DN 44)

Exhibit #2: Employer/Carrier's Motion to Dismiss/Motion to Compel filed March 1, 2016 (DN 51)

Exhibit #3: Employer/Carrier's Second Motion to Dismiss Petitions for Benefits filed on April 18, 2016 (DN 62)

Exhibit #4: Exhibits to Employer/Carrier's Second Motion to Dismiss Petitions for Benefits filed April 18, 2016 (DN 63)

Exhibit #5: Employer/Carrier's Uniform Pretrial Stipulation filed on April 19, 2016 (DN64)

Exhibit #6: Employer/Carrier's First Amendment to Pretrial Stipulation filed on April 22, 2016 DN 67)

Exhibit #7: Amendment to Pretrial Stipulation filed on May 12, 2016 (DN 68)

Exhibit #8: Notice of Amendment to Pretrial Stipulation filed on May 16, 2016 (DN 71)

Exhibit #9: Employer/Carrier's Response to Injured Worker/Claimant's Motion to Amend Pretrial Stipulation to Include Witnesses filed on May 25, 2016 (DN 72)

Exhibit #10: Motion to Strike Pleadings filed on June 8, 2016 (DN 74)

Exhibit #11: Motion to Quash Subpoenas filed June 9, 2016 (DN 78)

Exhibit #12: Employer/Carrier's Notice of Filing filed on June 14, 2016 (DN 81)

Exhibit #13: Trial Memorandum filed on June 14, 2016 (DN 82)

Exhibit #14: Deposition of Johnny Benjamin, Jr., M.D. taken May 11, 2016, filed on June 14, 2016 (DN 83) – The Claimant objected to the admission of this deposition on hearsay and relevance grounds. The deposition was duly noticed, but the Claimant elected not to attend. The objection is overruled.

Exhibit #15: Deposition of Heidi Boutieller taken May 18, 2016, filed on June 14, 2016 (DN 84) – The Claimant objected to the admission of this deposition on hearsay and relevance grounds. The deposition was duly noticed, but the Claimant elected not attend. The objection is overruled.

Exhibit #16: Notice of Denial dated February 17, 2010, filed on June 15, 2016 (DN 91)

Appearing live at the hearing was Irwin Douglas (the Claimant). The Claimant had subpoenaed several witnesses that were the subject of Motions to Quash Subpoena, but indicated at the beginning of the hearing that he was releasing the witnesses. As a result, it is not necessary to rule on the validity of the subpoenas or their service. In making my findings of fact and conclusions of law, I have carefully considered and weighed all the evidence presented to

me. Although I will not recite in explicit detail the witness's testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all of the conflicts in the testimony and evidence. Based on the forgoing and the applicable law, I make the following findings:

1. The undersigned has jurisdiction over the parties and the subject matter.

2. The items to which the parties were in agreement in the Uniform Pretrial Agreement and Pretrial Compliance Questionnaire are accepted and adopted as findings of fact.

3. Mr. Douglas is a 60 year old field and shop supervisor that installed impact resistant glass in commercial and public buildings such as schools. He worked 60-70 hours per week. The work involved heavy lifting and was "backbreaking." The Claimant began working for Sunryse Construction Services in 2003. Sunryse leased their employees from Progressive Employer Services (a professional employment organization (PEO)) which was insured for workers' compensation by SUNZ Insurance.

4. In 2004, Mr. Douglas was injured when his company vehicle was rearended while returning from a project in West Boca. Mr. Douglas sustained injuries to his neck and shoulder. The accident was reported to David Walton, the owner. Mr. Douglas returned to work the following Monday. He ultimately sought medical care from Cheyne Family Chiropractic Center in Ft. Pierce which was paid by PIP. There was no lost time from work.

5. On November 15, 2006, Mr. Douglas was replacing broken glass that had not been installed properly. While lifting heavy glass, he felt extreme pain in his back. He reported it to the office and was told to go to the doctor. He went to his personal doctor, Dr. Dwight Dawkins, and was reimbursed by the owner. It was not filed with insurance. Mr. Douglas kept working.

6. On Saturday, February 17, 2007, he was working for the third day in a row on balconies to repair the drainage channels (tracks) on sliding glass doors which had not been properly installed by another contractor. He was using a drill and wearing a safety harness because the balconies did not have any railings. The safety harness had a retractable steel cable, which was not locking properly when he wanted to stay in one position and kept pulling him while he bent over to drill a hole in the sliding glass door tracks. After three days of this, he woke up on Sunday really sore. On Monday morning, his knees buckled getting out of bed. He went to his doctor, but was unable to see his usual doctor. He called the employer each day to report on his progress. He was not able to return to work until Thursday at which time he was terminated by the project manager (who did not work for his employer) allegedly at the instruction of the employer.

7. In late June 2007, he got a call indicating that he was to be provided workers' compensation. In July 2007, he was contacted by Nubia Barry, an adjuster at SUNZ Insurance, who was handling his workers' compensation accident. Before he could go to their authorized doctor with whom an appointment had been set, he was instructed by the adjuster not to keep the appointment. No new appointment was scheduled. Mr. Douglas then located medical treatment through the Yellow Pages. Three petitions for benefits were filed on his behalf in 2008 (April 25, 2008 (DN 1), November 3, 2008 (DN 13), and November 21, 2008 (DN 21)).

8. Mr. Douglas was next contacted by the Carrier while he was in Sacramento, California in August 2008, approximately eighteen months after his accident. Dr. Root performed an MRI which indicated degenerative disc disease at multiple levels. Mr. Douglas believes that Dr. Root was the only authorized treating doctor for his back. He was sent to

physical therapy by the carrier although he didn't believe that physical therapy could help degenerative disc disease. He was transferred to Dr. Sunita Jain, a neurologist, in November 2008, and Dr. Jain, after reviewing her records, referred him to UC–Davis Medical Center. The Carrier denied the UC-Davis treatment, and referred him to another doctor, Dr. Thomas Mampalam, a neurosurgeon, whose office was over 100 miles away. Later he was sent to a different office that was 65 miles away. When he arrived at his office, Dr. Mampalam demanded that the Claimant sign an arbitration agreement. Mr. Douglas refused and returned to Dr. Root, but there was nothing else he could provide, so he released him.

9. Mr. Douglas returned to Florida in July 2009 and was referred to Dr. Edward Rosario, an orthopaedist, and was issued an indemnity check for several months of benefits. Dr. Rosario placed Mr. Douglas at maximum medical improvement (MMI) on July 27, 2009, and indicated that there was nothing he could do for him. The DWC-25 given to Mr. Douglas did not have an impairment rating. The adjuster then sent Mr. Douglas a copy of the DWC-25, and it indicated that he had a two percent (2%) impairment. The Carrier paid the impairment benefits on August 19, 2009. The Claimant confirms that this is the last indemnity check paid to him.

10. Mr. Douglas then requested his one-time change. The Employer/Carrier authorized Johnny Benjamin, M.D. also an orthopaedist. Mr. Douglas did not understand why the Carrier would assign him the same kind of specialist that had already indicated there was nothing that he could do for him. He went to see Dr. Benjamin on November 12, 2009, and again in January 2010. Dr. Benjamin denied Mr. Douglas gave him a history of prior back problems or a prior motor vehicle accident, and did not find any relevant objective medical findings as part of his examination (Benjamin Depo., DN 83, pp. 7-10). Dr. Benjamin felt the Claimant was at MMI

on November 12, 2009, and felt that a branch block was necessary but that the accident was not the major contributing cause (Benjamin Depo., DN 83, pp.13-14). Mr. Douglas indicates that Dr. Benjamin asked for his personal insurance information and then scheduled several appointments for him using the personal insurance. Mr. Douglas cancelled the appointments.

11. Mr. Douglas is a passionate advocate for his position. He believes that he continuously pursued workers' compensation benefits from his accident to the present, and that the Carrier ignored his requests. He simultaneously reports that he was pursuing a federal suit on other issues related to his employment with the employer.

12. Mr. Douglas believes that there was a conspiracy to deny him workers' compensation benefits. Early in the case, the denial of benefits was based on the Claimant voluntarily limiting his income by not working. That defense was later set aside, and both indemnity and medical benefits were paid. In 2010, benefits were stopped because all the benefits due based on the medical testimony of Dr. Benjamin had been paid. The Claimant was placed at MMI and assigned a two percent (2%) rating, for which impairment benefits were paid.

13. Section 440.19(1)-(4), Fla. Stat. (2006) states:

(1) Except to the extent provided elsewhere in this section, all employee petitions for benefits under this chapter shall be barred unless the employee, or the employee's estate if the employee is deceased, has advised the employer of the injury or death pursuant to s. 440.185(1) and the petition is 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.

(2) 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.

(3) The filing of a petition for benefits does not toll the limitations period set forth in this section unless the petition meets the specificity requirements set forth in s. 440.192.

(4) Notwithstanding the provisions of this section, 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. If a claimant contends that an employer or its carrier is estopped from raising a statute of limitations defense and the carrier demonstrates that it has provided notice to the employee in accordance with s. 440.185 and that the employer has posted notice in accordance with s. 440.055, the employee must demonstrate estoppel by clear and convincing evidence.

14. Ms. Heidi Boutieller, the current adjuster, testified that the Carrier sent the Claimant a letter on July 5, 2007, at the initiation of the claim, which enclosed an informational brochure identifying his rights and responsibilities (Boutieller Depo., DN 84, Exhibit 1, pp. 17-18). The Claimant introduced into evidence a letter dated July 10, 2007, from the adjuster that includes a paragraph on the statute of limitations (Claimant's Exhibit #17). The Carrier also sent a subsequent letter with information on the statute of limitations on or about August 4, 2009, identifying the two percent rating (Boutieller Depo., DN 84, Exhibit 2, p.19). The first and third

letters were sent to the Claimant's current address (and the address on the July 10, 2007, second letter received by the Claimant) and there is no evidence they were returned. Based on the mailbox rule, it is presumed that the letters were received. See Brown v. Giffen Industries, Inc., 281 So.2d 897 (Fla. 1973). The Claimant's possession of the July 10, 2007, letter evidences that he was placed on notice of, and had knowledge of, the statute of limitations.

15. The evidence is uncontroverted that the last date of service of medical treatment was on January 6, 2010, and the bill was paid on February 3, 2010. The last indemnity benefits (impairment benefits) were paid August 19, 2009 (Boutieller Depo., DN 84, p.6). The statute of limitations ran on February 3, 2011. The Petitions for Benefits filed on behalf of the Claimant were not filed until December 14, 2014, over four (4) years after the last benefit paid and three (3) years after the statute of limitations ran. Because running of the statute of limitations is an affirmative defense, the employer and servicing agent have the burden of raising that defense and proving that claimant's petitions for benefits were untimely. Palmer v. McKesson Corporation, 7 So.3d 561 (Fla. 1st DCA 2009). Where a workers' compensation claimant seeks to extend or avoid the statute of limitations by operation of statutory tolling exception, it is the claimant's burden of proving the applicability of the tolling exception contained in Section 440.19. *Id.*

16. The burden of proof on a workers' compensation claimant to establish that the employer/carrier is estopped from asserting a statute of limitations defense is a preponderance of the evidence, unless the employer/carrier has complied with statutory notice provisions, in which case the claimant has a higher burden of proof, clear and convincing evidence. Miranda v. Azul Plastering, 74 So.3d 1123 (Fla. 1st DCA 2011). There was no affirmative defense of estoppel

raised by the Claimant to the tolling of the statute of limitations. See Miami-Dade County School Board v. Russ, 88 So.3d 1038 (Fla. 1st DCA 2012).

17. The Carrier's initial response to the December 14, 2015, PFBs (DN 44) took the position that the statute of benefits had run and that the industrial accident was not the major contributing cause of the Claimant's medical condition. This complies with the requirement of Section 440.19(4), Fla. Stat. (2006). Denestan v. Miami-Dade County, 789 So.2d 515 (Fla. 1st DCA 2001). The Employer/Carrier subsequently filed a DWC-12 Notice of Denial based on the running of the statute of limitations and the injury not being the major contributing cause of the need for treatment (Boutieller Depo., DN 84, Exhibit 4, pp. 21-23).

18. Mr. Douglas believes that if he had been provided prompt medical attention, he would have been back to work in six (6) months. This opinion relates to this case while he was receiving indemnity and medical benefits before the statute of limitations ran. Unfortunately, I am unable to go back and change the course of the case between 2007 and 2010. The Claimant contends that he never stopped "pursuing his claim" after his accident but also documents pursuit of other claims in other courts, some of which may still be pending. I have reminded Mr. Douglas on several occasions that the only issue that can be addressed by the Office of the Judge of Compensation Claims is the workers' compensation claim and that we are bound by the language of Section 440 of the Florida Statutes. While the statute of limitations would not seem to be able to run if one is pursuing their compensable claim "non-stop" since the date of the accident, the language in Section 440.19 provides significant constraints on a case remaining open when no indemnity or medical benefits are being paid. The judge of compensation claims does not have the authority to expand the law beyond what is contained in

Section 440. Unreasonable outcomes as perceived by disappointed litigants should be addressed through amendment of the laws by the Legislature.

19. Since the statute of limitations has run, there is no reason to address the other defenses raised by the Employer/Carrier. The Petitions for Benefits filed December 14, 2015, are dismissed and the claims found within are denied with prejudice.

It is **ORDERED and ADJUDGED** that**:**

1. The Claimant's claim for compensability of the February 17, 2007, accident is denied due to the running of the statute of limitations.

2. The Claimant's claim for authorization of a primary care physician, continued authorization of Dr. Rosario, and pain management treatment is denied due to the running of the statute of limitations.

3. The Claimant's claim for temporary total disability / temporary partial disability benefits from February 17, 2007, through December 11, 2015, and continuing is denied due to the running of the statute of limitations.

4. The Claimant's claim for penalties and interest is denied since no indemnity benefits have been awarded.

5. The Claimant's claim for attorney fees and costs is denied since no benefits have been awarded.

DONE AND ELECTRONICALLY SERVED ON COUNSEL AND CARRIER this 14th day of July, 2016, in Sebastian, Indian River County, Florida.

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