STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. MYERS DISTRICT OFFICE

Nataniel Andrade,
Employee/Claimant,

vs.

CoAdvantage Resources, Inc./AmTrust North America of Florida,
Employer/Carrier/Servicing Agent.
_____/

OJCC Case No. 15-005125JAW

Accident date: 6/3/2012

Judge: Jack A. Weiss

FINAL COMPENSATION ORDER

This matter came before the Judge of Compensation Claims for Final Hearing held on September 28, 2015, upon Petition for Benefits filed on March 9, 2015. Monica De Feria Cooper, Esquire, appeared for Claimant. Andrew Borah, Esquire, appeared for Employer/Carrier. Final Hearing was conducted via video-teleconference with the lawyers and parties in Miami and the undersigned in Fort Myers. Documents and exhibits admitted into evidence are listed in the Appendix. Per Order of July 29, 2015, the issues were bifurcated and only the issue of whether the claims in the Petition for Benefits were barred by the running of the statute of limitations was heard at Final Hearing. Claimant was the only live witness to appear and testify before me. 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 witnesses' testimony and may not refer to each piece of documentary evidence, I have attempted to resolve all the conflicts in the testimony and evidence.

FINDINGS OF MATERIAL FACT

1. Claimant, Nataniel Andrade, testified live and via deposition through an

interpreter. He is able to read English. In June 2012 he was working as a van driver for a hotel. He was injured on June 3, 2012, when he was carrying a lot of heavy luggage when he felt a strong pain in his back and neck. He reported the injury to his supervisor, Janet. The Employer sent him the next day to Concentra. He received physical therapy for his back and neck for two weeks. He was placed on light duty work for one week, but after that he was told by the doctor from Concentra that he could continue to work normally. He finished his physical therapy but he did not return to Concentra because no one told him that he had to return. Claimant returned to work with his normal schedule missing only three or four days of work, but he always had pain. Other than going to Concentra one time, and receiving physical therapy, he did not obtain any medical treatment.

2. In June 2012 Claimant was living at 12917 SW 88th Terrace, Apartment # 2, Miami, Florida 33186. He lived at this address for almost seven years. He claims he never talked to anyone from the insurance company. He claims he did not receive any mail from the insurance company. Specifically, he denied receiving the State of Florida brochure (exhibit # 2 to the deposition of Elaine Yarber) or the June 28, 2012 letter from the insurance carrier (exhibit # 3 to the deposition of Elaine Yarber). Both the brochure and the letter state that an injured worker has two years from the date of accident or one year from the last payment of compensation or provision of medical treatment to file a claim.

3. Claimant first spoke with a lawyer in February 2015, more than two years after his accident. He testified that he did not know of a statute of limitations, and had he known, he would have talked to a lawyer sooner.

4. Elaine Yarber, the adjuster assigned to the claim, testified via deposition taken on

August 6, 2015. Ms. Yarber is responsible for adjusting the June 3, 2012 date of accident and she has been the adjuster on the claim since the outset. The claim was reported to the Carrier on June 4, 2012 and it was accepted as compensable for the low back injury. Ms. Yarber authorized medical care with Concentra. Claimant treated initially at Concentra on June 4, 2012. Claimant then returned to Concentra on June 12, 2012, June 19, 2012, and June 20, 2012. Claimant was placed at MMI on June 20, 2012 with a 0% impairment rating. No indemnity benefits were paid. The first Petition for Benefits was received on March 12, 2015. The Response to Petition for Benefits was issued on March 20, 2015 and in that response the Carrier denied all requested benefits because the statute of limitations has run. Per Ms. Yarber, the Carrier's initial packet was mailed to Claimant on June 8, 2012, and the initial packet contains the division brochure, revised March 2010, regarding benefits. The person responsible for mailing the initial packet was Justin Cannady. The address the Carrier has for Claimant is 12917 SW 88th Terrace, Number 2, Miami, Florida 33186.

5. Justin Cannady testified via deposition on September 10, 2015. Mr. Cannady is a claims assistant for AmTrust. He began working with Tower in 2009 but AmTrust bought out Tower. Part of Mr. Cannady's job duties include putting together the claimant packets, which is what is sent at the outset of a claim to an injured worker. It consists of a pharmacy card, release form for medical paperwork authorization, a mileage form, and an employee facts form, which includes the State of Florida brochure. Mr. Cannady testified that he completed the initial packet for Claimant on June 8, 2012, which he knows because he has a note in the file stating that he did so. He addressed the envelope to Claimant's address, 12917 SW 88th Terrace, Number 2, Miami, Florida 33186. He sealed the envelope but it was not his job to place the postage on it

and actually mail it. He placed the envelope in the bin for outgoing mail in the mail room. Jean Cherisme is responsible for mailing the envelopes in the mail bin.

6. Jean Cherisme testified via deposition taken on September 10, 2015. Mr. Cherisme is a claims assistant for the Carrier, and part of his job duties is to send out letters. In June 2012 he was in the workers' compensation department. At that time one of his responsibilities was taking the envelopes from the bin, putting postage on the envelopes, and placing the envelopes into the U.S. mail. He did so twice a day. At 10 a.m. he went to the post office and mailed the envelopes that were in the mail bin, picking up that day's mail from the post office too. Then at 3 p.m. he would take the mail from the bin and place it in the mailbox that was downstairs. This was his daily responsibility in June 2012. Specifically on this claim, he was also responsible for mailing out the MMI co-pay letter of June 28, 2012. He knows he did this because of a note he made in the file that he completed the adjuster's task of mailing out the MMI co-pay letter. The address he had for the Claimant was 12917 SW 88th Terrace, Number 2, Miami, Florida 33186. Mr. Cherisme placed the postage on the envelope and mailed the letter. Mr. Cherisme was the only one responsible for mailing out letters from 2012 to 2014 when the Carrier was Tower Group, before AmTrust bought them and the company expanded.

7. A medical report from Concentra Medical Centers dated June 20, 2012 was admitted into evidence. Per that report, Claimant was working regular duty without difficulty. Claimant reported that he was not in pain and he wanted to be released. Physical examination revealed full range of motion without pain. There was no pain to palpate and no tissue texture changes. The assessment was a lumbar strain and the plan was for Claimant to return to work with no restrictions. He was placed at MMI that date with a 0% impairment rating and he was

discharged from care.

DISCUSSION

Claimant agrees that he was placed at MMI from Concentra on June 20, 2012, though he argues that he returned to work and continued working despite discomfort and pain. He filed a Petition for Benefits on March 9, 2015 and the claim was denied because the statute of limitations had run. It is Claimant's position that based on sections 440.19(4) and 440.185 and the *Fontanills* case that the EC is estopped from relying on the running of the statute of limitations to deny benefits because he the EC never advised him, either in writing or verbally, about the statute of limitations.

Section 440.185 requires the Carrier to mail to the Claimant, within three days after the Employer advises the Carrier of an injury, an informational brochure approved by the department advising Claimant of the benefits and his rights under the workers' compensation law. It is Claimant's argument the EC failed to mail the brochure to Claimant. The EC argues that the testimony of Elaine Yarber, Justin Cannady, and Jean Cherisme, proves that the required information was mailed to Claimant.

Section 440.19(4) states:

> 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.

There is no argument in this claim that the EC failed to raise the statute of limitations

defense in its initial response to the Petition for Benefits. The evidence proves that the EC properly raised the statute of limitations defense. There is, however, no evidence that the Employer has posted notice in accordance with section 440.055, and the central dispute is whether the Carrier has demonstrated that it has provided notice to the Claimant per section 440.185. The threshold issue is whether Claimant must prove estoppel by clear and convincing evidence. Though the undersigned is uncertain what notice is actually required under section 440.055, as that statute on its face applies only to employers who employ fewer than four employees, based on the evidence presented and the arguments of the parties the undersigned finds that the burden of proof on Claimant is preponderance of the evidence.

EC argues that under *Palmer v. McKesson Corporation*, 7 So. 3d 561 (Fla. 1st DCA 2009), it has established a prima facie case that the statute of limitations has run, as the first Petition for Benefits was filed on March 9, 2015, more than two years after the accident occurred on June 3, 2012. EC is correct and therefore the burden of proof shifts to Claimant to show that the limitations period is extended because of provision of medical benefits or payment of indemnity benefits. Claimant does not make that argument, as it is undisputed that the last benefit furnished to Claimant was the Concentra medical care of June 20, 2012. Instead, Claimant argues that the EC is estopped from relying on the statute of limitations defense because the EC never advised Claimant of the statute of limitations, citing to *Fontanills v. Hillsborough County School Board*, 913 So. 2d 28, (Fla. 1st DCA 2005).

In *Fontanills* the injured worker argued that the carrier failed to disclose the one year statute of limitations in its informational brochure. The injured worker did not argue that he failed to receive the informational brochure, however, which is what the instant Claimant argues.

Under *Fontanills*, even if the undersigned concludes that the informational brochure was not properly mailed and received by Claimant, the EC can still rely on the statute of limitations if there is evidence that Claimant had actual knowledge of the statute of limitations. As the undersigned concludes that there is no such evidence, the decision in this claim hinges on whether the informational brochure was mailed and received by Claimant.

Claimant argues that he did not receive the informational brochure. His argument is that he did not receive any mail from the EC and that he was never verbally told about the statute of limitations. There is no evidence to counter Claimant's testimony that he never was verbally told about the statute of limitations. But there is evidence that the Carrier mailed the required informational brochure that had the required statute of limitations disclosure. There is also evidence that the Carrier mailed a MMI co-pay letter dated June 28, 2012 that likewise contained the statute of limitations disclosure. EC argues that once it has established that the required notice was mailed to Claimant at Claimant's correct address, the "mailbox rule" applies and creates a presumption that Claimant received the mailings, relying on *Scuteri v. Miller*, 584. So. 2d 15 (Fla. 3d DCA 1991).

In *Scuteri*, one lawyer mailed another lawyer a pleading, and signed a certificate of service to that effect. The court held that while this creates a presumption the pleading was received, this is not irrebuttable. If there is evidence that the recipient did not receive the pleading in the mail then it becomes a question of fact.

The evidence from the EC, specifically from Elaine Yarber, Justin Cannady, and Jean Cherisme, is accepted by the undersigned that the Carrier properly mailed the informational brochure as well as the MMI co-pay letter dated June 28, 2012, and both the informational

brochure and the MMI co-pay letter had the required statute of limitations disclosure that was sufficient to place Claimant on notice that he had two years after the date of accident to file a claim.

Claimant testified that he did not receive any mail from the Carrier. As such, per *Scuteri*, this becomes a question of fact as to whether the undersigned accepts or rejects Claimant's testimony. The undersigned rejects Claimant's testimony as not credible. Claimant expects the undersigned to believe his memory that he did not receive any mail from the Carrier in June 2012, over three years before he testified in this matter. It is clear to the undersigned that Claimant's memory is faulty, as he also testified, both in deposition and live at hearing that he went to Concentra to see the doctor only one time. While the only medical report in evidence was the June 20, 2012 office visit, Elaine Yarber testified there were three visits before this date, which is more believable since both parties agree Claimant underwent a number of physical therapy sessions. Also, the June 20, 2012 report is titled "Progress Note." More significantly, the accompanying DWC-25, box 8, has "no" checked answering the question of whether this was the initial visit with this physician. Thus the undersigned finds that as Claimant's memory is faulty as to the number of times he saw the doctor at Concentra, this calls into question Claimant's veracity as to whether he ever received mail from the Carrier.

While EC also argues Claimant is not truthful as the only injury the EC accepted was to the lumbar spine, and Claimant is insistent he told Concentra that he also hurt his neck, the undersigned agrees with Claimant's argument that EC only placed into evidence the medical report from June 20, 2012, and the remaining medical reports from Concentra that were not in evidence may have made note of an injury, or claim of injury, to the neck. The undersigned

agrees with Claimant on this point, though this argument does support the undersigned's conclusion that Claimant treated at Concentra more than one time, and as such, that Claimant's testimony that he only treated at Concentra one time was not true.

Moreover, the undersigned rejects Claimant's testimony that he was always in pain even after he returned to work after the accident. Instead, the undersigned accepts the June 20, 2012 Concentra medical report that Claimant did not have pain, he was working full duty, and he wanted to be discharged from medical treatment as more consistent with logic and reason. This too supports the undersigned's rejection of Claimant's testimony that he did not receive any mail from the Carrier as it shows Claimant's memory, from events that occurred over three years ago, is not reliable.

Accordingly, the undersigned finds:

1. The EC properly raised the statute of limitations defense in its initial response to the Petition for Benefits;

2. The Carrier mailed both the required informational brochure with the statute of limitations disclosure and a MMI co-pay letter that also had the statute of limitations disclosure to Claimant's correct address in June 2012;

3. The Claimant's testimony that he did not receive any mail from the Carrier is rejected as not supported by the preponderance of the evidence.

WHEREFORE, it is **ORDERED** and **ADJUDGED** that:

1. The March 9, 2015 Petition for Benefits is dismissed as the statute of limitations has run on the claim.

2. Jurisdiction is reserved as to any claim for costs and same will be adjudicated per the

procedures outlined in Rule 60Q-6.124.

DONE AND ELECTRONICALLY FILED in Fort Myers, Lee County, Florida this 8th day of October, 2015.

Jack A. Weiss
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APPENDIX – DOCUMENTARY EVIDENCE AND EXHIBITS

Joint Exhibit

1. Deposition of Claimant taken June 29, 2015

Employer/Carrier Exhibits

1. Deposition of Elaine Yarber taken August 6, 2015
2. Deposition of Jean Richard Cherisme taken September 10, 2015
3. Deposition of Justin Cannady taken September 10, 2015

JCC Exhibits

1. Petition for Benefits filed March 9, 2015
2. Response to Petition for Benefits filed March 20, 2015
3. Mediation Conference Report filed May 26, 2015
4. Notice of Pretrial and Final Hearing issued May 28, 2015
5. Uniform Pretrial Stipulation and Pretrial Compliance Questionnaire filed June 11, 2015
6. Order Scheduling Final Hearing issued July 8, 2015
7. Unopposed Motion to Bifurcate filed July 28, 2015 and Order Granting Unopposed Motion to Bifurcate issued July 29, 2015
8. Motion to Admit Medical Records filed August 11, 2015
9. Order Admitting Medical Records issued August 14, 2015
10. Employer/Carrier's Trial Memorandum filed September 23, 2015 (for argument only)
11. Claimant's Trial Memorandum filed September 23, 2015 (for argument only)