

**STATE OF FLORIDA  
 DIVISION OF ADMINISTRATIVE HEARINGS  
 OFFICE OF THE JUDGES OF COMPENSATION CLAIMS  
 MIAMI-DADE DISTRICT OFFICE**

Luis Angel Perez	)	
	)	
Employee/Claimant,	)	
	)	
vs.	)	OJCC Case No. 13-15146 EDS
	)	
Boulevard Tire Center	)	Accident Date: 9/21/2010
	)	
Employer,	)	
	)	JUDGE: E. Douglas Spangler
and	)	
	)	
Zenith	)	
	)	
Carrier/Servicing Agent.		

**COMPENSATION ORDER**

This case came on for a Final Hearing before the undersigned on March 3, 2014, concerning a Petition for Benefits (PFB) docketed on July 3, 2013. The Claimant and his attorney, Monica de Feria Cooper, and the counsel for the Employer/Carrier (E/C), Andrew Borah appeared for the hearing in the Offices of Judges of Compensation Claims, Miami, FL VTC Center 3; and, the undersigned presided by Video Teleconference from the Offices of Judges of Compensation Claims, Fort Myers, FL.

Live testimony was received from the claimant Luis Perez with the assistance of interpreter Lucille Grenet. The issues brought by the claimant in the pending PFB demanded a one-time change of treating physicians and a demand for costs and attorney's fees. The defense asserted was that the pending PFB was barred by the Statute of Limitations and consequently no benefits would be due and owing. The claimant admitted the deposition of the claimant taken February 13, 2014 into evidence. The parties stipulated that the medical records from Dr. Jesse Basadre, M.D. as filed into the record on December 9, 2013 were to be admitted as a joint exhibit. The E/C admitted the deposition of the adjuster Leslie Berdux, with exhibits into evidence. The claimant's

objection to exhibit #1 to this deposition was overruled after a brief hearing. The PFB dated 7/3/13; the response to the PFB dated 7/3/13; the mediation conference report dated 11/5/13; the Uniform Pretrial Stipulation dated November 26, 2013; the Pretrial Order and Notice of Final Hearing dated 12/2/13 and a mediation conference report dated 2/12/14 are JCC exhibits admitted into the record.

Based on the testimony of the witnesses, the documents, and depositions admitted into evidence, the written memoranda submitted by the parties counsel, and the oral arguments of the attorneys made at the hearing, the undersigned finds and concludes that the PFB filed on July 3/2013 is barred by the Statute of Limitations and is denied and dismissed with prejudice.

The reasons for these determinations follow:

#### **FINDINGS OF MATERIAL FACT**

1. The claimant, Luis Angel Perez was an employee of Boulevard Tire Center and was working as a tire dismounter technician in 2010.
2. Claimant was unable to remember the date or even the month he was injured, but was positive it occurred in 2010. He sustained a crush type injury to the small finger on his right hand while dismounting a tire from a rim.
3. The date of accident is established by stipulation to be September 21, 2010.
4. Following the injury the claimant received medical treatment for the injury with Dr. Jesse Basadre, M.D. The medical treatment was provided until October 25, 2010 when the claimant was placed at maximum medical improvement and provided a 2% permanent impairment rating.
5. The claimant received payment for temporary total disability benefits from September 22, 2010 through October 25, 2010. He later received payment for the permanent partial disability (impairment income benefits) from 10/26/2010 through 11/22/2010.
6. After November 22, 2010, no further benefits were paid for or provided by the Employer/Carrier for this date of accident.<sup>1</sup>

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<sup>1</sup> Claimant has had two other dates of accident with the same employer

7. In deposition taken on February 13, 2014, adjuster Leslie Berdux testified that she was the only adjuster on this claim since September 24, 2010. She testified that she had a conversation with the claimant on that date and advised him that he would be receiving some forms in the mail. The brochure from the State of Florida was sent in the packet. The packet also included a false and fraudulent claims warning form. The claimant signed and returned the false and fraudulent claims warning forms to the carrier on October 4, 2010.
8. Both the State of Florida brochure and the false/ fraudulent claims warnings forms were submitted in English and Spanish and both contained references to the statute of limitations periods.
9. In his trial testimony the claimant denied reading any of the forms, even though he signed them, and any disavowed any awareness of references in the forms to the statute of limitations. He is capable of reading and writing Spanish. He did identify his signatures on both the English and Spanish fraudulent claims forms. One of the signatures was adjacent to the date placed on the form of September 28, 2010.
10. The claimant provided a deposition on February 13, 2014 during which he was asked about receiving the forms, reading them, and signing them. The deposition testimony disagreed with the claimant's trial testimony, particularly pages 28 and 53, wherein the claimant expressed knowledge of the contents and the purpose of the forms he signed. When he was asked to explain this difference claimant stated he did read the forms but only at the deposition, but not before then; and, he continued to express ignorance of the statute of limitations.
11. Although claimant stated he could not remember the month or date of his accident in 2010, the claimant testified definitively that he was not paid by the employer for the work he performed on September 21, 2010.

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subsequently: 1/19/2012 and 5/24/13.

## DISCUSSION

Because the Statute of Limitations defense is an affirmative defense, the E/C has the initial burden of establishing that the defense applies to the facts of this case. In this matter, the E/C has met that initial burden. The E/C was obliged only to establish the date of the injury and the date of the first Petition for Benefits to carry the burden. *Palmer v. McKesson Corp.* 7 So.3d 561, 563 (Fla. 1<sup>st</sup> DCA 2009). The stipulated date of accident in this matter was September 21, 2010 and the first PFB was filed July 3, 2013. In addition the E/C established that benefits were provided and/or paid through November 22, 2010. All employee petitions for benefits are barred unless the petition is filed within 2 years after the date on which the employee knew or should have known that the injury arose out of the work performed in the course of employment, and because benefits were provided, within one year from the date the last benefits were provided and paid. Sections 440.19 (1) and (2) F.S (2010). In this case, because the July 3, 2013 PFB was filed well in excess of two years from the stipulated date of accident and well after one year from the date the last benefits were provided, the E/C has met their prima facie burden.

In avoidance of this defense, the claimant has argued that the E/C is stopped from relying on the defense. There are two prongs to this argument: first the employee has implied that he had no knowledge of the requisite limitations period. See, *Fontanills v. Hillsborough County School Board*, 913 So. 2d 28 (Fla. 1<sup>st</sup> DCA 2005); second, the employee states that the employer/carrier did not compensate him for work performed on the date of accident, September 21, 2010, and therefore, failed to place needed benefits in the hand of the claimant resulting in the E/C being stopped from relying on the defense. See, *Gauthier v. Florida International University, et.al.* 38 So.3d 221 (Fla. 1<sup>st</sup> DCA 2010).

The facts do not support either of claimant's arguments. First, the evidence is clear that the E/C supplied the claimant with acceptable information that included notice of the statute of limitations and its effect on a claim. The argument being made by claimant is not that it was not supplied, but that he was not told about it. This argument fails, because the E/C placed the necessary information into claimant's own hands, even

in Spanish that claimant is capable of reading. The only reason for his lack of knowledge that is supported by the evidence is that the claimant did not know about the limitations periods simply because he did not read the materials he received. Additionally, even the claim of not reading the materials is suspect, because the claimant testified, in his deposition and in contradiction of that assertion, that he had some awareness of the intent of some of the forms and material he received. Claimant's overall credibility is therefore highly suspect.

The claimant's lack of credibility also affects the second estoppel argument. The claimant alleged, in response to a direct question during trial that contained the date of the accident, that he had not been paid for his work on that day. "Were you paid for your work on September 21, 2010?" The claimant responded, "No." However, the claimant on more than one occasion during the hearing also testified, convincingly, that he actually did not recall either the month or the date of his finger injury; but, he was sure it was in 2010. E/C Counsel argued, convincingly, that these two pieces of testimony are irreconcilable noting that it cannot be possible for him to remember specifically not being paid on September 21, if in turn he could not remember being injured on September 21. Beyond this, the claimant offered no corroborating evidence that would in any way provide an inference that he was not paid for his work on September 21, 2010. Thus, there is no competent, substantial evidence to support an inference that the claimant was not paid.

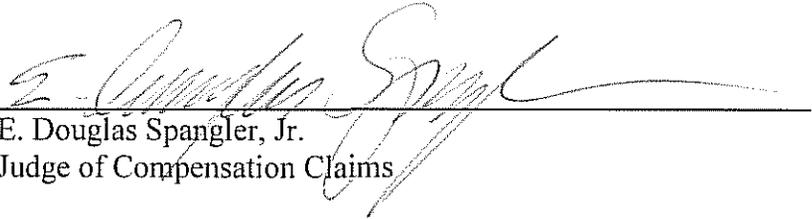
Claimant needs this evidence to support his estoppel argument. However, even if the evidence existed, the undersigned would not find estoppel under the facts of this case. The payment of the claimant's wages on September 21, 2010 would have had no effect on the tolling of the statute of limitations, because claimant has not demanded payment of those wages in the PFB or otherwise; and, the tolling period extended out 90 days beyond the date of the accident, to November 20, 2010 the last date benefits were paid. See *Gauthier*, supra at 222. Further, there is no evidence that would support a conclusion that the claimant was misled in his actions or inaction by the employer's failure to pay wages on September 21, 2010. There is no competent evidence that the employer or carrier failed to perform any obligation to the claimant that they were under a duty to perform. For these reasons the claimant's estoppel argument in avoidance of the Statute of

Limitations defense has no merit.

**WHEREFORE it is Ordered and Adjudged:**

1. The petition for benefits filed on July 3, 2013 is denied and dismissed with prejudice.

**DONE AND ELECTRONICALLY MAILED** this 4<sup>th</sup> day of March 2014  
in Fort Myers, Florida.

  
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E. Douglas Spangler, Jr.  
Judge of Compensation Claims