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

Oswaldo Sauri, Employee/Claimant, vs. Record Aircraft Parts/CastlePoint (Tower Group Companies), and Tower Group Companies, Employer/ Carrier/Servicing Agent.	)	OJCC Case No. 12-021001DSR Accident date: 4/8/2009

FINAL COMPENSATION ORDER

This cause was heard before the undersigned via Video Teleconference from Miami at Sebastian, Indian River County, Florida on March 7, 2013, upon the Claimant's claims for proper payment of impairment benefits, payment of TTD/TPD benefits from the date of accident to date, and continuing, authorization of appointment with authorized treating physician, penalties, interest, costs and attorney's fees. The Claimant also asserted that the Statute of Limitations was tolled and estoppel. The Petition for Benefits was filed on September 12, 2012. Mediation occurred on December 13, 2012, and the parties' pretrial compliance questionnaire was filed on January 14, 2013. Jesse L. Casher, Esq., was present on behalf of the Claimant. Andrew Borah, Esq., was present on behalf of the Employer/Carrier.

The defenses were that the Statute of Limitations has run; impairment benefits based on an 8% impairment rating were paid to the Claimant in full; Claimant earned at least 80% of his pre-injury AWW every week until he was placed at MMI on June 22, 2009, Claimant was TPD for one week, resulting in an overpayment of $256.00; no TTD/TPD benefits are due or owing; authorization of return appointment with authorized treating physician is denied as the Statute of

Limitations has run; misrepresentation; the accident is no longer the major contributing cause; that no penalties, interest, costs or attorney's fees are due or owing.

The following documentary items were received into evidence:

1. Pretrial Stipulation Sheet and Order dated January 14, 2013, together with the documentary items required by Rule 9.180 (Judge's Exhibit #1).

2. Deposition of Rena West taken on February 7, 2013 (Joint Exhibit #1).

3. Deposition of Lisa Sabattini taken on February 19, 2013 (Joint Exhibit #2).

4. Order Admitting Medical Records of Rolando Garcia, M.D., filed on February 6, 2013 and Medical/Exempt Records filed on February 5, 2013 (Joint Exhibit #3).

5. Deposition of Ryan Trombly, M.D., taken on March 5, 2013 (Claimant Exhibit #1).

6. Deposition of Leo Golowinsky, taken on March 1, 2013 (Claimant's Exhibit #2).

7. 13 Week Wage Statement filed on March 4, 2013 (Employer/Carrier's Exhibit #1).

8. Payroll Records filed on March 4, 2013 (Employer/Carrier's Exhibit #2).

9. Medical Records from Homestead Hospital filed on March 4, 2013 (Employer/Carrier's Exhibit #3).

10. Deposition of Dr. Miguel Rodriguez-May, taken on February 26, 2013 (Employer/Carrier's Exhibit #4).

11. Deposition of Dr. Amar Rajadhyaksha, taken on March 1, 2013 (Employer/Carrier's Exhibit #5).

12. Deposition of Ana Morejon, taken on February 19, 2013 (Employer/Carrier's Exhibit #6).

13. Deposition of Matthew Johnson, taken on February 14, 2013 (Employer/Carrier's Exhibit #7).

14. Deposition of Richard Zaccaro, taken on February 21, 2013 (Employer/Carrier's Exhibit #8).

15. Informational Brochure filed on March 7, 2013 (Employer/Carrier's Exhibit #9).

At the hearing, the Claimant, Oswaldo Sauri and his wife, Mayi Sauri, appeared and testified before me through an interpreter, Richard Perez. 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 of the conflicts in the testimony and evidence. Based on the foregoing and the applicable law, I make the following findings:

1. The items to which the parties were in agreement on the pretrial stipulation sheet are accepted and adopted as findings of fact.

2. The parties stipulated that the Claimant suffered an industrial accident arising out of and in the course and scope of his employment on April 8, 2009, and suffered injuries to his low back.

3. The parties stipulated to an average weekly wage of $420.01 with a corresponding compensation rate of $280.01.

4. The parties stipulated that the Claimant reached maximum medical improvement on June 22, 2009, with an 8% permanent impairment rating, as found by Dr. Garcia.

5. The Claimant is a 45-year old male who sustained a compensable accident on April 8, 2009, when lifting heavy pieces of aviation equipment resulting in injury to his low back. The Employer/Carrier authorized the Claimant to treat with Concentra Medical Center,

who performed an MRI that showed a right-sided disc herniation at the L5-S1 level. Due to the disc herniation, Concentra referred the Claimant to an orthopedic specialist, Dr. Rolando Garcia. The Claimant complained to Dr. Garcia of right-sided radiating low back symptoms. Dr. Garcia provided the Claimant with conservative treatment, and after the Claimant showed significant improvement. Dr. Garcia placed him at MMI with an 8% impairment rating on June 22, 2009. The Claimant underwent a functional capacity evaluation, which indicated that he was capable of working at medium duty. The Claimant has not received any authorized medical treatment since June 22, 2009.

6. The Employer/Carrier paid out impairment benefits based on the 8% impairment rating, and last paid benefits November 9, 2009. The Claimant filed a petition requesting workers' compensation benefits on September 12, 2012, more than two years since the Claimant's date of accident and more than one year since the Employer/Carrier last provided the Claimant with any type of benefit. The Employer/Carrier raised a Statute of Limitations defense in its first response to the Claimant's Petition for Benefits.

7. The Claimant was involved in a subsequent motor vehicle accident on October 26, 2010. The Claimant received treatment for those injuries through his Allstate PIP insurance with Dr. Miguel Rodriguez-May. The Claimant exhausted his $10,000.00 worth of PIP benefits. At the conclusion of the Claimant's treatment for his October 26, 2010, injuries, he reported that he was asymptomatic in his low back.

8. The Claimant's low back symptoms were next documented in emergency room records on September 12, 2012. The Claimant first presented to Homestead Hospital on September 5, 2012, where he indicated that he had been experiencing intermittent low back pain since he fell while walking one year prior. The Claimant was complaining of left-sided radiating

low back symptoms. (The Claimant complained of right-sided radiating low back symptoms immediately after the industrial accident, and when he was treating with Dr. Garcia.) After being released from Homestead Hospital, the Claimant went to the Hialeah Hospital emergency room indicating that he could no longer walk. The Claimant has undergone a number of lumbar MRI's since September 2012, all of which demonstrate a left-sided disc herniation at the L5-S1 level, which is different than the right-sided L5-S1 herniation that was documented shortly after the Claimant's industrial accident. The Claimant underwent an emergency left L5-S1 lumbar microdiscectomy at Baptist Hospital on September 28, 2009. In January 2013, the Claimant followed up at Baptist Hospital again complaining of left-sided radiating low back symptoms and he underwent epidural steroid injections.

9. Pursuant to Florida Statutes §440.19(1)(2), all Petition for Benefits shall be barred unless the employee files the petition within 2 years after the date of injury, or within 1 year from the last payment of indemnity benefits or furnishing of remedial treatment. The Employer/Carrier has the burden of raising this affirmative defense and proving that the Petition for Benefits was untimely.

10. At issue is a Petition for Benefits filed on September 12, 2012, to which the Employer/Carrier filed a response on October 9, 2012, raising the Statute of Limitations defense. The response raises the Statute of Limitations defense in the Carrier's initial responsive pleadings in compliance with Sec. 440.19(4), which is a condition precedent to raising the defense.

11. Lisa Sabattini, the claims adjuster for the Employer/Carrier, testified that impairment benefits were last paid on November 9, 2009. The Claimant last received authorized medical treatment on June 22, 2009, when he was placed at Maximum Medical Improvement.

After this, the Carrier did not hear from the Claimant again until the Petition for Benefits was filed on September 12, 2012. The Petition was not timely because it was filed more than two years after the date of accident of April 8, 2009, and more than one year since the last payment of indemnity benefits or furnished medical treatment. This evidence establishes a prima facie case that the petition was untimely.

12. I find that the Employer/Carrier gave the Claimant proper notice of the Statute of Limitations. The Employer/Carrier sent an informational brochure that contains the required statutory language to the Claimant. By mailing the brochure to the Claimant, this places the burden on the Claimant to prove by a preponderance of the evidence that he did not receive proper notice of his rights and, if proven, the burden then shifts to the Employer/Carrier to establish that despite the failed notice, the Claimant otherwise has actual knowledge by the Employer or other source. In order to raise estoppel, the Claimant must demonstrate, by clear and convincing evidence that the Employer/Carrier failed to place the Claimant on notice.

13. On April 9, 2009, Rena West, a senior claims assistant for Tower Group Companies mailed the Division provided brochure to the Claimant. Ms. West testified during her deposition that it was her regular practice to mail the informational packet on the same day that she set up the file, as she had done in this case. The initial packet, containing the informational brochure, was sent to the Claimant at his address as listed on the First Report of Injury/Illness, 8120 West 8th Court, Hialeah, FL 33014. Ms. West testified that she prepared the envelope herself, and made a note in the file that the packet was sent to this address. Ms. West further noted that there was nothing indicating that the packet that was sent was returned or was undeliverable.

14. Another letter was sent to the Claimant on April 28, 2009, at the same address,

explaining the Claimant's temporary partial disability benefits. None of these letters were returned to the Carrier as undeliverable. The Claimant also received checks at that same address, and all of these checks were cashed. I find that the Carrier placed the Claimant on notice of the Statute of Limitations. The evidence in this matter establishes that the Claimant filed his petition on September 12, 2012, more than two years after the Claimant's April 8, 2009, date of accident. With those facts alone, the Employer/Carrier has established its prima facie case that the Statute of Limitations has run, Palmer v. McKessen, 7 So.3d 561 (Fla. 1st DCA 2012).

15. The Claimant asserts that the Employer/Carrier should be estopped from raising a Statute of Limitations defense. The Claimant attempts to do this by alleging that the Employer/Carrier did not comply with the Notice requirement in Fla. Stat. §440.185(4) by failing to send out the initial informational brochure to him within three days of becoming aware of the Claimant's accident. The case of Fontanillis v. Hillsborough County School Board, 913 So.2d 28 (Fla. 1st DCA 2005), establishes that the burden is on the Claimant to establish that he did not receive the initial informational brochure. The Claimant must establish this by preponderance of the evidence. Ms. West, the senior claims assistant at the Carrier back in April 2009, testified that she personally put the initial informational brochure in an envelope that was addressed to the Claimant's address. It is important to point out that was the only address that the Employer/Carrier has ever had for the Claimant. Ms. West also testified that she put the envelope in the mail and specifically put a notation in the computer file that she mailed out the initial packet to the Claimant that contained the initial informational brochure.

16. Since the Employer/Carrier has provided evidence that the initial informational brochure was sent in the mail to the Claimant at his correct address, the mailbox rule now comes into play. The mailbox rule establishes that proof of the mailing of a document

to the correct party at the correct address creates a presumption that the party received the document, Scuteri v. Miller, 584 So.2d 15 (Fla. 3d DCA 1991). The Claimant attempts to overcome the presumption in the mailbox rule in two ways: (1) the Claimant (mainly through his wife) just denies that he received the packet; and (2) the Claimant argues since the Employer/Carrier did not save the cover letter that came along with the initial informational brochure that is evidence that he did not receive the initial informational brochure.

17. The Claimant's wife testified that she is the person in the household who gets the mail and that she saves every piece of paper that gets sent to them. She denied receiving the initial informational brochure that contains the description of the Statute of Limitations. The Claimant's wife's testimony is clearly self-serving. The Claimant has not worked since August 2009 and his wife has not worked since October 2010. Since that time, the Claimant and his wife have been relying up family and friends to pay their expenses. The Claimant's wife's testimony by itself is not enough to rebut the presumption in the mailbox rule. Further, the Claimant's wife testified that she had to stop working in October 2010 in order to take care of the Claimant due to his deteriorating condition. The records from Dr. Miguel Rodriguez-May documenting the Claimant's physical condition around that time do not establish that the Claimant had severe debilitating pain. In fact, by January 6, 2011, the Claimant was no longer complaining of any type of symptoms to Dr. Rodriguez-May. The Claimant also saw Dr. Alejandro Platon on January 19, 2011, for a chiropractic IME and he continued to indicate that he was completely asymptomatic. There are significant inconsistencies with the Claimant's wife's testimony and I find that her testimony alone does not rebut the presumption of the mailbox rule that the Claimant received the initial informational brochure that was mailed to him by Rena West.

18. The Claimant next argues that the Employer/Carrier's failure to keep the cover letter that went along with the initial informational brochure to the Claimant is evidence in itself that the initial informational brochure never got sent out. In the instant case, Ms. West testified that the initial informational brochure was mailed to the Claimant at the Claimant's correct address, but Ms. West is also the one who actually did the mailing. Ms. West explained at her deposition that at the time of the Claimant's industrial accident, the Employer/Carrier did not save the cover letters that accompanied the initial informational brochure. That fact does not suggest that the initial informational brochure was not sent to the Claimant's address when Ms. West testified that she personally mailed the initial informational brochure to the Claimant's address. Ms. West's testimony is further supported by the fact that there is a computer note in the Claimant's file indicating that Ms. West did send the initial informational brochure to the Claimant's address. As such, the Claimant cannot rebut either the presumption in the Fontanillis case or in the mailbox rule that establishes the Claimant did receive the initial informational brochure.

19. The Claimant next argues that assuming that he did receive the initial informational brochure, the receipt of such document was ineffective towards him since it was not sent in clear and understandable language since the brochure was sent in English, not in Spanish, his native language. This argument is rejected by the undersigned. The Claimant and his wife have testified that they have never received the initial informational brochure, therefore, the Claimant cannot argue that the Employer/Carrier should be estopped from raising a Statute of Limitations defense since the initial brochure the Employer/Carrier sent out was in English when it is the Claimant's position that he never even received the initial informational brochure. Obviously, the initial informational brochure being sent in English would have no impact on the

Claimant if the Claimant did not receive the initial informational brochure as he alleges. The Florida State Constitution mandates that English be the official state language. While it may be advisable or helpful for a Carrier to arrange to communicate with an injured worker in that worker's native tongue, it is not a requirement and the Carrier's failure to do so in the Claimant's case does not establish a failure to comply with the requirements of Fla. Stat. §440.185(4).

20. The Claimant has provided numerous false statements for the purpose of obtaining workers' compensation benefits. The Claimant's attorney acknowledged that the Claimant provided inaccurate information at his deposition. Interestingly, the Claimant provided the same exact inaccurate information at the Final Hearing. The Claimant denied ever being involved in a motor vehicle accident, and denied ever receiving medical treatment due to a motor vehicle accident. The Claimant also denied ever receiving any medical treatment for his low back for the time period in between when he last saw Dr. Garcia and when he first went to the emergency rooms in September 2012.

21. The Claimant's attorney and the Claimant's wife acknowledged that all of the above statements were inaccurate, as there are numerous records documenting that the Claimant was involved in a motor vehicle accident on October 26, 2010, and that he received significant treatment with Dr. Miguel Rodriguez-May for the injuries he sustained in the accident, treating with the physician at least 38 times. The Claimant asserts that he did not intentionally provide these false statements for the purpose of obtaining workers' compensation benefits, but that he just simply forgot he was ever involved in a motor vehicle accident and that he ever received treatment for injuries associated with a motor vehicle accident.

22. The Claimant's wife explained that his memory is extremely poor due to the pain medications he takes due to his intense low back pain. Even at the Final Hearing the Claimant

denied ever being involved in a motor vehicle accident when his wife testified just minutes prior in the Claimant's presence that he was involved in a motor vehicle accident.

23. The Claimant has a history of providing false statements regarding his medical history even during the time period when he was not taking any pain medications. When the Claimant began treating with Dr. Rodriguez-May on October 28, 2010, he was not taking any pain medication as he was not treating with any doctors at that time who could have prescribed him pain medication. The Claimant acknowledged this to Dr. Rajadhyaksha as Dr. Rajadhyaksha testified that during the timeframe in between when he last saw Dr. Garcia and when he presented to the emergency rooms in September 2010; the Claimant did nothing in that time for treatment and was just at home taking Tylenol for pain. Despite the Claimant not taking any pain medication at the time he was treating with Dr. Rodriguez-May, he still provided Dr. Rodriguez-May with an inaccurate medical history. The October 29, 2010, attending physician's report indicates that the Claimant denied having same or similar conditions in the past. Since the Claimant presented to Dr. Rodriguez-May with low back complaints, this statement is false. The Claimant also told Dr. Rodriguez-May that his condition was solely as a result of his October 26, 2010, motor vehicle accident. Assuming that the testimony that the Claimant provided at the Final Hearing stating that his low back pain has been constant since his April 8, 2009, industrial accident, this is another false statement the Claimant provided Dr. Rodriguez-May. Lastly, the Claimant denied to Dr. Rodriguez-May that his injury arose out of his employment, but testified before the undersigned that his low back pain is due to his employment. There is no medical evidence establishing that the pain medication the Claimant is taking should be impacting his memory.

24. .Based on the totality of the evidence before me I find that the Claimant's claims

are barred based on the Statute of Limitations expiring prior to the filing of the Petition for Benefits. Alternatively, I find that the Claimant has provided false and misleading testimony in an effort to obtain Workers' Compensation Benefits in violation of Florida Statutes Sections 440.105 and 440.09 so that he is not entitled to additional benefits. All pending claims are hereby denied and dismissed.

WHEREFORE, it is hereby ORDERED and ADJUDGED that:

All pending claims are hereby denied and dismissed.

DONE AND ELECTRONICALLY SERVED ON COUNSEL this 15th day of March, 2013, in Sebastian, Indian River County, Florida.

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