**STATE OF FLORIDA**
**DIVISION OF ADMINISTRATIVE HEARINGS**
**OFFICE OF JUDGES OF COMPENSATION CLAIMS**
**FORT LAUDERDALE DISTRICT OFFICE**

**EMPLOYEE:**
Robert Schiano
1352 NW 129th Way
Sunrise, FL 33323

**ATTORNEY FOR EMPLOYEE:**
Mark Touby, Esquire
2030 S. Douglas Road, Suite #217
Coral Gables, FL 33134

**EMPLOYER:**
City of Hollywood
2600 Hollywood Blvd., Suite #212
Hollywood, FL 33022

**ATTORNEY FOR EMPLOYER/CARRIER:**
Andrew Borah, Esquire
700 W. Hillsboro Blvd., Suite #2-107
Deerfield Beach, FL 33441

**CARRIER:**
Employer's Mutual, Inc.
700 Central Parkway
Stuart, FL 34994

**OJCC No:** 16-001410DAL
**D/A:** 08/21/2014
**JUDGE:** Daniel A. Lewis

---

## FINAL COMPENSATION ORDER

---

AFTER DUE NOTICE to the parties, a Final Merits Hearing was conducted before the undersigned Judge of Compensation Claims (JCC) on March 27, 2018 in Lauderdale Lakes, Broward County, Florida. The petition for benefits which came on for adjudication was filed on August 31, 2017. The parties stipulated as follows:

A. The undersigned has jurisdiction of the parties and of the subject matter.

B. Venue lies in Broward County, Florida.

C. Notice of hearing was timely given to the proper parties.

D. The claimant's accident of August 21, 2014 was initially accepted as compensable by the employer/carrier, and the claimant's head, neck and back injuries were also accepted. However, the employer/carrier contends that the claimant's claim is barred by the expiration of the applicable statute of limitations.

E. Pursuant to my Order entered on January 4, 2018, this cause was bifurcated. Only the issues of the continuing compensability of the claimant's accident, the employer/carrier's statute of limitations defense, and the claimant's estoppel or avoidance to the employer/carrier's defense were tried at this Final Hearing. Jurisdiction was reserved as to all other pending issues in the event the claimant prevails on these issues.

F. Pursuant to their Pretrial Stipulation, the parties stipulated that the employer/carrier has established a prima facie case that the statute of limitations has run; i.e., more than 2 years have elapsed since the date of the accident and more than one year went by from the last provision of a workers' compensation benefit without a workers' compensation claim being filed. The parties also agreed that the employer/carrier advised the claimant of the statute of limitations at the onset of the case. The only issue is whether the employer/carrier failed to raise the statute of limitations in its initial response to the claimant's August 31, 2017 petition as required by section 440.19(4), Fla. Stat., and is thereby estopped from raising a statute of limitations defense.

G. Claim was made for:

1. A determination that the claimant's accident of August 21, 2014 is not barred by the statute of limitations.

2. Also claimed were attorney's fees and costs.

3. As indicated, the claimant also raised an estoppel or avoidance to the employer/carrier's defense that the expiration of the statute of limitations bars this claim.[1]

[1] I reject the employer/carrier's argument, as raised in its Trial Memorandum, that the claimant waived his avoidance defense of estoppel by not listing same on the parties' February 6, 2018 Pretrial Stipulation. First of all, per my Order on the employer/carrier's Motion for Clarification entered on January 4, 2018, I specified that the issues to be tried at this bifurcated Final Hearing were the merits of the employer/carrier's defensive position or assertion that the statute of limitations bars this claim, and the claimant's position that the employer/carrier should be estopped from raising that defense. Secondly, the claimant recited this exact language in the Pretrial Stipulation.

H. The employer/carrier asserted as defenses that:

1. The statute of limitations has run on the claim so all benefits are denied.

2. The employer/carrier also raised a general denial to the claim for attorney's fees and costs.

After careful consideration and review of the testimony, documentary evidence and argument presented, the following are my findings of ultimate facts and conclusions of law:

***FINDINGS OF ULTIMATE FACTS***

1. This claimant is a police officer employed by the employer herein, the City of Hollywood Police Department. On August 21, 2014, the claimant sustained a compensable workers' compensation accident when he was involved in a motor vehicle accident. As the result of the accident, the claimant injured his head, neck and back.

2. The facts herein are essentially undisputed. On August 30, 2017, claimant's counsel faxed a letter to Barbara Dawson, the claims representative for the insurance carrier herein. The letter requested authorization of a replacement neurologist, Dr. Ross, for ongoing treatment due to the death of Dr. Ballweg. The letter also sought authorization of an orthopedic, Dr. Fishman, in accordance with the one-time change provisions of section 440.13(2)(f), Fla. Stat. The letter indicated it was being sent pursuant to section 440.192(4), Fla. Stat., as the claimant's good faith effort to resolve those issues.

3. On August 31, 2017, the claimant filed his petition for benefits claiming these benefits as well as attorney's fees and costs thereon.

4. The evidence further reveals that on September 1, 2017, counsel for the employer/carrier sent an email to claimant's counsel stating the following:

> Hey Mark, my client authorizes Dr. Christopher Brown as the claimant's alternate orthopedist in light of your one time change request in the attached. FYI, Christina Rodriguez is the new adjuster handling this claim. She will provide the claimant with an appointment to see Dr. Brown shortly.

There is no dispute and the evidence reveals that the document referred to as "attached" in the September 1, 2017 email was claimant's counsel's August 30, 2017 good faith letter.

5. On September 6, 2017, the carrier filed a Response to Petition for Benefits indicating that all requested benefits in the claimant's August 31, 2017 petition for benefits were denied on the basis that the statute of limitations ran on the claim.

***CONCLUSIONS OF LAW***

6. Case law instructs us that the statute of limitations is a substantive right, which is determined by the law in effect the year the claimant was injured. Batista vs. Publix Supermarkets, Inc., 993 So. 2d 570 (Fla. 1st DCA 2008). Sections 440.19(1) and (2), Fla. Stat., in effect for this claimant's August 21, 2014 accident, provide that all petitions for benefits shall be barred unless the petition is filed within two (2) years after the date on which the employee knew or should have known that the injury arose out of work performed in the course and scope of employment and that the payment of indemnity or furnishing of remedial treatment tolls the limitations period for one (1) year from the date of such payment.

7. Section 440.19(4), Fla. Stat., further provides that:

> 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.

8. It is undisputed that here, the claimant's August 31, 2017 petition for benefits was filed more than 2 years after the date of accident and more than one year from the date of the

employer/carrier's last payment of compensation or furnishing of medical treatment. However, the claimant contends that the employer/carrier has waived or is estopped from asserting the statute of limitations defense because it failed to advance the defense in its initial response to the petition for benefits, in contravention to section 440.19(4), Fla. Stat. According to the claimant, the employer/carrier's "initial response" to the petition was the September 1, 2017 email from counsel for the employer/carrier authorizing Dr. Brown as the claimant's one-time change of physician.

9. In Miami-Dade County School Board vs. Russ, 88 So. 3d 1038 (Fla. 1st DCA 2012), the JCC therein found that a notice of appearance, request for production, letter of representation, notice of deposition and letter to the mediator constituted the employer/carrier's initial response to the claimant's petition for benefits. The JCC concluded that, since the employer/carrier did not assert a statute of limitations defense in those documents, the employer/carrier had waived that defense.

10. In reversing the JCC, our Appellate Court in Russ held that, because the documents in question did not deny the claim in its entirety or explicitly state a position either denying or conceding the particular claims in the petition, the documents did not constitute the employer/carrier's initial response to the petition for benefits. The First DCA held its interpretation fit with the requirement in section 440.192(8), Fla. Stat., that in a response to a petition, the carrier must list all benefits requested but not paid and explain its justification for nonpayment. The First DCA noted, however, that the statutory requirement did not appear to have been intended as a definition. *See also* Certain vs. Big Johnson Concrete Pumping, Inc., 34 So. 3d 149 (Fla. 1st DCA 2010).

11. I find that here, the September 1, 2017 email from counsel for the employer/carrier to claimant's counsel authorizing orthopedic surgeon Dr. Brown as the claimant's one-time change in physician did not deny or concede all of the claims in the petition but only addressed the request for the one-time change. The email did not state a position with respect to the claims for authorization of a replacement neurologist, attorney's fees or costs. I further find that the September 1, 2017 email was not in response to the claimant's August 31, 2017 petition but rather was a response to the claimant's August 30, 2017 good faith letter.

12. As such, I find that the September 1, 2017 email does not constitute the employer/carrier's initial response to the petition for benefits. Instead, I find the carrier's Response to Petition for Benefits, filed on September 6, 2017 was its initial response to the petition. In that response, the carrier advanced the statute of limitations defense. Consequently, I find that the employer/carrier has not waived and is not estopped or precluded from asserting a statute of limitations defense.

13. The claimant also argues that, by agreeing to authorize the one-time change in treating physician, the employer/carrier furnished or was "contractually obligated" to furnish the medical care specified. According to the claimant, his claim was thereby revived. I disagree. Under the case law, medical services are furnished when they are received by the claimant. ABC Liquors, Inc. vs. Creed, 573 So. 2d 35 (Fla. 1st DCA 1990). However, where there is a question as to the employer/carrier's acceptance of responsibility for a particular service, medical care may be deemed to be furnished when the employer/carrier accepts responsibility for same, such as by payment of the medical bill. ABC Liquors, Inc. vs. Creed, 573 So. 2d at 36. *See also* Commercial Roof Decks vs. Flippo, 616 So. 2d 138 (Fla. 1st DCA 1993), Arboleda vs. Premier Beverage Co., 739 So. 2d 655 (Fla. 1st DCA 1999).

14. I find the facts herein to be similar to those in Eagle Point Mobile Home Estates vs. Smith, 475 So. 2d 992 (Fla. 1st DCA 1985). In that case, the carrier initially indicated it would authorize medical care. However, before such care was furnished, the carrier denied the claim on the basis of the expiration of the statute of limitations. The First DCA held that, since there was no subsequent voluntary furnishing of remedial medical care by the employer/carrier, the issue of "revival" did not arise, and the claimant's claim was barred by the statute of limitations. Eagle Point Mobile Home Estates vs. Smith, 475 So. 2d at 994.

15. I find that the claimant's petition for benefits, filed on August 31, 2017, is untimely and is barred by the expiration of the statute of limitations. Consequently, the claimant's claims shall be, and the same are hereby, denied and dismissed.

DONE AND ORDERED at Lauderdale Lakes, Broward County, Florida this 6th day of April, 2018.

Honorable Daniel A. Lewis
Judge of Compensation Claims

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true copy of the foregoing Final Compensation Order was furnished this 6th day of April, 2018 by electronic transmission to the parties' counsel of record and by U.S. mail to the parties

Secretary to Judge of Compensation Claims