STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGE OF COMPENSATION CLAIMS

LAZARO PEDREZ-MARTINEZ
Employee

Ms. Grethel San Miguel-Callejas, Attorney

YRC, INC.
Employer

Mr. Scott B. Miller, Attorney

OJCC CASE NO.: 11-023737HHH

GALLAGHER BASSETT SERVICES - NASHVILLE
Carrier

D/A: 4/20/2006

Judge: **HENRY H. HARNAGE**

FINAL COMPENSATION ORDER

This cause came before me on September 28, 2012, for a Final Merits Hearing. This Final Compensation Order is in substantial conformance with my summary ruling, in the Employer/Carrier's favor, on their statute of limitations defense, as contained in my October 1, 2012 letter ruling.

ISSUES AND DEFENSES

The Claimant sought a variety of indemnity benefits from April 20, 2006 to present. As well, the October 13, 2011 Petition for Benefits requested correction of the average weekly wage [AWW]/compensation rate, authorization of a follow-up evaluation with the prior authorized orthopedist (Dr. Donshik), and penalties, interest, costs and attorney's fees.

The Employer/Carrier maintained that the Petition for Benefits, including any further medical treatment, is barred by the statute of limitations. Regardless, the

defense stated that the AWW was correctly calculated, all appropriate temporary total/temporary partial indemnity was paid timely (the Claimant being at maximum medical improvement [MMI] as of October 4, 2006), and, no penalties, interest, costs or attorney's fees are due.

EVIDENCE

At the final hearing I heard testimony from the Claimant, Mr. Lazaro Pedrez-Martinez, and two Employer representatives, Mr. James Worsdale and Mr. James Redington. By stipulation of the parties, I received additional telephone testimony from the adjuster, Ms. Susan Athanasopoulos.

The documentary evidence is set forth in the **ATTACHMENT** to this Final Order.

FINDINGS

Background - and Care Provided

1. On April 20, 2006, the Claimant sustained a compensable accident to his low back.

2. Mr. Pedrez-Martinez testified that at the time of his accident he resided at 20431 S.W. 187th Avenue, Miami, Florida, and he remained at that address during these last six years. The Claimant also confirmed that as of the date of the accident, his mother, Ms. Elena Perez, also lived at that address.

3. The Claimant admitted in deposition, and at trial before me, that he received a certified letter from the adjuster shortly after the 2006 accident, which packet included the State of Florida Informational Brochure on Workers' Compensation. He also affirmed that his mother, Ms. Elena Perez, signed the certified mail receipt, or "green card." The Claimant admitted to reading some of the information which was sent to him in that packet.

4. The adjuster, Ms. Susan Athanasopoulos, testified in deposition that the State's Informational Brochure was sent to the Claimant by certified mail on April 25, 2006. She also confirmed that the return receipt was signed by Elena Pedrez on April 26, 2006. Thereafter the 120-day letter as required by Statute was sent to the Claimant at the same address on May 4, 2006. All indemnity checks were sent to the same address, and none were returned as non-deliverable.

5. The Claimant received initial care with a primary care physician office, the Concentra Medical Center. He was later referred to an orthopedic specialist, Dr. Don Donshik. Dr. Donshik provided authorized medical treatment for the Claimant's injuries for the next six months up until the last visit of October 4, 2006. The Claimant was then placed at maximum medical improvement and assigned a three percent (3%) impairment rating.

6. The adjuster related that she received notification from Dr. Donshik of the MMI date on October 5, 2006, and thereafter on October 11, 2006 initiated the

impairment benefits pursuant to the three percent (3%) impairment rating. On October 12, 2006, she mailed a Notice of Action Change letter to the Claimant regarding the indemnity status change, maximum medical improvement, and his entitlement to impairment benefits.

7. Ms. Athanasopoulos also testified that the last indemnity payment was made to the Claimant on November 13, 2006. The last payment for medical treatment was made on July 6, 2007, for a date of service occurring in August, 2006. The last authorized office visit to Dr. Donshik was on October 4, 2006.

The Timeliness of the 2011 Petition for Benefits

8. The Claimant testified in deposition, and at the Final Hearing, that he would periodically wear a back brace, which was provided to him by the Concentra Medical Center. He testified that he wore this brace "off and on", and he acknowledged that it really did not help his condition. The Claimant also admitted that this back brace was worn underneath his shirt and, significantly, that he was unaware of the Employer having any knowledge that he wore such a brace.

9. The credible testimony before me from the two Employer representatives, Mr. Jim Worsdale and Jim Redington, confirmed that the Claimant was able to return to work, full-duty, sometime in late-September or early-October, 2006. The Claimant continued to work in that same capacity up until a layoff, which occurred in May, 2009. The Claimant then returned to this employer in March, 2011, and worked

continuously until his last day of work, on or about July 20, 2011. At no time, I find, did either Mr. Redington or Mr. Worsdale ever become aware that the Claimant wore a back brace underneath his shirt at work.

10. I note that the Employer/Carrier timely raised the statute of limitations defense in their initial responsive pleadings. I also find that the Employer/Carrier provided unrefuted evidence that they have complied with Section 440.185, Fla. Stat., and have therefore met their initial burden as to the statute of limitations defense. The Claimant acknowledged to receiving the package by certified mail which explained his rights and obligations under the Statute. The Claimant also admitted to reading at least portions of that packet of information.[1]

In light of such evidence, I reject the Claimant's assertion that the Employer/Carrier have failed to comply with Section 440.185(4), Florida Statutes, since the informational brochure was mailed to the Claimant (even though four days after notice of the accident as opposed to the three days required by the Statute). The Claimant's argument in this regard would otherwise elevate form over substance, and I find that the Employer/Carrier has fully complied with the spirit of the law and adequately informed the Claimant of his rights under the Florida Workers' Compensation Law.

11. Finding that the Employer/Carrier provided timely and appropriate notice, I also find that Section 440.19(4) requires the Claimant to demonstrate estoppel by clear

1 The Claimant returned mileage reimbursement forms which had been included in the May 25, 2006 packet.

and convincing evidence. The Claimant relies on the case of *Crutcher v. School Board of Broward County and Gallagher Bassett, Inc.*, 834 So. 2d 228 (Fla. 1st DCA 2002), and argues that the Claimant's burden of proof is by preponderance of the evidence unless the Employer/Carrier has strictly complied with Section 440.185 and 440.055, Florida Statutes. However, I find that this was not the paramount holding in *Crutcher*. In that case, there was no dispute that the employer/carrier failed to comply with Section 440.185(4), distinguishing those facts. Moreover, the Court held in *Crutcher* that the focus should not be exclusively on whether the employer/carrier strictly complied with the letter of the law, but instead, the focus should include the extent of the claimant's generic knowledge of the statute of limitations and whether the defense hindered the Claimant's understanding of the time constraints. Specifically, the Court explained:

> Under that view, no matter what the claimant may have known about her rights, the E/C can never raise a statute of limitations defense if it has failed to comply strictly with the provisions of either Section 440.185 or 440.055. **We disagree.**

Crutcher, 834 So. 2d at p. 228.

12. The evidence presented by this Claimant is woefully lacking and certainly fails to provide clear and convincing evidence to estop the Employer/Carrier's statute of limitations' defense. With regard to the intermittent use of the prosthetic device, I rely upon the decision of *Gore v. Lee County School Board*, 42 So. 3d 846 (Fla. 1st DCA 2010), which requires that a prosthetic device must be used continuously

and the employer/carrier must have actual knowledge of the use of this device. *Id.* at p. 848. *See also, Lee v. City of Jacksonville,* 616 So. 2d 37 (Fla. 1993).

13. I also reject the Claimant's argument that the Employer/Carrier should be estopped from raising the statute of limitations defense based upon the analysis within *Gauthier v. Florida International University*, 38 So. 3d 221 (Fla. 1st DCA 2010). In *Gauthier,* the claimant suffered a severe eye injury which necessitated surgery and resulted in a significant loss of vision. The facts there revealed that the employer/carrier failed to obtain *any* information from the treating physician as to MMI or an impairment rating, as required by statute. Therefore, no impairment benefits were paid, which consequently resulted in the passage of time without benefits, thereby allowing the statute of limitations defense to be raised. By so doing, the employer/carrier "avoided payment of permanent impairment benefits which, if paid, would have tolled the statute of limitations." *Id.* at p. 223.

14. The facts here are distinguishable from the facts in the *Gauthier* decision. This Employer/Carrier properly identified the maximum medical improvement and the impairment rating, and timely provided the impairment benefits pursuant to Dr. Donshik's three percent (3%) impairment rating. Moreover, there is no evidence to suggest that the Claimant relied to his detriment on any actions of the Employer/Carrier which resulted in the expiration of the statute of limitations.

15. Indeed, the Claimant's own testimony before me confirms the very purpose of the statute of limitations. On at least three occasions, the Claimant equivocated in his responses to fact questions because it was, "quite a while ago." Such dilemma is the very reason why the statute of limitations exists – in order to avoid the litigation of claims where the evidence has become stale over time.

Consequently, the claims for medical treatment and indemnity, which were filed approximately five years after the last provision of benefits, are to be denied.

The Average Weekly Wage Issue

16. There is a slight conflict in the evidence concerning the AWW. According to the adjuster, Ms. Athanasopoulos, the AWW of $810.**70** was used to calculate temporary partial disability benefits and impairment benefits. Yet, according to the employer's payroll records representative, Mr. Rocky Wilson, the AWW should be $810.**80**. In her deposition testimony, Ms. Athanasopoulos admitted that the gross wages were $10,540.46, which does produce an AWW of $810.80.

17. The Adjuster testified that she provided temporary partial disability benefits to the Claimant from April 21, 2006 through September 6, 2006. These benefits were paid pursuant to a formula contained in a union contract, and such formula is attached to the deposition of Ms. Athanasopoulos (as Employer/Carrier's Exhibit No. 1). In her telephonic testimony at trial, Ms. Athanasopoulos explained how the contractual formula calculates the hourly rate for modified duty and the hourly rate at which she

provided temporary partial disability benefits. According to her testimony, the temporary partial disability payments and modified duty rate were calculated utilizing the AWW of $810.70 per week. Notwithstanding, the proffered underpayment is *de minimis* and does not trump, five years later, the statutorily-imposed time requirement for when claims must be filed.

18. Finally, there was a considerable amount of testimony about the underpayment or overpayment of temporary partial disability benefits pursuant to the union contract which governs such calculations. In light of my ruling above concerning the expiration of the statute of limitations, there is no need to address the assertions apart from the AWW of either an underpayment, or an overpayment, of benefits.

CONCLUSIONS

19. The Employer/Carrier have met their burden of proving that the statute of limitations has expired, based upon the totality of the direct, and circumstantial, evidence presented.

20. The Claimant has presented insufficient evidence to prove that the Employer/Carrier should be prohibited from raising the statute of limitations defense.

WHEREFORE IT IS **ORDERED** AND **ADJUDGED** that:

A. The statute of limitations has expired for the April 20, 2006 date of accident;

B. All claims for medical and indemnity benefits are **denied**, with prejudice;

C. The Claimant's claims for penalties, interest, costs, or attorney's fees are also **denied**, with prejudice; and

D. The Employer/Carrier, as the prevailing party, is entitled to costs pursuant to Section 440.34(3), Florida Statutes.

ORDERED in chambers at Miami, Miami-Dade County, Florida, this 16th day of October, 2012.

Henry H. Harnage
Judge of Compensation Claims

ATTACHMENT

The documentary evidence received includes the following:

JCC #1: Pretrial Stipulation executed on April 4, 2012;

Joint #1: Deposition of Adjuster, Susan Athanasopoulos, dated January 17, 2012;

Joint #2: Deposition of Payroll Representative, Rocky Wilson, dated August 16, 2012;

Joint #3: Petition for Benefits dated October 13, 2011;

Employer/Carrier #A: Deposition of Dr. Jon Donshik, dated June 26, 2012; and

Employer/Carrier #B: Deposition of Mr. Lazaro Pedrez-Martinez, dated January 17, 2012

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that the foregoing Order was entered and a true and correct copy was E-served to the attorneys of record and mailed to the parties on this 16th day of October, 2012.

Assistant to Judge of Compensation Claims

Mr. Lazaro A. Pedrez-Martinez
20431 S.W. 187th Avenue
Miami, Florida 33187

Yellow Roadway Corporation (YRC)
11301 N.W. 134 Street
Miami, Florida 33178

Johns Eastern Company, Inc.
P.O. Box 292109
Nashville, Tennessee 37229

Ms. Grethel San Miguel-Callejas, Attorney
Fornaris and Associates, P.A.
65 Almeria
Coral Gables, Florida 33134
fornaris@fornaris.com

Mr. Scott B. Miller, Attorney
Hurley, Rogner, Miller, Cox, Waranch & Westcott, P.A.
1560 Orange Avenue, Suite 500
Winter Park, Florida 32789
smiller@hrmcw.com,smclaughlin@hrmcw.com