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

EMPLOYEE:
Charles (Charlie) Freeman
2950 NW 26th Street
Fort Lauderdale, FL 33311

ATTORNEY FOR EMPLOYEE:
Neal Falk, Esquire
100 S.E. 3rd Avenue, Seventh Floor
Fort Lauderdale, FL 33394

EMPLOYER:
The Home Depot
2455 Paces Ferry Rd. NW
Atlanta, GA 30339

ATTORNEY FOR EMPLOYER/CARRIER:
David C. Halpern, Esquire
2875 NE 191st Street, Suite 802
Aventura, FL 33180

CARRIER:
Liberty Mutual Insurance Group
P.O. Box 31204
Tampa, FL 33631

OJCC No: 10-016028DAL
D/A: 09/17/2004
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 August 30, 2011 in Lauderdale Lakes, Broward County, Florida. The petition for benefits which came on for adjudication was filed on August 4, 2010. 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 afforded to the proper parties.

D. The claimant's accident of September 17, 2004 was initially accepted by the employer/carrier as a compensable occurrence, and the claimant's left thumb injury was also

accepted. However, the employer/carrier contends that claimant's claim is barred by expiration of the applicable statute of limitations.

E. At this Final Hearing, the parties stipulated the date of the claimant's attainment of maximum medical improvement (MMI) and residual permanent physical impairment were, respectively, January 28, 2005 and 4%, as per orthopedic surgeon Dr. Blum.

F. Claim was made for:

1. Authorization of a follow up visit with a hand specialist for the claimant's left thumb.

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

G. The employer/carrier asserted as defenses that:

1. The statute of limitations has run.

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

H. At this Final Hearing, the parties stipulated that if I found the statute of limitations did not bar this claim, the employer/carrier would provide the claimed follow up evaluation. Consequently, the only issue before me is whether the instant claim is barred by expiration of the statute of limitations.

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:

1. This claimant sustained his compensable workers' compensation accident on September 17, 2004. At that time, claimant was lifting and carrying plywood for the employer herein, Home Depot, when he injured his left thumb. Claimant testified he is right hand dominant.

2. Claimant testified that after the accident, he could not bend the thumb. Claimant came under the care of orthopedic surgeon Dr. Blum, who was authorized by the employer/carrier to treat. Dr. Blum performed surgery to the claimant's left wrist and thumb. Claimant testified the surgery was to the ligaments in his left thumb and wrist.

3. Claimant testified he continues to experience pain off and on in the left thumb. He testified that at times, the thumb tightens up. Claimant testified he wants to return to a doctor for a follow up evaluation. The claimant has not seen a doctor for this injury since 2005. As indicated, the parties stipulated the claimant attained his MMI as of January 28, 2005 with a residual 4% permanent impairment, as per Dr. Blum. Claimant also testified he is still employed at the Home Depot.

4. The employer/carrier contends the claimant's petition for benefits filed on August 4, 2010 is barred by the expiration of the applicable statute of limitations, specifically, sections 440.19(1) and (2), Fla. Stat. Those subsections provide that all petitions for benefits shall be 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 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 1 year from the date of such payment. The evidence reflects claimant's accident occurred on September 17, 2004, and the claimant has not received medical care for this injury since 2005. Although the claimant objected to the testimony of Heather Powers, the adjuster for Sedgwick Claims Management Services (Sedgwick) on the basis of hearsay, the testimony of Timothy Martin, the adjuster for Liberty Mutual Insurance Group (Liberty), reveals

no indemnity benefits have been paid since at least February, 2009 when Liberty assumed the handling of this claims file, and claimant's petition for benefits was filed on August 4, 2010.[1]

5. Claimant contends he was never advised of the limitations period under section 440.19, Fla. Stat., and that the employer/carrier should therefore be estopped from raising the statute of limitations defense, in accordance with section 440.19(4), Fla. Stat. Case law instructs us that, once the employer/carrier asserts a statute of limitations defense, the claimant has the burden of proving the employer/carrier should be estopped from raising the defense. Crutcher vs. School Board of Broward County, 834 So. 2d 228 (Fla. 1st DCA 2002). Under the case law, it is not enough for a claimant to establish only that the employer/carrier failed to comply strictly with either section 440.185 or 440.055, Fla. Stat., to estop the employer/carrier's statute of limitations defense. Crutcher vs. School Board of Broward County, 834 So. 2d at 229, 230. Instead, the burden of proof is on the claimant to show that he lacked actual knowledge of any pertinent right under the workers' compensation law, substantive or procedural, and, if so, whether such ignorance accounted for his failure to obtain medical care within the limitations period or to timely file his petition for benefits. Section 440.19(4), Fla. Stat., Crutcher vs. School Board of Broward County, 834 So. 2d at 229, Fontanills vs. Hillsborough County School Board, 913 So. 2d 28 (Fla. 1st DCA 2005), Palmer vs. McKesson Corporation, 7 So. 3d 561 (Fla. 1st DCA 2009). The burden of proof on the claimant to show estoppel is by a preponderance of the evidence, unless the employer/carrier has complied with both sections 440.185 and 440.055, Fla. Stat., in which case the claimant has a higher burden of proof, that of clear and convincing evidence. Crutcher, 834 So. 2d at 230.

[1] Claimant's workers' compensation claim was previously handled and adjusted by Sedgwick Claims Management Services (Sedgwick). In February, 2009, Sedgwick transferred its claims files on Home Depot cases to Liberty Mutual Insurance Group (Liberty).

6. Here, claimant denied having received any documentation or information from the carrier, either Sedgwick Claims Management Services or Liberty Mutual Insurance Group, regarding his rights, benefits, or procedures for obtaining benefits under the Florida Workers' Compensation Law, as required by section 440.185(4). Specifically, claimant testified he was never provided notice as to the statute of limitations nor advised what might happen if he failed to timely obtain medical care or file a petition for benefits. Claimant further testified this lack of knowledge was the reason he did not obtain medical care or file his petition for benefits within the limitations period.

7. In response, the employer/carrier presented the deposition testimony of Heather Powers, claims assistant and medical only adjuster for Sedgwick. The claimant objected to the testimony of this witness on the basis of lack of personal knowledge and hearsay. Ms. Powers testified from Sedgwick's journal or computer file (log) notes, which were supplied to her by counsel for the employer/carrier, since Sedgwick was no longer in possession of this claimant's claims file. Ms. Powers admittedly did not have personal knowledge of what information was initially sent to the claimant and when, since she testified she was not the person responsible for performing that task. Under the business records exception to the hearsay rule, however, it is not necessary to present testimony from the person who actually observed the matter recorded or who made the entry, notation or record. Instead, a custodian or other qualified witness who has the necessary knowledge may lay the foundation for the admission of the record. Section 90.803(6), Florida Evidence Code, C. Ehrhardt, Florida Evidence, section 803.6 (2011 Edition).

8. I find, however, that Ms. Powers was not properly qualified as a business records custodian under section 90.803(6), Fla. Stat., and therefore her testimony as to what information may have been sent to the claimant and when is inadmissible hearsay. Records of regularly

conducted business activity are admissible under section 90.803(6) if it is shown that they were (1) made at or near the time of the event recorded, (2) by, or from information transmitted by, a person with knowledge, (3) kept in the course of a regularly conducted business activity and (4) it was the regular practice of that business to make such a record. Section 90.803(6), Fla. Stat., German vs. Ryta Food Corporation, 65 So. 3d 20 (Fla. 1st DCA 2011). Although the evidence presented here supports a conclusion that the first three elements were established, no testimony was adduced as to the fourth element; that is, that it was the regular practice of Sedgwick to make such a record. Consequently, the necessary foundation for the admission of this evidence was not laid. German vs. Ryta Food Corporation, 65 So. 3d at 20.[2]

9. Even were I to find Ms. Powers' testimony as to what information was sent to the claimant and when to be admissible, no copy of what was purportedly sent to the claimant was offered into evidence, so I cannot determine what information as to the limitations period was included therein. Ms. Powers testified that the claimant was sent a Florida workers' compensation "information packet" on September 21, 2004 by the claims assistant at that time, which Ms. Powers testified included information as to the statute of limitations. However, under the statute and the case law, claimant must be mailed "an informational brochure setting forth in clear and understandable language an explanation of his or her rights, benefits, procedures for obtaining benefits and assistance... under the Florida Workers' Compensation Law." Section 440.185(4), Fla. Stat., Fontanills vs. Hillsborough County School Board, 913 So. 2d at 30, Hanson vs. Florida Hospital, 946 So. 2d 601 (Fla. 1st DCA 2006). Since I cannot determine whether such an informational brochure was mailed to the claimant or even what information as

[2] It should be noted that the testimony of Timothy Martin, the claims adjuster for Liberty, could not establish the predicate or foundation for the admissibility of Sedgwick's records. A records custodian of a second business, even if it has possession of the records of the first business, would not have personal knowledge of how the first business kept its records and therefore could not establish the foundational requirements. C. Ehrhardt, Florida Evidence, section 803.6 (2011 Edition).

to the claimant's rights and benefits was contained in what purportedly was sent, I find the employer/carrier failed to comply with the requirements of section 440.185, Fla. Stat.

10. Based on the evidence presented, I find the claimant has established he was unaware of the statutory requirements, including the requirement that he must file his petition for benefits within one year from the last date he was furnished remedial treatment, and that the lack of such knowledge was the cause of his failure to obtain medical care or file his petition for benefits within the limitations period. Fontanills vs. Hillsborough County School Board, 913 So. 2d at 31. I accept the claimant's testimony in this regard. I find the employer/carrier is estopped from asserting the statute of limitations defense and that the claimant's petition for benefits filed on August 4, 2010 is not barred by the expiration of the statute of limitations. Pursuant to the parties' stipulation, the employer/carrier shall provide the requested follow up evaluation with a hand specialist for the claimant's left thumb.

11. Jurisdiction shall be retained and reserved over the claimant's entitlement to recover his reasonable attorney's fees and taxable costs from the employer/carrier, pursuant to section 440.34, Fla. Stat. Jurisdiction shall also be reserved over the amount of such fees and costs due.

DONE AND ORDERED at Lauderdale Lakes, Broward County, Florida this 31st day of August, 2011.

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 31ST day of August, 2011 by electronic transmission to the parties' counsel of record and by U.S. mail to the parties.

Sylvia Kamblin
Secretary to Judge of Compensation Claims