

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JOSHUA BRANHAM,

Appellant,

v.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

CASE NO. 1D07-4071

TMG STAFFING SERVICES,

Appellee.

Opinion filed June 18, 2008.

An appeal from the Judge of Compensation Claims.
William H. Dane, Judge.

Bill McCabe of Shepherd, McCabe & Cooley, Longwood; Carl Carrillo, Gainesville,
for Appellant.

Wilbur W. Anderson of Eraclides, Johns, Hall, Gelman, Johannessen & Kempner,
LLP, Jacksonville, for Appellees.

THOMAS, J.

Appellant (Claimant) appeals a final order of the Judge of Compensation Claims (JCC) denying his petition for benefits based on the statute of limitations. Claimant concedes that the applicable statute of limitations has expired, but argues that Appellee (Employer) failed to notify him of the applicable statute and is therefore

estopped from denying benefits, and also that the JCC erred by dismissing his petition without determining whether he would have qualified for benefits while incarcerated.

We find that Claimant failed to preserve his second argument, as he did not raise it below. See Perez v. Winn-Dixie, 639 So. 2d 109, 112 (Fla. 1st DCA 1994) (stating that as a general rule, failure to argue a point below will preclude review of that particular point on appeal). Regarding Claimant's first argument, we find that the JCC applied the incorrect legal standard in evaluating the evidence showing that he did not receive notice of the statute of limitations; therefore, we reverse and remand.

Facts and Procedural History

Claimant suffered a work-related injury on January 19, 2002, which Employer accepted as compensable and provided medical treatment and indemnity benefits. Employer provided Claimant's last medical benefit in March 2004.

Claimant filed a petition for benefits on January 3, 2006, seeking medical treatment. At the merits hearing, Employer's adjustor testified that a benefits package was mailed to Claimant on January 22, 2002, which contained forms for Claimant to complete and return along with a document explaining his rights and responsibilities under worker's compensation law, including the applicable statute of limitations. This document was not required to be returned. The adjustor admitted that it mailed the package to Claimant at an incorrect address, listing his city of residence as "Graham,

Florida,” rather than “Starke, Florida.” Claimant’s address was corrected in the computer system, but the initial package was not mailed to Claimant again. The adjustor testified that the forms sent in the initial package which required Claimant’s completion were returned to Employer in April 2002.

Claimant testified that he did not remember receiving the initial package from Employer; he only recalled receiving indemnity checks. Claimant testified that, although he lived other places after his injury, including Starke, he always used his parents’ address in Graham to receive mail. Claimant testified that he did not remember either receiving or completing one form which was returned to Employer bearing his signature, and he was unsure about receiving or completing another form. He did remember receiving a mileage form that was sent with his indemnity check, which he completed. When shown one of the completed forms, Claimant testified that it was written in his mother’s handwriting, but contained his signature. He did not know how his mother received this form, but testified that he was on a lot of medication after his injury and did not remember what he received in the mail. When asked if it was possible that he received it, but just did not remember, Claimant testified, “I guess. I mean it’s sitting right here in front of me.” He testified that his mother signed another form and incorrectly listed his address on it.

Claimant's mother testified that she only saw the form she completed, not the form explaining Claimant's rights and responsibilities and the statute of limitations. She did not know that Claimant had to see his authorized doctor once a year in order to maintain his benefits. She admitted completing one form, but testified that she did not receive any forms mailed to her address and never retrieved mail from Claimant's house.

Claimant argued that Employer was estopped from denying benefits because it had not informed Claimant of the applicable statute of limitations, as it mailed the benefits packet to an incorrect address. Although documents were signed and returned to Employer, Claimant argued that no evidence was presented that these were the same documents that Employer mailed in its initial benefits packet. Employer argued that Claimant did not prove that it failed to notify him of the applicable statute.

In his final order, the JCC acknowledged that, had Claimant established by a preponderance of the evidence that Employer did not provide him with notice of his rights under workers' compensation law, Employer would be estopped from raising a statute of limitations defense. The JCC found, however, that Claimant did not present "competent, substantial evidence" that Employer failed to notify him of his rights because Claimant only said he could not recall receiving this information and acknowledged he had been taking a lot of medication. The JCC found that Employer

mailed Claimant's benefits packet to an incorrect address, but the packet was not returned by the postal service as undeliverable, and he further found that Claimant returned the forms contained in the packet within a reasonable time period. Thus, the JCC ruled that Claimant did receive notice of the applicable statute of limitations; therefore, it denied his petition as time-barred.

Analysis

Following a workplace injury, section 440.185(4), Florida Statutes (2002), requires an employer/carrier to mail a claimant an informational brochure explaining his or her rights, benefits, and the applicable procedures for obtaining those benefits. When the employer/carrier asserts a statute of limitations defense and the claimant asserts that the employer/carrier is estopped from asserting such a defense, as here, the claimant has the burden to prove by a preponderance of the evidence that he or she did not receive proper notice of such rights. See § 440.19(4), Fla. Stat. (2002); Crutcher v. Sch. Bd. of Broward County, 834 So. 2d 228, 229 (Fla. 1st DCA 2002). If a claimant meets this burden of proof by a preponderance of the evidence, the burden then shifts to the employer/carrier to show that the claimant did receive actual notice of the requisite time limits. Fontanills v. Hillsborough County Sch. Bd., 913 So. 2d 28, 30 (Fla. 1st DCA 2005).

Here, the JCC found that Claimant presented no competent, substantial evidence that he did not receive notice of the applicable statute of limitations. After our review of the record, we find that not only is the JCC's determination incorrect based on Claimant's evidence, but also that the JCC applied an improper legal standard when ruling on Claimant's estoppel argument.

The JCC did not determine whether Claimant showed by a preponderance of the evidence that he did not receive information regarding the statute of limitations. Although the JCC accepted as fact Claimant's undisputed evidence that Employer mailed its benefits packet to the wrong address, he concluded that Claimant "failed to present competent, substantial evidence to support his position[.]" This was error.

Accordingly, we remand for the JCC to apply the correct legal standard, determining whether Claimant demonstrates by a preponderance of evidence that he did not receive Employer's benefits packet, including notice of the applicable statute of limitations, in light of Employer's conflicting evidence regarding the signed documents. Should the JCC find that Claimant has proven by a preponderance of the evidence that Employer failed to mail the required information to him, the burden of persuasion then shifts to Employer to prove that Claimant had actual notice, from any source, of his obligation to comply with the statute. See Fontanills, 913 So. 2d at 30; see also Waffle House v. Scharmen, 33 Fla. L. Weekly D1347 (Fla. 1st DCA May 21,

2008) (explaining that an attorney's communication to his client regarding the applicable statute of limitations was mere statutory language and not confidential attorney-client communication; therefore, it was subject to discovery).

REVERSED and REMANDED.

BROWNING, C.J., and KAHN, J., CONCUR.