

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

JOSHUA BRANHAM,

Appellant,

v.

CASE NO. 1D07-4071

TMG STAFFING SERVICES,

Appellee.

Opinion filed October 22, 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.

OPINION ON MOTION FOR REHEARING AND
MOTION FOR CLARIFICATION

THOMAS, J.

This cause is before us on Appellee's motion for rehearing and/or clarification.
We grant Appellee's motion and, accordingly, withdraw our previously published
opinion dated June 18, 2008, and substitute the following opinion in its place.

We affirm the ruling of the Judge of Compensation Claims (JCC) finding that Appellant failed to prove that he did not receive notice of the applicable statute of limitations. Even if the JCC applied the incorrect standard in evaluating the evidence, we agree with Appellee that if such error occurred, it was harmless. Because the JCC found that Appellant failed to demonstrate by competent and substantial evidence that he did not receive notice, it logically follows that Appellant cannot demonstrate such lack of notice by a preponderance of the evidence. The competent, substantial evidence standard is a lesser standard than the preponderance of the evidence standard. See Schafrath v. Marco Bay Resort, Ltd., 608 So. 2d 97, 102-03 (Fla. 1st DCA 1992); Am. Ins. Ass'n v. Dep't of Ins., 518 So. 2d 1342, 1346 (Fla. 1st DCA 1987) (“The competent substantial evidence test may be met and that evidence still may wholly fail to constitute a preponderance of the evidence.”).

AFFIRMED. Our previous order dated June 18, 2008, granting attorneys' fees to Appellant is hereby VACATED.

KAHN, J., CONCURS; BROWNING, C.J., DISSENTS WITH SEPARATE OPINION.

BROWNING, C.J., dissents.

Because the majority fails to apply sections 440.185(4) and 440.19, Florida Statutes, as construed by this court, I dissent from the majority opinion. See Fontanills v. Hillsborough County Sch. Bd., 913 So. 2d 28 (Fla. 1st DCA 2005).

The majority grants rehearing and affirms because Claimant did not prove by competent, substantial evidence or a preponderance of the evidence that he did not receive notice of the information to which he was entitled; however, this is not Claimant's burden here. An E/C is required by sections 440.185 and 440.19 to mail the required informational brochure to a claimant within three days after the carrier is informed of an injury. Failure to do so requires the E/C, when claiming a statute of limitations defense, to prove that a claimant had actual knowledge of the time required for filing. See id. at 30.

The E/C admitted that it mailed the informational brochure to an incorrect address, was made aware of that mistake, but failed to mail the brochure to Claimant at his correct address. Upon this admission, the burden of proof shifted to E/C, requiring it to prove that Claimant otherwise had actual knowledge of the claim period. Claimant had no duty to prove he did not get notice by either competent, substantial evidence or by a preponderance of the evidence; as stated, sections 440.185 and 440.19 place the burden of proving actual notice on E/C for failure to

follow these provisions. The majority opinion effectively rejects Fontanills by requiring Claimant to prove what E/C was required to prove.

For these reasons, I take no part in failing to apply Fontanills and dissent.