STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
LAKELAND DISTRICT OFFICE

Yamileth Alvarez, Employee/Claimant,	)	OJCC Case No. 11-014660MES
vs.	)	Accident date: 1/4/2010
Thrive HR FL1, LLC/Sunz Insurance Co., Employer/ Carrier/Servicing Agent.	)	Judge: Margaret E. Sojourner

FINAL COMPENSATION ORDER

This matter was heard at a Final Hearing before the undersigned at Lakeland, Polk County, Florida on October 30, 2012. The issues arose from Petitions for Benefits (PFB) filed December 7, 2012 and May 30, 2012. Mediation was held on February 9, 2012. A Pretrial Stipulation was completed by the parties and filed on October 16, 2012. Present at the hearing were Yamileth Alvarez, Claimant, and her attorney, Bradley G. Smith. Also present at the hearing was attorney Gregory D. White on behalf of the Employer/Carrier (EC).

Issues:

1. Temporary total disability (TTD) from January 4, 2010 and continuing.
2. Temporary partial disability (TPD) from January 4, 2010 and continuing.
3. Authorization of medical care and treatment with an ophthalmologist for claimant's right eye.
4. Penalties, interest, costs and attorney fees.

Defenses:

1. Claimant did not give proper notice of the injury.
2. The statute of limitations has expired.
3. The alleged accident is not the major contributing cause of the claimant's condition or need for treatment.
4. The claim is not compensable.
5. The requested medical care is not medically necessary or causally related.
6. Claimant is not temporarily totally or temporarily partially disabled.
7. Claimant has no work restrictions.
8. Any loss of earnings is not causally related to the industrial accident.

9. The EC is entitled to an offset for unemployment if any indemnity benefits are due.
10. EC seeks costs if it is the prevailing party.
11. No penalties, interest, cost or attorney's fees are due.

At the hearing the following items were marked as exhibits:

Judge's Exhibits:

1. PFB filed December 7, 2011.
2. PFB filed May 30, 2012.
3. Response to PFB filed June 25, 2012.
4. Order dismissing On Site Services, LLC and USIS.
5. Pretrial Stipulation filed October 16, 2012.
6. Claimant's Trial Memorandum filed October 24, 2012, for purposes of argument only.
7. EC's Trial Memorandum filed October 25, 2012, for purposes of argument only.

Claimant's Exhibits:

1. PFB filed June 24, 2011.
2. Deposition of Dr. Raymond Barnes taken November 30, 2011 and filed October 25, 2012.

Employer/Carrier Exhibits:

1. Deposition of Yamileth Alvarez taken September 6, 2011 and filed October 25, 2012.
2. Deposition of the Records Custodian of the Florida Department of Economic Opportunity filed October 26, 2012.
3. Notice of Voluntary Dismissal filed June 24, 2011.

Findings of Fact and Conclusions of Law

In making my findings of fact and conclusions of law in this claim, I have carefully considered and weighed all of the testimony and evidence presented. I have resolved all of the conflicts in the testimony and documentary evidence. Based upon the foregoing, the evidence, and the applicable law, I make the following determinations:

1. I have jurisdiction over the parties and the subject matter of this claim.
2. Venue is in Polk County, Florida.
3. The stipulations of the parties are accepted and adopted by me as findings of fact.
4. On June 24, 2011 the first PFB was filed in this matter and listed as the employer Thrive HR FL1, LLC (Thrive) and as the carrier USIS. On November 7, 2011 a pretrial stipulation was filed in which the employer denied that there was an employer/employee relationship on the date of accident. The pretrial also noted that the correct carrier for the employer was Sunz

Insurance Co (Sunz). On December 7, 2011 a second PFB was filed which named the same employer and carrier as the first PFB. On the bottom of the December 2011 PFB under "Other Claims" it states that the Claimant is requesting that the records reflect a change in employer from Thrive to Florida Citrus Business Industry. Also on December 7, 2011 the claimant voluntarily dismissed the June 2011 PFB although reserving on attorney's fees and costs. On March 28, 2012 the claimant filed an Amended PFB listing as the Employer On Site Services, Inc. and as the Carrier Sunz Insurance Co. On April 18, 2012 an order was entered striking the Amended Petition as the attempted amendment did not comply with Rule 60Q-6.107(2). The dispute regarding the employer/employee relationship continued until August 17, 2012 when Thrive acknowledged that the claimant was an employee on the date of accident.

5. I find that the statute of limitations did not expire in this matter as to Thrive and Sunz. The argument made by the EC is that the December 2011 PFB was not filed as to them as it seeks a change of Employer in the "other claims" portion of the PFB. Changes to PFB's can be made as provided for in Rule 60Q-6.107(2). This rule clearly states that a PFB may only be amended by written stipulation of the parties or by an order of the JCC. There was no written stipulation by the parties agreeing to this change or order of the JCC approving this change. The claimant filed a timely PFB against Thrive which remained pending through the date of the hearing.
6. The claimant, a naturalized American citizen, was born in Costa Rica. She left school after completing the seventh grade. She speaks very limited English. She worked at Clear Springs in the warehouse in which fruit was packaged. She was getting down the little baskets that blueberries are packed and the box she was carrying fell and the corner of it hit her in the eye. She testified in her deposition[1] that she mentioned to her foreman several times that her eye was bothering her, but did not tell her foreman that it was a work injury until two months later when she realized something was wrong. She stated that up until that time she did not realize that the problem would be so serious. The employer did not provide medical care and she ultimately went to the doctor on her own. The EC has denied that benefits are due as the claimant failed to give timely notice and the EC argues, which argument is supported by the medical evidence, that immediate medical attention may have preserved some, if not all, of

[1] Claimant attempted to testify at trial but her English was extremely limited and no interpreter was present. Thus her only testimony is through her deposition.

the vision in the claimant's eye. This argument as to prejudice based upon lack of notice is somewhat surprising in that the EC consistently denied an employee/employer relationship and based upon that denial refused to provide care.

7. Section 440.185 provides that an employee shall give notice of an injury within 30 days after the date of or the initial manifestation of the injury. Failure to give timely notice acts as a bar to the filing of a petition for benefits. A petition is not barred if the claimant gives notice within 30 days after realizing the nature, seriousness and probable compensable nature of the injury. *Orange County Pub. Servs. v. Ottley*, 9 So.2d 638 (Fla. 1st DCA 2009). The *Ottley* court stated that for the phrase "initial manifestation" to have any effect, it must refer to cases where an incident occurs, but the injury is not manifested until later. The *Ottley* court recognized that this interpretation is consistent with the "reasonable person" doctrine set forth in *Escarra v. Winn Dixie Stores*, 131 So.2d 483 (Fla. 1961). *Escarra* involved a claimant who worked at Winn Dixie and was injured when a case of beer fell from a shelf and hit him on the nose. His nose bled and caused some pain but he was able to stop the bleeding. He did not report the incident to his employer. Some weeks later he consulted a physician about difficulty he was having with breathing and it was discovered that he had a deviated septum. He then reported the injury to his employer. The court held that the reporting was timely as the injury initially appeared to be slight and caused no immediate disability and thus a reasonable person would have no way of knowing that the injury would ultimately require medical treatment. In this matter Alvarez was hit in the eye by a box used for packing blueberries. She did not have any bleeding or other signs of trauma, although she did feel pain. She stated that around two months later it felt like there was something very strong in her eye. Dr. Barnes is an ophthalmologist who performed an IME for the claimant. He testified that claimant told him that over the course of several weeks her vision began deteriorating and becoming increasingly painful. Her eye began to water and it became light sensitive.
8. I find that the claimant did give timely notice of the injury to her eye. The facts of this matter are quite similar to those in *Escarra.* The initial accident did not cause any bleeding or other noticeable trauma. The claimant felt pain but did not believe the injury to be serious. She continued to work and did not miss any time due to the injury. It wasn't until she began to experience light sensitivity and the pain became worse that she realized the seriousness of the injury and that it would require medical care. The claimant notified the employer of the

injury within 30 days of the manifestation of the injury.

9. I find that the EC must provide medical care and treatment. The claimant was diagnosed with trauma with macular-off detachment. Dr. Barnes testified that due to the lack of treatment that it is unlikely that claimant will recover functional vision. Medical treatment is recommended in order to reduce Alvarez' discomfort and pain. Dr. Barnes testified that the major contributing cause of the injury and need for treatment was the compensable accident. No contrary evidence was offered by the EC.
10. I find that claimant is not due any temporary total or temporary partial disability. The claimant continued to work until the work for the season ended. She has worked at other jobs since that time and testified that the employer had called and offered her work. Dr. Barnes stated that he would not place any limitations or restrictions on her ability to work. He did note that there were some occupations which require binocular vision which she obviously could not do, but he did not have any specific restrictions to place on her ability to work. While Dr. Barnes noted that the claimant had undergone surgery for the detached retina prior to seeing him, no testimony or evidence was offered by the claimant to establish when this surgery occurred or what if any restrictions claimant had during the period of recovery. Without this evidence no temporary benefits can be awarded.
11. As the claimant has prevailed on the claim for medical benefits and compensability the EC shall pay an attorney's fee and costs.

Wherefore it is ordered and adjudged as follows:

1. The EC shall authorize an ophthalmologist to provide medical care and treatment to the claimant for the compensable right eye injury.
2. The claim for temporary total and temporary partial disability is denied.
3. The claim for penalties and interest is denied.
4. The EC shall pay an attorney's fee and costs on behalf of the claimant for the obtaining of these benefits.
5. Jurisdiction is reserved to determine the amount of attorney fees and costs if the parties are unable to resolve the same.

DONE AND MAILED this 2nd day of November, 2012, in Lakeland, Polk County, Florida.

Margaret E. Sojourner
Judge of Compensation Claims

Division of Administrative Hearings
Office of the Judges of Compensation Claims
Lakeland District Office
5015 South Florida Avenue, Suite 401
Lakeland, Florida 33813-3150
(863)648-3150
www.jcc.state.fl.us

Bradley G. Smith, Esquire
bsmith@sfsmlaw.com,jccmail@sfsmlaw.com

Gregory D. White, Esquire
GWhite@hrmcw.com,DDykes@hrmcw.com