STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF THE JUDGES OF COMPENSATION CLAIMS
FT. LAUDERDALE DISTRICT OFFICE

Deguerre Anestal,
Employee/Claimant,

vs.

List Industries, Inc./Amerisure Insurance,
Employer/Carrier/Servicing Agent.

OJCC Case No. 13-005212JJL

Accident date: 10/22/2012

Judge John J. Lazzara

FINAL ORDER

AFTER DUE NOTICE to the parties, a Final Hearing on October 2, 2013, simultaneously in Ft. Lauderdale, Broward County, Florida and in Tallahassee, Leon County, Florida, by way of the Division of Administrative Hearings' Video Teleconferencing System. The claimant, Deguerre Anestal, appeared for the Final Hearing along with his attorney of record, Kevin R. Gallagher, Esquire. The employer/carrier was represented by their attorney of record, Zal Linder, Esquire. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter.

The litigation history of this matter reflects that the pending Petition for Benefits (PFB) was filed on March 6, 2013. The matter was mediated on July 8, 2013, resulting in an impasse. The Uniform Statewide Pretrial Stipulation was filed on July 26, 2013, and the case was scheduled for final hearing and commenced on October 2, 2013. On July 16, 2013, counsel for the parties filed a Joint Motion to Bifurcate the Issue of Compensability. The motion was granted by Order of the undersigned judge entered on July 19, 2013. Thus the single issue for adjudication at trial was the compensability of the accident, which compensability issue hinged on whether or not the claimant provided the employer with timely notice of injury as required under §440.185(1), Fla. Stat.

The employer/carrier asserts that there was no timely notice of the injury provided as required by §440.185(1), Fla. Stat., and that there was no accident which occurred

within the course and scope of the claimant's employment with the employer.

The parties have entered into the following pretrial stipulations:

1. The Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim.

2. Venue properly lies in Broward County, Florida.

3. Notice of Hearing was properly furnished and received as required by the Workers' Compensation Law.

4. On October 22, 2012, the captioned claimant was employed by the captioned employer, and there was workers' compensation insurance coverage on the alleged date of accident.

At the trial of this cause, the following Exhibits were admitted into evidence.

Claimant's Exhibits

1. Petition for Benefits filed on 3/6/2013.

Employer/Carrier's Exhibits

1. Response to PFB, dated 3/28/2013.

2. Deposition of Michael Freedman, together with exhibits, taken 9/11/2013.

3. Deposition of John Lemanski, taken 9/11/2013.

Joint Exhibits

1. Deposition of Deguerre Anestal, taken 6/13/2013.

2. Pretrial Stipulation and Order approving entered 7/29/2013.

Although the claimant, Deguerre Anestal, was present at the Final Hearing he did not testify and no other witnesses testified live at trial.

After due consideration of this matter and after having the opportunity to review and consider the aforesaid exhibits which were admitted into evidence, and having endeavored to resolve all conflicts of facts in the evidence presented herein, I hereby make the following findings of fact and conclusions of law:

1. The undersigned Judge of Compensation Claims has jurisdiction of the parties and the subject matter of this claim;

2. The stipulations entered into by and between the parties herein are hereby approved and adopted as findings of fact and are incorporated herein by reference;

3. In my determination herein I have attempted to distill all the testimony and salient facts together with the findings and conclusions necessary to the resolution of this matter. I have not necessarily attempted to summarize the substance of the claimant's testimony or the testimony of any live or deposition witness, nor have I attempted to state nonessential facts. Because I have not done so should not be construed that I have failed to consider all of the evidence.

4. Any and all issues raised in the petition or petitions for benefits described above which were the subject matter of the final hearing, but which issues were not tried at the hearing are presumed resolved or, in the alternative, deemed abandoned by the employee/claimant and therefore **denied.** *See* Betancourt v. Sears Roebuck & Co., 693 So.2d 253 (Fla. 1st DCA 1997).

5. On October 22, 2012, the captioned claimant, Deguerre Anestal, who is 62 years of age, was employed by the captioned employer as a Press Machine Operator for a period of over 10 years sprinkled with periodic layoffs. The claimant by deposition testified that his job activities required him to slide metal material into a press machine and punch holes in the material by depressing on the machine's foot pedal. The machine pedal is comparable to the pedals used to operate a car and requires a minimum amount of pressure to operate. However, it appears that the task is of a repetitive nature. The claimant alleges that as result of his frequent use of the foot pedal he suffered repetitive trauma to his lower back and left knee resulting in medical treatment on or about October 22, 2012.

6. The claimant's deposition shows that in the month of September, 2012, he told his supervisor, John Lemanski, about back pain he was experiencing. However,

although asked, Mr. Anestal did not inform his supervisor that he believed the back pain he claimed he was experiencing was due to his work activities or the use of the machine pedal. In his deposition, the claimant admitted that Michael Freedman, the employer's Human Resource Manager, and his immediate supervisor, John Lemanski, both asked him whether he was injured at work and he told them "no."[1]

7. Moreover, the depositional testimony of John Lemanski shows that when the claimant told him about his back pain, Mr. Lemanski "asked him if it happened at work and he (the claimant) said, no, he just woke up and it was hurting him."[2]

Mr. Freedman in his depositional testimony also testified that the claimant never advised him that any of his alleged injury was work-related or the result of "what he was doing on the job."[3]

I find that the evidence demonstrates that the employer/carrier first became aware that the claimant was alleging work related accident and injury on 11/15/2012 when Mr. Anestal reported an injury to the safety trainer, at which time the First Report of Injury was filed. I further find that the employer had no actual knowledge of injury until 11/15/2012. The claimant continued to work for his employer until 12/14/2012.

8. In his deposition the claimant was asked when he first thought or considered his back pain was due to his work activities. Mr. Anestal testified that he thought his condition was due to his work activities, even though he had not been "injured" at work or "didn't fall", sometime the end of September, 2012. Yet inexplicably, Mr. Anestal did not report or inform his employer of any work injury or accident until November of 2012 when the First Report of Injury was made.

9. I find the evidence indicates that as of the end of September, 2012, Mr. Anestal believed that somehow his back condition and knee conditions were related to his

[1] Claimant's deposition of 6/13/2013, p. 24, L 4-17 and p.25, L 17-18, "[t]hey asked me if I was injured or if I was pushed by someone else. I told them, no."
[2] Deposition of John Lemanski, 9/11/2013, p. 10, L 17-18.
[3] Deposition of Michael Freedman, 9/11/2013, p. 10, L 9-12.

employment in some way, but yet did not report it to his employer even though he claimed he was pain during that period and had to visit the emergency room for treatment. Again, even though he thought his physical ailments were work-related as late as September, 2012, he did not report his injuries as such to his employer on or about 11/15/2012, more than 30 days after the date he believed there was a nexus between his employment and his physical condition.

10. The evidence also shows that claimant had knowledge that he was to report any work accidents to his employer. Mr. Anestal had prior accidents with this employer in 2008 and in 1991 and properly reported those accidents to his employer and was provided medical care.

11. Section 440.185(1), Fla. Stat., provides that "[a]n employee who suffers an injury arising out and in the course and scope of employment shall advise his or her employer of the injury within 30 days after the date of or initial manifestation of the injury." Mr. Anestal testified that he began experiencing lower back pain at the end of September, 2012, but did not report any work-related accident or injury until on or about 11/15/2012, more than 30 days after the initial manifestation of the injury.

Although, §440.185(1) provides certain exceptions to the 30 days reporting requirement, I find that none of the exceptions apply in this case.[4] The employer or the claimant's supervisor did not have actual knowledge of any injury, one of the exceptions; because the claimant told him that he was not hurt at work and that he just "woke up" with back pain.

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[4] Section 440.185(1), provides that: "Failure to so advise the employer shall bar a petition under this chapter unless:
(a) The employer or the employer's agent had actual knowledge of the injury;
(b) The cause of the injury could not be identified without a medical opinion and the employee advised the employer within 30 days after obtaining a medical opinion indicating that the injury arose out of and in the course of employment;
(c) The employer did not put its employees on notice of the requirements of this section by posting notice pursuant to s. 440.055; or
(d) Exceptional circumstances, outside the scope of paragraph (a) or paragraph (b) justify such failure."

12. Another exception is that if the injury could not be identified without a medical opinion after which time the injured worker advises his employer within 30 days of having knowledge of said medical opinion. The claimant did not do so in this case. In fact, no medical evidence of any kind was introduced as to when a physician informed Mr. Anestal that his back condition could be related to his employment. Moreover, the claimant's deposition does not show when the Mr. Anestal was advised by any physician his back could be related to his employment.

An additional exception to the 30 day reporting requirement is that the employer failed to put its workers on notice of the requirements of reporting an injury. Clearly here the claimant had prior work accidents which he reported and, therefore, I find that he was aware of the 30 day reporting requirement. I further find that there are no exceptional circumstances that would have prevented the claimant from timely reporting his alleged work accident. The counsel for the claimant's argument that any late notice of injury did not prejudice the employer/carrier here is irrelevant as support for an delineated exception. The total of the evidence demonstrates that the claimant did not timely report the accident to his employer, and that said failure to timely report does not fall into any of the exceptions provided in section 440.185(1), Fla. Stat. Therefore and for all of the foregoing reasons, compensability of the alleged accident of 10/22/2012 should be denied.

WHEREFORE, it is **ORDERED** that the claim of the employee, Deguerre Anestal, based on his claimed injury by accident of October 22, 2012 is hereby **DENIED** and **DISMISSED**.

DONE AND ORDERED at Tallahassee, Leon County, Florida.

John J. Lazzara
Judge of Compensation Claims
Division of Administrative Hearings
Office of the Judges of Compensation Claims

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing order was entered and a true copy was furnished by electronic transmission on this 22nd day of November, 2013 to counsel of record.

Assistant to Judge of Compensation Claims

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