STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS
OFFICE OF JUDGE OF COMPENSATION CLAIMS
MIAMI-DADE DISTRICT

EMPLOYEE:
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JUDGE: Robert D. McAliley
OJCC#: 12-011987RDM
VENUE: Saint Lucie County
D/A: 8/24/2010

ORDER ON THE MERITS

As detailed below, I find claimant fails to demonstrate she had an industrial accident on August 24, 2010, while working for Frank Crum, a labor source provider for a TGI Friday's restaurant located in Key West, Florida. Even if claimant did have an accident, the claim is barred due to her failure to report the incident to the employer.

JURISDICTION AND NOTICE

The parties agree, and I find, the Judge of Compensation Claims (JCC) has jurisdiction over the parties and subject matter. This case was properly noticed for trial.

STIPULATIONS

Although E/C maintains an accident did not occur, the parties agree the appropriate "venue" is Monroe County. There was an employer/employee relationship on the alleged date of accident. Workers' compensation insurance coverage applies. No indemnity benefits are at issue. All issues pertaining to attorney's fees and costs may be reserved for subsequent hearing.

PETITIONS FOR BENEFITS (PFB)

The issues considered in this order are raised in the PFB filed August 2, 2012. The issues contained in the PFB filed February 19, 2013, are severed from these proceedings. It is agreed a notice of controvert was filed August 10, 2012.

ISSUES

Claimant seeks a determination she sustained a compensable industrial accident resulting in a left shoulder injury entitling her to initial medical care as well as attorney's fees and costs.

E/C contends no accident occurred but if it did claimant failed to provide appropriate notice pursuant to section

440.185. Additionally, claimant is disqualified from receiving compensation benefits due to the application of sections 440.094 and 440.105(4)(b)1, hereinafter referred as the fraud defense. General denial of all remaining claims.

EVIDENTIARY RULINGS

The deposition of Katheryn Neese is accepted into evidence. E/C demonstrates good cause why Ms. Neese's testimony should be permitted notwithstanding her late identification as a witness. Claimant further objects to her deposition being taken within a few days of trial. However, I find good cause exists for permitting this procedure and that in any event the applicable rule precludes "discovery" within ten days of a final hearing. *Fla. Admin. Code R.* 60Q-6.113(7). In this instance it was a deposition for trial.

Additionally, I find circumstances exist permitting her deposition transcript to be considered as opposed to Ms. Neese testifying in person. *See,* § 440.30, *Fla. Stat.* (2012) and *Fla. Admin. Code R.* 60Q-6.114(2)(a) (providing depositions may be used in accordance with the civil rules) and *Fla. R. Civ. P.* 1.330(a)(3)(E) (providing such use is discretionary within certain parameters).

Although claimant complains of undue prejudice, this case has been controverted since its inception and claimant did not seek a continuance.

Brenda Robinson is an employee of USIS, Inc., and is the adjuster pertaining to a claim pursued by this claimant for an industrial accident occurring January 5, 2009. The attachments to that deposition particularly including medical records and the opinions of various adjusters and other carrier personnel are disregarded.

However, I consider attachments consisting of USIS generated records to the extent they demonstrate claimant filed a PFB received by USIS sometime around April 1, 2009 (the date varies) claiming she stumbled and fell injuring her right ankle, right foot and back. USIS concedes the January 2009 accident was reported to the employer but asserts that claimant refused medical treatment contending she was uninjured and continued working until the end of the week after which she did not return to her job.

BACKGROUND

Claimant is a 51 year old Cuban national who immigrated to the United States in 1980 at age 17. She claims to speak minimal English although she began answering one question put to her in English before it was interpreted. She completed the seventh grade in Cuba.

According to claimant’s deposition testimony she worked mainly as a security guard since 1991 for a variety of companies. Between security guard jobs she worked at

restaurants primarily doing cleaning duties.

On deposition claimant explains having a left foot injury in 1991. Claimant goes into some detail about her father confronting the employer regarding their failure to provide medical treatment. According to her testimony at deposition, this was the only industrial accident preceding the present claim.

In any event, during a period when claimant was not employed as a security guard she obtained work at TGI Friday's performing cleaning duties which included mopping floors.

In the process of mopping claimant testifies she had to ring out a mop by hand resulting in an immediate pain in her shoulder. Claimant makes no mention of falling to the floor in the process.

This was promptly reported to Ms. Neese, discussed above, who did not offer to provide claimant medical care. Instead, claimant came in the next day and was fired.

Claimant testifies on deposition that perhaps four or five days later she went to the emergency room whereupon her shoulder was x-rayed and treated. When questioned further about the timing (by her attorney), claimant responds, "I really don't know. Maybe four or five days, but after that I did go to the doctor continuously." This reference is to an emergency room doctor in Key West.

Claimant further testifies on her May 1, 2012, deposition that she has not been employed at all since the shoulder injury.

OTHER ACCIDENTS

Plainly, claimant's deposition testimony regarding other industrial accidents is incorrect. At trial claimant concedes she was injured on January 5, 2009, which is the subject matter of the USIS claim.

Moreover, as admitted at trial but not on deposition, claimant was employed after August 2010 as a maintenance person at a Miami Beach hotel where she had an injury on August 9, 2011, due to chemical exposure. Claimant is represented by the same law firm in all three workers' compensation cases.

MEDICAL RECORDS

Claimant does not have a family physician. Instead, she receives all her medical care at the Lower Keys Medical Center, located in Key West, and Mount Sinai Medical Center, located in Miami Beach. The extensive records of both facilities are placed in evidence.

On December 8, 2010, claimant reports to Mount Sinai complaining of shoulder pain indicating it started about six months previously. Her pain is described as being intermittent. The start date, of course, would be three months before the present alleged industrial accident.

On August 26, 2010, two days after her industrial accident,

claimant reports to Lower Keys Medical Center complaining to an allergic reaction to shellfish. Shoulder pain is unmentioned, notwithstanding her deposition testimony summarized above.

On June 15, 2011, claimant goes to Lower Keys complaining of neck pain of no known origin. Again, there are no complaints of shoulder pain. Instead, the first time she complained of pain in her left shoulder at Lower Keys was on June 22, 2011. The doctors report claimant advises there was no associated accident.

TESTIMONY OF KATHERYN NEESE

Ms. Neese was claimant's supervisor at TGI Friday's. She testifies that when an employee reports an injury, she completes the necessary accident forms.

According to Ms. Neese, claimant never advised her of an accident. Claimant was fired because of poor job performance.

TESTIMONY OF MICHAEL A. LANGONE, M.D.

This board certified orthopedic surgeon performed an independent medical examination (IME) at claimant's behest.

As noted above, claimant reports having marked limitations communicating in English. She testified at the merits hearing in English as to the manner she reported the accident to Ms. Neese. Suffice it to say this testimony was not understandable. Apparently this was intended to demonstrate Ms Neese did not understand claimant when the accident was first reported.

Dr. Langone explains that he takes the history from the patient himself. While he does not specifically state the communicating language is English, this is certainly implied. "There's a little bit of a language barrier but we were able to get through it. I don't think there was an insurmountable language barrier but I just think that she's got her dates wrong, you know, basically."

The differences are not limited to dates. Claimant's history to Dr. Langone differs from that given on deposition, in her testimony before me and in the medical records. Claimant advised the doctor that upon reporting the accident "…she was terminated on the spot…." Moreover, claimant "…sought medical attention a few days later on her own." The doctor reports a history of pain intensifying in the neck and throughout the back in the following days prompting claimant to obtain treatment at a Key West emergency room. Claimant also told Dr. Langone that she lost her footing in the process of twisting the mop resulting in falling to the floor.

Dr. Langone diagnoses claimant as having a strain to her neck, dorsal spine, lumbosacreal area and left shoulder as well as an impingement syndrome of the left shoulder with possible rotator cuff disease. He recommends imaging studies and follow-up medical care. Dr. Langone's testimony constitutes the only medical opinion pertaining to the injury itself.

ANALYSIS

I find claimant fails to show by competent substantial evidence that an accident of any sort occurred on August 24, 2010, while working at TGI Friday's and even if there was some slip or mishap that the episode produced any symptoms so that it cannot be concluded an injury by accident occurred necessary to be eligible for compensation benefits. § 440.09(1), *Fla. Stat.* (2010).

This conclusion is based on the inconsistencies in claimant's testimony on two separate occasions and the history given various healthcare providers including her own IME physician. *See, Rollins v. Cochran Forrest Products,* 627 So. 2d 304 (Fla. 1st DCA 1993) ("It is well established that it is the JCC's duty to judge the credibility of witnesses and to resolve conflicts in the evidence…."); *Alston v. Etcetera Janitorial Services,* 634 So. 2d 1133 (Fla. 1st DCA 1994) (holding the logical cause doctrine does not relieve a claimant of the initial burden of demonstrating a causal connection between an injury and an on the job occurrence).

I reject claimant's argument that because the opinions of Dr. Langone constitute the only medical evidence in the case and he relates claimant's present injury to an industrial accident on August 24, 2010, this compels finding for the claimant. It is well settled the opinion on an expert witness cannot

constitute proof of the underlying facts necessary to support that opinion. *See, Schindler Elevator Corp. v. Carvalho,* 895 So. 2d 1103 (Fla. 4th DCA 2005). The primary issue is what, if anything, caused claimant's shoulder disease not its existence.

While the forgoing conclusion does not hinge on the testimony of Katheryn Neese, I also find that even if claimant did have an accident on August 24, 2010, it was not reported to the employer until claimant filed her initial PFB and even then it was the incorrect date. Hence, this claim is also barred by section 440.185(1).

Given the findings above, it is unnecessary to address the employment fraud defense.

CONCLUSIONS

Based on the foregoing findings, it is

ORDERED AND ADJUDGED as follows:

a. The claim for a determination that claimant sustained a compensable industrial accident resulting in a left shoulder injury on August 24, 2010, is DENIED AND DISMISSED.

b. All issues pertaining to attorney's fees and costs are reserved for subsequent hearing.

DONE AND ORDERED in chambers, in Port Saint Lucie, Saint Lucie County, Florida, this 5th day of March, 2013.

Robert D. McAliley
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I HEREBY certify that a true and correct copy of the foregoing has been e-mailed to the attorneys this 5th day of March, 2013.

Assistant to the Judge