FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D21-881

EDDY JUNIOR BONHOMME,

Appellant/Cross-Appellee,

v.

STAFF TEAM HOTELS, CORP. and
FRANK WINSTON CRUM
INSURANCE, INC.,

Appellees/Cross-Appellants.

On appeal from an order of the Office of the Judges of Compensation Claims.
Neal P. Pitts, Judge.

Date of Accident: May 22, 2019.

October 12, 2022

TANENBAUM, J.

Eddy Bonhomme claims he injured his neck and back while lifting a mattress at work on May 22, 2019. He contends the injury prevents him from "working and living normally, without pain and restrictions and limitations." Despite making repeated trips to the emergency room with consistent pain symptoms that he traced back to the incident that day, the records from those visits fail to indicate any complaint from him of neck or back pain until an emergency room visit on July 17, 2019, when a doctor mentioned

to him the possibility of a cervical sprain but without giving that as a formal diagnosis. None of those records contain any objective findings to support his claimed injury. Nevertheless, Bonhomme repeatedly testified that he had constant neck and back pain dating back to May 22, that he knew the May 22 incident was the cause of that pain from the moment it happened, and that he reported that pain to doctors during his emergency room visits. He did not notify his employer of this association until July 19, 2019, two days after his July 17 hospital visit. The judge of compensation claims ("JCC") denied the claim and dismissed the petition. Bonhomme now appeals and asserts several bases for setting the final order aside. The employer and carrier also appeal, contending that the JCC erred by reaching the merits of the claim at all because they established that Bonhomme's notice to the employer was untimely. We affirm.

I

At the heart of this appeal is the question whether the evidence sufficiently supported the JCC's final order denying compensability. To answer this requires an intensive review of the facts. As we mention in the next part, the hospital records from Bonhomme's multiple emergency room visits tell one story, and his later testimony given in the context of his petition for benefits tells a different story. We describe the story told by the records in this part, and we will contrast that with the one told in his testimony in the next.

Bonhomme has a bachelor's degree in accounting and speaks four languages (English, Spanish, French, and Haitian Creole). Prior to 2019, he had not suffered any accidents or injuries and had not experienced any neck or back pain or orthopedic issues. Starting in 2018, he worked as a laundry attendant at a hotel. His employer is essentially a staffing company that services hotels. Bonhomme does not have health insurance.

On May 22, 2019, he was asked to work with another employee and help carry mattresses to rooms at the hotel. In his testimony, Bonhomme was very clear in his recollection about that day. He made six trips carrying mattresses. On his fourth trip (not his second or fifth), as he was lifting a mattress with his partner, he bore the greater load and suddenly "felt a tingling from head to

toe on the right side," as if his right side was being "twisted." He described it as "like pinching from the neck – in the back of the neck." He experienced pain in his neck and back. He finished with the rest of the mattresses and did not tell his employer about the incident. Still, he went home while continuing to experience pain, so he took some acetaminophen for relief. Bonhomme was off from work on May 23 and 24, but his neck and back pain continued, which he again addressed with more acetaminophen.

Bonhomme went into work on May 25 after taking more acetaminophen. He worked a full day, but after coming home and going to bed, he awoke in the middle of that night with "certain numbness from my right side from head to toe." He described experiencing at the time "numbness," "tingling," "muscle weakness," and "blurred vision." He called 911 and was transported by ambulance to the emergency room in the early morning of May 26. According to records, Bonhomme reported to attending personnel that he woke up feeling hot and sweaty and experiencing a stretching feeling on his right side. There is no indication in the records that he reported at the hospital with any complaint of neck or back pain, and Bonhomme later confirmed in testimony that at no point during his hospital visit did he mention the May 22 incident or the link between that incident and his symptoms. The emergency room personnel did not diagnose him with any back or neck injury during this visit. Instead, they chalked his symptoms up to some sort of heat exhaustion and sent him home.

On June 3, Bonhomme returned to the emergency room, again by ambulance. The records show, however, that his chief complaint at this visit was weakness due to excessive heat. He mentioned that his air conditioning was not working at his apartment and stated he had been experiencing sweating and weakness at night while sleeping. He also indicated he worked outside in the heat and wondered whether he had sufficiently hydrated. There was no record of his reporting neck or back pain. In fact, according to the records, he denied any current symptoms while in the emergency room. There still was no diagnosis of any neck or back process related to his reported symptoms, and he was discharged with a recommendation that he stay hydrated.

Another visit to the emergency room occurred a few days later, on June 9. According to the records, Bonhomme reported having numbness on his right side and "tingling" for two weeks and that his symptoms were constant. He once again mentioned his not having air conditioning at his apartment and possibly being dehydrated. He also mentioned that he might have been drinking an excessive amount of water. He denied suffering any recent trauma or difficulty walking. There was no record of his reporting neck or back pain, and the records indicated that his spine appeared normal and that his range of motion was not limited. A head scan was ordered; it showed no abnormality. There still was no diagnosis of any neck or back process related to his reported symptoms, and he was discharged with diagnoses related to his kidneys, excessive water intake, and anxiety.

According to records, on June 25, Bonhomme walked back into the emergency room, chiefly complaining about "heat exhaustion/recurring symptoms." A chest x-ray, a CT scan of his head, and an MRI of his brain were performed. No abnormalities were detected. There is no indication in the reports that he complained of any neck or back pain or that he had suffered some sort of accident or injury.

Having not received any medical care and not worked for a month, Bonhomme returned to the emergency room by ambulance on July 17, this time with a chief complaint of "body aches." According to the records, he indicated that he had been sleeping in a room without adequate air conditioning, and the right side of both his head and back hurt after he drank some bottles of water. The records also show Bonhomme as complaining of neck and lower back pain for the preceding twenty hours, which slowly had developed over his right side. He said that the pain felt "like shooting start[ing] from his right scalp and goes down to his neck and radiates to his right upper back and lower back." Bonhomme also apparently mentioned that he thought he might be dehydrated again.

The records from this visit also show that his entire spine had full range of motion without any complaint from Bonhomme regarding pain, and that there were no problems with his extremities or joints. The records indicate that he had only

generalized symptoms—"no specifics"—and there were no abnormal movements in his gait. There is a mention in the records that Bonhomme had not worked and had been seeing a lawyer about an incident at work. He was discharged from this visit with a diagnosis of "chronic renal insufficiency," "muscle pain," and myalgia, unspecified site (IPC code M79.10). There is a reference to "cervical sprain" for "patient education" under "discharge instructions," but there is no diagnosis for cervical sprain or strain indicated.

A few days later, Bonhomme contacted the employer in an effort to make a claim. This was the first time Bonhomme gave any specific notice to the employer that the pain he was suffering—which had sent him multiple times to the emergency room—was related to the May 22 mattress incident. At the end of July 2019, Bonhomme petitioned for benefits.

II

Our task in an appeal under Florida's Workers' Compensation Law is not as defined as it is in the typical appeal under the Administrative Procedure Act. Still, as with any appeal, we essentially are looking for whether the order on review is the product of some sort of legal error that matters to the outcome. In that vein, we have closely reviewed the administrative record on appeal in this case, and we find no error that would justify disturbing the JCC's final order denying compensability.

A

Bonhomme put himself in a difficult spot in connection with his claim. As we mentioned in the prior part, the records from his several hospital visits do not indicate that he was suffering any symptoms until, arguably, his visit on July 17—nearly two months after the incident that he claims was a workplace accident. From the records alone, one might surmise that Bonhomme was not aware that he had suffered an injury from the May 22 "accident" until the July 17 hospital visit. As we explain in the next subpart, though, the records reflect a significant passage of time between the May 22 incident and the first appearance of symptoms consistent with the May 22 workplace injury that Bonhomme now claims. That gap in time shown by the evidence *could* support a

medical conclusion that the May 22 incident was not the cause of the injury. If Bonhomme's testimony is to be believed, however—and the JCC appears to have found him credible—then he was clearly aware that he had suffered some sort of injury when he lifted the mattress on that fourth delivery on May 22. It is undisputed that he did not report this injury to his employer until July 19, which means that in this scenario, Bonhomme's claim was untimely and statutorily barred. We disagree with the JCC's conclusion to the contrary on this point.

By statute, Bonhomme had to advise his employer of an injury he believed he suffered from work "within 30 days after the date of" the injury, which here was May 22, 2019. § 440.185(1), Fla. Stat. (2021). If for some reason Bonhomme was initially unaware that he had just suffered an injury at the time he was lifting the mattress on that day, he had to advise his employer of this injury within thirty days of the date of its "initial manifestation." *Id.* A failure to timely advise the employer bars Bonhomme's petition unless he could show, among other things, that the employer "had actual knowledge of the injury"; that he could not discern that the work caused his injury without a medical opinion; or "exceptional circumstances, outside the scope [of these other circumstances], justify such failure." *Id.* (1)(a), (b), (d).

According to the JCC, Bonhomme did not know about his injury (read: initially manifested itself) until his July 17 emergency room visit, when a doctor first mentioned cervical sprain to him. Section 440.185, though, speaks in terms of injury, which is defined as "personal injury or death by accident arising out of and in the course of employment." § 440.02(19), Fla. Stat. This determination is not consistent with the statute. The "time of injury" is "the time of the occurrence of the accident resulting in the injury," and the accident is the "unexpected or unusual event or result that happens suddenly." *Id.* (1), (27). A diagnosis is not necessary to start the clock under the statute unless he either was unaware at the time that the incident caused him some bodily harm, or he was unaware that the incident itself caused the debilitating symptoms he otherwise knew he was suffering (which is where the need for a medical opinion would come in). Bonhomme's testimony, which he presumably gave to fill in the gaps in his medical records and prove a link between his condition

and the May 22 incident (discussed in a moment, in the next subpart), obviates both contingencies.

In fact, his testimony—given retrospectively in connection with his claim—perfectly unites his knowledge that he suffered some bodily harm on May 22 with the work cause of that harm, even if he did not know at the time the medical terminology used to describe it. Again, if Bonhomme's testimony is to be believed, he knew at that moment of lifting the mattress on May 22 that the work triggered debilitating pain in him that did not exist before May 22 and did not go away, even to this day. Notwithstanding the records, according to the Bonhomme, he did in fact report at one or more of the visits preceding the July 17 visit that he felt "something burning in the back of my neck," that "my chest was hurting," that he felt "a stretching" on his right side, that he was experiencing back and neck pain, and that he did not have full range of motion in his neck. Bonhomme also described how if he turned his head, he felt electricity up and down along with numbness like he was having a stroke.

Bonhomme testified that he consistently presented to the hospital with the same pain complaints and symptoms over the course of all the visits, from May 26 through July 17 and beyond. Bonhomme testified that the pain he suffered ran "non-stop" back to the day he lifted mattresses on May 22. He distinctly recalled the occurrence, the pain that immediately ensued, and the persistence of the debilitating pain, which drove him to the emergency room multiple times and kept him from working.

We reject Bonhomme's argument that more is required under section 440.185(1) to be proven about his state of mind and awareness of his injury before the thirty days started to run. It was enough that, based on his own admissions, he knew the pain he started suffering on May 22 was not trivial. Indeed, he explained that it caused him to stop work and sent him to the emergency room multiple times. Bonhomme associated his constant pain with the May 22 mattress incident from the beginning, and there was no doubt in his mind—according to Bonhomme's testimony—that the lifting that occurred on May 22 was the cause of his chronically recurring symptoms from that day to the present. Even though he did not receive a medical diagnosis that formally explained his

symptoms until July 17, then, the evidentiary record indisputably shows both that Bonhomme suffered some sort of injury at work on May 22 and that, having experienced the debilitating effects every day since then, he knew as of that date of the injury he now claims.

As the JCC did in determining that his claim was timely, Bonhomme relies on an old statement of the "reasonable man" standard set out by the supreme court in *Escarra v. Winn Dixie Stores, Inc.*, 131 So. 2d 483 (Fla. 1961). The supreme court in that case suggested that the time for a claim "does not begin to run until the claimant, as a reasonable man, should recognize the nature, seriousness and probable compensable character of his injury or disease." *Id.* at 485 (quoting 2 LARSON'S WORKMEN'S COMPENSATION LAW § 78.41). There is a problem with putting too much stock in this statement as the applicable standard. The court in *Escarra* was applying a different version of the time-bar statute, a version that allowed for the excusal of untimely notice "on the ground that for some satisfactory reason such notice could not be given." § 440.18(4), Fla. Stat. (1961). According to the court, this statutory standard reflected "that of a reasonable, prudent man," which in turn is reflected in the quotation from Larson's. *Escarra*, 131 So. 2d at 485. Applying that standard, as required by statute at the time, the court determined that the administrative fact-finder had evidentiary support to "excuse" the employee's untimeliness because "the injury was apparently slight and caused no immediate disability" and the employee "thought no more about" it at the time it happened. *Id.*

The current version of the statute runs the thirty days either from when the employee suffers the injury, or from its "initial manifestation" if the injury was not readily apparent at the time of the accident. § 440.185(1), Fla. Stat. One exception to this requirement is that the "*cause* of the injury could not be identified without a medical opinion." *Id.* (1)(b) (emphasis supplied). There was never any doubt in Bonhomme's mind, though about the cause of his pain underlying the injury he now claims—the May 22 incident—and a medical opinion was not needed to clear that up.

The only other possible basis that Bonhomme could argue for not applying the time bar is a finding of "exceptional

circumstances." *Id.* (1)(d). Even though this statutory basis for excusal is more exacting than the more permissive "satisfactory reason" basis set out in the 1961 version of the statute applied in *Escarra*, the supreme court's decision in *Overholser Construction Co. v. Porter*, 173 So. 2d 697 (Fla. 1964), is instructive. In that case, the court noted that *Escarra* "represents the outer limits of leniency that should be extended in such situations. There the initial injury was slight" and "of such minor consequence that the employee 'thought no more of it' until he consulted a physician several months later, after he developed some difficulty in breathing." *Id.* at 700. By contrast, the employee in *Porter* "suffered an excruciatingly painful reaction," which "drove him from his job and into a doctor's office. It followed immediately upon the lifting of concrete blocks and 90 pound sacks of cement. He stated that it started with a 'catch' in his back. He continuously sought medical treatment over a period of months." *Id.* On those facts, the supreme court determined that there was no excuse for the employee's failure to timely notify his employer of the workplace injury. The facts in this case are sufficiently similar to those in *Porter* to allow us to conclude that even under the old reasonably prudent person standard, Bonhomme's untimeliness could not be excused.

The *Porter* Court's observation about the statutory time bar is particularly apt as we close out this subpart:

> The basic purpose of section 440.18, Florida Statutes, F.S.A., is to enable an employer to make a prompt investigation of the accident and ensuing injury, if any. This is important because, as illustrated by the case before us, it is often extremely difficult to identify the causal relation factors after long periods of delay. It is also important to the employee because if notice is promptly given he can be supplied early medical attention which might avoid complications.

Id. So it is here with respect to Bonhomme. He knew something non-trivial happened when he lifted the mattress on the fourth trip on May 22, and he knew that the "something" required medical attention soon thereafter. His dilatoriness interfered both with the employer's ability to investigate the causation of his injury and

with, as we have seen, the prompt provision of the medical attention he ostensibly needed. The time bar set out in section 440.185(1) appropriately applies, and we can affirm the denial of Bonhomme's claim on this basis alone.

B

Contrariwise, if Bonhomme's own testimony is *not* to be believed or accepted—and instead, the JCC were just to accept his later contention that he had no idea that his symptoms constituted a compensable injury until his July 17 diagnosis—then he has only the hospital records and his own independent medical examiner's ("IME") opinion to link a back strain to the May 22 incident. This poses a problem for Bonhomme's claim because there is no record from May 26 to July 17, 2019, that includes any objective medical finding that Bonhomme had any back or neck injury. The absence of such findings and the dearth of indication in the records that Bonhomme even mentioned his neck or back pain to emergency personnel fatally undermine Bonhomme's arguments on appeal that the JCC had an insufficient evidentiary basis for his determination.

Much of Bonhomme's appellate contention centers on the JCC's reliance on the expert medical advisor ("EMA"), a neurosurgeon named Dr. Scott.[*] The appointment of an EMA became necessary after a conflict in opinions arose between Bonhomme's IME, Dr. Smith; and the employer's IME, Dr. Friedman.

Upon noting Bonhomme's complaints of pain, the emergency room records, and his own physical examination of the claimant, Dr. Smith opined that the May 22 incident was the major contributing cause of Bonhomme's "current condition, restrictions, and need for additional treatment." According to Dr. Smith, an MRI performed on March 24, 2020, showed herniated discs in Bonhomme's neck and lower back, so he recommended epidural steroid injections and physical therapy.

[*] We reject out of hand Bonhomme's due process argument.

The employer hired an IME, Dr. Friedman, who conducted a physical exam of Bonhomme and reviewed his medical records. Dr. Friedman opined that it was not possible that someone like Bonhomme would strain, sprain, or injure his lower back and neck in a lifting accident and not experience pain and report it to medical personnel. He concluded from the records that there was no objective evidence to support Bonhomme having suffered an injury to his back or neck as a result of the May 22 incident and opined that Bonhomme's complaints of pain and limitations were subjective only.

To resolve this conflict, the JCC posed several questions to Dr. Scott: whether he had any "diagnosis relating to any spinal injury/condition directly caused by the alleged work accident of May 22, 2019"; whether the May 22 incident aggravated or exacerbated "any preexisting upper extremity injury/condition(s)"; and whether there is "any current need for further medical care, treatment, diagnostic study(s), and/or specialty referrals" that are medically necessary and for which the May 22 incident was the major contributing cause.

Dr. Scott examined Bonhomme and reviewed the various hospital records previously mentioned. His stated impression was that Bonhomme's complaints about neck and back pain were subjective and lacked support from "objective findings on physical examination or radiographic studies." In his view of the March 2020 MRI, there was no showing of disc herniation, but he did surmise that Bonhomme could have suffered a back strain. He noted that subsequent exams reflected some objective evidence of a cervical sprain, but he could not relate that sprain or later complaints of pain—post-petition—to the incident occurring back on May 22, 2019. Dr. Scott noted, in fact, that Bonhomme's post-petition complaints of pain and his attribution of that pain to May 22 were inconsistent with the descriptions of his symptoms he provided in his multiple emergency room visits and normal objective findings included in the records from those visits.

In turn, Dr. Scott answered the first of the JCC's questions by stating he did "not believe there was any injury to the cervical or lumbar spine or spinal cord or nerve roots in the alleged work accident of 05/22/2019." He answered the next one by opining that

there was no "aggravation or exacerbation of any pre-existing condition." He answered the last of the JCC's questions by opining that there was "no current need for further medical care, treatment, diagnostic studies or specialty referrals for the patient's complaints." After considering all of the evidence submitted into the record—roughly a thousand pages of reports, depositions, and records—the JCC concluded that there was not clear and convincing evidence to reject Dr. Scott's opinion that the May 22, 2019, incident was not the major contributing cause of Bonhomme's claimed condition. Section 440.13(9)(c), Florida Statutes, provides that "[t]he opinion of the expert medical advisor is presumed to be correct unless there is clear and convincing evidence to the contrary as determined by the judge of compensation claims." We conclude, based on our own review of the hospital records—recounted in detail above—and the testimony, that the JCC's conclusion was not erroneous.

There was ample evidentiary support both for the EMA's opinion and for the JCC's determination to take that opinion as being correct. As we mentioned a moment ago, the hospital records—with their lack of objective findings and complaints of back and neck pain by Bonhomme—are incompetent to provide any link between the injury he claims to suffer now and the May 22 incident. Bonhomme's own testimony—that he has been suffering debilitating back and neck pain since that moment on May 22 when lifted the mattress on the fourth delivery—is the only real evidentiary link. But that testimony contradicts the hospital records.

The JCC even noted this contradiction as an alternative basis for denying compensability, stating that Bonhomme failed to meet his evidentiary burden because his history and diagnoses recorded in the medical notes were "too incompatible upon which to base a finding that a compensable injury occurred on May 22, 2019." According to the JCC, "[w]hile one visit may be explained away, three consecutive ER visits with no reported complaints of a work injury, coupled with the normal physical examination findings by the ER physician as discussed by Dr. Scott, are simply inconsistent" and do not support a workplace injury.

Bringing together our points from the preceding subpart and this one, we note that there are serious gaps regarding causation in the hospital records, and those gaps appear to have been the result of Bonhomme's lack of diligence in the first days and weeks following the alleged accident on May 22. Using Bonhomme's testimony to fill those gaps, or to explain them away, cannot salvage his claim or his appeal, because that testimony points to a failure to timely report under section 440.185. Basically, Bonhomme cannot have it both ways, and either way alone, he loses. The JCC reached the correct disposition.

AFFIRMED.

LEWIS, J., concurs; BILBREY, J., concurs in result with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

BILBREY, J., concurring in result.

Because the Claimant did not tell his "employer within 30 days after the date of or initial manifestation of the injury," and since no statutory exceptions to that requirement apply, I agree that we are compelled to uphold the denial the claim. § 440.181(1), Fla. Stat. (2019); *see also Marion County v. Futch*, 983 So. 2d 689 (Fla. 1st DCA 2008).

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