STATE OF VERMONT
DEPARTMENT OF LABOR

Jesus Otero

v.

Woodstock Inn & Resort

Opinion No. 29-11WC

By: Phyllis Phillips, Esq.
Hearing Officer

For: Anne M. Noonan
Commissioner

State File No. AA-51834

OPINION AND ORDER

Hearing held in Montpelier, Vermont on April 5, 2011
Record closed on May 21, 2011

APPEARANCES:

Joseph Galanes, Esq., for Claimant
John Valente, Esq., for Defendant

ISSUE:

Did Claimant suffer an injury arising out of and in the course of his employment on May 15, 2005?

EXHIBITS:

Joint Exhibit I:	Medical records
Claimant's Exhibit 1:	Deposition of Daniel Jackson, March 8, 2011
Claimant's Exhibit 2:	May 2005 time card records
Claimant's Exhibit 3:	Dr. Peraza out-of-work notes, 4/1/08 and 5/13/08
Defendant's Exhibit A:	Notice and Application for Hearing, August 13, 2009
Defendant's Exhibit B:	Certificate of Dependency
Defendant's Exhibit C:	Notice of Intent to Change Health Care Provider, August 19, 2008
Defendant's Exhibit D:	Letter from Agnes Hughes, August 28, 2009

CLAIM:

All workers' compensation benefits to which Claimant proves his entitlement as causally related to his alleged work injuries

Costs and attorney fees pursuant to 21 V.S.A. §678

FINDINGS OF FACT:

1. At all times relevant to these proceedings, Claimant was an employee and Defendant was his employer as those terms are defined in Vermont's Workers' Compensation Act.

2. Judicial notice is taken of all relevant forms contained in the Departments' file relating to this claim.

3. Claimant is a 55 year old immigrant from Lima, Peru. He came to the United States in August 2001 to be closer to his mother and two sisters, who had immigrated here sometime earlier.

4. Within a month after his arrival in Vermont Claimant began working as a dishwasher at Defendant's resort hotel. This employment is the only position Claimant has held since immigrating to the U.S.

5. Claimant received a university education plus postgraduate work in economics while in Peru. He worked as an accountant.

6. Claimant studied English both in high school and at the university, but never to the point of becoming conversant. His language limitations were evident at the formal hearing. He required an interpreter and without her assistance could comprehend and respond only to simple questions posed to him in English. Beyond that, perhaps the most credible evidence of Claimant's limited English proficiency was his assertion that if he could speak English, he would be studying at a university here in the United States, not working as a dishwasher. I find this testimony extremely persuasive.

7. On Sunday, May 15, 2005 Claimant reported to work for Defendant at approximately 4:00 PM. Claimant specifically recalled the day, as the night before he had worked at a wedding on the premises until 2:00 AM. Defendant's time card records substantiate Claimant's recollection, and I find it credible.

8. At some point during his shift Claimant was washing sheet pans. Unbeknownst to him, a co-employee had washed the kitchen floor and it was slippery. As Claimant carried one of the sheet pans across the room, he slipped on the wet, soapy floor and fell hard to the ground.

9. Claimant recalled hitting the left side of his body on some large pots as he fell, and hitting the floor with such force that he lost consciousness for a few moments. He testified that he broke both a tooth and his eyeglasses in the fall. I find this testimony to be credible.

10. Claimant credibly testified that after he fell, two of his co-workers, Jarrod and Matt, assisted him first to his feet and then to a chair. As documented by Defendant's time card records, Claimant left work thereafter without completing his shift. Claimant testified that this was on account of the pain he was suffering after his fall. I find this testimony to be credible.

11. On the following day, Claimant's sister, Rosie O'Connell, visited Claimant at his home, having heard from their mother that he was not well. Ms. O'Connell is conversant in both English and Spanish. She testified that while visiting with Claimant she observed that he was walking slowly, that his tooth was missing and that he was not wearing his glasses. Ms. O'Connell further testified that Claimant told her that he had injured himself after falling in the kitchen at work the evening before. I find this testimony to be credible in all respects.

12. At the time of Claimant's injury Ms. O'Connell also worked for Defendant. She testified that after visiting with Claimant, she proceeded to the Inn. Initially she sought out Ann Tucker, Defendant's personnel director, to speak to her about Claimant's fall, but as Ms. Tucker was not in her office, she went to see Claimant's supervisor, Executive Chef Jackson, instead. Ms. O'Connell testified that Chef Jackson told her that he was aware of the accident and that he would take care of filing the appropriate forms with Ms. Tucker immediately. I find this testimony to be credible.

13. For his part, Chef Jackson clearly recalled in his deposition testimony that Ms. O'Connell had come to see him shortly after Claimant's fall and had asked him to complete an accident report. He testified that he was aware of the protocol for reporting work-related injuries, and that it was his responsibility as head of the culinary department to complete and forward an injury report to Ms. Tucker whenever one of his employees suffered a work-related injury. This was true even if he was not on duty at the time, and the injury was first reported to a sous chef or other supervisor. Chef Jackson testified that presumably this was the protocol he followed in Claimant's case, but that with the passage of time he could no longer be one hundred percent certain that he actually did file a written report with Ms. Tucker. I find this testimony to be credible.

14. As to the timing of Claimant's fall and Ms. O'Connell's visit, Chef Jackson was fairly certain that it occurred in 2005, as he terminated his employment with Defendant in early 2006. I find this testimony to be credible.

15. On the morning after his fall, Claimant called his primary care provider, Dr. Smith, and was given an appointment for Thursday, May 19, 2005. Claimant testified that at that appointment he told Dr. Smith that he had injured his back, neck and shoulder in a fall at work four days earlier. Dr. Smith's office note does not reflect this history at all, however. To the contrary, it refers to a two-week history of intermittent back pain, flared by lifting and bending at work.

16. I find that Claimant likely did attempt to communicate the circumstances of his injury to Dr. Smith, but that Dr. Smith misunderstood. Claimant credibly testified that he and Dr. Smith often had difficulty communicating, a fact that Dr. Smith substantiated in subsequent office notes, which specifically reference a significant language barrier between them. I thus find that the discrepancy between Claimant's version of the events leading up to his May 19th appointment and Dr. Smith's reported history does not fatally undermine his credibility.

17. Claimant next followed up with Dr. Smith in June 2005. Dr. Smith prescribed physical therapy for Claimant's continuing complaints, but Claimant lacked the funds to pursue this treatment. In the meantime, aside from a brief period of time out of work immediately after his fall, Claimant continued to work.

18. In July 2008 Dr. Smith referred Claimant to Dartmouth-Hitchcock Medical Center (DHMC) for further evaluation of what had become chronic left shoulder pain. Unlike his visits with Dr. Smith, Claimant's DHMC providers were assisted by professional interpreters. Consequently, for the first time the medical record clearly reflected Claimant's report that his fall at work was the incident that initially gave rise to his symptoms.

19. Through the DHMC staff and their interpreters, Claimant learned that Defendant had never filed a workers' compensation claim on his behalf after his fall at work. As he now had been referred for an MRI, DHMC staff sought authorization from Defendant to proceed. Ms. Tucker credibly testified that the phone call she received to that effect, in late July 2008, was when she first learned of Claimant's fall.

20. Upon learning that Claimant was seeking treatment for an alleged work-related injury, Ms. Tucker next undertook to investigate the circumstances surrounding the incident. She credibly testified that Claimant told her that he thought the fall had occurred in February 2006. Indeed, Claimant cited February 2006 as the date of injury in the workers' compensation forms that he himself completed once his claim was finally filed. In light of what I consider to be highly credible corroborative evidence from Ms. O'Connell and Chef Jackson, however, I find that Claimant's memory for dates at this point likely had faded, and that the fall giving rise to his injuries most likely occurred in May 2005, not February 2006.

21. Ms. Tucker was emphatic in her assertion that had Claimant's supervisor been notified of Claimant's fall in May 2005, he would have reported it to her promptly in accordance with Defendant's protocol. However, when presented with evidence that on two occasions in 2008 Claimant had provided his supervisor with medical notes documenting work-related eczema in his hands, Ms. Tucker acknowledged that the supervisor had not passed that information along to her. I find from this that despite Ms. Tucker's best efforts and intentions, Defendants' supervisors did not always report their employees' work-related injury claims to her as they had been instructed to.

CONCLUSIONS OF LAW:

1. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984). There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of the injury and the resulting disability, and the inference from the facts proved must be the more probable hypothesis. *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941); *Morse v. John E. Russell Corp.*, Opinion No. 40-92WC (May 7, 1993).

2. This case is in essence a dispute about credibility. Defendant asserts that Claimant's alleged injury was both unwitnessed and late reported. It argues that Claimant has not produced sufficient credible evidence to sustain his burden of proving that it in fact occurred as and when he says it did.

3. It is true that a claimant may have difficulty sustaining his burden of proof when he delays filing a workers' compensation claim for a significant period of time after an alleged injury, particularly where the injury is unwitnessed. In such instances, the trier of fact must evaluate the factual evidence carefully so as to explore any inconsistencies, investigate possible intervening causes and evaluate "hidden or not-so-hidden motivations." *Darrah v. Censor Security, Inc.*, Opinion No. 16-09WC (June 3, 2009); *Jurden v. Northern Power Systems, Inc.*, Opinion No. 39-08WC (October 6, 2008); *Russell v. Omega Electric*, Opinion No. 42-03WC (November 10, 2003), citing *Fanger v. Village Inn*, Opinion No. 5-95WC (April 20, 1995).

4. I acknowledge here that Claimant's injury may have been unwitnessed at the exact moment that it happened. Claimant credibly testified, however, as to the two co-workers who assisted him immediately thereafter, and Ms. O'Connell credibly testified that she observed his injuries, which were obvious, the next day. Defendant offered no evidence to rebut either of these accounts. Without such rebuttal testimony, I am satisfied that Claimant in fact fell as he said he did in Defendant's kitchen.

5. Defendant's argument notwithstanding, furthermore, I disagree that Claimant's injury was late reported. Again, I am satisfied by the testimony provided by both Ms. O'Connell and Chef Jackson that in fact it was reported, barely 24 hours after it occurred. The fact that the report did not subsequently find its way to Ms. Tucker in a timely manner may be cause for concern among Defendant's supervisory staff, but it provides no basis at all for penalizing Claimant.

6. Defendant points as well to the lack of contemporaneous medical records documenting the nature and timing of Claimant's fall as support for its attack on his credibility. To my mind, however, the language barrier between Claimant and his primary care provider adequately accounts for this omission, and therefore I read nothing suspicious into it. Similarly, I am convinced that the discrepancy between the date of injury Claimant first reported and the one he recalled three years later likely represents his faulty memory rather than any devious motive or hidden agenda.

7. I conclude that Claimant has sustained his burden of proving that he suffered a compensable work-related injury when he slipped and fell in Defendant's kitchen on May 15, 2005. Claimant is entitled to whatever workers' compensation benefits he establishes to be causally related to that incident.

8. As Claimant has prevailed on his claim for benefits, he is entitled to an award of costs and attorney fees. In accordance with 21 V.S.A. §678(e), Claimant shall have 30 days from the date of this opinion within which to submit his itemized claim.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant is hereby **ORDERED** to pay:

1. All workers' compensation benefits to which Claimant proves his entitlement as causally related to his May 15, 2005 fall at work; and

2. Costs and attorney fees in amounts to be determined in accordance with 21 V.S.A. §678.

DATED at Montpelier, Vermont this 29th day of September 2011.

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Anne M. Noonan
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672.