

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

LYNN CHITTICK, *Applicant*

vs.

**HEART OF HUMANITY HOME HEALTH CARE SERVICES;
NORGUARD INSURANCE COMPANY, administered by GALLAGHER BASSETT
SERVICES, INC., *Defendants***

**Adjudication Numbers: ADJ14742380, ADJ14742854
San Francisco District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

In his Report, the WCJ discusses defendant's failure to properly refer to the evidence in its Petition. (See Cal. Code Regs., tit. 8, § 10945.) Counsel for defendant is reminded that compliance with the requirements of WCAB Rule 10945 is required, and a failure to do so may result in dismissal of a petition.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 13, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**LYNN CHITTICK
LAW OFFICES OF TIMOTHY J. EGAN
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

HAV/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. o.o

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

Lawrence Keller, Workers' Compensation Judge, hereby submits his report and recommendation on the Petition for Reconsideration filed herein.

I. INTRODUCTION

On July 15, 2022, the defendant filed a timely and verified Petition for Reconsideration alleging that the evidence does not support my June 21, 2022 Findings of Fact. Defendant contends the evidence does not support my opinion that the applicant reported her December 16, 2019 injury in ADJ14742380, and argues that applicant's December 16, 2018 injury claim should be barred by the statute of limitations because she possessed "superior knowledge of entitlement to benefits." Defendant's Petition for Reconsideration does not contest any of the Findings of Fact or opinions regarding the applicant's April 27, 2021 injury in ADJ14742854.

At the time of the December 16, 2019 injury at issue in ADJ14742380, Lynn Chittick was a registered nurse engaged in traveling to client homes while employed by Heart of Humanity Home Health Care Services (hereinafter "Heart of Humanity"). On that date at approximately 4:00 p.m., the applicant was in a motor vehicle accident. There was no dispute that the accident occurred, although there were disputes as to the time of the accident, whether the accident occurred while applicant was travelling to an appointment, and whether the applicant reported the automobile accident to the employer. At the March 10, 2022 trial, testimony was given by the applicant and applicant's witness Barbara Clark, who was formerly in charge of scheduling for Heart of Humanity. Testimony was also given by two defense witnesses, Heart of Humanity chief executive officer Verlinda Montoya, and Heart of Humanity director of operations Jacqueline Gallmon.

The applicant's and defendant's versions of whether or not the December 16, 2019 automobile accident was reported were directly contrary and incompatible. I found the applicant and Barbara Clark's testimony to be more credible than the defendant's witnesses. Therefore, I determined that the applicant had timely reported the December 16, 2019 injury, that defendant's failure to provide notices relating to potential workers' compensation benefits precluded them from asserting a statute of limitations defense, and as a result found that the applicant sustained an injury arising out of and in the course of employment on December 16, 2019 in ADJ14742380.

**II. THE PETITION DOES NOT PROPERLY CITE TO THE EVIDENTIARY
RECORD**

Title 8 California Code of Regulations section 10945 states the requirements for a Petition for Reconsideration, including that:

“(b) Every petition and answer shall support its evidentiary statements by specific references to the record.

(1) References to any stipulations, issues or testimony contained in any Minutes of Hearing, Summary of Evidence or hearing transcript shall specify:

- (A) The date and time of the hearing; and
 - (B) If available, the page(s) and line number(s) of the Minutes, Summary, or transcript to which the evidentiary statement relates (e.g., “Summary of Evidence, 5/1/08 trial, 1:30pm session, at 6:11-6:15”).
- (2) References to any documentary evidence shall specify:
- (A) The exhibit number or letter of the document;
 - (B) Where applicable, the author(s) of the document;
 - (C) Where applicable, the date(s) of the document; and
 - (D) The relevant page number(s) (e.g., “Exhibit M, Report of John A. Jones, M.D., 6/16/08 at p. 7.”).

Title 8 California Code of Regulations section 10972 provides that, “[a] petition for reconsideration, removal or disqualification may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved.”

Defendant’s Petition for Reconsideration references witness testimony but does not cite to the record in this matter. In fact, there are no citations to the evidentiary record in defendant’s Petition for Reconsideration. Because of the failure to reference the evidentiary record with specificity, defendant’s Petition for Reconsideration should be denied. Notwithstanding the foregoing, defendant’s Petition should be denied upon its merits as well, as discussed below.

III. WHETHER APPLICANT PROVIDED NOTICE OF THE DECEMBER 16, 2019 INJURY

THE LAW

The injured worker may not maintain a claim for workers’ compensation unless written notice of the claimed injury is served on the employer within thirty days of the injury. (Labor Code § 5400.) Labor Code § 5402(a) provides that, “[k]nowledge of an injury, obtained from any source, on the part of an employer, his or her managing agent, superintendent, foreman, or other person in authority, or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts, is equivalent to service under Section 5400.” However, a failure to give notice under Labor Code § 5400 will not bar recovery if the employer was not misled or prejudiced. (Labor Code § 5403.)

The applicant must meet the required burden of proof that the injury was reported by a preponderance of the evidence. (Labor Code § 3202.5) “‘Preponderance’ of the evidence means that evidence that, when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.” (Labor Code § 3202.5.) Workers’ compensation law must be liberally construed in the employee’s favor. (Labor Code §3202.) “[A]ll reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee.” (*Garza v. Workers’ Comp. Appeals Bd.* (1970) 3 Cal. 3d 312, 317.)

DISCUSSION

The applicant testified that she attempted to phone Heart of Humanity CEO Verlinda Montoya just after the automobile accident occurred on December 16, 2019, but was unable to reach her, and so phoned Barbara Clark about the accident. (Testimony of Lynn Chittick, Summary of Evidence for the Trial on March 10, 2022, page 8, lines 17-19.) Ms. Clark alleged that during the call, Ms. Montoya came in and grabbed the witness's arm and told her to hang up the phone, and not to talk to Ms. Chittick. (Testimony of Barbara Clark, Summary of Evidence for the Trial on March 10, 2022, page 6, lines 45-47.) Ms. Clark testified that Montoya said she would talk with the applicant. (*Id.* at page 7, line 1.) Ms. Montoya said that Ms. Clark's memory was faulty regarding her interrupting Ms. Clark's call with applicant. (Testimony of Verlinda Montoya, Summary of Evidence for the Trial on March 10, 2022, page 15, lines 12-14.) Ms. Montoya testified that she has a separate office from Ms. Clark and would have no knowledge of whom she is talking to, or what they are saying. (*Id.* at page 13, line 46 page 14, line 1.) Ms. Montoya testified she did not speak with Ms. Chittick on December 16, 2019. (*Id.* at page 14, lines 1-2.)

Because there were no call logs, phone records, or other documentary evidence submitted to support whether or not a telephone call was received, the determination of whether this occurred rests solely on the testimony of the witnesses. Based on the testimony of all witnesses, I determined that the testimony of the applicant and Ms. Clark was more persuasive than the testimony of defense witnesses Verlinda Montoya and Jacqueline Gallmon. The testimony of Ms. Montoya and Ms. Gallmon contained significant contradictions and inconsistencies which undermined their credibility. These discrepancies included how potential work injuries were reported.

Ms. Gallmon testified that an employee receiving a call about a potential injury would not complete an incident form, but instead instruct the employee reporting the injury to complete an incident report. (Testimony of Jacqueline Gallmon, Summary of Evidence for the Trial on March 10, 2022, page 12, lines 15-17.) The person receiving a call about an injury would not be required to report the incident themselves. (*Id.* at page 13, lines 2-3.) In contrast, Ms. Montoya testified that if an employee received a call about a potential work injury, that call must immediately be transferred to her. (Testimony of Verlinda Montoya, Summary of Evidence for the Trial on March 10, 2022, page 14, lines 43-44.) Additionally, Ms. Gallmon testified that the applicant would clock in when she arrived at the home of the first client, and clock out when she left the last client of the day, and was paid travel time between visits. (Testimony of Jacqueline Gallmon, Summary of Evidence for the Trial on March 10, 2022, page 11, lines 35-37.) Ms. Montoya testified that the applicant was only "on the clock during visits ... [and] off the clock if there was a break between visits." (Testimony of Verlinda Montoya, Summary of Evidence for the Trial on March 10, 2022, page 13, lines 22-24.) These significant discrepancies between the testimonies of the two employer witnesses harmed their credibility beyond repair. Additionally, if both testimonies were truthful, it is an indication that the system for handling reports of potential work injuries is unclear among staff, which could lead to Ms. Chittick's reports not having being conveyed properly.

In its Petition for Reconsideration, the defendant implies that Ms. Clark's version of events could not have occurred because Ms. Montoya had "no knowledge of the motor vehicle accident or who was on the phone." (Petition for Reconsideration dated July 15, 2022, page 4, lines 2-5.) It is noted that Ms. Montoya testified she denied interrupting the phone call, and that her office was separate

from Ms. Clark and she was unable to know what Ms. Clark was speaking about, or whom she was speaking to. (Testimony of Verlinda Montoya, Summary of Evidence for the Trial on March 10, 2022, page 13, line 45 page 14, line 1.) It is also noted that Ms. Clark did not know how Ms. Montoya may have had knowledge of an accident. (Testimony of Barbara Clark, Summary of Evidence for the Trial on March 10, 2022, page 7, lines 22-24.) However, because Ms. Montoya's credibility is undermined as discussed above, her testimony that she had no knowledge of what Ms. Clark was speaking about, or to whom, cannot be relied upon.

The applicant did not testify as to the interaction between Ms. Clark and Ms. Montoya during her phone call to Ms. Clark. Therefore, even if the recollection of Ms. Clark was faulty, and Ms. Montoya did not interrupt the call, the applicant's credibility and testimony are not negatively impacted. In addition, the applicant credibly testified to having spoken with Ms. Montoya and Ms. Gallmon about the accident on the following day. (Testimony of Lynn Chittick, Summary of Evidence for the Trial on March 10, 2022, page 8, lines 32-33.) Again, Ms. Montoya denied this (Testimony of Verlinda Montoya, Summary of Evidence for the Trial on March 10, 2022, page 14, lines 7-9), as did Ms. Gallmon (Testimony of Jacqueline Gallmon, Summary of Evidence for the Trial on March 10, 2022, page 11, lines 43-47). However, their credibility was undermined, whereas the applicant's credibility was not, and I remain persuaded that Ms. Chittick spoke with Ms. Gallmon and Ms. Montoya about the accident. Accordingly, even if the employer were not advised of the accident by a phone call on December 16, 2019, the employer was still informed by the employee in a timely fashion in the following days.

IV. WHETHER APPLICANT HAD KNOWLEDGE OF ENTITLEMENT TO BENEFITS TO PRECLUDE TOLLING OF THE STATUTE OF LIMITATIONS

THE LAW

Labor Code § 5405 governs the period in which proceedings with the Appeals Board must be commenced:

“The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:

- (a) The date of injury.
- (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
- (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.”

Where an employee is not provided notices relating to potential workers' compensation benefits, then the employer is precluded from asserting a statute of limitations defense. (*Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726, 730 [117 Cal.Rptr. 79, 527 P.2d 631].) If the employer breaches its duty to provide notices, the employer bears the burden of showing that the employee had actual knowledge of her workers' compensation rights to prevent to tolling of

the statute of limitations. (*California Ins. Guar. Ass'n v. Workers' Compensation Appeals Bd.*, 73 Cal. Comp. Cases 771, 776 (Cal. App. 2d Dist. June 4, 2008).)

Defendant relies on the Court of Appeal decision in *Hurwitz v. Workers' Comp. Appeals Bd.* (1979) 97 Cal.App.3d 854 [158 Cal.Rptr. 914] in support of its position that the applicant possessed knowledge of her right to workers' compensation benefits sufficient to prevent tolling of the statute of limitations. In *Hurwitz*, the Court of Appeal held that the applicant's claim was barred by the statute of limitations, despite employer's failure to provide notice to the applicant of her workers' compensation right. (*Id.* at 875.) Because the tolling of the statute of limitations is based on the doctrine of equitable estoppel, the party asserting estoppel of the statute of limitation "must have been ignorant of the true facts and must have relied upon the words or conduct of the adverse party to his or her detriment." (*Id.* at 874.) Within two months of her injury, the applicant in *Hurwitz* was aware of the of the need to institute workers' compensation proceedings within one year of the date of injury, but made a deliberate decision not to file an application based on the advice of her attorney in a third party action. (*Id.* at 875.)

DISCUSSION

The circumstances in the case at issue are very different from those of the applicant in *Hurwitz*. There was no evidence presented that Ms. Chittick was pursuing a third-party claim related to the automobile accident or may have strategically delayed filing an application for the December 16, 2019 injury. Indeed the applicant testified that she asked if the accident may have been a workers' compensation matter, but she was told by Verlinda Montoya that the automobile accident was not covered by workers' compensation. (Testimony of Lynn Chittick, Summary of Evidence for the Trial on March 10, 2022, page 8, lines 33-37.) The applicant thereafter self-procured treatment and did not further discuss her injuries with her employer because she had been told that the accident was not a workers' compensation matter. (*Id.* at page 8, line 40 page 9, line 10.) This ignorance of the true facts and reliance on the words or conduct of the adverse party to the applicant's detriment means the defendant is equitably estopped from asserting the statute of limitations defense.

Defendant argues that the applicant had extensive training which would provide her with knowledge akin to the applicant in *Hurwitz* to preclude estoppel of the statute of limitations defense. (Petition for Reconsideration dated July 15, 2022, page 5, lines 12-16.) However the defendant offered no evidence that the applicant had sufficient knowledge of her potential workers' compensation benefits. As discussed in defendant's Petition, the applicant may have been well trained on how to report injuries. (*Id.* at page 5, lines 2-13.) However, knowledge on how to report injuries to an employer is not the same as knowledge of one's workers' compensation rights, and the requirement to file an application within one year. Furthermore, the content of the training on how to report an injury was not presented as evidence so there is no evidence the employer advised employees of their potential workers' compensation benefits during those trainings. There is no evidence to support a finding that the applicant had actual knowledge of her potential workers' compensation benefits to preclude estoppel of the statute of limitations defense.

Nothing presented in Defendant's Petition for Reconsideration causes me to alter my opinion that the defendant had notice of the applicant's December 16, 2019 injury, and that the defendant failed to meet its burden to show the statute of limitations bars applicant's claim.

V. RECOMMENDATION

For the foregoing reasons, I recommend that the Petition for Reconsideration of defendant, filed herein on July 15, 2022, be **DENIED**.

DATE: July 29, 2022

Lawrence Keller
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE