

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

SERGIO CEJA, *Applicant*

vs.

**JORGE MONTES DBA MONTES LANDSCAPING,
ILLEGALLY UNINSURED,
*Defendants***

**Adjudication Number: ADJ13592884
Anaheim 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.

The Appeals Board is bound to accomplish substantial justice in all cases and is generally not bound by the common law or statutory rules of evidence. (Lab. Code, § 5708.) While we recognize that hearsay is often received into evidence in workers' compensation hearings and is routinely relied upon to support findings (see Lab. Code, § 5703); we also recognize that the WJC may properly exclude evidence based on a party's failure to follow pretrial disclosure rules.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 14, 2024

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

**SERGIO CEJA
LAW OFFICES OF DENNIS FUSI & ASSOCIATES
LAW OFFICES OF VICKI TEMKIN**

LN/pm

*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**

**I.
INTRODUCTION**

Date of Injury: June 10, 2020

Parts of Body at Issue: Neck, Right Shoulder and Low Back

Identity of Petitioner: Defendant

Timeliness: The petition was timely filed on March 22, 2024

Verification: The petition was verified

Date of Orders: February 29, 2024

Petitioner’s Contentions: Petitioner contends the WCJ erred and denied petitioner due process by 1) ruling defendant’s Exhibits C-E inadmissible; 2) denying petitioner’s oral motion to allow a witness to testify who was not listed on the Pre-Trial Conference Statement, and 3) finding the applicant credible on the issues presented for decision.

Applicant filed a response.

**II.
FACTS**

By way of an application for Adjudication of Claim filed on September 14, 2020, applicant claimed to have sustained injury arising out and in the course of his employment with the defendant to his neck, right shoulder and low back. (*See* Application for Adjudication of Claim, EAMS Doc ID 33771276.) The claim was denied September 21, 2020 with the defendant claiming, in part, that applicant was an independent contractor. (*See* Defendant’s Exhibit A, EAMS Doc ID 76509352.)

On July 19, 2022 the parties filed a Pre-Trial Conference Statement in advance of the Mandatory Settlement Conference occurring on July 20, 2023. (*See* Pre-Trial Conference Statement, EAMS Doc ID 42380139.) The case was set for Trial “On-Notice” with the Notice of Hearing scheduling the trial to commence on December 7, 2022 having been served by the Workers’ Compensation Appeals Board on August 19, 2022. (*See* EAMS.)

On the Pre-Trial Conference Statement defendant listed the documentary evidence he intended to introduce as “APPLICANT’S EXHIBITS; DEFENDANT’S EXHIBITS” and listed the following witnesses: “APPLICANT’S WITNESSES; DEFENDANT’S WITNESSES”. (*See* Pre-Trial Conference Statement, *supra*.)

On November 8, 2022, defendant submitted a supplementary document entitled “DEFENDANT’S LIST OF TRIAL EXHIBITS” wherein the following exhibits were listed:

Notice Regarding Denial of Worker’s Compensation Benefit, dated 9/21/2020 2020 From 1099-MISC from Jorge Montes to Sergio Ceja Camacho
Letter from Jorge Montes/DBA Montes Landscaping
Letter from Miguel Santiago, Spanish and English Translation Letter from Henry Solis Garcia, Spanish and English Translation
Letter from Sergio Ceja to Arturo Camarillo, Dep. Labor Comm., dated 6/14/2018” (*See* Defendant’s List of Trial Exhibits, EAMS Doc ID 45280514.)

The case proceeded to trial on March 8, 2023 at which time the Stipulations and Issues were framed and read into the record. In addition, the Exhibits were identified with the objections thereto noted on the Minutes of Hearing. (*See* Minutes of Hearing, March 8, 2023, EAMS Doc ID 76527017.) As is relevant to the issues presented for Reconsideration applicant objected to defendant’s Exhibits C through E “Undated Letter from Jorge Montes/DBA Montes Landscaping, Undated Letter from Miguel Santiago, Spanish and English Translation and Undated Letter from Henry Solis Garcia, Spanish and English Translation” the summary of which is as follows:

“Applicant also objected to defendant’s exhibits C, D and E (witness statements) in as much as their introduction, without the production of live witnesses, would deprive the applicant and the Court of the opportunity to question the witnesses and would deprive the Court the ability to judge the witnesses’ credibility. Applicant further objected on due process grounds as he would be prejudiced by allowing the introduction of witness statements from un-deposed witnesses without an opportunity at cross-examination.” (*Id.* at 4:15-20.)

The defendant was given an opportunity to respond to applicant’s objection,

“The uninsured employer responded that the statements were being offered pursuant to Evidence Code 250 in lieu of live testimony. The

uninsured employer further offered to have the defendant employer and one of the witnesses present for trial if needed.” (*Id.* at 4:21-23)

Thereafter the Minutes of Hearing are noted as follows:

“Through questioning by the Court, it was noted that the defendant did not list any witnesses with specificity on the Pre-Trial Conference Statement. Rather, defendant listed “defendants witnesses” without listing the names of any witnesses the defendant intended to call. The Court further inquired into the efforts that were made by uninsured employer prior to the trial date to have the witnesses present to testify to which the uninsured employer responded that no efforts had been made prior to the date of trial as it was felt that the witness statements would be sufficient.

The Uninsured Employers Trust Fund offered that applicant’s objection appears to be in the nature of a hearsay objection and that in general the Rules of Evidence are more lax in Workers' Compensation courts and that the documents may be admitted over a hearsay objection with the Court affording the documents the weight to which the Court determines they are entitled.” (*Id.* at 4:24-5:9.)

Based on the objections raised, defendants Exhibits C through E were marked for identification with an advisory that their admissibility would be ruled upon at the time of Decision. Due to the lateness of the hour, the trial was thereafter continued.

After a couple of failed attempts, the record was re-opened for the final day of Trial on January 22, 2024 at which time applicant submitted to rigorous cross-examination and examination by this Court. At the conclusion of applicant’s examination, counsel for the defendant made an Oral Motion to call the defendant employer as a witness. The Oral Motion and the Court’s response thereto is clearly set forth in the Further Minutes of Hearing and Summary of Evidence as follows:

“Ms. Temkin made an Oral Motion on the record to call an undisclosed witness to the stand, Mr. Jorge Montes, as part of her case-in-chief. Mr. Fusi objected in as much as Mr. Montes was not listed as a witness on the Pre-Trial Conference Statement. Ms. Temkin replied that Mr. Fusi was aware of her desire to call Mr. Montes as a witness and that he could have deposed Mr. Montes in preparation of today.

The Court notes that Ms. Temkin participated in the Mandatory Settlement Conference conducted on July 20, 2022 and participated in the preparation of the Pre-Trial Conference Statement that was filed with the Court on July 19, 2022.

The Court also notes that for witnesses, Ms. Temkin listed "APPLICANT'S WITNESSES" and "DEFENDANT'S WITNESSES".

Off the record, the Court inquired of Ms. Temkin the circumstances surrounding her failure to list Mr. Montes as a witness. Ms. Temkin advised that she does not have many workers' compensation cases and the ones she does have are venued in Los Angeles. Per Ms. Temkin, the Los Angeles Judges allow her to call witnesses based on her identifying "DEFENDANT'S WITNESSES" on the Pre-Trial Conference Statement. Ms. Temkin also confirmed to the Court that she desired to call Mr. Montes as part of her case-in-chief.

After due consideration of the Oral Motion and the objection thereto, Ms. Temkin was advised that she had not demonstrated good cause to excuse her failure to list Mr. Montes as a witness on the Pre-Trial Conference Statement. As a result, Ms. Temkin's request to call the undisclosed witness was denied." (See Further Minutes of Hearing and Summary of Evidence, EAMS Doc ID 77574549 at 13:15-14:6.)

The case was submitted for decision and on February 29, 2024 this WCJ issued her Findings and Award and Order and Opinion on Decision finding that defendant's Exhibits C through E were inadmissible and determining that applicant's testimony was credible on the issues presented for decision thereby finding employment, injury AOE/COE, an entitlement to temporary disability indemnity and that the lien of E.D.D. was recoverable. It is from these findings specific as it relates to defendant's Exhibits C through E and applicant's credibility along with the prior determination that no good cause had been shown to allow for the testimony of Jorge Montes that the Petitioner seeks reconsideration.

Contemporaneous with the receipt of defendant's Petition for Reconsideration, the Court received correspondence from applicant's attorney pointing to an error in the issues as framed (attorney fees had been omitted). In response thereto, this Court on March 25, 2024 issued Amended Findings and Award and Order and Amended Opinion on Decision rectifying this error. In as much as there were no substantive changes made to the Findings and Award and Order and Opinion on Decision that would have any bearing on defendant's Petition for Reconsideration and the contentions raised therein, this WCJ hereby submits the within Report and Recommendation pertaining to the Petition for Reconsideration on file herein.

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III. DISCUSSION

ALLEGED DUE PROCESS VIOLATION FOR FAILURE TO ALLOW INTO EVIDENCE DEFENDANT'S EXHIBITS C THROUGH E AND FAILURE TO ALLOW THE TESTIMONY OF A NON-DISCLOSED WITNESS.

Defendant's Exhibits C through E are undated statements purportedly authored by the defendant Jorge Montes and two individuals, Miguel Santiago and Henry Solis Garcia. Applicant objected to said exhibits in as much as none of the witnesses were listed on the Pre-Trial Conference Statement and the introduction of the witness statements without the ability to cross-examine the witnesses themselves violates the due process rights of the applicant. As an aside, the Court also notes that the witness statements were not listed on the Pre-Trial Conference Statement. (*See* Pre-Trial Conference Statement, *supra*.) After consideration of applicant's objection the Court found the statements inadmissible.

“At the time of trial, the Court noted that the defendant did not list any witnesses with specificity on the Pre-Trial Conference Statement. Rather, defendant listed “defendants witnesses” without listing the names of any witnesses the defendant intended to call. The Court also noted that the uninsured employer made no efforts to have the witnesses available to testify prior the commencement of trial. (*See* Minutes of Hearing (March 8, 2023), EAMS Doc ID 76527017 at 4:24-5:5.)

Evidence Code section 1200 states that:

- (a) 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
- (b) Except as provided by law, hearsay evidence is inadmissible.
- (c) This section shall be known and may be cited as the hearsay rule."

Evidence Code section 1220 states that:

Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

Evidence Code section 1220 creates an exception to the hearsay rule for [an] admission of a party ¶... [Section] 1220 does not define when a

declarant-party's extrajudicial hearsay statement becomes relevant to be admissible against such party under the personal admission exception to the hearsay rule [For] such a statement to be admissible against a party as an admission, the statement must assert facts which would have a tendency in reason either (1) to prove some portion of the proponent's [defense], or (2) to rebut some portion of the party declarant's [cause of action]. (Citations.)" (*Carson v. Facilities Development Co.*, (1984) 36 Cal.3d 830, 849.) Evidence Code section 1230 requires a showing that the declarant is unavailable and allows a declaration against interest to be admissible when the declarant is not a party but makes a statement against his or her own interest.

Labor Code section 5709 states that:

No informality in any proceeding or in the manner of taking testimony shall invalidate any order, decision, award, or rule made and filed as specified in this division. No order, decision, award, or rule shall be invalidated because of the admission into the record, and use as proof of any fact in dispute, of any evidence not admissible under the common law or statutory rules of evidence and procedure.

Hence, evidence which ordinarily might be inadmissible as hearsay may be admitted in a workers' compensation proceeding. (See *Regents of University of Ca. v. Workers' Comp. Appeals Bd. (Lappi)* (226 Cal.App.4th 1530, 1537 [2014 Cal.App.LEXIS 530] ["the WCAB is free to adopt rules of practice and procedures which ignore the 'rules of evidence' set forth in the Evidence Code"]; *Martinez v. Associated Engineering & Construction Company* (1979) 44 Cal.Comp.Cases 1012, 1018 (Appeals Board en banc) (*Martinez*) ["evidence (particularly certain types of hearsay) is admissible in compensation proceedings which would not normally be admissible in civil proceedings over objection . . . [if] consistent with the requirements of due process"] emphasis added.)

Here, Exhibits C, D and E are hearsay: they are out of court statements offered to prove the matter asserted. Although hearsay evidence may be admitted in a workers' compensation proceeding, and although those statements that are Exhibits C, D and E here may fall under the Evidence Code section 1220 exception, admitting the exhibits without the declarants' testifying at trial violates applicant's due process rights. The defendant listed no witnesses on the Pre-Trial Conference Statement and counsel confirmed to the Court that no efforts were made to have the witnesses present to offer live testimony." (See Opinion on Decision (February 29, 2024) at pgs 1-3.)

Petitioner seems most aggrieved that this Court excluded defendant's Exhibit C, the undated statement from the Jorge Montes, in as much as Mr.

Montes was available to testify. It is true that Mr. Montes was present each day in Court. It is also true that Mr. Montes was not identified as a witness on the Pre-Trial Conference Statement.

It is well-settled in California that failure to identify a witness on the pre-trial conference statement will prevent the witness from testifying at trial unless the proponent can establish the witness was unavailable or could not have been discovered through due diligence before the MSC. (*SCIF v. Workers' Comp. Appeals Bd. (Welcher)* (1995) 60 Cal.Comp.Cases 717 [testimony of defendant's claims adjuster inadmissible at trial pursuant to section 5502(d)(3) because she was not identified as a witness at the MSC]; *Spectrum Temporary Employees v. Workers' Comp. Appeals Bd. (Cobley)* (2005) 70 Cal.Comp.Cases 1528 (writ den.) [record closed at time of trial without impeachment testimony of general employer's counsel, when WCAB found that this testimony would be no more probative than testimony already in record, general employer did not list its counsel as witness at time of mandatory settlement conference, and discovery closed at time of mandatory settlement conference]; *Dipiro v. Workers' Comp. Appeals Bd. (Laczko)* (2001) 66 Cal.Comp.Cases 747 (writ den.) [WCJ did not abuse discretion by refusing to develop record with rebuttal evidence offered by applicant for first time at trial, when applicant, without showing of good cause, failed to comply with statutory discovery requirements]; *Kimball v. Workers' Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 70 (writ den.) [WCJ properly refused to admit testimony of applicant's key witness as well as several documents submitted at trial, on grounds that applicant failed to disclose the name of the witness and the existence of the documents in MSC statement]; *City of Los Angeles v. Workers' Comp. Appeals Bd. (Marez-Porrás)* (1994) 59 Cal.Comp.Cases 1062 (writ den.) [defendant not allowed to introduce impeachment testimony at trial when witness was not listed at MSC and defendant did not show that witness was unavailable or could not have been discovered prior to conference or trial; *Waste Management v. Workers' Comp. Appeals Bd. (Sulek)* (2012) 77 Cal.Comp.Cases 353 (writ den.) [defendant failed to identify its witnesses at pretrial conference, WCJ correctly excluded undisclosed witnesses from testifying at trial and found defendant not excused from disclosing witnesses at trial on basis that it intended to call witnesses only for impeachment purposes].)

Independent contractor status has been the focal point of dispute since the inception of the case. Applicant has claimed all along to be an employee of the defendant; defendant has all along claimed that applicant was an independent contractor. As a result, it is inexplicable to this Court why the Petitioner did not list any witnesses it intended to call to support its position in the case.

The essence of due process is simply notice and the opportunity to be heard. At the time of trial Petitioner was heard on the issues raised in its Petition for Reconsideration and the Court was given the following explanation:

“Ms. Temkin advised that she does not have many workers' compensation cases and the ones she does have are venued in Los Angeles. Per Ms. Temkin, the Los Angeles Judges allow her to call witnesses based on her identifying "DEFENDANT'S WITNESSES" on the Pre-Trial Conference Statement.” (See Further Minutes of Hearing and Summary of Evidence, *supra.*)

Whether or not counsel's representation as to the procedures employed at the Los Angeles District Office is correct is quite honestly of no concern to this WCJ. Discovery closed at the Mandatory Settlement Conference. ("Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference." Labor Code section 5502, subdivision (d)(3).) Employment has been an issue from the start. Petitioner failed to disclose any witnesses it intended to call and actually failed to disclose any witness statements it intended to introduce.

There is nothing fundamentally inequitable in requiring a party to comply with established procedural rules which are designed to improve the overall fairness and efficiency of an adjudicatory procedure. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 at pp. 936-937.)

In as much as Petitioner was given an opportunity to be heard on the issue, Petitioner's due process rights were maintained. It remains this Court's opinion that Petitioner did not demonstrate good cause or due diligence that excuses the failure to list any witnesses, including the defendant Mr. Montes, on the Pre-Trial Conference Statement.

CREDIBILITY OF THE APPLICANT

Defendant is aggrieved that this Court found the applicant credible and cited to instances wherein the defendant felt applicant's testimony was inconsistent and contradictory. The Court concedes that the applicant's memory was poor and that he was, at times, argumentative with both the Court and counsel (as is reflected in the Further Minutes of Hearing and Summary of Evidence). However, having a poor memory and being argumentative does not mean that the applicant's credibility was impeached on the issues presented for decision.

Applicant was subjected to rigorous cross-examination and even examination by this Court. This Court found applicant's testimony on the issues presented for decision to be credible even when due consideration was given to the examples cited by the Petitioner.

A WCJ's opinions regarding witness credibility are entitled to great weight, (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 319 [35 Cal.Comp.Cases 500, 505]), and should be rejected only on the basis of contrary evidence of considerable substance. (*Lamb v. WCAB* (1974) 39 CCC 310, 314; *Western Electric Co. v. WCAB (Smith)* (1979) 44 CCC 1145, 1152.) In this case, Petitioner presented no evidence whatsoever that is contrary to applicant's testimony and neither Petitioner's cross-examination nor this Court's own examination impeached the applicant.

IV. RECOMMENDATION

Clearly Petitioner is aggrieved by this WCJ's Findings and Award and Order and Opinion on Decision finding employment and injury AOE/COE. Simply disagreeing with this WCJ's findings however, does not render those findings erroneous. Petitioner failed to demonstrate error on the part of the undersigned by the exclusion of Defendant's Exhibits C through E and by denial of its oral motion on the second day of trial. Petitioner also failed to support that it has been denied due process of law. Based thereon, it is respectfully recommended that the Petition for Reconsideration be denied in its entirety.

Date: April 3, 2024

Stefanie Ashton
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE