WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DENYCE IVERSON, *Applicant*

vs.

CVS PHARMACY, INC.; XL INSURANCE AMERICA, INC., *Defendants*

Adjudication Number: ADJ14940193
Redding District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings of Fact and Order of October 5, 2023, wherein it was found that "The applicant's claim for workers' compensation benefits is not barred by the statute of limitations set forth in LC section 5405." Applicant claims that while employed on August 11, 2019 as a shift supervisor, she sustained industrial injury in the forms of Guillain-Barre syndrome, nervous syndrome, fatigue, cellulitis, demyelinating neuropathy, depression, anxiety, irritable bowel syndrome, neurogenic bladder, urinary dysfunction, sexual dysfunction, anorectal dysfunction, asthma, gastroesophageal reflux disease, acute chronic inflammatory demyelinating polyradiculoneuropathy, urinary incontinence, and to the fingers, hands, legs, back and "sleep." Applicant's claimed injury was caused as a result of receiving influenza and pneumonia vaccines at work. In a Findings of Fact of April 28, 2023, it was found that, "The applicant's vaccination on 8/11/2019 was an act that arose out of and in the course of employment with the defendant."[1]

Defendant contends that the WCJ erred in finding that that applicant's claim was not barred by the statute of limitations. Defendant argues that the statute should not have been tolled due to its failure to provide applicant with a DWC-1 claim form because it did not have the requisite knowledge of injury or claim of injury necessary to impose an obligation to provide applicant with

[1] Defendant filed a Petition for Reconsideration of the Findings of Fact of April 28, 2023, which we denied on July 3, 2023. Since the issuance of our Order Denying Reconsideration of July 3, 2023, former Commissioner Natalie Palugyai, who was a panelist in the prior reconsideration proceedings, has left the Appeals Board. Commissioner Joseph V. Capurro has been substituted in her place for the instant proceedings.

the claim form. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will deny defendant's Petition for the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below. Although, as noted by petitioner, applicant did not expressly make a claim of injury (Petition for Reconsideration, p. 6, fn. 2), at the original February 28, 2023 hearing in this matter, applicant's supervisor testified that the day after the vaccinations, "he heard of the applicant's symptoms. He did provide the applicant with an ice pack. He knew that the applicant went to urgent care across the street from the store. He believed at the time the applicant's symptoms were, in fact, from the flu shot." (Minutes of Hearing and Summary of Evidence of February 28, 2023 trial at p. 10.) Applicant's manager thus had knowledge of all of the facts underlaying applicant's injury. We find that actual knowledge of the factual underpinning of a claim of injury is sufficient to constitute "knowledge" of injury under Labor Code sections 5401 or 5402. While applicant's supervisor may have sincerely testified that he was unaware that the underlying facts constituted a compensable industrial injury, an employer's mistake of law after knowledge of all relevant facts, even if reasonable, does not serve to deprive an employer of "knowledge" of injury under sections 5401 and 5402. Here defendant was aware that an incident at the job site caused the need for medical treatment and time off work. It thus was required to provide applicant with a DWC-1 claim form, and failure to comply, even if the failure was due to a layman's understandable lack of knowledge of workers' compensation law, has the consequence of tolling of the statute of limitations. (*Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24, 35 [70 Cal.Comp.Cases 97].)

In its Petition, defendant cites *Batista v. Lee's Paving, Inc.* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 8 (Appeals Bd. panel). However, in *Batista*, the defendant did not have knowledge of the factual elements underpinning the fact that an injury causing medical treatment or disability was sustained in the course of and arising out of employment. Unlike in the instant case, the injury in *Batista* was not sustained at the job site and thus the only source of knowledge could be the injured worker themself. In *Batista*, the injured worker did not apprise the employer of facts showing that he was in the course of employment at the time of injury, and in *Batista* it was actually found that applicant was *not* in the course of employment at the time of injury. (*Batista*, 2020 Cal. Wrk. Comp. P.D. LEXIS at pp. 9-12.) *Batista* is thus inapposite.

We otherwise deny the defendant's Petition for the reasons stated in the Report quoted below. We have omitted a brief paragraph (Report p. 8) which somewhat inaccurately summarizes the Supreme Court's holding in *Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24 [70 Cal.Comp.Cases 97].

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1. Applicant's Occupation:	Shift Supervisor
2. Applicant's Age:	28
3. Date of Injury:	8/11/2019
4. Parts of Body Claimed:	Guillain-Barre Syndrome, nervous system, fingers, hands, legs, fatigue, cellulitis, demyelinating neuropathy, depression, anxiety, irritable bowel syndrome, neurogenic bladder, back, sleep, urinary dysfunction, sexual dysfunction, anorectal dysfunction, asthma, gastro-esophageal reflex disease, acute inflammatory demyelinating polyradiculoneuropathy, urinary incontinence.
5. Manner of Injury:	Reaction to flu vaccination
6. Identity of Petitioner:	The petitioner is the defendant
7. Timeliness:	The petition was timely filed
8. Verification:	The petition was properly verified.
9. Date of Findings of Fact:	10/5/2023
10. Petitioner's Contentions: of	Petitioner contends that the statute limitations was not tolled because the petitioner did not have knowledge of an industrial injury sufficient to trigger its obligation to provide a claim form and notice of rights to the applicant.

II.
FACTS

There is no dispute that the applicant filed her claim form more than one year from the date of her injury. There is further no dispute that the applicant was wholly ignorant of her rights to workers' compensation, or even that a system of workers' compensation existed. Both the applicant and the applicant's supervisor at work believed that the flu shot was the cause of the applicant's symptoms and injury, and the petitioner, when informed of the applicant's development of symptoms, directed her to treatment and advised her to apply for a leave of absence from work as a consequence of her symptoms.

The applicant's supervisor testified at trial that although he was aware of this injury from the flu vaccination that the applicant received at work, on company time, and administered by the company pharmacist, he did not believe it was an industrial injury. Therefore, he did not report it to the adjusting agency, tell the applicant she had any rights to workers' compensation, or provide a claim form and notice of rights. He further testified that he could not recall any training on how to recognize an industrial injury beyond an obvious slip and fall or back injury.

The applicant finally became aware of her right to workers' compensation about a year and a half after her injury when a social security attorney told her. Upon being given this information, she immediately located a workers' compensation lawyer and filed a claim. The question of whether this was an industrial injury has been tried. When this judge determined after trial that this was an industrial injury, defendant petitioned for reconsideration. However, the Board agreed that this injury was one that arose out of and in the course of employment, resolving that issue. Defendant did not appeal that decision. Next, defendant asserted that they had no liability, as the remedy for the applicant's claim was barred by the statute of limitations due to the fact that claim was filed more than one year from the date of injury. Unable to resolve that issue between themselves, the parties tried that issue alone on 9/19/23. A decision issued thereafter on 10/5/23, finding that the statute of limitations was tolled until the applicant became aware of her rights. The defendant found itself once again in disagreement with this finding, and has now petitioned for reconsideration from this latest determination.

III.
DISCUSSION

Petitioner's argument is that because it was not aware that the applicant had suffered an industrial injury such that the applicant had rights to workers' compensation, it had no duty to provide a claim form and notice of potential eligibility to the applicant, and therefore the failure to do so does not toll the statute of limitations.

However, **LC section 5401(a)** states, in pertinent part, the following:

"Within one working day of receiving notice or knowledge of injury under Section 5400 or 5402, which injury results in lost time beyond the employee's work shift at the time of injury or which results in medical treatment beyond first aid, the employer shall provide, personally or by first class mail, a claim for and notice of potential eligibility for benefits under this division to the injured employee. "

Labor Code section 5400 requires the applicant to file written notice of the injury within thirty days of the injury, except as provided in LC sections 5402 and 5403.

LC section 5402 states, in pertinent part, the following:

"Knowledge 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."

Here, the undisputed facts establish that both the applicant and the employer were well aware that the vaccination given to the applicant at work, at the employer's request, on the employer's time and at their expense, and by the employer's pharmacist, had caused the reaction that resulted in the applicant losing her ability to work and that required immediate and extended treatment far beyond first aid (2/28/23 Summary of Testimony, page I 0: 16-19; 9/19/23 Summary of Testimony, page 3: 6-13; page 5: 12-13).

Petitioner's supervisor erroneously decided at that time that these circumstances did not give rise to an industrial injury sufficient to entitle the applicant to workers' compensation benefits, and therefore did not report the matter to petitioner's adjusting agency, nor provide the applicant with a claim form and notice of eligibility.

Petitioner now argues that this error on the part of their supervisor absolves them of any duty to provide a claim form and notice of eligibility, and in tum that failure does not toll the statute of limitations for the applicant to file her claim. So, in essence, the petitioner argues that their error deprives the applicant of her right to be informed of workers' compensation, and thus she does not receive the benefit of the tolling of the statute of limitations.

However, the [Supreme Court] has addressed nearly this exact situation in the case of **Reynolds v. WCAB (1974) 39 CCC 768.**

There, the applicant began having severe symptoms at work of cardiac arrest, and the employer's supervisor called an ambulance and had Mr. Reynolds sent to the hospital, where a cardiac arrest was diagnosed and treated.

In our case, the applicant began having symptoms the day after the vaccination, and the employer sent the applicant to a nearby clinic, where the diagnosis was made that those symptoms were the result of the vaccination for the flu that happened at work the day before. The employer, through their supervisor, was well aware of these facts.

In both Reynolds and our case, neither employer notified the applicant in any way that they could be entitled to workers' compensation benefits.

In both cases, the injured worker only became aware of their rights to such benefits much more than a year after the injury when told by a third party, and after which a claim was quickly filed.

At the time of the Reynolds injury, the predecessor to LC section 5401 required the employer to, on knowledge of an injury which required hospitalization or which resulted in disability of more than seven days, provide notice of payment or non-payment of benefits as well as notice of the right to file an application and litigate. The [Supreme] court in Reynolds noted that *"the clear purpose of these rules is to protect and preserve the rights of an injured employee who may be ignorant of the procedures or, indeed, the very existence of workers' compensation law."*

The Reynolds court went on to conclude that the defendant there either knew or should have known of the relationship of the heart attack to the work, and was therefore obligated to give the notices described, and that the failure to do so precluded them from raising the statute of limitations defense.

This is nearly the exact situation in the instant case, and the same legal analysis applies. Here, the employer/petitioner knew of the relation of the applicant's injury to her work, but made the incorrect legal decision that because the applicant took the vaccination voluntarily, they did not need to provide a claim form and notice of eligibility.

In addition, since Reynolds was decided, the applicable rules of knowledge and notice have been made even more stringent via the definitions found in LC sections 5401 and 5402, both of which were in effect in 2019 when our applicant had her vaccination injury.

Petitioner attempts to argue that if the applicant doesn't specifically report an injury at work as industrial, and the employer for whatever reason doesn't

recognize it as such, then they have no duty to provide the claim form and notice of eligibility.

However, this argument goes clearly against both the language and the logic of **LC section 5401(a) a**nd the Reynolds decision.

In other words, and contrary to petitioner's arguments, the law requires that if the employer learns of an injury associated with the employment that results in lost time beyond one shift and more that first aid, the duty to provide the claim form and notice arises. As the Reynolds decision said, *"the clear purpose of these rules is to protect and preserve the rights of an injured employee who may be ignorant of the procedures or, indeed, the very existence of workers ' compensation law."*

If this were not so, any defendant could simply shrug its shoulders and claim, as petitioner is doing here, that their misinterpretation of the law and a lack of formal notice of a work injury from an injured worker that is ignorant of even the existence of workers' compensation relieves them of this clear statutory duty.

Petitioner's argument, if followed, would allow them to take advantage of uninformed injured workers, and thereby avoid their clear statutory duty to provide notice to the worker of his or her rights.

It is interesting to notice here that even the case law cited by petitioner supports tolling of the statute of limitations in the absence of proper notice.

In **CIGA v. WCAB (Carls) (2008) 163 Cal. App. 4th 853, 863-864** the [Court of Appeal] summarized this duty as follows:

"When the employer receives either written notice or knowledge of an injury that has caused lost work time or required medical treatment, the employer is to provide the employee, within one working day, with a workers' compensation claim form and notice of potential eligibility for benefits ...."

This language applies directly to the facts of our case. Here, it is not disputed that the petitioner's supervisor knew of the applicant's reaction to the vaccine that she had received the day before at work, but did not recognize it as an industrial injury due to the mistaken belief that because she had voluntarily received the vaccination this was not an industrial injury that required him to provide a claim form and notice of eligibility, or even to call and notify the company's adjusting agency via their handy 800 number. Thus, the failure to do so tolls the statute of limitations.

[Discussion of *Honeywell v. Workers' Comp. Appeals Bd. (Wagner)* (2005) 35 Cal.4th 24 [70 Cal.Comp.Cases 97] omitted.]

Here, in Ms. Iverson's case, it is undisputed that the employer/petitioner was aware of the injury and the circumstances under which it occurred. It was clearly an industrial injury that the employer's supervisor decided did not reach the status of a workers' compensation injury because the applicant agreed to the vaccination voluntarily.

This quasi legal determination was, of course, quite incorrect, and that error certainly does not relieve the petitioner of their duty, clearly defined in the relevant statutes and case law already discussed above, to step up and provide a claim form and notice of eligibility.

The failure to do so because of this erroneous decision means that the running of the statute of limitations for the applicant to file her claim was tolled until she did become aware of her rights.

IV.
RECOMMENDATION

For the reasons discussed above, it is respectfully recommended that the petition for reconsideration be denied in its entirety.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact and Order of October 5, 2023 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 29, 2023

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

DENYCE IVERSON
SILES & FOSTER
BRADFORD & BARTHEL

DW/oo

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