**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**GINA CHAVEZ, *Applicant***

**vs.**

**LOBEL FINANCIAL CORPORATION;**
**HARTFORD FIRE INSURANCE COMPANY, administered by**
**THE HARTFORD, *Defendants***

**Adjudication Number: ADJ13034108**
**Pomona District Office**

# OPINION AND ORDER
# DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the "Findings & Order" (F&O) issued on December 15, 2020 by a workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant's claim for a December 19, 2017 injury is barred by the statute of limitations, and that her use of employer-provided health benefits did not toll the statute of limitations. The WCJ thereby ordered that applicant's claim be dismissed.

Applicant contends that her application for adjudication of claim was timely filed on March 5, 2020 pursuant to Labor Code[1] section 5405, subdivision (c), and *Mihesuah v. Workmen's Comp. Appeals Bd.* (1972) 29 Cal.App.3d 337 [37 Cal.Comp.Cases 790].

Defendant filed an Answer to Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report). The WCJ recommends that the petition be denied pursuant to *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918, 933 [50 Cal.Comp.Cases 104], because applicant failed to notify her employer that the injury was work related.

We reviewed the record in this case, as well as the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report. Based on the reasons set forth in the

[1] All further references are to the Labor Code unless otherwise noted.

Report, which we adopt and incorporate herein, as well as for the reasons discussed below, we deny applicant's Petition for Reconsideration.

**DISCUSSION**

It is undisputed that applicant filed her claim in this case on March 3, 2020 for an alleged industrial injury to her hand on December 19, 2017. (See Application for Adjudication, March 3, 2020, ¶ 1.) Therefore, we agree with the WCJ that the claim is barred by section 5405, subdivision (a), as it was filed more than one year from the date of injury. (Lab. Code, § 5405(a).)

Applicant contends that her claim was timely filed under section 5405, subdivision (c), and the *Mihesuah* decision, because she received medical treatment for her injury through an employer provided health plan. Based on the testimony of applicant and defendants' witnesses, the WCJ determined that the facts in this case are distinguishable from those in *Mihesuah* because applicant failed to notify her employer that her injury was work-related. (Report, p. 3.)[2] We concur.[3]

In *Mihesuah*, the employee was injured in a motor vehicle accident while driving a truck for his employer. (*Mihesuah, supra,* 29 Cal.App.3d at pp. 338-339.) The employer "treated the injury as a nonindustrial injury and, over the next two years, applicant received extensive benefits from Union and its group policy carriers. Petitioner was not informed by Union Oil that they had

[2] An employer can receive "notice or knowledge of an alleged work injury" via service by the injured worker or someone on his/her behalf. (Lab. Code, § 5400.) "Service" includes, "[k]nowledge of an injury, obtained from any source, on the part of an employer...or knowledge of the assertion of a claim of injury sufficient to afford opportunity to the employer to make an investigation into the facts..." (Lab. Code, § 5402(a).) An employer's duty to provide a DWC-1 claim form, and notification of their potential right to workers' compensation benefits arises when the employer has "'*...actual or constructive knowledge* of any work-related injury...'" (*Carls, supra*, 163 Cal.App.4th at pp. 863-864, fn. 8, quoting *Martin, supra*, 39 Cal.3d at p. 64, emphasis added in *Carls*.)

[3] We note that the WCJ states that "[t]here are two other arguments to consider. The first is whether there is an estoppel argument or tolling due to Applicant not knowing how to file a workers compensation claim. The second is tolling due to employer furnished benefits under subsection (c) in the form of medical treatment for the hand using the employer-provided health insurance. (Blue Shield HMO and later Anthem Blue Cross)." (Report, p. 4, citing F&O, Opinion on Decision, p. 2.) Applicant does not petition the Board for reconsideration of any issue related to "tolling due to Applicant not knowing how to file" a claim; rather, she petitions for reconsideration of the WCJ's decision that her claim is barred by the statute of limitations, and that it is not "tolled pursuant to section 5405, subdivision (c). We therefore do not address this portion of the WCJ's Opinion on Decision. (Lab. Code, § 5904; see *Schultz v. Workers' Comp. Appeals Bd.* (2015) 232 Cal.App.4th 1126, 1134 [80 Cal.Comp.Cases 16].) However, we note that the question of an injured workers' knowledge in the context of equitable tolling under *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 762 [39 Cal.Comp.Cases 768] and *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Martin)* (1985) 39 Cal.3d 57 [50 Cal.Comp.Cases 411], involves establishing that the worker had *actual* knowledge of his or her right to file a workers' compensation claim. (See *California Insurance Guarantee Association v. Workers' Comp. Appeals. Bd. (Carls)* (2008) 163 Cal.App.4th 853, 863 [73 Cal.Comp.Cases 771] [Actual knowledge of the "...potential eligibility for a particular injury..." cannot be proven by showing an injured worker's "...general awareness of the existence of the workers' compensation system..." or "...past experience with workers' compensation..."].)

decided to treat his accident on a nonindustrial basis." (*Ibid.*) The employee filed his application for adjudication immediately after receiving notification from his employer that all benefits the employer was providing would be terminated. (*Ibid.*) The Court held that under the circumstances, the employer's contributions to the employee's medical insurance coverage constituted section 4600 benefits sufficient to make his claim timely under section 5404, subsection (c). (*Id.*, p. 340.) The Court explained that because the employer willingly provided applicant with medical treatment and employment benefits for an injury it knew was industrial, the employee "had no reason to seek workmen's compensation" prior to the termination of those benefits. (*Ibid.*)

As explained by the California Supreme Court in *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (Webb)* (1977) 19 Cal.3d 329 [42 Cal.Comp.Cases 302]:

> In *Mihesuah*, an employer disclaimed compensation responsibility for an employee's disabling truck accident. Unlike the instant case, however, the employer failed to advise the injured employee of its disclaimer, but rather, for over two years, continued to furnish medical treatment under its own medical plan and paid the employee substantial benefits from its own pension and disability fund. When these benefits were suddenly withdrawn the employee promptly filed a claim. In reversing the Board's determination that the claim was barred, the *Mihesuah* court concluded that the employer's contributions to the employee group medical care plan necessarily constituted section 4600 "benefits," thus tolling the statute of limitations for so long as treatment for a compensable injury was afforded under the plan. (*Id.*, at pp. 334-335.)

The Court in *Nielsen v. Workers' Comp. Appeals Bd.* (1985) 164 Cal.App.3d 918 [50 Cal.Comp.Cases 104] (*Nielsen*), concluded that, "the *Mihesuah* decision is simply another in the line of decisions holding that '**if an employer or its compensation carrier, knowing of a potential claim, furnishes treatment or advances sums for purposes bearing a clear relationship to an industrial injury, such benefits will be deemed to have been given under the Act thus tolling the statute**.'" (*Id.*, at p. 933, citing *Webb, supra,* 19 Cal.3d at p. 333, emphasis added; see *Gonzalez v. Workers' Comp. Appeals Bd*. (1986) 186 Cal.App.3d 514, 523 [51 Cal.Comp.Cases 485].) In support, the *Nielsen* Court cited to cases dating back to the 1930's and 1940's:

> "Several courts have considered the meaning of 'compensation' or 'benefits' as used in section 5405, subdivisions (b) and (c), and their predecessor sections. **The interpretation of these terms has been judicially related to the legislative purpose behind the 'tolling' provisions of subdivisions (b) and**

> **(c). This purpose, as we develop below, 'is the protection of the injured employee from being lulled into a sense of security by *voluntary* payments of benefits until the time to commence formal proceedings with the commission has expired.'** (*Pacific Emp. Ins. Co. v. Ind. Acc. Com.* (1944) 66 Cal.App.2d 376, 380 [152 P.2d 501] [construing predecessor statute], italics added; see State of Cal. v. Industrial Acc. Com. (1957) 155 Cal.App.2d 288, 290 [318 P.2d 34] [construing current language].) [Orig. italics.]
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> **"Consistent with the foregoing legislative goal, several older cases have held that if an employer or its compensation carrier, knowing of a potential claim, furnishes treatment or advances sums for purposes bearing a clear relationship to an industrial injury, such benefits will be deemed to have been given under the Act thus tolling the statute.** (E.g., *Bulger v. Industrial Acc. Com*. (1933) 218 Cal. 716, 724 [24 P.2d 796]; *Rendleman v. Industrial Acc. Com.* (1966) 242 Cal.App.2d 32, 35-37 [50 Cal.Rptr. 923]; *Morrison v. Industrial Acc. Com*. (1938) 29 Cal.App.2d 528, 537 [85 P.2d 186]; *London G. & A. Co. v. Indus. Acc. Com.* (1928) 92 Cal.App. 298, 301 [268 P. 670].)
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> ...
>
> **"The foregoing cases indicate that the underlying purpose of the 'tolling' provisions of section 5405 and its predecessors is to prevent a potential claimant from being misled by an employer's voluntary acts which reasonably indicate an acceptance of responsibility for the employee's injury.** ...
>
> (*Nielsen, supra,* 164 Cal.App.3d at p. 932-933, italics in the original, bold added, citing *Webb, supra,* at p. 333 and cases there cited.)

Here, the WCJ determined that although there were "numerous opportunities for Ms. Chavez to report her injury," applicant failed to report her injury to her employer until November 2019.[4] The WCJ clarifies in the Report that he made his decision in this case after reviewing and weighing the trial testimony of applicant, the deposition testimony of applicant (Def. Exh. A), and the credible trial testimony of defendant's witnesses, Human Resources Manager Jackie M. Alvarez and applicant's direct supervisor, Maria Luz Hopper. (Report, p. 5.)

Specifically, the WCJ identified applicant's trial testimony that "she believed the employer knew she had injured her hand but didn't know if her employer knew her hand was injured from

[4] Applicant testified she reported her injury to witness Jackie M. Alvarez in October 2019, but she was not certain. (Def. Exh. A, p. 69.) Ms. Alvarez testified that applicant reported the injury on November 11, 2019 (Minutes of Hearing and Summary of Evidence, November 17, 2020 (MOH), p. 7). The employer's denial letter was dated February 10, 2020 (Def. Exh. B), which lends credibility to Ms. Alvarez' testimony.

an incident at work," and that she did not report to her employer that her hand injury and medical treatment for that injury were work related until after her hand surgery in October 2019. (*Id.*, p. 2.) The WCJ also referenced applicant's deposition testimony that she had "personal reasons" for not reporting the injury to her employer. (Report, p. 2; see Def. Exh. A, pp. 69, 72-73.) We note this testimony as follows:

> A. I didn't want to lose my job. I didn't think that it was Workers' Compensation. I wasn't sure if it was considered that. In my mind, it didn't seem like it, and I didn't think it was going to keep getting worse. I didn't anticipate all the stuff that came from that after the fact. That's the best explanation I have. I didn't think of it as a Workers' Compensation injury even though it happened at work. I don't know if that makes sense, but I didn't think of it that way. I did seek out medical attention to try to resolve it on my own with the injections and whatnot. It just continued to evolve into what it is now.
>
> Q. When you officially reported it as an industrial injury in October of 2019, how did your employer respond?
>
> A. She gave me a form and instructions on how to fill it out pretty much, which I did, and I returned it to them.
>
> Q. That was in October of 2019?
>
> A. I believe that's correct.
> ...
>
> Q. When the injury was worsening your hand symptoms and they were getting worse and worse, why did you wait until October then to tell your employer?
>
> A. As far as claiming it as Workers' Compensation?
>
> Q. Yes. Why didn't you report it to your employer until October?
>
> A. I did not want -- I was worried about losing my job.
>
> Q. You were aware that it was industrial, but you were worried about losing your job; is that correct?
>
> A. In the back of my mind, I knew it happened at work. It was not a traditional thing I would say was Workers' Compensation. It's been a while since I had to do that kind of work with Workers' Compensation. It's not something that registered in that way even though it happened at work. I thought the surgery would take care of it and that would be the end of it. I did fear about losing my job, which I desperately needed. **I had trouble with that decision for a while**.

...

> Q. You were afraid of losing your job, but you were aware there was an industrial component and you were avoiding telling your employer about it then; is that correct?
>
> A. I don't want to say I was avoiding it, but **I really didn't think it was going to continue to get worse and worse. I probably should have done something different before it got worse. I had just continued to work like that, but it made everything worse over time. It just progressed more and more and more. I really didn't think it would get out of hand like that or the way it is now. It didn't cross my mind. I thought the surgery would take care of it. I didn't want to make any trouble or anything like that.** (*Id*., pp. 69, 72-73, emphasis added.)

As pointed out by the WCJ, there were no follow up questions regarding why applicant was concerned about losing her job in response to reporting a workers' compensation injury (see Def. Exh. A); there were also no questions on this issue posed to either Ms. Alvarez or Ms. Hopper (see Minutes of Hearing and Summary of Evidence, November 17, 2020 (MOH), pp. 5-9). We note that applicant testified at deposition that she reported a workers' compensation injury to her back to a prior employer, Home Depot, but was not terminated from that job. (Def. Exh. A, p. 52.) Applicant voluntarily took another job that did not involve the "hard labor" required at Home Depot. (*Id.*, at p. 64.) We also note that applicant thought her Home Depot back injury would "go away" if she stopped doing that work. (*Id.*, p. 52.) Even so, the back injury got worse, and she ended up having back surgery in 2006. (*Ibid.*)

The WCJ also found that Ms. Alvarez and Ms. Hopper credibly testified that applicant did not report her injury to them until November 2019. (Report, p. 2-4; F&O, Opinion on Decision, p. 2.) Ms. Alvarez testified that although she knew of applicant's hand injury and need for work restrictions prior to applicant's July 2019 surgery, applicant did not give Ms. Alvarez any medical records, nor tell her the cause of the hand injury. (MOH, pp. 7-8.) She did not ask applicant about her medical issues because of HIPAA. (*Id.*) Ms. Alvarez first learned that applicant's hand injury was work related on November 11, 2019 when applicant told her. (MOH, p. 7.) Ms. Hopper testified that she learned that applicant's hand injury was work related after Ms. Alvarez told her, and that she was never informed by applicant herself. (MOH, p. 5.) The WCJ states:

> The employer witnesses testified credibly as to their lack of knowledge or understanding of circumstances that would lead a person to conclude with a

> reasonable degree of certainty that a work injury had occurred. The work-caused injury was never directly reported for over two years. The untimely first reporting of the injury in November 2019 is what led the employer to first learn of the claim. This is well after statute of limitations had expired. ...
>
> Petitioner seemingly ignores certain testimony of HR Manager Jackie Alvarez who helped Applicant complete the forms related to FMLA benefits, which was being used instead of sick or vacation pay. Ms. Alvarez testified that nothing on the FMLA Application completed by Applicant, or on any medical notes, mentioned that the surgery was for a work injury. (Summary of Evidence, page 7, lines 12-20) This same witnesses [*sic*] gave testimony of several instances where Ms. Alvarez spoke with the Applicant concerning the request for time off, the completing of paperwork related to time off, the FMLA Application, and work restrictions when returning to work. During none of those exchanges did Applicant ever report this as a work injury. This was despite Ms. Alvarez' testimony that the lunchroom and breakroom each have the workers compensation poster in it and that employees are advised how to report a work injury when they are trained and as part of the opening package of documents that new employees receive. (Summary of Evidence, page 8, lines 15-19)
>
> Moreover, Petitioner's cross examination of Jackie Alvarez was brief and there was no confrontation about the claimed duty to investigate under LC 5402 based on what information was known at the time. (Report, p. 4, 6; see F&O, Opinion on Decision, p. 2.)

In workers' compensation proceedings, a WCJ's credibility determinations are "entitled to great weight because of the [WCJ's] 'opportunity to observe the demeanor of the witnesses and weigh their statements in connection with their manner on the stand...' [Citation.]" (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500]; also see *Meiner v. Ford Motor Co*. (1971) 17 Cal.App.3d 127, 140-141.)[5] Only evidence of considerable substantiality would warrant rejecting the WCJ's credibility determination. (*Garza, supra*, 3 Cal.3d at 318-319.) We find no such evidence in the record of this case.

[5] "The law has long recognized the problem of appellate review in the matter of credibility of witnesses based upon their demeanor, and for that reason the rule has evolved that the trier of facts is the sole and exclusive judge of the credibility of witnesses as determined by their demeanor. A written transcript of testimony is but a pallid reflection of what actually happens in a trial court. '"'The best and most accurate record is like a dehydrated peach; it has neither the substance nor the flavor of the fruit before it was dried.'" It resembles a pressed flower.' (*Broadcast Music v. Havana Madrid Restaurant Corp.*, 175 F.2d 77, 80.)" (*Meiner v. Ford Motor Co*. (1971) 17 Cal.App.3d 127, 140 [94 Cal.Rptr. 702].)

Finally, applicant argues that the plain and ordinary language of section 5405, subsection (c), is not ambiguous, and does not require that the employer "must have knowledge of [a] claim as a precondition to tolling [t]he statute of limitations." (Petition for Reconsideration, p. 9.) However, decisions published by the California Supreme Court and the California Appellate Courts are controlling authority for the Workers' Compensation Appeals Board. We know of no authority contrary to *Webb* or *Nielsen*.[6]

Accordingly, we concur with the decision of the WCJ that applicant's claim is barred by the statute of limitations, and under the circumstances of this case, the claim is not made timely by defendant's contributions to applicant's health care plan pursuant to *Mihesuah, Webb,* and/or *Nielsen*. We therefore deny applicant's Petition for Reconsideration.

[6] In addition, the Board has consistently issued decisions in accord with *Webb* and *Nielsen*. (See *Vera v. Montgomery Hardware Co.*, 2020 Cal. Wrk. Comp. P.D. LEXIS 362; *Erwin v. Gulfstream Aero*. (2016) 81 Cal. Comp. Cases 932, 935, 942 [2016 Cal. Wrk. Comp. P.D. LEXIS 320]; *Miller v. Workers Compensation Appeals Bd.* (1999) 65 Cal. Comp. Cases 95 [1999 Cal. Wrk. Comp. LEXIS 5170] (writ den.); *San Diego Unified Sch. Dist. v. Workers Compensation Appeals Bd*. (1996) 61 Cal. Comp. Cases 1220, 1222-1223, [1996 Cal. Wrk. Comp. LEXIS 3404], (writ den.); *Deeny v. Workers' Compensation Appeals Bd. of California* (1980) 45 Cal. Comp. Cases 968, 971 [1980 Cal.Wrk.Comp. LEXIS 3466] (writ den.); *Pizza Hut of San Diego, Inc. v. Workers' Comp. Appeals Bd.* (1978) 76 Cal.App.3d 818, 824.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the Findings & Order issued on December 15, 2020 by a workers' compensation administrative law judge is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**ANNE SCHMITZ, DEPUTY COMMISSIONER**
**PARTICIPATING NOT SIGNING**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 30, 2021**

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

**GINA CHAVEZ**
**LAW OFFICES OF FRED FONG**
**ALBERT & MACKENZIE**

**AJF/abs**

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

## REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

## I.
## INTRODUCTION

After a Hearing involving several witnesses, the judge determined that Gina Chavez' case was barred by the statute of limitations. A specific findings of fact was made that "*Use of employer-provided health benefits does not toll the statute of limitations*."

The matter was submitted on 11/17/20. A Findings & Order was issued on 12/15/20 by designated service on defense counsel. Defendant served the document on Applicant on 1/26/21.

Applicant responded by filing a timely and verified Petition for Reconsideration on 2/2/21 raising all five grounds set forth in Labor Code § 5903. Defendant filed an Answer.

## II.
## STATEMENT OF FACTS

Gina Chavez, at age 44, while employed on 12/19/17, as a Staff Accountant, at Anaheim, California, by Lobel Financial Corporation, claimed to have sustained injury arising out of and in the course of employment to the arms, hands and fingers. The judge dismissed the claim after determining it was filed late and barred by the statute of limitations.

Applicant testified that on 12/19/17 she was entering the office of her supervisor Luz Hopper, who was not present at the time, when she hit her left hand on the doorknob. There was immediate pain. She did not report the injury and saw a physician through her health plan about a month later. She also testified she did not report her injury to her employer during 2017 and the whole year of 2018 and most of 2019. The injury was first reported in October of 2019 after returning to work from surgery in July 2019. A workers compensation claim was formally filed on 3/3/20.

Ms. Chavez told her employer the surgery was for a bump on the hand. There was also testimony about how the employer prepared for Applicant's time off and at no time did Applicant report she had sustained a work injury or that her time off for surgery as due to a work injury. The employer helped complete documents related to FMLA for the time missed from work.

During cross-examination Defendant focused on Applicant's deposition

testimony as to the personal reasons why Applicant did not report her injury to her employer. (Exhibit A, page 72, line 20 to page 73, line 23) Applicant also testified to having hired an attorney for a prior work injury at Home Depot.

Applicant told the judge that she believed the employer knew she had injured her hand but didn't know if her employer knew her hand was injured from an incident at work. She then continued working until she had surgery on her left hand. She missed time from work taking it as FMLA. She returned to work on October 2019 at which time the injury was first reported shortly thereafter.

Both defense witnesses reasonably knew Applicant was having hand problems and that she was missing time from work due to needed surgery. Both testified credibly to not knowing about any work injury claim until October or November of 2019. A workers compensation claim was formally filed on 3/3/20.

## III.

## DISCUSSION

The Petition for Reconsideration is timely due to delayed service of the Findings & Order upon Applicant attorney by Defendant.

Petitioner's main contention is that Applicant's self-procured medical treatment for the hand, using her health insurance provided by the employer, and taking FMLA, is the type of medical treatment under LC 4600 that qualifies as LC 5405(c) "benefits" and thus tolls the statute of limitations.

It is also argued by Petitioner that LC 4600 does not require the employer to have knowledge that use of those health benefits was for a work injury for the tolling provision to be triggered.

Petitioner also contends that the employer should have investigated the circumstances behind Applicant's request to take time off work for hand surgery, or somehow should have known it was really a work injury, and that their failure to do anything about it tolled the statute of limitations based on LC 5402.

Petitioner also disputes the conclusion as to the lack of evidence to show Ms. Chavez didn't know how to file a claim for a work injury.

All of these arguments had been considered by the judge in his decision. The Opinion on Decision stated:

> *An injured worker must file a claim timely or else it's barred by the statute of limitations. Here Defendant is raising the one year statute of limitations based on Labor Code Section 5405 which states:*
>
> *"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."*

*The claimed injury occurred on 12/19/17. Without any tolling of the statute of limitations the last date to commence proceedings would be 12/19/18.*

*Witness Jackie Alvarez credibly testified to first learning of the claim around 11/11/19 when Applicant returned to work following her surgery. A claim form was provided. The claim itself was formally filed with the WCAB on 3/3/20 which is arguably the date that proceedings commenced for the collection of benefits. Thus based on subsection (a) above the claim is barred as untimely as being filed over two years from the injury date.*

*There are two other arguments to consider. The first is whether there is an estoppel argument or tolling due to Applicant not knowing how to file a workers compensation claim. The second is tolling due to employer furnished benefits under subsection (c) in the form of medical treatment for the hand using the employer- provided health insurance. (Blue Shield HMO and later Anthem Blue Cross)*

*Overall the judge found no extension or tolling of the statute of limitations, or exception to its application. The employer witnesses testified credibly as to their lack of knowledge or understanding of circumstances that would lead a person to conclude with a reasonable degree of certainty that a work injury had occurred. The work-caused injury was never directly reported for over two years. The untimely first reporting of the injury in November 2019 is what led the employer to first learn of the claim. This is well after statute of limitations had expired.*

*The judge cannot conclude that Applicant did not know how to file a claim. The employer had two group locations for which workers compensation rights and duties were already posted. Employees are trained to report their work injuries. The Applicant also testified to having a prior workers compensation claim experience.*

*The employer witnesses may have known Applicant was taking time off work to treat for a hand injury but reasonably was not aware it was related to any work injury. There were also issues of privacy and HIPAA to consider as one witness testified.*

*The judge was also not convinced that medical insurance provided by the employer, and Ms. Chavez use of those benefits, was the equivalent of benefits furnished on the claim sufficient to toll the one year statute of*

*limitations under the LC 5405(c). The Mihesuah v. Workmen's Comp. Appeals Bd., 29 Cal. App. 3d 337 case cited by Applicant was distinguished in the more recent case cited by Defendant in Nielsen v. Workers' Comp. Appeals Bd., 164 Cal. App. 3d 918.*

*The judge has determined that the employer needs to furnish benefits with knowledge that it relates to the claimed work injury. The case cited by Applicant seems more of a collateral estoppel argument caused by the employer knowing about the injury, and it probably being work related, but never informing the Applicant of his right to file a claim, and that they were treating it as non-industrial.*

*The Nielsen case is a better analysis of the situation where the employer-provided health insurance is being used but the employer has no knowledge that the treatment is related to a work injury. As applied here, Applicant's use of her health insurance furnished by the employer does not toll the one year statute of limitations of LC 5405(c). A reasonable employer would have no reason to believe that Applicant was treating for an industrial injury at the time she left work for surgery.*

*The conclusion is that there are no exceptions, tolling or estoppel that caused the one year statute of limitations to be beyond 12/19/18 and thus this claim filed on 3/3/20 is barred by the statute of limitations.*

Overall it was up to the judge to try to understand how the course of events proceeded in this case. After hearing all the evidence the judge concluded that Applicant never reported her injury timely, despite knowledge of her rights and duty to do so. Instead she self-procured medical treatment, outside of any employer medical control or knowledge.

There were numerous opportunities for Ms. Chavez to report her injury. However, instead of performing this simple task, Applicant argues that the employer somehow should have known or should have investigated that it was work related. Petitioner failed to convince the trier of fact that this was the case and that is why the judge decided matters along the lines of the Nielsen case rather than Mihesuah. It was not established by the preponderance of the evidence that the employer allowed the one year statute of limitations to expire while at the same time knew that all the treatment, time off and surgery for the hand was from a work injury.

Had Applicant reported the injury then this case probably would never have ended up in litigation. Instead, Petitioner is resorting to making page after page of extreme argument that would in effect serve to vitiate the entire statute of limitations. The judge agrees with Defendant's assertion in its Answer that tolling the statute of limitations in this instance would severely prejudice future Defendant's from taking initial medical control within their Medical Provider Network.

Petitioner spends several pages going over HIPAA. Yet the judge barely even mentions it in his Opinion and it had to do with why a witness testified to not asking Applicant about her medical issues. (Witness Jackie Alvarez--Page 8 of Summary, line 3)

The HIPAA answer came right before Applicant's very brief cross examination of that witness.

Petitioner argues that the act of Gina Chavez reporting to her employer that she would miss time from work due to hand surgery, and claimed FMLA benefits from her employer, is sufficient notice under LC 5402 that an investigation was required to be performed. The judge does not read this into LC 5402 and Petitioner cites no case law that supports this contention. The duty that was clearly violated was Applicant's duty to report her work injuries to her employer.

Petitioner seemingly ignores certain testimony of HR Manager Jackie Alvarez who helped Applicant complete the forms related to FMLA benefits, which was being used instead of sick or vacation pay. Ms. Alvarez testified that nothing on the FMLA Application completed by Applicant, or on any medical notes, mentioned that the surgery was for a work injury. (Summary of Evidence, page 7, lines 12-20) This same witnesses gave testimony of several instances where Ms. Alvarez spoke with the Applicant concerning the request for time off, the completing of paperwork related to time off, the FMLA Application, and work restrictions when returning to work. During none of those exchanges did Applicant ever report this as a work injury. This was despite Ms. Alvarez' testimony that the lunchroom and breakroom each have the workers compensation poster in it and that employees are advised how to report a work injury when they are trained and as part of the opening package of documents that new employees receive. (Summery of Evidence, page 8, lines 15-19)

Moreover, Petitioner's cross examination of Jackie Alvarez was brief and there was no confrontation about the claimed duty to investigate under LC 5402 based on what information was known at the time.

Petitioner makes little effort to discuss the noted differences between the two decisions in Nielsen and Mihesuah cases cited above. However, Defendant's Answer filed in response to the Petition for Reconsideration discusses why it was appropriate that the judge based his decision on the conclusions in the Nielsen case instead of Mihesuah. Defendant's Answer is detailed and deserves to be considered in conjunction with this report.

## IV.

## CONCLUSION

It is respectfully requested that the Petition for Reconsideration filed by Applicant be denied.

DATE: FEBRUARY 12, 2021
**JEFFREY WARD**
WORKERS' COMPENSATION ADMINSITRATIVE LAW JUDGE