OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO
WORKERS' COMPENSATION NOS. 5-264-330-001

ISSUE

- Whether claimant's claim is barred by the Statute of Limitations

FINDINGS OF FACT

1. Claimant was employed with Alps insurance beginning in June of 2021. Claimant worked remotely from her home in Colorado. Claimant received a promotion with the Employer, which was also a remote position

2. Claimant chose to travel to the Employer's home office and attend training. Clamant arrived in Missoula on the evening of Sunday, October 17, 2021, and returned to Colorado on the afternoon of Wednesday, October 20, 2021.

3. At the Employer's office in Montana, Claimant worked with Heather Kellum, who was a client processing specialist, and Liesel Brink, who was a manager and payroll coordinator. The employer witnesses testified that upon claimant's arrival at the office, on Monday, October 18, 2021, they both observed claimant to exhibit symptoms of sniffling with a runny nose. The two women observed the existence of these symptoms throughout claimant's training. When asked about these symptoms by both women, claimant advised both that she was just suffering from allergies, and had left her medication at home.

4. Liesel Brink testified that she was approached by a co-worker, who was worried about claimant coming to the office with these symptoms, especially since claimant's visit was during the COVID pandemic. As such, Ms. Brink approached the claimant during her brief two and one-half day visit to inquire as to whether claimant was ill. Claimant advised Ms. Brink that she was suffering from allergies and left her allergy medicine at home. Claimant testified that she did not recall these conversations with Ms. Kellum or Ms. Brink.

5. Ms. Kellum testified that she worked in closely with claimant during her training visit as she was the one whose primary responsibility it was to train claimant. During there time together, Ms. Kellum testified that claimant also advised her that she felt extremely fatigued, and Ms. Kellum observed claimant having a difficult time going up and down stairs. Claimant advised Ms. Kellum that she suffered from an autoimmune disorder which caused achy joints.

6. Clamant further testified that on October 19 & 20th, she was hurting, she had a headache and didn't feel good.

7. Both Ms. Kellum and Ms. Brink testified that during claimant's visit, she had confided in them that she was upset as one of her sons had tested positive for

COVID and she believed that he contracted the disease from one of the teachers at his school.

8. When Claimant was asked at hearing as to whether she told the two women about one of her son's testing positive before the trip, claimant responded, "not that I can recall". On rebuttal, Claimant denied that either of her boys had tested positive for COVID before she left for her trip to Montana.

9. Liesel Brink drove clamant to the airport on Wednesday, October 20, 2021. Ms. Brink continued to notice that claimant appeared ill; and in fact, claimant admitted that when she arrived at the airport in Missoula, she texted her husband at 1:38 p.m. the following: "I AM HURTING AND FEELING SO BAD AND EVERYTHING MY NOSE IS RUNNING SUPER BAD, THROAT IS SORE AND I AM SNEEZING SO BAD".

10. At the end of October, 2021, claimant was hospitalized, and for a period placed on a ventilator. Claimant was released from the hospital in December, 2021.

11. During Claimant's hospitalization, Claimant's husband maintained contact with Employer as the Employer was concerned for the claimant's well-being. Claimant admitted that at no time during her hospitalization did she or her husband advise Employer that she believed she had contracted COVID at work. Claimant also admitted that at no time after her release from the hospital, or during the time that she returned to work in February or March 2022, up until the time she left the company on August, 2022, did she advise anyone at Employer that she suspected she contracted COVID while working at Employer. Claimant secured subsequent employment with Verizon within a couple of days of leaving the Employer. Claimant was laid off from Verizon in July, 2023.

12. Claimant testified that after being laid off from Verizon in July 2023, she applied for Unemployment. In connection with her Application, she had an phone interview with one of the unemployment representatives. Initially, she testified that this interview took place in July or August 2023, but later testified that it may have taken place later than that, due to the back log for unemployment. Clamant testified that it was after speaking to this representative that she learned she may have a claim for the contraction of COVID against Alps. Claimant testified that during this conversation the unemployment officer conducting the phone interview indicated: "Honey, if you got sick… they had made me aware that there was laws that should have been protecting me when I fell ill with COVID but it was out of her hands but that I needed to talk to an lawyer." At no time after this meeting did claimant contact Employer to advise that she suspected her prior COVID diagnosis was caused by her employment, nor did she ask Employer to file a claim. Rather, claimant waited until February 4, 2024 to file a Workers' Claim for Compensation. When asked by her attorney why she did not file a claim in

the fall of 2023, Claimant responded, “Because I was not aware of the COVID laws protecting me as an employee.”

13. Consistent with this testimony, Ms. Brink confirmed that Employer did not receive any notice from claimant that she was alleging that her diagnosis of COVID back in October 2021, was in any way linked to her employment. Ms. Brink did not receive notice of this allegation until the insurance company notified her after Clamant filed her Workers’ Claim for Compensation.

14. Clamant filed her Workers’ Claim for Compensation on February, 8, 2024. (Resp. Ex. A). Respondents filed a Notice of Contest on February 29, 2024 (Resp. Ex. B).

CONCLUSIONS OF LAW

GENERALLY

A. The purpose of the Workers’ Compensation Act of Colorado, §§ 8-40-101, *et seq.*, C.R.S., is to assure the quick and efficient delivery of disability and medical benefits to injured workers at a reasonable cost to employers, without the necessity of litigation. *See* § 8-40-102(1), C.R.S. The claimant shoulders the burden of proving entitlement to benefits by a preponderance of the evidence. *See* § 8-43-201, C.R.S. A preponderance of the evidence is that which leads the trier-of-fact, after considering all of the evidence, to find that a fact is more probably true than not. *Page v. Clark*, 592 P.2d 792 (Colo. 1979).

B. Assessing weight, credibility, and sufficiency of evidence in Workers' Compensation proceeding is exclusive domain of administrative law judge. *University Park Care Center v. Industrial Claim Appeals Office*, 43 P.3d 637 (Colo. App. 2001). Even if other evidence in the record may have supported a contrary inference, it is for the ALJ to resolve conflicts in the evidence, make credibility determinations, and draw plausible inferences from the evidence. When determining credibility, the fact finder should consider, among other things, the consistency or inconsistency of the witness's testimony and actions; the reasonableness or unreasonableness (probability or improbability) of the testimony and actions; the motives of the witness; whether the testimony has been contradicted; and bias, prejudice, or interest. See *Prudential Insurance Co. v. Cline*, 57 P.2d 1205 (Colo. 1936); *Bodensieck v. Industrial Claim Appeals Office*, 183 P.3d 684 (Colo. App. 2008); *Kroupa v. Industrial Claim Appeals Office*, 53 P.3d 1192 (Colo. App. 2002). The weight and credibility to be assigned expert testimony is a matter within the discretion of the ALJ. *Cordova v. Industrial Claim Appeals Office,* 55 P.3d 186 (Colo. App. 2002). To the extent expert testimony is subject to conflicting interpretations, the ALJ may resolve the conflict by crediting part or none of the testimony. *Colorado Springs Motors, Ltd. v. Industrial Commission,* 441 P.2d 21 (Colo. 1968).

C. The ALJ's factual findings concern only evidence and inferences found to be dispositive of the issues involved; the ALJ has not addressed every piece of evidence or every inference that might lead to conflicting conclusions and has rejected evidence contrary to the above findings as unpersuasive. *Magnetic Engineering, Inc. v. Industrial Claim Appeals Office,* 5 P.3d 385 (Colo. App. 2000).

STATUTE OF LIMITATIONS

D. Sec. 8-43-103 (2), C.R.S. provides:

(2) The director and administrative law judges employed by the office of administrative courts shall have jurisdiction at all times to hear and determine and make findings and awards on all cases of injury for which compensation or benefits are provided by articles 40 to 47 of this title. Except in cases of disability or death resulting from exposure to radioactive materials, substances, or machines or to fissionable materials, or any type of malignancy caused thereby, or from poisoning by uranium or its compounds, or from asbestosis, silicosis, and anthracosis, the right to compensation and benefits provided by said articles **shall be barred unless, within two years after the injury** or after death resulting therefrom, a notice claiming compensation is filed with the division. **This limitation shall not apply** to any claimant to whom compensation has been paid or if it is established to the satisfaction of the **director within three years after the injury or death that a <u>reasonable excuse</u> exists for the failure** to file such notice claiming compensation and if the employer's rights have not been prejudiced thereby**,** and the furnishing of medical, surgical, or hospital treatment by the employer shall not be considered payment of compensation or benefits within the meaning of this section;… but, in all cases in which the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division as required by the provisions of said articles, this statute of limitations shall not begin to run against the claim of the injured employee or said employee's dependents in the event of death until the required report has been filed with the division. (*emphasis added).*

Claimant is alleging a date of last exposure to an alleged occupation disease in the form of COVID, of October 20, 2021. There is no dispute that pursuant to the statute a Workers' Claim for Compensation was due to be filed by October 20, 2023. Because the claim was not filed with the Division of Worker's Compensation within two years, claimant has failed to meet the two year filing deadline for the statute of limitations and the claim is time barred. *Clubb v. RE Monks*, W.C. 4-952-696 (ICAO March 31, 2015).

First, claimant alleges that she had a "reasonable excuse" for the untimely fling of her Workers' Claim for Compensation. In a workers' compensation claim, the statute begins to run when a claimant, as a reasonable person, "should recognize the nature, seriousness, and probable compensability of the injury. *City of Boulder v. Payne*, 162 Colo. 345, 426 P.2d 194 (1967).

Claimant testified that she was hospitalized for COVID from late October until December 2021. Claimant and her Employer testified that either claimant or her husband were in contact with the Employer to advise as to the status of claimant's recovery. It is undisputed that, at no time during any of these discussions, or at any time during the period that claimant returned to work for the employer, which occurred in February 2022, did claimant advise her Employer that she believed she had contracted COVID from visiting her employer in October 2021.

Arguably, a "reasonable person" who believes she contracted COVID at work, should had made a reasonable effort to identify and rule out potential sources for the contraction of their disease, shortly after the contraction of same. In this effort to analyze the source of her exposure, a reasonable person would have suspected that since she was immunocompromised and unvaccinated, that perhaps she contracted COVID on the trip to or during her visit to Montana for business training. At the very least, a reasonable person would have discussed this possibility with their Employer at some time after they returned to work at the Employer. Claimant has provided no reasonable explanation for her failure to suspect that she contracted COVID during her visit to her employer in October 2021. Not having the necessary evidence to prove a compensable claim is not the same as not knowing the probable compensable nature of claim. Claimant clearly was aware of the facts necessary to suspect and at least allege the probable compensable nature of the claim, shortly after her contraction of COVID.

Claimant testified that she did not realize that she could file a claim until after she met with an unidentified unemployment worker in either July or August 2023. Claimant claims that it was only until after speaking with the alleged worker that she learned of her right to file a claim. Claimant testified that this meeting took place shortly after she was laid off from her subsequent employer, Verizon, which conversation occurred on or about July or August 2023. Claimant testified that during this conversation she was advised to consult an attorney. At no time after this meeting did the Claimant contact Employer to advise that she suspected her prior COVID diagnosis was caused by her employment, nor did she ask Employer to file a claim.

Not all reasons for the late filing of a claim are sufficient to sustain the claimant's burden of proof. *Industrial Commission v. Canfield,* 172 Colo. 18, 469 P.2d 737 (1970). A "reasonable excuse" is one which is "legally justifiable." *Armour & Co. v. Industrial Commission,* 149 Colo. 251, 368 P.2d 798 (Colo. 1962). Here, the Claimant has provided no reasonable explanation as to why she waited until February 4, 2024, to file a Workers' Claim for Compensation.

Whether or not a claimant has shown a reasonable excuse for the late filing of a claim is a discretionary decision for the administrative law judge. Reasonable excuses have been found in cases where employers have knowingly and willfully misled claimants about the compensability of injuries and where attorneys have incorrectly advised claimants. The key to the question to be asked is the reasonableness of the claimant's actions. Here, the claimants' actions were simply not reasonable.

E. Tolling of the Statute of Limitations

Claimant has asserted that the statute of limitations is somehow tolled by inaction on the part of Respondents.

Per 8-43-301 (2), C.R.S, the statute of limitations does not begin to run if the employer has been given notice of an injury and fails, neglects, or refuses to report said injury to the division" as required by the Workers' Compensation Act. *City of Englewood v. Industrial Claim Appeals Office*, 954 P.2d 640 (Colo. App. 1998). An employer has notice of an occupational disease or lost-time injury when it obtains some knowledge of facts connecting the claimant's injury or condition with employment and indicating to a reasonably conscientious manager that the case may involve a potential claim for benefits. *See Jones v. Adolph Coors Co.*, 689 P.2d 681 (Colo. App. 1984). The determination of whether circumstances trigger the running of the statute of limitations is generally one of fact for the ALJ. *Mendoza v. Sanders Construction, Inc.,* W.C. Nos. 4-655-387; 4-749-187 (May 27, 2009); *Saxton v. King Soopers, Inc.,* W.C. No. 4-200-777 (March 11, 1997).

Claimant has not pointed to any evidence in the record to support her contention that the Employer had notice of a work-related injury/disease. In fact, Claimant admitted that she never advised her Employer that she suspected that her contraction of COVID was caused by exposure at work. Further, there is no evidence that Employer received any such notice until after Claimant filed her Workers' Claim on February 4, 2024. This is three and one-half (3.5) years after claimant's alleged exposure. Therefore, the record is devoid of any evidence to support Claimant's allegation that Respondents did not timely admit or report this underlying claim; and as such, any argument forwarded for the tolling of the statute of limitations must fail. Neither the law nor the facts of this claim triggered any duty on the part of Employer to file any notice with the Division, since they had no knowledge of its alleged link to claimant's employment. On the contrary, Respondents were entitled to the benefit of the presumption that the Claimant's contraction of COVID was in fact unrelated to her work in October 2021, especially since the employer was in contact with the claimant's husband after she contracted COVID. Claimant has presented no evidence that respondents were aware of anything other than the fact that claimant was hospitalized with COVID in the fall of 2021. As such Respondents could not have known of a potential claim for claimant's contraction of COVID at her work prior to her filing her claim and Respondents had no duty to file any report of incident until after such notification, which they timely did after the Notice from the Claimant. Thus, the statute of limitations is not tolled by any failure to act on the part of respondents. Claimants have a duty to properly report the claims to respondents as well as a duty to timely file their claim with the Division of Workers Compensation. *Pierce-Kouyate, v. Wilson's Of Colorado Ltd,* W.C. 4-717-784 (November 21, 2007). (Statute of limitations not tolled where respondents had no notice of either lost time or permanent impairment)

F. Statute not tolled by the decision of Life Care Centers of America v. ICAO, 553 P.3d 905 (Colo. App. 2024. (Hereinafter referred to as the *Gaines* decision).

Contrary to claimant's argument, the *Gaines* decision did not decide if a COVID claim could be filed in Colorado. Rather, as noted in the first paragraph of the decision, *Gaines at 905*, the Court stated, "We conclude that under the circumstances in of this case, COVID met the statutory definition of an Occupational Disease set forth in §8-40-201 (14), C.R.S. 2023."

In *Gaines,* the Court of Appeals affirmed the ALJ's finding of compensability. The Court did not rule that claimant was legally prohibited from filing a claim for COVID until after this decision had been issued. Rather, as evidenced by the facts of *Gaines,* claimant filed a Workers' claim for Compensation alleging exposure to an occupational disease in the nature of COVID on June 2, 2020. Further, *Gaines* proceeded to hearing before an ALJ on January 17, 2023; thus, disproving this claimant's allegation that she was legally barred from filing a claim for COVID until after this decision was issued.

In *Gaines,* the Court of Appeals further discussed claimant's additional policy argument that the Panel's order violated the underlying policies associated with and giving rise to the requirements set forth for occupational disease. The Court noted that although the argument had not been preserved on appeal, that if was preserved for appeal, the petitioner's argument is unpersuasive, because the Act expressly allows coverage for diseases or infections, such as COVID-19, so long certain requirements are met.

The very case cited by claimant as support for her argument that there was somehow a legal impediment to her filing her Workers' Claim for Compensation within the two (2) year statute of limitations, actually, supports the converse conclusion, i.e. that claimant was free to file a claim alleging COVID exposure as an occupational disease before the issuance of this decision.

In further support of this conclusion, many claims were filed and hearings held on admitted and denied COVID claims during the time period wherein claimant had a duty to file her Workers' Claim for Compensation. See *Gibbs v. Madison Creek Partners, LLC*., W.C. No: 5-201-483 (July 18, 2023); Michael *Schledwitz v. Larimer County*, W.C. No. 5-162-929 (September 21, 2022), and *Nichols v. ICAO,* W.C. No.: 5-228-939 (April 4, 2024). This is not to mention the many cases litigated at the OAC and not appealed, as well as the many claims settled, as verified by the fact that the Director of the Division of Workers' Compensation published statistics as to the number of COVID claims filed, which was published on a regular basis after the outbreak. As such claimant's argument that the *Gaines* decision somehow tolled the statute of limitations must fail.

ORDER

It is therefore ordered that:

1. Claimant's claim is barred by the application of the Statute of Limitations, as set forth in Sec. 8-43-103(2), C.R.S. and the claim is hereby denied and dismissed.

If you are dissatisfied with the Judge's order, you may file a Petition to Review the order with the Denver Office of Administrative Courts, 1525 Sherman St., 4th Floor, Denver, CO 80203. You must file your Petition to Review within twenty (20) days after mailing or service of the order, as indicated on certificate of mailing or service; otherwise, the Judge's order will be final. You may file the Petition to Review by mail, as long as the certificate of mailing attached to your petition shows: (1) That you mailed it within twenty (20) days after mailing or service of the order of the Judge; and (2) That you mailed it to the above address for the Denver Office of Administrative Courts. For statutory reference, see section 8-43-301(2), C.R.S. For further information regarding procedures to follow when filing a Petition to Review, see Rule 27, OACRP. You may access a petition to review form at: http://www.colorado.gov/dpa/oac/forms-WC.htm.

DATED: April 30, 2025

Michael A. Perales

Michael Perales
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