WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CARLOS URIBE, JR., *Applicant*

vs.

**XCEL MECHANICAL SYSTEM, INC.;
CALIFORNIA INSURANCE GUARANTEE ASSOCIATION,
administered by SEDGWWICK CMS for RELIANCE/SABLE,
in liquidation; ZURICH AMERICAN INSURANCE COMPANY, *Defendants***

Adjudication Number: ADJ487398
Anaheim District Office

OPINION AND DECISION AFTER RECONSIDERATION

Defendant California Insurance Guarantee Association (CIGA) seeks reconsideration of a Findings and Order allegedly issued by a workers' compensation arbitrator (WCA) on August 6, 2021. We previously granted applicant's Petition for Reconsideration on June 13, 2022 in order to further study the legal and factual issues raised therein, and to enable us to reach a just and reasoned decision. This is our Opinion and Decision after Reconsideration.[1]

CIGA contends that defendant Zurich American Insurance Company (Zurich) failed to meet its burden of proof that applicant did not come under Zurich's workers' compensation coverage of employer defendant XCEL Mechanical System, Inc. (XCEL) because "Zurich failed to offer proof its policy with Xcel contained approved limiting endorsements. Zurich's policy is considered unlimited and covered applicant. (Petition for Reconsideration, at p. 2.) In addition, CIGA contends that "[t]he WCA erred by finding that Zurich's policy with Xcel did not require a premium and that the policy was void because of the alleged lack of the premium. Premiums do not follow policies, and the redactions in the premium section of Zurich's policy suggests the existence of a premium." (*Ibid*.) CIGA contends that "[t]he issue with OCIP policies, Alliance and master policies are red herrings. Applicant worked for Xcel, not the Alliance for Schools, and so the policy between Zurich and Xcel from 2000 to 2001 is the relevant policy, not the policy

[1] Commissioner Dodd, who was on the panel previously is unavailable to participate in this decision. Another commissioner was assigned in her place.

between Zurich and Alliance from 2000 to 2005, and not the subsequent policy between Zurich and Xcel/Alliance from 2001 to 2002." (*Ibid.*) CIGA also contends that "[t]he WCA erred by finding laches, because one of the elements of the defense–prejudice– has not been established;" and, that "[t]he prior stipulations do not absolve Zurich from its responsibilities to CIGA as Xcel's concurrent workers' compensation carrier (*Id.*, p. 3.) Finally, CIGA contends that Zurich's trial exhibits are inadmissible because they were offered "beyond the window allowable by Labor Code section 5276..." (*Ibid.*)

Defendant Zurich filed an Answer of Zurich American Insurance Company to CIGA's Petition for Reconsideration (Answer), and the WCA filed an Arbitrator's Report on Reconsideration (Report). However, the WCA did not simultaneously submit "an electronic copy of the complete arbitration file" with the presiding judge of the Anaheim District Office, as required by WCAB Rule 10995 (Cal. Code Regs., tit. 8, § 10995(c)(3).)

We have reviewed the limited record of this matter available in the Electronic Adjudication Management System (EAMS), the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. Based on our review of the limited EAMS record and for the reasons discussed below, it is our decision after reconsideration to rescind the F&O and return this matter to the arbitrator to create an adequate record of arbitration consistent with this decision and WCAB Rule 10995, subdivision (c)(3).

I.

Section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.)[2] However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493]; see *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635 fn. 22 [70 Cal.Comp.Cases 312] ["irregularity which deprives reconsideration under the statutory scheme denies due process"].) In *Shipley, supra,* 7 Cal.App.4th at pp. 1107-1108, applicant sought a writ of review of a decision of the Appeals Board denying his petition for reconsideration by

[2] We note that the 1992 amendments to section 5909 merely indicate that the bill removed the requirement to state good cause to extend the time to response from 30 days to 60 days. "This bill would instead deem that petition denied unless acted upon within 60 days from the date of filing and would delete the provision authorizing an extension [from 30 days to 60 days]." (*Evans v. Workers' Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 (*Evans*).)

operation of law (Lab. Code, § 5909). The Court there granted a writ of review, stating that **while the "language [section 5909] appears mandatory and jurisdictional, the time periods must be based on a presumption that a claimant's file will be available to the board**; any other result deprives a claimant of due process and the right to a review by the board." (*Shipley, supra,* 7 Cal.App.4th at pp. 1107-1108, emphasis added.)[3]

> We emphasize Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control. Surely the Legislature did not write the statute in anticipation of a system so inefficient that such gaffes were statutorily provided for.
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> **While we are not convinced that the burden of the system's inadequacies should fall on claimants**, in any event Shipley did make inquiries and received reassurances from the board that his petition would be considered either after his file was found or after he reconstructed a duplicate file. **Allowing the board to subsequently deny the petition by operation of law under section 5909 makes no sense.** ... Noting that the right to judicial review, having been provided by statute, must comport with the guarantees of due process in the United States and California Constitutions, the court stated, "It is a fundamental principle of due process that a party may not be deprived of a substantial right without notice [citations], and **a rule that the statutory right to judicial review of Board decisions is lost by passage of the 45-day statutory period even though the affected party was not afforded notice of the decision to be reviewed would offend elementary due process principles."** (*Shipley, supra*, 7 Cal.App.4th at pp. 1107-1108, emphasis added, citing *State Farm Fire & Casualty Co. v. Workers' Comp. Appeals Bd.* (1981) 119 Cal.App.3d 193, 196-197.)[4]

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[3] We note that in 1951, the Legislature enacted section 5908.5 wherein it is mandated that all decisions of the Appeals Board "shall state the evidence relied upon and specify in detail the reasons for the decision." (Lab. Code, § 5908.5.) The California Supreme Court held that the purpose of section 5908.3 "is to assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful. (citation)" (*Evans, supra*, 68 Cal.2d at p. 755.) In 1970, the California Supreme Court held that section 5909 must be reconciled with the clear mandate of section 5908.5 and *Evans*, even when the Appeals Board denies reconsideration. (*Le Vesque v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 633-635 (*Le Vesque*) ["if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee*,* provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision*.* (See Lab. Code, § 5908.5.)"].) Thus, it is unclear that a denial of reconsideration by operation of law under section 5909 due to administrative irregularity on the part of the Division of Workers' Compensation (DWC) and/or the Appeals Board, could ever be upheld as the final decision of the Appeals Board without being subject to inevitable remand for a decision on the merits.

[4] The administrative burden of processing petitions for reconsideration is unfortunately, a very real consideration in this discussion. There are many moving parts in the Workers' Compensation system, and thus, various pinch points where inefficiencies can arise. Today's Workers' Compensation system is much larger, with the number of claims

The Court of Appeal reversed the Appeals Board in *Shipley*, holding that the time to act on the petition was tolled during the period the file was misplaced and unavailable to the Appeals Board. (*Shipley, supra,* 7 Cal.App.4th at p. 1007.) The Court emphasized that "Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shipley, supra,* 7 Cal.App.4th at p. 1007.) "Shipley's right to reconsideration by the board is likewise statutorily provided and cannot be denied him without due process. Any other result offends not only elementary due process principles but common sensibilities. *Shipley is entitled to the board's review of his petition and its decision on its merits*." (*Id.*, at p. 1108, emphasis added.)[5]

We note that timely petitions for reconsideration filed *and received* by the Appeals Board are "acted upon within 60 days from the date of filing" pursuant to section 5909, by either denying or granting the petition. The exception to this rule are those petitions *not received* by the Appeals Board within 60 days *due to irregularities outside the petitioner's control*. (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22, emphasis added ["Irregularity which deprives reconsideration under the statutory scheme denies due process..."].)[6] Pursuant to the holding in *Shipley* allowing tolling of the 60-day time period in section 5909, the Appeals Board acts to grant or deny such petitions for reconsideration within 60 days of receipt of any such petition. This approach is consistent with the California appellate courts, which have consistently

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filed increasing exponentially since the latter part of the 20th century, without a concomitant increase in resources to handle those claims.

[5] The Court also stated that the fundamental principles of substantial justice (Cal. Const., art. XIV, § 4), and the policies enunciated by Labor Code section 3202 "to construe the act liberally 'with the purpose of extending their benefits for the protection of person injured in the course of their employment,'" compelled its finding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.*, at p. 1107.)

[6] Petitions for reconsideration are filed in EAMS or filed with the district office where the case at issue is venued. Petitions for reconsideration are first processed by the district office, whose staff must manually notify the Appeals Board that reconsideration is being sought. Due to the nature of EAMS, which is outside the control of the parties or the Appeals Board, as well as due to normal human error, there are often delays in the transmission of petitions for reconsideration from the district offices to the Appeals Board. Of course, during these last two years of unprecedented change in the world, the entire Workers' Compensation system was subject to new and extraordinary pressures, including the transition of the Appeals Board and all 22 district offices to electronic processing of files and a virtual hearing environment. Logically, this resulted in additional delays in the administrative processing of petitions for reconsideration.

followed Shipley's lead when weighing the statutory mandate of 60 days against the parties' constitutional due process right to a true and complete judicial review by the Appeals Board.[7]

In this case, CIGA's Petition for Reconsideration was filed on August 31, 2021, and the Appeals Board failed to act within 60 days pursuant section 5909. Due to an administrative irregularity, the petition was not available to the Appeals Board until after 60 days from the time of filing. The Appeals Board thereafter granted CIGA'S Petition for Reconsideration on June 13, 2022, which was within 60 days of the Appeals Board's receipt of the petition.[8] The administrative irregularity which caused CIGA's Petition for Reconsideration to be unavailable to the Appeals Board was not the fault of either party. Thus, pursuant to *Shipley*, the time within which the Appeals Board was to act on CIGA's Petition for Reconsideration was tolled until the petition became available to the Appeals Board.

The Court's holding in Shipley does not include the requirement that a party make inquiries of the Appeals Board regarding the status of a petition for reconsideration in order for CIGA's

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[7] See eg., *Hubbard v. Workers Compensation Appeals Bd. of California* (1993) 58 Cal.Comp.Cases 739 [writ of review granted to annul Appeals Board's denial of petition for reconsideration by operation of law (Lab. Code, § 5909)]; *Bailey v. Workers Compensation Appeals Bd. of California* (1994) 59 Cal.Comp.Cases 350 (writ den.); Entertainment by *J & J, Inc. v. Workers' Comp. Appeals Bd. (Bernstein)* (2017) 82 Cal.Comp.Cases 384 (writ den.). Recently, this District (Divisions 3 and 7), as well as the First, Third, Fourth, and Fifth District Courts of Appeal (DCA) have, at the request of the Appeals Board, dismissed writs where the petition for reconsideration was deemed denied under section 5909 so that the Appeals Board could consider the merits: *Kaiser Foundation Health Plan v. Workers' Compensation Appeals Board and Julie Santucci* (2021) (A163107) 1st DCA, Div. 4; *Employers Insurance Group v. Workers' Comp. Appeals Bd. et al. (Hafezi)* (2020) (B305322) (SAU8706806) 2nd DCA, Div. 3; *Frontline Medical Associates Inc. v. Workers' Comp. Appeals Bd. and Liberty Mutual Insurance Group et al. (Lopez/Sablan)* (2022) (B317006) 2nd DCA, Div. 7; *Reach Air Medical Services, LLC et al. v. Workers' Compensation Appeals Board. et al. (Lomeli)* (2022) (C095051) 3rd DCA; *Ace American Insurance Company v. Workers' Compensation Appeals Board and David Valdez* (C094627) (2021) 3rd DCA; *Great Divide Insurance Company v. Workers' Compensation Appeals Board et al. (Melendez Banegas)* (2021) (F083019) 5th DCA; *Carlos Piro v. Workers' Compensation Appeals Board and County of San Bernardino* (2021) (E076962) 4th DCA, Div. 2.

[8] Any further disclosure into the deliberations of the Appeals Board regarding any petition filed with the Appeals Board is protected by the right to privacy in and protection from public disclosure of judicial deliberations. Requests for the details of the Appeals Board's judicial deliberations could impair the independence of the Appeals Board as a deliberative body, i.e., a constitutional court that operates statewide as an appellate court of limited jurisdiction to review and decide appeals from decisions issued by workers' compensation administrative law judges. (Cal. Const., art. XIV, § 4; Lab. Code, §§ 111-116, 133-134, 3201, 5300-5302; *Bankers Indemnity Ins. Co. v. I.A.C. (Merzoian)* (1935) 4 Cal.2d 89; *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd. (Zepeda)* (1984) 153 Cal.App.3d 965; *Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 376 ["[t]he WCAB...is a constitutional court"].) It could also call into question the basic fairness of any proceedings currently pending before the Appeals Board, or in any appellate court against the Appeals Board. (See Bus. & Prof. Code, § 6068(b) [An attorney has a duty to "maintain the respect due to the courts of justice and judicial officers."].) Moreover, "[t]here is a presumption that those serving as judges do so with honesty and integrity. (citations)" (*Robbins v. Sharp Healthcare, et al.* (2006) 71 Cal.Comp.Cases 1291, 1306 [2006 Cal. Wrk. Comp. LEXIS 314] citing *People v. Chatman* (2006) 38 Cal.4th 344, 364.)

Petition for Reconsideration to be tolled. Even though the petitioner in Shipley did make inquiries and received reassurances from the Appeals Board, the court in Shipley expressly stated that "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (Shipley, supra, 7 Cal.App.4th at p. 1108.)

The administrative irregularity that resulted in the petition being unavailable to the Appeals Board was simply not within the control of CIGA or Zurich. Moreover, as set forth more fully below, the WCA failed to fulfill his duty to forward the arbitration record to the DWC, which contributed to the delay in this case. This failure was also not within the control of either party. Given that the Appeals Board is under the same mandate as any court to ensure due process to all parties (which has been held by the California Supreme Court in workers' compensation cases to include issuing a decision on the merits to anyone seeking reconsideration), we agree with the Court in *Shipley* that "the burden of the system's inadequacies" should not fall on a party. (See *Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755; *Le Vesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 633-635.)

II.

WCAB Rule 10914 requires the WCA to make and maintain the record of the arbitration proceeding, which must include the following:

> (1) Order Appointing Arbitrator;
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> (2) Notices of appearance of the parties involved in the arbitration;
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> (3) Minutes of the arbitration proceedings, identifying those present, the date of the proceeding, the disposition and those served with the minutes or the identification of the party designated to serve the minutes;
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> (4) Pleadings, petitions, objections, briefs and responses filed by the parties with the arbitrator;
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> (5) Exhibits filed by the parties;
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> (6) Stipulations and issues entered into by the parties;
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> (7) Arbitrator's Summary of Evidence containing evidentiary rulings, a description of exhibits admitted into evidence, the identification of witnesses who testified and summary of witness testimony;

(8) Verbatim transcripts of witness testimony if witness testimony was taken under oath.

(9) Findings, orders, awards, decisions and opinions on decision made by the arbitrator; and

(10) Arbitrator's report on petition for reconsideration, removal or disqualification. (Cal. Code Regs., tit. 8, § 10914(c).)

WCAB Rule 10995 requires that within 15 days after receiving a petition for reconsideration, the arbitrator "shall perform one of the following actions:"

(1) Rescind the entire order, decision or award and initiate further proceedings within 30 days; or

(2) Rescind the order, decision or award and issue an amended order, decision or award. The time for filing a petition for reconsideration pursuant to Labor Code section 5903 will run from the filing date of the amended order, decision or award; or

(3) Prepare and serve a report on reconsideration as provided in rule 10962. **Upon completion of the report on reconsideration, the arbitrator shall concurrently forward an electronic copy of the arbitrator's report and an electronic copy of the complete arbitration file directly to the presiding workers' compensation judge of the district office having venue over the matter. Upon receipt of the arbitrator's report and the record of arbitration proceedings, the district office shall enter the report and the file into the EAMS adjudication file.** (Cal. Code Regs., tit. 8, § 10995(c)(1)-(3), emphasis added.)

Here, the WCA failed to electronically file a copy of the arbitration record with the Report. (Cal. Code Regs., tit. 8, § 10995(c)(3).) The Appeals Board has not received these documents despite repeated requests.[9] As a result, the Appeals Board has no access to the arbitration file, and cannot review any of the exhibits filed by the parties; the minutes of the arbitration proceedings; any stipulations and issues entered into by the parties; the arbitrator's summary and description of exhibits admitted into evidence; the arbitrator's evidentiary rulings; the witnesses who testified with a summary of their testimony; verbatim transcripts of witness testimony*; or even the Findings and Order and Opinion on Decision at issue herein*. (See Cal. Code Regs., tit. 8, § 10914(c).)

[9] There is no indication in EAMS that either party requested through petition or correspondence that the WCA submit the electronic arbitration as required under WCAB Rule 10995, subsection (c)(3).

The Appeals Board's constitutional requirement to accomplish substantial justice means that the Appeals Board must protect the due process rights of every person seeking reconsideration. (See *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] ["essence of due process is . . . notice and the opportunity to be heard"]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) In fact, "a denial of due process renders the appeals board's decision unreasonable..." and therefore vulnerable to a writ of review. (*Ogden Entertainment Services v. Workers' Comp. Appeals Bd. (Von Ritzhoff)* (2014) 233 Cal.App.4th 970, 985 citing Lab. Code, § 5952(a), (c).) Thus, due process requires a meaningful consideration of the merits of every case de novo with a well-reasoned decision based on the evidentiary record and the relevant law. (See Cal. Const., Art. XIV § 4; Lab. Code, § 5907 5908.5; *United States Pipe & Foundry Co. v. Industrial Acci. Com*. (1962) 201 Cal.App.2d 545, 548-549 ["reconsideration fulfills substantially the same function as the new trial in civil proceedings"].)

Thus, as with a workers' compensation administrative law judge (WCJ), a WCA's decision must be based on admitted evidence and must be supported by substantial evidence. (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Bd. en banc).) Meaningful review of an arbitrator's decision requires that the "decision be based on an ascertainable and adequate record," including "an *orderly identification* in the record of the evidence submitted by a party; and *what evidence is admitted or denied admission*." (*Lewis v. Arlie Rogers & Sons* (2003) 69 Cal.Comp.Cases 490, 494, emphasis in original.) "An organized evidentiary record assists an arbitrator in rendering a decision, informs the parties what evidence will be utilized by the arbitrator in making a determination, preserves the rights of parties to object to proffered evidence, and affords meaningful review by the Board, or reviewing tribunal." (*Id.*; accord *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753 [a full and complete record allows for a meaningful right of reconsideration]; and, *Hamilton, supra,* 66 Cal.Comp.Cases at p. 476.) As we have no access to the arbitration record in this case, it is impossible to conduct a meaningful review of the WCA's decision or render a decision on the merits.

Accordingly, it is our decision after reconsideration, return this case to the arbitrator to create an adequate record of arbitration consistent with this decision and Cal. Code Regs., tit. 8, § 10995, subdivision (c)(3).

For the foregoing reasons,

IT IS ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Order allegedly issued by a workers' compensation arbitrator on August 6, 2021 case is **RESCINDED** and this matter is **RETURNED** to the workers' compensation arbitrator for a new decision consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 8, 2022

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

CARLOS URIBE, JR.
SILBERMAN & LAM
GUILFORD SARVAS & CARBONARA
LAW OFFICE OF TRACEY LAZARUS
ROBERT DRAKULICH, ARBITRATOR

AJF/abs

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