

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

DAVID VALDEZ, *Applicant*

vs.

**FW SERVICES INC.; ACE AMERICAN INSURANCE COMPANY administered by
ESIS, *Defendants***

**Adjudication Number: ADJ8554228
Redding District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration on July 13, 2021 in order to further study the legal and factual issues raised by the Petition for Reconsideration, and to enable us to reach a just and reasoned decision. This is our Opinion and Decision after Reconsideration.

Applicant sought reconsideration of the Findings, Award and Order (F&O) issued on December 18, 2020 by a workers' compensation administrative law judge (WCJ). The WCJ found in pertinent part that on July 14, 2012, applicant sustained injury arising out of and in the course of his employment (AOE/COE) to his left elbow, and did not sustain injury AOE/COE to his back, neck, upper extremities and shoulders.¹ The WCJ found that applicant did not state grounds to reopen the evidentiary record related to further body parts including psyche and sleep disorder. The WCJ found that applicant sustained a 12% permanent disability without apportionment, and that he will require further medical treatment to cure or relieve him from the effects of the injury to his left elbow.

Applicant contends that the WCJ erred in finding that he did not sustain injury AOE/COE to his neck and spine causing pain and headache, psychological damages, and a sleep disorder.

¹ The Petition for Reconsideration states that it seeks reconsideration of the Findings, Award and Order issued on October 7, 2020. However, applicant previously sought timely reconsideration of the October 7, 2020 Findings, Award and Order. In response to that timely petition, the WCJ rescinded the October 7, 2020 Findings, Award and Order in order to allow applicant to offer additional evidence into the record. The matter was then resubmitted and thereafter, the December 18, 2020 F&O issued. We consider the reference to the October 7, 2020 Findings, Award and Order to be a clerical error, and that the current petition seeks reconsideration of the December 18, 2020 F&O.

There was no answer filed in response to the Petition for Reconsideration. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that the petition be denied as untimely.

We have reviewed the record in this matter, and have considered the allegations of the Petition for Reconsideration and the contents of the Report. Based on the reasons set forth below, we dismiss the Petition for Reconsideration.

DISCUSSION

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.) However, “it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice....” (*Shiple 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].) In *Shiple*, the Appeals Board denied applicant’s petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits. (*Shiple, supra*, 7 Cal.App.4th at p. 1106.) The Appeals Board had not acted on applicant’s petition because, through no fault of the parties, it had misplaced the file. (*Ibid.*)

The Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced. (*Shiple, supra*, 7 Cal.App.4th at p. 1007.) The Court emphasized that “Shiple’s file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control.” (*Shiple, supra*, 7 Cal.App.4th at p. 1007.) “Shiple’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.” (*Id.*, at p. 1108.)²

Applicant’s Petition for Reconsideration was filed on January 19, 2020, and the Appeals Board failed to act within 60 days pursuant to Labor Code section 5909. This failure to act was due to an internal procedural error that was not the fault of either party. Like the Court in *Shiple*,

² 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.)

“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.) Thus, the time within which the Appeals Board was to act on applicant’s Petition was tolled.

II.

There are twenty-five days allowed within which to file a petition for reconsideration from a “final” decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a).) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed (Cal. Code Regs., tit. 8, §§ 10940, 10615(b)). Proof that the petition was mailed (posted) within that period is insufficient.

Here, applicant seeks reconsideration of the F&O, which was served by mail on December 18, 2020. Therefore, any petition for reconsideration needed to be filed 25 days from December 18, 2020, i.e., on or before Tuesday, January 12, 2021. Applicant filed the Petition for Reconsideration on January 19, 2021. The Petition for Reconsideration is therefore untimely.

The time limit for filing a petition for reconsideration is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers’ Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].) We must therefore dismiss the Petition for Reconsideration as untimely.

Moreover, the Petition for Reconsideration is skeletal in that it fails to set forth with specificity the material evidence in support of the issues presented, or the relevant principles of law in support of applicant’s request to set-aside the Order. (See Lab. Code, § 5902; Cal. Code Regs., tit. 8, §§ 10945.) “A petition for reconsideration, removal or disqualification may be denied or dismissed if it is unsupported by specific references to the record and to the principles of law involved.” (Cal. Code Regs., tit. 8, § 10972.) Thus, the Petition for Reconsideration is also dismissed as skeletal.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Order Granting Reconsideration issued by the Workers' Compensation Appeals Board on July 13, 2021 is **VACATED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration of the Findings, Award and Order issued on December 18, 2020 by a workers' compensation administrative law judge is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 25, 2021

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

**DAVID VALDEZ
LOUIS PAPELL**

AJF/abs

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