

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

JOSE LUIS RASCON, *Applicant*

vs.

**FUTURE MACHINE PRODUCTS; CALIFORNIA INSURANCE GUARANTEE
ASSOCIATION for PACIFIC NATIONAL INSURANCE COMPANY, in liquidation,
*Defendants***

**Adjudication Numbers: ADJ1737668 (MF); ADJ3697324
Oxnard District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Lien claimant California Physician Network LLC doing business as Global and Aldon Medical Transport (lien claimant) seeks reconsideration of our November 3, 2023 Opinion and Order Granting Reconsideration and Decision After Reconsideration (O&O), wherein we granted reconsideration of the September 12, 2023 Findings and Order (F&O) filed by the workers' compensation administrative law judge (WCJ). Our O&O amended the WCJ's decision to reflect lien claimant's corrected name, but otherwise affirmed the findings of the WCJ that the lien claimant failed to comply with the filing fee and other requirements set forth under section Labor Code section 4903.05, barring recovery on its lien.

Lien claimant contends that the opinions of the WCJ are incorrect, and that the issue has previously been resolved to the satisfaction of various WCJs and defendant. (Lien Claimant's Response to Order Granted on 11/3/2023 (Petition), undated, at p. 2.) Lien claimant further avers that defendant is acting in bad faith.

We have not received an answer from any party. The WCJ has not prepared a Report and Recommendation on Petition for Reconsideration (Report) because lien claimant seeks reconsideration of the decision of the Workers' Compensation Appeals Board (WCAB).

We have considered the Petition for Reconsideration and we have reviewed the record in this matter. For the reasons discussed below, we will deny the petition.

FACTS

On September 12, 2023, the WCJ issued his F&O determining that lien claimant failed to establish that they complied with section 4903.05 and due to this failure could not recover on their lien. (Findings of Fact Nos. 3 & 4.)

On September 20, 2023, lien claimant filed a Petition for Reconsideration of the F&O.

On November 3, 2023, we issued our O&O, amending the Findings of Fact to reflect the corrected name of lien claimant, but otherwise affirming the WCJ's decision.

On November 20, 2023, lien claimant filed a Petition for Reconsideration (Petition) of our O&O. Lien claimant contends the record establishes compliance with section 4903.05 declarations and that the WCJ's F&O is not supported in the evidentiary record. (Petition, at p. 2.) Lien claimant avers newly discovered documents were not taken into consideration in the previous decision.

DISCUSSION

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....” (*Shipley, supra*, 7 Cal.App.4th at p. 1108; 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*, applicant sought a writ of review of a decision of the Appeals Board denying his petition for reconsideration by 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, italics added.)

In *Shipley*, 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 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, italics added.) The Court stated that its finding was also compelled by the fundamental principle that the Appeals Board “accomplish substantial justice in all cases...” (Cal. Const., art. XIV, § 4), and the policies enunciated by 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.’” (*Id.*, at p. 1107.) The Court in *Shipley* properly recognized that in workers’ compensation, deprivation of reconsideration without due process – without this full de novo review of the record in the case – “offends” the fundamental right of due process, as well as the Appeals Board’s mandate to “accomplish substantial justice in all cases...” (*Shipley, supra*, 7 Cal.App.4th at p. 1107-1108.)

We note that all 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.¹ 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. (See *Rea, supra*, 127 Cal.App.4th at p. 635, fn. 22.) 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, and thereafter to issue a decision on the merits. By doing so, the Appeals Board also preserves the parties’ ability to seek meaningful appellate review. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra*, 68 Cal.2d at p. 753.) This approach is consistent with *Rea* and other California appellate courts,² which have consistently

¹ The Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909 based on the Supreme Court’s holdings that summary denial of reconsideration is no longer sufficient after the enactment of section 5908.5. (*Evans, supra*, 68 Cal.2d at pp. 754-755, *Le Vesque, supra*, 1 Cal.3d at pp. 635 [“We hold that 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.)”]; *Goytia v. Workers’ Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 893.)

² See e.g., *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)]; see also, *Frontline Medical Associates, Inc. v. W.C.A.B. (Lopez, Leonel; Sablan, Yolanda)* (2022) 87 Cal.Comp.Cases 314 (writ den.); *Entertainment by J & J, Inc. v. Workers’ Comp. Appeals Bd. (Bernstein)* (2017) 82 Cal.Comp.Cases 384 (writ den.); *Bailey v. Workers Compensation Appeals Bd. of California* (1994) 59 Cal.Comp.Cases 350 (writ den.). Recent denials in all District Courts of Appeal include: First District, Div. 1 (*Scaffold Solutions v. Workers’ Compensation Appeals Board and Angelo Paredes* (2023) (A166655)); First District, Div. 4 (*Kaiser Foundation Health Plan v. Workers’ Compensation Appeals Board and Julie Santucci* (2021) (A163107)); Second District, Div. 3 (*Farhed Hafezi and Fred F. Hafezi, M.D., Inc. v. Workers’ Comp. Appeals Bd.* (2020) (B300261)(SAU8706806)); Third District (*Reach Air Medical Services, LLC et al. v. Workers’ Compensation Appeals Board. et al. (Lomeli)* (2022) (C095051)); Third District (*Ace American Insurance Company v. Workers’ Compensation Appeals Board and David Valdez* (C094627) (2021)); Fourth District, Div. 2 (*Carlos Piro v. Workers’*

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.³

In this case, lien claimant's petition was filed on November 20, 2023, but due to an administrative irregularity, the petition was not received and therefore unavailable to the Appeals Board until after 60 days from the time of filing. This administrative irregularity was not the fault of either party. Thus, pursuant to *Shipley*, the time within which the Appeals Board was to act on the petition for reconsideration was tolled until the petition became available to the Appeals Board.

We begin our discussion by noting that the Petition describes "new discovery" and attaches nine documentary exhibits to the Petition. (Petition, at p. 2.) However, it is not clear from the petition whether lien claimant avers it is newly *discovered* evidence. To the extent the attachments to the petition are offered as newly discovered evidence, WCAB Rule 10974 provides that such evidence will only be considered on the grounds that it could not, with reasonable diligence, have been produced before submission of the case, or on the ground that the decision had been procured by fraud. (Cal Code Regs., tit. 8, § 10974.) Moreover, WCAB Rule 10974 requires that the petition contain an "offer of proof, specific and detailed" providing information as to the evidence to be offered, as well as a "full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case." (Cal. Code Regs., tit. 8, §§10974(e).) Here, petitioner offers no explanation of why the attached documentation could not have been produced before submission of the case, or why such documentation was procured by fraud.

If, on the other hand, the documentation attached to the petition is not being offered as newly discovered evidence, WCAB Rule 10945(c) provides that "[c]opies of documents that have

Compensation Appeals Board and County of San Bernardino (2021) 86 Cal.Comp.Cases 599); Fourth District, Div. 3 (*Patricia Lazcano v. Workers' Comp. Appeals Bd.* (2022) 88 Cal.Comp.Cases 54); Fifth District (*Great Divide Insurance Company v. Workers' Compensation Appeals Board et al. (Melendez Banegas)* (2021) 86 Cal.Comp.Cases 1046); Sixth District (*Rebar International, Inc., et al. v. Workers' Comp. Appeals Board et al. (Haynes)* (2022) 87 Cal.Comp.Cases 905).

³ But see *Zurich American Ins. Co. v. Workers' Compensation Appeals Bd.* (2023) 97 Cal.App.5th 1213, wherein the Second District Court of Appeal, Division 7, concluded that the language of Labor Code section 5909 shows a clear legislative intent to terminate the Appeals Board's jurisdiction to consider a petition for reconsideration after 60 days, and therefore decisions on a petition for reconsideration made after that date are void as in excess of the Board's jurisdiction unless specified equitable circumstances are present. The Court's opinion in *Zurich* reflects a split of authority on the application of "*Shipley*" because it disagreed "with the conclusion in *Shipley* that a petitioner has a due process right to review by the Board of a petition for reconsideration even after 60 days has passed..." (*Id.*, at p. 1237.) The Court in *Zurich* did not indicate that its decision applies retroactively.

already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration....” (Cal. Code Regs., tit. 8, § 10945(c)(1).) Further, “[a] document that is not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer unless a ground for the petition for reconsideration is newly discovered evidence.” (Cal. Code Regs., tit. 8, § 10945(c)(2).) Finally, “[a] document shall not be attached to or filed with a petition for removal or disqualification or answer unless the document is not part of the adjudication file and is relevant to a petition for removal or disqualification.” (Cal. Code Regs., tit. 8, § 10945(c)(3).) Here, the Petition does not substantively address *any* of the grounds upon which the attachments to the petition may be accepted and considered by the Appeals Board. Accordingly, we have not considered the attachments to lien claimant’s petition.

We also observe that all petitions for reconsideration must be served on all adverse parties. (See Lab. Code § 5905.) Here, lien claimant failed to serve the Petition on defendant employer, an adverse party. The failure to properly serve all adverse parties may constitute grounds for dismissal of the petition. (See *State Compensation Ins. Fund v. Workers’ Comp. Appeals Bd. (Paquette)* (1983) 48 Cal.Comp.Cases 475 [1983 Cal. Wrk. Comp, LEXIS 3831] (writ den).)

In addition, Workers’ Compensation Appeals Board (WCAB) Rule 10940(c) requires that every petition and answer be “be verified upon oath in the manner required for verified pleadings in courts of record,” and that “[a] verification and a proof of service shall be attached to each petition and answer.” (Cal. Code Regs., tit. 8, § 10940(c).) Here, lien claimant has not attached the required verification or proof of service to the Petition. The failure to file a proof of service “shall constitute valid ground for dismissing the petition.” (*Ibid.*)

Accordingly, we will deny the Petition. (Lab. Code, § 5905; Cal. Code Regs., tit. 8, § 10940(c).)

We further admonish Dennise Mejia and lien claimant California Physician Network LLC doing business as Global and Aldon Medical Transport for filing an unverified Petition, and for failing to serve the petition for reconsideration on all parties. Future compliance with the requirements for verification and service on parties is expected. (Lab. Code, § 5905; Cal. Code Regs., tit. 8, § 10940(c).)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 13, 2024

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

**CALIFORNIA PHYSICIAN NETWORK dba ALDON MEDICAL TRANSPORT
DENNISE MEJIA, LIEN REPRESENTATIVE
FLOYD, SKEREN, MANUKIAN & LANGEVIN**

SAR/abs

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