

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

KERI NOYCE, *Applicant*

vs.

**WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT
permissibly self-insured, administered by CONTRA COSTA COUNTY
SCHOOLS INSURANCE GROUP, *Defendants***

**Adjudication Number: ADJ9898386
Oakland District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and the reasons stated below, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

There are 25 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, § 10507(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10508.) To be timely, however, a petition for reconsideration must be *filed* (i.e., received) within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10845(a), 10392(a).) As explained further below, petitions for reconsideration are required to be filed at the district office, and not directly at the Appeals Board. (Cal. Code Regs., tit. 8,

§ 10940(a)); see Cal. Code Regs., tit. 8, § 10205(l) [defining a “district office” as a “trial level workers’ compensation court.”]).

This time limit 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] (*Maranian*); *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].)

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 is a petition *not received* by the Appeals Board within 60 days due to irregularities outside the petitioner’s control. (See *Rea v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312].) Labor Code section 5909 provides that a petition is denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.)¹

However, we believe that “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].)² In *Shipley*, the Appeals Board denied the applicant’s petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board

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 v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350], *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) [“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; See also *Goytia v. Workers’ Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 893 [35 Cal.Comp.Cases 27].)]

² Under the grant of authority in the California Constitution, the Appeals Board operates as an appellate court that reviews and decides appeals from decisions issued by workers’ compensation administrative law judges, and all decisions of the Appeals Board are final unless appealed to the courts of appeal. (Cal. Const., art. XIV, § 4; §§ 111-116, 133-134, 3201, 5300-5302, 5900 et seq.) In performing its duties as a court, the Appeals Board is bound by the constitutional mandate that it “accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character...” (Cal. Const., Art. XIV, § 4.) *Substantial justice requires the Appeals Board to 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]; and *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "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.)

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 issues a decision on the merits. By doing so, the Appeals Board also preserves the parties' ability to seek meaningful appellate review.³ (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,⁴ which have consistently 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.⁵

³ "The purpose of [section 5900] is to allow reconsideration, in the context of a specific, framed challenge, of a matter which has been heard only once previously. [Citations omitted.] The power to reconsider affords the WCAB an opportunity to review its own decisions and the decisions of the WCJs 'in house,' by applying the Board's administrative expertise to rectify errors, when required, prior to judicial involvement." (*Maranian, supra*, 81 Cal.App.4th at p. 1074.) Thus, meaningful review by the Appeals Board of factual determinations made at the trial level affords the parties essential due process because an appellate court considering a petition for writ of review of a decision of the Appeals Board may not reweigh the evidence or decide disputed questions of fact. (Lab. Code, § 5952.) Rather, the appellate courts must determine whether the evidence, when viewed in light of the entire record, supports the award of the WCAB. (*Keulen v. Workers Compensation Appeals Bd.* (1998) 66 Cal.App.4th 1089, 1095-1096 [63 Cal.Comp.Cases 1125].)

⁴ 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' 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).

⁵ 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 Labor Code section 5909 terminates the Appeals Board's

In this case, the WCJ issued the Findings and Order on November 14, 2023, and applicant filed a timely petition on December 8, 2023 in the Electronic Adjudication System (EAMS). (See Cal. Code Regs., tit. 8, §10206 [electronic document filing rules], § 10205.11 [manner of filing of documents].) The Division of Workers’ Compensation (DWC) is headed by the Administrative Director, who administers all 24 district offices, including employment of more than 190 WCJs and maintenance of EAMS. (See Cal. Code Regs., tit. 8, §§10205, 10205.4, 10206, 10208.5; see also Lab. Code §§ 110, 111 [delineating the powers of the Administrative Director and Appeals Board].) When a Petition is filed, a task is sent to the WCJ through EAMS so that the WCJ receives notice that a Report is required. (See Cal. Code Regs., tit. 8, §10206; 10962.) No such notice is provided to the Appeals Board. Thereafter, the district office electronically transmits the case to the Appeals Board through EAMS. Here, according to Events in EAMS, which functions as the “docket,” the district office transmitted the case to the Appeals Board on February 14, 2024. Thus, the first notice to the Appeals Board of the Petition was on February 14, 2024. Due to this lack of notice *by the district office*, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties.⁶ Therefore, considering that applicant filed a timely petition and that the Appeals Board’s failure to act on that petition was in error, we find that our time to act on applicant’s petition was tolled until 60 days after February 14, 2024.

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* appears to reflect 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.

In addition to disregarding the respondent’s right to due process and depriving the parties of meaningful review by the Appeals Board, the *Zurich* Court apparently failed to consider that Labor Code section 5803 provides for *continuing jurisdiction* by the Appeals Board over all of its “orders, decisions, and awards,” and section 5301 provides for “full power, authority and jurisdiction” by the Appeals Board for all proceedings under section 5300. Additionally, jurisdiction is conferred on the Appeals Board when a petition is timely filed under Labor Code section 5900(a), and the Appeals Board may review the entire record, even with respect to issues not raised in the petition for reconsideration before it. A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

⁶ Contrary to the Court’s speculation in *Zurich, supra*, given the tremendous volume of documents that the district offices must process, the vast number of cases in the system, and the limitations of the EAMS system, the parties’ ability to inquire at the district office as to the status of a petition for reconsideration is limited; in fact, there is simply no mechanism to do so. Instead, the parties must rely on a verification of timely filing from the EAMS system. (Cal. Code Regs., tit. 8, § 10206.3.)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the November 14, 2023 Findings of Fact is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 14, 2023 Findings of Fact is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 15, 2024

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

**KERI NOYCE
LARSON, VANDERSLOOT & RIVERS
COHEN & ASSOCIATES**

PAG/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

INTRODUCTION

By a timely and verified Petition for Reconsideration, applicant seeks reconsideration of my November [14], 2023 Findings [of] Fact, wherein I found that the Workers' Compensation Appeals Board does not have jurisdiction to determine whether the Brain Injury Program requested by July 7, 2023 Request for Authorization (RFA) from the primary treating physician, Dr. Timothy Lo is reasonable and necessary to cure or relieve applicant from the effects of the herein injury. In doing so, I determined that the July 7, 2023 RFA was not based on a material change in fact so as to constitute a valid basis for resubmission of the prior timely Utilization Review (UR) determination issued by defendant on June 22, 2023.

Applicant contends that the information provided in the July 7, 2023 RFA and the June 27, 2023 report of Dr. Lo is a material change in fact, because it provides information and facts that were missing at the time of the June 22, 2023 UR determination. Defendant filed an Answer, disputing applicant's contentions. I have reviewed the Petition, the Answer and the entire record in this matter, and I recommend that reconsideration be granted, that the November [14], 2023 Findings [of] Fact be rescinded, that the matter be returned to the trial level for further proceedings by the trial judge.

BACKGROUND

The background is summarized at pages 1-2 of my Opinion on Decision as follows:

The salient issues to be determined herein are whether the Workers' Compensation Appeals Board had jurisdiction to determine whether the Brain Injury Program requested by the primary treating physician, Dr. Timothy Lo, in the July 7, 2023 (Exh. 1) Appeal/Request for Authorization (RFA) is reasonable and necessary to cure or relieve applicant from the effects of the herein injury, and if so, whether applicant is in need of the Brain Injury Program.

On June 22, 2023, defendant's Utilization Review (UR) provider, Status Medical Management, issued a determination letter (Exh. 102), which, among other things, did not certify the Brain Injury Program requested by Dr. Lo on or about June 15, 2023. There is no allegation that the June 22, 2023 UR determination is untimely. On June 27, 2023, Dr. Lo's office provided a narrative report (Exh. 2) regarding the UR denial and the need for the program. On July 7, Dr. Lo issued a form (Exh. 1) entitled both "Appeal" and "Request for Authorization," with the box checked to indicate, "Resubmission – Change in Material Facts." On July 11, 2023, defendant's UR provider issues correspondence, in which it noted the prior UR denial of June 22, 2023, and declined to conduct further UR.

DISCUSSION

In my decision, I noted that the brain injury program was the subject of a prior June 15, 2023 RFA, and the June 22, 2023 UR determination did not certify the program. This UR determination stated that the RFA and supporting documents did not provide documentation regarding the objective evidence of deficits in muscular strength, endurance, socialization issues, and dependency on activities of daily living, and also pointed out that there was no notation in the records submitted for review of the failure of other outpatient therapies. Dr. Lo then issued a June 27, 2023 report and a July 7, 2023 RFA. Upon reconsideration, I am now of the opinion that the information provided by Dr. Lo in the June 27, 2023 report and the July 7, 2023 RFA may document a change in material facts. This is because the information provided by Dr. Lo addresses the facts which were noted by the UR reviewer as lacking in the prior RFA of June 15, 2023. Therefore, I am recommending that reconsideration be granted, that my decision be vacated, and that the matter be returned to the trial level for further proceedings and decision.

RECOMMENDATION

Based upon the foregoing, it is recommended that reconsideration be granted, that the November [14], 2023 Findings [of] Fact be rescinded, that the matter be returned to the trial level for further proceedings by the trial judge.

Dated: February 14, 2024

JAMES GRIFFIN
Workers' Compensation
Administrative Law Judge