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

**RICHARD FISHER,** ***Applicant***

**vs.**

**KLINGSPOR ABRASIVES, INC.;**
**ALLIANZ GLOBAL CORPORATE AND SPECIALTY,** ***Defendants***

**Adjudication Number: ADJ11434587**
**Oakland District Office**

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

Applicant seeks reconsideration of the Findings, Award and Order (FA&O) of June 14, 2023, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that while employed as a factory representative for defendant on September 6, 2017, applicant sustained injury to his low back; and that applicant's injury caused permanent disability of 17%. In his Opinion, the WCJ discussed that the evidence was not clear as to whether applicant's primary treating physician was Tariq Mirza, M.D., and stated that he could not "rely on the opinion of Dr. Mirza as applicant's *primary treating physician* for determining the issues of applicant's permanent disability and need for further medical care. (Italics added.)" Thus, he stated that he relied on the opinions of qualified medical evaluator (QME) Jeffrey Holmes, M.D. (Opinion on Decision, pp. 2-3.)

Applicant alleges that Dr. Mirza was applicant's primary treating physician and was in defendant's medical provider network (MPN) and contends that Dr. Mirza's reporting was substantial evidence on the issues of applicant's permanent disability and need for further medical care.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration, rescind the WCJ's FA&O, and return this matter to the WCJ for further proceedings.

**FACTS**

Applicant claimed injury to his low back while employed as a factory representative for defendant on September 6, 2017.

Dr. Jeffrey Holmes served as the panel QME in this matter. In his January 10, 2022 report, he provided an impairment rating for applicant of 10%. (Ex. I, QME report of Dr. Holmes, dated 1/3/22, p. 6.)

Applicant began treating with Dr. Mirza in approximately November 2018, and the record contains treatment records through 2022. In his permanent and stationary report of April 1, 2022, Dr. Mirza provided an impairment rating of 26%. (Ex. 4, P&S Report of Dr. Mirza, dated 4/1/22, p. 8.) Although defendant paid for applicant's medical treatment with Dr. Mirza (Exhibit D, Printout of Medical Benefits), defendant claims that it objected to treatment by Dr. Mirza because Dr. Mirza was not part of its MPN. (Ex. C, pp. 1, 10, 26, 39, 41, 52, 54, 61, 68, 69, 86, 88, 103.)

The parties proceeded to trial on April 6, 2023. Defendant objected to the admission of the reports of Dr. Mirza (Exhibits 4 and 5) because it asserted that Dr. Mirza was not applicant's treating physician.

Applicant testified that he had been seeing Dr. Mirza approximately once per month. (4/6/23 Minutes of Hearing/Summary of Evidence (MOH/SOE), p. 4.) Dr. Mirza had been trying to obtain an MRI for applicant for over a year but it had been denied by Utilization Review. (MOH/SOE, p. 4.) Applicant has problems lifting items and has to brace himself while showering and brushing his teeth. (MOH/SOE, p. 4.)

Relying on Dr. Holmes' medical reports and not Dr. Mirza's reports, the WCJ found that applicant's injury caused permanent disability of 17% and awarded permanent disability indemnity benefits based on that permanent disability finding of 17%. (FA&O, pp. 1-2; Opinion on Decision (OOD), pp. 2-3.)

## DISCUSSION

I.

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[1], §§ 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.)[2]

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[1] All further statutory references are to the Labor Code unless otherwise noted.

[2] 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 also Lab. Code, § 5908.5; *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 893 [35 Cal.Comp.Cases 27].)

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].)[3] 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 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.[4] (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,[5] which have consistently followed *Shipley's* lead

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[3] 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]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

[4] "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].)

[5] 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

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.[6]

In this case, the WCJ issued the FA&O on June 14, 2023, and applicant filed a timely petition on July 10, 2023, in EAMS as a "Petition-Other." 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 for reconsideration 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.) However, because the Petition here was not labeled properly as a "petition for reconsideration," no task was sent to the

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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. (MelendezBanegas)* (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).

[6] 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 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].)

WCJ, and 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 January 17, 2024. Thus, the first notice to the Appeals Board of the Petition was on January 17, 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.[7] 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 January 17, 2024.

II.

Applicant contends that the issue in this case is whether the WCJ appropriately decided that he could not rely on Dr. Mirza's medical reports when deciding the issues of applicant's permanent disability and further medical treatment because Dr. Mirza was not applicant's primary treating physician. The parties disagree on whether Dr. Mirza was in defendant's MPN and disagree as to whether Dr. Mirza is applicant's primary treating physician. As noted above, while the WCJ made no finding as to the issue of Dr. Mirza's reports, he determined that he could not rely on Dr. Mirza's medical reports as he believed that Dr. Mirza was not applicant's primary treating physician. (OOD, pp. 2-3.) However, whether Dr. Mirza was in the MPN is irrelevant to the issue of whether the WCJ could rely on his reports for permanent disability and future medical treatment because the issue of whether a provider is within the MPN concerns the issue of payment to the provider. Moreover, the issue of whether the evidence by a treating physician is substantial evidence to support a finding as to permanent disability and need for further medical treatment, does not depend on a finding that the treating physician is the "primary" treating physician. Like the issue of whether a particular provider is in the MPN, the issue of who is the primary treating physician is also a payment issue, as the lack of designation may mean that defendant is relieved from the obligation of payment.

[7] 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.)

Labor Code section4606 provides that:

> Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.

(Lab. Code, § 4605; see also *Batten v. Workers' Comp. Appeals Bd*. (2015) 241 Cal.App.4th 1009, 1016 ["When an employee consults with a doctor at his or her own expense, in the course of seeking medical treatment, the resulting report is admissible."].)

Further, "[t]he appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing: (a) Reports of attending or examining physicians." (Lab. Code, § 5703; see *Lorenz v. Encino Hosp. Med. Ctr.* (Aug. 21, 2014, ADJ7659456) [2014 Cal.Wrk.Comp. P.D. LEXIS 410].) We observe, moreover, it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

Additionally, Labor Code section 4061(i) states that:

> No issue relating to a dispute over the existence or extent of permanent impairment and limitations resulting from the injury may be the subject of a declaration of readiness to proceed unless there has first been a medical evaluation by a treating physician and by either an agreed or qualified medical evaluator. With the exception of an evaluation or evaluations prepared by the treating physician or physicians, no evaluation of permanent impairment and limitations resulting from the injury shall be obtained, except in accordance with Section 4062.1 or 4062.2. Evaluations obtained in violation of this prohibition shall not be admissible in any proceeding before the appeals board.

(Lab. Code, § 4061(i).)

As stated above, the issue of whether Dr. Mirza was in the defendant's MPN is only relevant as to whether defendant is responsible for paying Dr. Mirza, and not to the issue of whether his report can be relied upon as evidence. (Lab. Code, § 4064(d).) Even if Dr. Mirza was not in the MPN, he is a treating physician, and a treating physician's report may be the basis for

an award. (See *Place, supra,* 3 Cal.3d 372, 378-379.) By way of comparison, a privately retained doctor's report may provide some basis for an award, although it cannot be the sole basis of an award of compensation. (*Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1232.) Therefore, the WCJ should have considered Dr. Mirza's report to determine the issues of applicant's permanent disability and need for further medical treatment.

Furthermore, QME Dr. Holmes only considered Dr. Mirza's reports up to November 2021, and did not consider Dr. Mirza's more recent reports, including his P&S report of April 2022, in his QME report. (Ex. I, QME Report of Dr. Holmes, dated 1/3/22, pp. 9-10.) The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on a threshold issue. (Lab. Code, §§ 5701, 5906; *Nunes* (*Grace*) *v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 392-394 [62 Cal.Comp.Cases 924]; *McDonald v. Workers' Comp. Appeals Bd., TLG Med. Prods.* (2005) 70 Cal.Comp.Cases 797, 802.) The Appeals Board has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 396, 403.) Therefore, upon return to the WCJ, we recommend that the medical record be developed to cure the deficiencies in Dr. Holmes' report.

Accordingly, we grant the Petition, rescind the FA&O, and return this matter to the trial level for further proceedings consistent with this opinion.

For the foregoing reasons,

**IT IS ORDERED** that applicant's Petition for Reconsideration of the June 14, 2023, Findings, Award, and Order is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the June 14, 2023, Findings, Award, and Order is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 12, 2024**

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

**RICHARD FISHER**
**RAYMOND E. FROST & ASSOCIATES**
**GILSON DAUB**

**JMR/*ara***

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