

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

PERCY TUCKER, *Applicant*

vs.

**CITY OF PASADENA, permissibly self-insured;
administered by ADMINSURE, INC., *Defendants***

**Adjudication Number: ADJ11951678
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact & Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on March 30, 2021 wherein the WCJ found, in pertinent part, that applicant's claim is not barred by the statute of limitations (Lab. Code, § 5405).

Defendant contends that the F&A was issued prematurely because of the 45-day period to file a writ of review following a final decision of the Workers' Compensation Appeals Board (Lab. Code, § 5950); and, there is no substantial evidence to support the finding that applicant's claim is not barred by the statute of limitations.

Applicant filed an Answer to Defendant's Petition for Reconsideration (Answer), and the WCJ filed a Report and Recommendation on Petition for Reconsideration (Report).

Applicant filed a Petition for Finding from Reconsideration Unit (Petition for Finding), but failed to file a request to file supplemental pleading as required pursuant to WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964). We therefore do not accept or consider the Petition for Finding.

We reviewed the record in this case, the allegations of the Petition for Reconsideration and the Answer, and the contents of the Report. For the reasons set forth below, we deny reconsideration.

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] [“irregularity which deprives reconsideration under the statutory scheme denies due process”].) In *Shiple, 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 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.” (*Shiple, supra*, 7 Cal.App.4th at pp. 1107-1108.)

In *Shiple*, 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. (*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. Shiple is entitled to the board’s review of his petition and its decision on its merits.” (*Id.*, at p. 1108.)¹

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

¹ 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.)

deprives reconsideration under the statutory scheme denies due process...”].) 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 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.²

In this case, the Petition for Reconsideration was filed on April 23, 2021, but due to an administrative irregularity, the petition was unavailable to the Appeals Board until after 60 days from the time of filing. The administrative irregularity which caused the petition to be unavailable to the Appeals Board was not the fault of either party. Thus, pursuant to *Shipley*, the time to act on the petition was tolled until it became available to the Appeals Board. This decision is timely filed within 60 days of the Appeals Board’s receipt of the petition.

II.

Defendant contends that the F&A could not be issued until after the 45-day time period to file a writ of review has expired, and that because it filed a petition for writ of review of our March 29, 2021 Opinion and Order Granting Reconsideration and Decision after Reconsideration (Decision),³ the F&A was filed prematurely. We disagree with defendant and note that defendant was obviously able to timely and correctly file its petition for writ of review of the Decision with the District Court of Appeals, and timely and correctly file this petition for reconsideration of the

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)]; *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.). Five California District Courts of Appeal have recently denied or dismissed writs at the request of the Appeals Board (citing *Shipley*) where the petition for reconsideration was deemed denied under section 5909, in order for the Appeals Board to 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; *Carlos Piro v. Workers’ Compensation Appeals Board and County of San Bernardino* (2021) (E076962) 4th DCA, Div. 2; *Great Divide Insurance Company v. Workers’ Compensation Appeals Board et al. (Melendez Banegas)* (2021) (F083019) 5th DCA.

³ Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer served on the Appeals Board. Another panelist was assigned in her place.

F&A. Regardless, there is no stay of proceedings following the Board's issuance of a decision in any case. In fact, as noted by the WCJ, there is also no stay of proceedings even when a writ of review has been filed and is pending.

Pursuant to Labor Code § 5950, an “application for writ of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeals board own motion, within 45 days after the filing of the order, decision, or award following reconsideration.”

However, pursuant to Labor Code § 5956, [t]he filing of a petition for, or the pendency of, a writ of review shall not of itself stay or suspend the operation of any order, rule, decision, or award of the appeals board.”

In this case, the WCAB ordered that “this matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ consistent with this opinion” (p. 8) and the undersigned WCJ did so. To require the undersigned WCJ to wait 45 days before taking any further action on this case would frustrate the goal of the workers' compensation system to “accomplish substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character” [Cal. Cont., art. XIV, § 4] in order to expedite the Applicant's permanent disability award which was reduced from 89% to 85%.

Therefore, the undersigned WCJ did not err in following the directions of the WCAB in an expeditious manner. (Report, p. 2, bold in the original.)

We therefore deny reconsideration based on defendant's contention that the WCJ improperly issued the F&A during the 45-day period in which the parties had to seek review from the appellate court.

II

No party may file a successive petition alleging the same facts and the same law as was already determined by the Appeals Board. (*Crowe Glass Co. v. Industrial Acc. Com. (Graham)* (1927) 84 Cal.App. 287, 293 (*Crowe Glass*); *Navarro v. A&A Farming* (2002) 67 Cal.Comp.Cases 296, 299 (Appeal Bd. en banc) (*Navarro*)).) The Court in *Crowe Glass* explained that,

Under such a practice there would be no end to the litigation, as no time, however great, would operate to bar successive applications provided only that they were applied for in seasonable time. Such a construction would lead to legal chaos. ... the construction contended for would defeat the very purposes of the act itself which contemplates a speedy determination of controversies involved

thereunder, and not a vacillating attitude on the part of the Commission. (*Crowe Glass, supra*, 84 Cal.App. 287 at p., 293.)

The only exception to this rule is when the Appeals Board's decision is based on new and additional evidence (*Pacific Employers Ins. Co. v. Industrial Acci. Com. (Mazzanti)* (1956) 139 Cal.App.2d 22, 25 [21 Cal.Comp.Cases 46]; or, on a new rationale not previously raised (*Navarro, supra*, 67 Cal.Comp.Cases at p. 300-301, citing *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584, 592] and *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157–158 [65 Cal.Comp.Cases 805, 809–810]).

Here, defendant seeks reconsideration of the F&A based on *identical* factual and legal arguments as raised in its January 27, 2021 Petition for Reconsideration, i.e., that applicant had knowledge that his orthopedic injuries were caused by his employment while he was still working, and therefore, that his section 5412 date of injury should be his last date of work, April 15, 2012. (Petition for Reconsideration, January 27, 2021, pp. 5-6; Petition for Reconsideration, April 23, 2021, pp. 3-4.) We rejected these arguments in the Decision. (Decision, pp. 6-8 ["In this case, we agree with the WCJ that defendant did not meet it burden to show the concurrence of knowledge and disability in 2012.])

Defendant is wrong that its identical arguments somehow address our new finding that the section 5412 date of injury is February 14, 2019, i.e., based on the date applicant filed his workers' compensation claim for the orthopedic injuries. Defendant raises no new facts or law related to our new finding. The successive grounds stated in the pending petition reiterate identical arguments that we should find applicant had knowledge that his injury was work-related while still working and therefore, that his section 5412 date of injury should be his last day of work in 2012. However, we obviously considered and rejected these identical arguments given that we found a February 14, 2019 date of injury and not, as contended in both petitions, an April 15, 2012 date of injury.

Accordingly, we could have dismissed the Petition for Reconsideration as impermissibly successive.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact & Award issued by a workers' compensation administrative law judge on March 30, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 16, 2023

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

**PERCY TUCKER
LEWIS MARENSTEIN
ARMSTRONG SIGEL**

AJF/abs

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