

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

GAMAL HABIB, *Applicant*

vs.

**LITHIA MOTORS, INC./DCH TOYOTA
OF TORRANCE; CORVEL, *Defendants***

**Adjudication Number: ADJ12304191
Marina del Rey District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. It has come to the attention of the Appeals Board that, while this matter has been pending on reconsideration, the parties have reached a proposed settlement. Since the District Office is precluded from acting on a case while it is pending on reconsideration (Cal. Code Regs., tit. 8, § 10961), we now issue our Opinion and Decision After Reconsideration affirming our February 25, 2022 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration.

On March 7, 2022, defendant newly aggrieved timely sought reconsideration of our February 25, 2022 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration. Therein, we granted applicant's Petition for Reconsideration of the August 31, 2021 Findings of Fact, Award, and Order issued by the workers' compensation administrative law judge (WCJ) and, based on the WCJ's Report and Recommendation which we adopted and incorporated as part of our decision, we found that defendant failed to meet its burden of proof regarding non-industrial apportionment and that the injury herein caused 80% permanent disability. We further noted that we had failed to act on applicant's petition within 60 days of its filing on September 20, 2021, through no fault of applicant. Therefore, considering that the Appeals Board's failure to act on the petition was in error, we found that our time to act was tolled

pursuant to *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].

In its Petition for Reconsideration, defendant, citing to multiple unpublished Court of Appeal decisions, contends that the Appeals Board failed to satisfy the requirements of Labor Code section 5908.5 by failing to set forth an adequate statement of the evidence or reasoning upon which we relied and that our decision “was silent as to any legal or evidentiary reasoning in its vacating the trial decision and blind adoption of the Recommendations.” Defendant further contends that decision was not timely issued and that our application of the holding in *Shipley* was in error. Finally, defendant contends that the Appeals Board should have affirmed the WCJ’s initial finding of non-industrial apportionment.

Applicant filed an Answer. On May 6, 2022, we granted reconsideration of defendant’s petition for further study the factual and legal issues. We now issue our Opinion and Decision After Reconsideration.

After the Appeals Board acts upon a petition for reconsideration, a decision following reconsideration must be prepared in compliance with various constitutional and statutory mandates imposed on the Appeals Board, including section 5908.5. (See Lab. Code, §§ 5906-5908.5.) In *Le Vesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 (“*Le Vesque*”), the Supreme Court held 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.)”].) Thus, because the WCJ’s report stated the evidence relied upon and specified in detail the reasons for the decision, the Appeals Board is empowered to adopt and incorporate the WCJ’s report as the basis for its decision.

Regarding our application of the holding in *Shipley*, we note that the District Courts of Appeal have uniformly concluded that the parties’ right to due process requires tolling of the 60 days. (See e.g., *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.).)

Next, we deny defendant’s request that we reconsider the issue of non-industrial appointment for the reasons stated in our February 25, 2022 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration, which we incorporate here.

Finally, we admonish defendant for citing to multiple unpublished decisions. (California Rules of Court, rule 8.1115(a).)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that our February 25, 2022 Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER



/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 14, 2022

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

**GAMAL HABIB
LAW OFFICES OF BERKOWITZ & COHEN
MISA STEFEN KOLLER WARD, LLP**

PAG/abs

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