WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PETER WATSON, *Applicant*

vs.

FPL ENERGY, Self-Insured, administered by BROADSPIRE SERVICES, *Defendants*

Adjudication Numbers: ADJ1968745 (MON 0357166); ADJ3771069 (MON 0357167); ADJ1711136 (MON 0357168)
Marina Del Rey District Office

OPINION AND ORDER DENYING PETITION FOR 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, we will deny reconsideration.

Former Labor Code[1] section 5909 provided that a petition was denied by operation of law if the Appeals Board did not "act on" the petition within 60 days of the petition's filing. However, the Appeals Board cannot "act on" the petition if it has not received it, and if it has not received the case file. Transmission of the case to the Appeals Board is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board." When the Appeals Board does not receive the case file and does not review the petition within 60 days due to irregularities outside the petitioner's control, and the 60-day period lapses through no fault of the petitioner, the Appeals Board must then consider whether circumstances exist to allow an equitable remedy, such as equitable tolling.

It is well-settled that the Appeals Board has broad equitable powers. (*Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board* (1978) 83 Cal.App.3d 413, 418 [43

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

Cal.Comp.Cases 785] citing *Bankers Indem. Ins. Co. v. Indus. Acc. Com.* (1935) 4 Cal.2d 89, 94-98 [47 P.2d 719]; see *Truck Ins. Exchange v. Workers' Comp. Appeals Bd.* (*Kwok*) (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *State Farm General Ins. Co. v. Workers' Comp. Appeals Bd.* (*Lutz*) (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758]; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) It is an issue of fact whether an equitable doctrine such as laches applies. (*Kwok*, *supra* 2 Cal.App.5th at p. 402.) The doctrine of equitable tolling applies to workers' compensation cases, and the analysis turns on the factual determination of whether an opposing party received notice and will suffer prejudice if equitable tolling is permitted. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 412 [39 Cal.Comp.Cases 624].) As explained above, only the Appeals Board is empowered to make this factual determination.[2]

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of 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. (*Id*. at p. 1108.) Pursuant to the holding in *Shipley* allowing equitable tolling of the 60-day time period in section 5909, the Appeals Board acts to grant, dismiss, or deny such petitions for reconsideration within 60 days of receipt of the petition, and thereafter issues a decision on the merits. "[I]t 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.) All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd*. (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].)

[2] Section 5952 sets forth the scope of appellate review, and states that: "Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." (Lab. Code, § 5952; see Lab. Code, § 5953.)

If a timely filed petition is never acted upon and considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity and not through the fault of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, § 5908.5; see *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].) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans*, *supra*, 68 Cal.2d 753; see also *Rea*, *supra*, 127 Cal.App.4th at p. 643.)

On December 11, 2024, the California Supreme Court granted review in *Mayor v. Workers' Compensation Appeals Bd*. (2024) 104 Cal.App.5th 713 [2024 Cal.App. LEXIS 531] ("*Mayor*"). One issue granted for review is whether section 5909 is subject to equitable tolling. The Supreme Court noted the conflict present in the published decisions of the Courts of Appeal, and in its order granting review of *Mayor*, stated as follows:

> Pending review, the opinion of the Court of Appeal, which is currently published at 104 Cal.App.5th 1297, may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict. (See *Standing Order Exercising Authority Under California Rules of Court, Rule 8.1115 (e)(3), Upon Grant of Review or Transfer of a Matter with an Underlying Published Court of Appeal Opinion,* Administrative Order 2021-04-21; Cal. Rules of Court, rule 8.1115(e)(3) and corresponding Comment, par. 2.)

(Order Granting Petition for Review, S287261, December 11, 2024.)

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.) The touchstone of the workers' compensation system is our constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) "Substantial justice" is not a euphemism for inadequate justice. Instead, it is an exhortation that the workers' compensation system must focus on the substance of justice, rather than on the arcana or minutiae of its administration. (See Lab. Code, § 4709 ["No informality in any proceeding ... shall invalidate any order, decision, award, or rule made and filed as specified in this division."].) When a litigant is deprived of their due process rights based upon the

administrative errors of a third party, for which they bear no blame and over whom they have no control, substantial justice cannot be compatible with such a draconian result.

In keeping with the WCAB's constitutional and statutory mandate, all litigants before the WCAB must be able to rely on precedential authority, and all litigants must have the expectation that they will be treated equitably on issues of procedure and be accorded same or similar access to the WCAB. The Appeals Board has relied on the *Shipley* precedent for over thirty years, by continuing to consider all timely filed petitions for reconsideration on the merits, consistent with due process. Treating all petitions for reconsideration in the same or similar way procedurally promotes judicial stability, consistency, and predictability and safeguards due process for all litigants. We also observe that a decision on the merits of the petition protects every litigant's right to seek meaningful appellate review after receiving a final decision from the Appeals Board.

Consequently, we apply the doctrine of equitable tolling pursuant to *Shipley* to this case. Here, the WCJ issued the decision on August 29, 2022. Lien claimant timely filed its Petition for Reconsideration on September 23, 2022. However, for reasons that are not entirely clear from the record, the Appeals Board did not actually receive notice of and review the petition until June 5, 2025. Thus, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties.

Accordingly, our time to act on applicant's petition was equitably tolled until 60 days after June 5, 2025. The date 60 days from June 5, 2025 is August 4, 2025. This decision is issued by or on August 4, 2025, so that we have timely acted on the petition as required by section 5909(a).

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 4, 2025

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

COLLECTIVE RESOURCE
COSTFIRST CORPORATION

DLM/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

The Prescription Center Pharmacy, by and through their attorneys of record, has filed a timely and verified Petition for Reconsideration challenging the Findings and Order of 08/29/2022.

II

FACTS

Peter Watson, while employed in California by FPL Energy, sustained injury to the cervical spine, lumbar spine, erectile dysfunction, GERD and Psyche arising out of and in the course of his employment during the period of 01/01/2000-09/27/2007.

The case-in-chief resolved by way of Compromise and Release approved on 07/19/2018.

The first lien conference took place on 12/19/2018. The Lien Conference was continued three times and on 06/12/2019 the case was set for a Lien Trial. The first Lien Trial date was 08/01/2019 and the case was continued numerous times until the trial finally took place on 05/19/2022.

The undersigned issued a Findings & Award with an Opinion on Decision on 08/29/2022. It is from this F&A that The Prescription Center seeks Reconsideration.

III

DISCUSSION

1. Rule 10608 and Adverse Inference

Petitioner, The Prescription Center (TPC) contends that because they provided medication to the applicant prior to 2013, under CCR § 10608 (a), the defendant was obligated to serve all medical evidence on TPC and did not do so. Petitioner argues that the undersigned should have ordered defendant to serve Petitioner with all medical evidence prior to 2013. Finally, that an adverse inference should be drawn from the defendant's willful suppression of evidence that was in their possession, pursuant to CCR § 10622

While Petitioner may have provided services prior to 2013, they also provided substantial services after 2013. Therefore CCR § 10608 (a) never applied to a substantial portion of the Petitioner's services. When Labor Code § 4903.6(d) was enacted, it applied retroactively and thus, after 01/01/2013, defendant could not serve even the pre-2013 medical reports without a court order.

Notably absent from Petitioner's discussion is their failure to exercise their due process rights. As highlighted by defendant's Answer, petitioner had six (6) years prior to the first lien conference to pursue medical discovery. Petitioner filed inadequate petitions for medical information and received two orders denying those petitions. Petitioner made no effort to petition for Removal or Reconsideration of those orders.

When the matter was set for trial over the objection of the Petitioner, no Removal was filed. While Petitioner is correct that they have due process rights, it is necessary for them to exercise those rights. Their failure to properly exercise their due process rights does not form a basis upon which discovery can be reopened.

Petitioner argues that defendant was obliged to serve the medical reports of Dr. Darryl Burstein on TPC but provides no evidence that the pre 2013 medical reports from Dr. Burstein were ever in the possession of the defendant. Thus, Petitioner has failed to establish that defendant failed to serve medical evidence in their possession in accordance with CCR § 10608 (a).

Having failed to establish that defendant was even in possession of medical evidence, Petitioner has failed to establish that defendant willfully suppressed this evidence in any manner.

Petitioner has failed to establish any basis for an adverse inference regarding alleged medical evidence.

2. Burden of Proof

Petitioner contends that they "met their burden of proof" regarding reasonableness and necessity of the medication provided by them to the applicant.

Petitioner argues that they must only prove one (1) percent industrial causation to be fully reimbursed in accordance with the Official Medical Fee Schedule (OMFS).

However, injury arising out of and in the course of employment was not at issue in this case. The parties stipulated to the industrially injured body parts caused by the applicant's continuous trauma injury. Thus, Petitioner's argument regarding proving one percent industrial causation is not relevant to the issues raised in this matter.

Regarding the medications deemed to be necessary to cure or relieve the industrial injury, the undersigned relied upon the findings of the Agreed Medical Examiner Dr. Mark Hyman, who opined that only the medications Lisinopril and Carvedilol (Coreg) were necessary for the treatment of applicant's industrial injury. Dr. Hyman concluded that the remainder of the medications were not medically necessary to treat the applicant's industrial injury (exhibit C).

Dr. Darryl Burstein is an internist and therefore appropriately treated only the applicant's internal medicine injuries only. The reports from Dr. Burstein (exhibits 5 & 7) state that the applicant was

treating for other complaints with doctors in Arizona. Any medications prescribed to treat injuries outside of Dr. Burstein's specialty as an internist were disallowed. Petitioner offered no evidence of medical necessity regarding those other medications.

Medications that were not supported by the MTUS guidelines were also disallowed and Petitioner offered no evidence that would have supported the prescription of such medication notwithstanding the MTUS guidelines.

Petitioner argues that their efforts to prove their case were hampered by not being in possession of the applicant's medical records. However, Petitioner also failed to provide all of the prescriptions allegedly issued by Dr. Burstein.

Prescription medications cannot be dispensed by a pharmacy without a doctor's prescription. So, for TPC to dispense prescription medications either the applicant or Dr. Burstein's office would have had to provide a prescription to TPC for each medication dispensed. We know that petitioner was in possession of some of the prescriptions issued by Dr. Burstein because some of the prescriptions were offered into evidence. However, the majority of the medications dispensed by the Petitioner are not supported by prescriptions issued by Dr. Burstein

The failure to support the medications dispensed with a prescription from Dr. Burstein resulted in disallowance of many of Petitioner's charges.

In summary, Petitioner fails to provide a basis to reopen discovery in light of their lack of efforts to exercise their due process rights in the first place. Not only did Petitioner fail to establish that defendant was ever in possession of that evidence, but there was also no showing of any willful suppression of that evidence. Petitioner failed to establish any reason for the court to find an adverse inference for medical reports not served by the defendant.

The AME determined that many of the medications were not necessary to treat the industrial injuries and some medications were not supported by the MTUS. Finally, Petitioner, a pharmacy, must possess prescriptions from a doctor to dispense prescription medication. Here, Petitioner should have been in possession of a prescription from Dr. Darryl Burstein for each medication dispensed. However, only a small number of prescriptions were offered in to evidence. None of the Petitioner's arguments explain why they were unable to provide evidence that Dr. Burstein actually prescribed the medications dispensed to the applicant.

IV.
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Date: October 4, 2022

Respectfully submitted,
Martha Gaines
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE