

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

SHANE PERRY, *Applicant*

vs.

MASTEC INC.; ACE AMERICAN INSURANCE COMPANY, *Defendants*

**Adjudication Numbers: ADJ10814219, ADJ10817362, ADJ10815251
Oakland District Office**

**OPINION AND DECISION AFTER
RECONSIDERATION**

The Appeals Board has been advised that, while this matter has been pending on reconsideration, the Petition for Removal of the decision issued on January 19, 2021 has been withdrawn by petitioner. Therefore, as our decision after reconsideration, we vacate our grant of reconsideration and dismiss the Petition for Removal.

Labor Code section 5909¹ provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. Section 5315 provides for a 60 day period for the Appeals Board to confirm, adopt, modify or set aside the findings, order, decision or award of a workers' compensation administrative law judge. (Lab. Code, § 5315.) Here, defendant filed its petition on February 12, 2021, and we issued an Opinion and Order Granting Petition for Reconsideration on January 3, 2022.

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].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision and held that the time to act on applicant's petition was

¹ Unless otherwise stated, all further citation is to the Labor Code.

tolled during the period that the file was misplaced. (*Shiplely, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shiplely*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shiplely, supra*, 7 Cal.App.4th at p. 1108.) Therefore, considering that the WCAB’s failure to act was through no fault of defendant, we find that our time to act on the petition for reconsideration is tolled.

If a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ’s determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ’s decision includes a finding regarding a threshold issue. Accordingly, the WCJ’s decision is a final order subject to reconsideration rather than removal, and the petition is properly treated as one for reconsideration.

Accordingly, as our decision after reconsideration, we vacate our order granting reconsideration and dismiss the petition.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Opinion and Order Granting Reconsideration issued by the Workers' Compensation Appeals Board on January 3, 2022 is **VACATED** and the Petition for Reconsideration is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 7, 2022

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

**SHANE PERRY
APPEL LAW FIRM
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN (2)**

AS/ara

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