

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

ALAN LIVHITS, *Applicant*

vs.

**DEPENDABLE CARE AMBULANCE INC.; CALIFORNIA INSURANCE COMPANY;
administered by APPLIED RISK SERVICES, INC.; SUSSEX INSURANCE COMPANY;
administered by INTERCARE HOLDINGS INSURANCE SERVICES, INC.;
PRAETORIAN INSURANCE COMPANY; administered by QBE INSURANCE GROUP,
*Defendants***

**Adjudication Numbers: ADJ7959316; ADJ8228747
Van Nuys District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the petition for reconsideration filed by defendant Applied Risk Omaha, on behalf of California Insurance Company, on June 28, 2019. Based on our review of the record, and for the reasons explained below, the petition is untimely and it will be dismissed.

I.

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.)

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

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

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 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.) 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.

II.

On March 14, 2019, we issued an "Opinion and Order Dismissing Petition for Reconsideration," wherein we dismissed the petition for reconsideration filed by defendant in response to the Findings and Order issued by an arbitrator on October 6, 2018. Defendant filed its petition on November 1, 2018, 26 days after service of the Findings and Order.

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, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020).) 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, former § 10508, now § 10600 (eff. Jan. 1, 2020).) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the Appeals Board within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) 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]; *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]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

In a letter to the Court of Appeal on May 28, 2019, the Appeals Board admittedly, referred to then WCAB Rule 10392(c) (Cal. Code Regs., tit. 8, former § 10392(c), now § 10616 (eff. Jan. 1, 2020)), which concerns filing of documents by parties. However, decisions by an arbitrator acting under the jurisdiction of the WCAB are effective upon service. Hence, the date of service is the date of issue, and the time to respond begins to run upon service. (See Cal. Code Regs., tit.

8, former § 10500, now § 10616 (eff. Jan. 1, 2020) [providing for service by the WCAB]; former § 10507, now § 10605 [providing for the time to react in response to service]; former § 10508, now § 10600 [extending time to respond to the next business day]; see also *Matute v. Los Angeles Unif. School Dist.* (2015) 80 Cal. Comp. Cases 1036 (Appeals Board en banc); *Messele v. Pitco Foods, Inc.* (2011) 76 Cal.Comp.Cases 956 (Appeals Board en banc); Code of Civ. Proc., § 1013(a.) Accordingly, we correctly dismissed defendant’s Petition for Reconsideration as untimely on March 14, 2019, and we did not have jurisdiction to consider it.

III.

Following our decision of March 14, 2019, on either April 30, 2019 or May 1, 2019, defendant filed a petition for writ of review with the Court of Appeal. On June 6, 2019, the Court of Appeal issued an order dismissing defendant’s petition for a writ of review as untimely since it was filed more than 45 days after our decision of March 14, 2019. (See Lab. Code, § 5950.) That is, the Court of Appeal’s order dismissing defendant’s petition for writ of review was not based on the grounds that defendant’s petition was untimely at the Appeals Board, but was based on the separate grounds of defendant’s untimely filing with the Court of Appeal.

If the real parties in interest or the Appeals Board disagree with an order by the Court of Appeal, the sole remedy is to either (1) file a petition for rehearing with the Court of Appeal (Cal. Rules of Court, rule 8.268); or (2) file a petition for review by the California Supreme Court (Cal. Rules of Court, rule 8.500). (See Lab. Code, §§ 5810, 5950, 5955.) There are no alternative ways to challenge an order by the Court of Appeal, and the Appeals Board and the real parties at interest are bound by the Court’s determination unless review is granted. (*Id.*) While the Appeals Board may submit briefing to the Court of Appeal before a determination issues, the Appeals Board does not have jurisdiction to alter an order by the Court of Appeal.

Accordingly, we do not have jurisdiction to circumvent the Court’s June 6, 2019 order dismissing defendant’s petition for writ of review, and the October 6, 2018 decision by the arbitrator is final.

IV.

Turning to defendant’s subsequent petition, on June 28, 2019, defendant filed a petition to “reopen” our decision of March 14, 2019, and cited to section 5803. However, the decision of March 14, 2019 was rendered by a three member panel appointed under the authority granted by sections 111 and 116, and that decision could only be challenged by way of a petition for a writ of

review pursuant to sections 5810, 5950, and 5955, or by way of a new petition for reconsideration pursuant to sections 5810 and 5911. (See *Navarro v. A & A Framing* (2002) 67Cal.Comp.Cases 296, 299 (Appeals Board en banc).) Specifically, under section 5911, a newly aggrieved person may seek reconsideration in response to a decision by the Appeals Board, but only within the time limits specified in section 5903.

Assuming *arguendo* that we were not bound by the June 6, 2019 order by the Court of Appeal and were able to consider defendant's petition as one for reconsideration, it was filed 103 days after the service of our March 14, 2019 decision, and is therefore untimely.

Thus, we dismiss the petition for reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 13, 2021

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

**GOODSTEIN BERMAN
HANNA BROPHY
MANNING KASS
PETER HONG
TRESSLER LLP
WOOTEN DAVIS**

AS/pc

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