

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

**RODNEY ESPANA, *Applicant***

**vs.**

**HEALTH NET, INC.; ARCH INSURANCE, adjusted by SEDGWICK CLAIMS  
MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ6840792  
Van Nuys District Office**

**OPINION AND ORDER  
DISMISSING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the presiding workers' compensation administrative law judge (PWCJ) with respect thereto. Based on our review of the record, the petition is untimely, unverified, and was filed without proof of service on adverse parties. Therefore, it will be dismissed.

Preliminarily, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "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].) In *Shiple*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code 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. (*Shiple, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shiple*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shiple, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on applicant's petition within 60 days of its filing on June 15, 2021, through no fault of applicant. Therefore, considering that the Appeals Board's failure to act on the petition was in error, we find that our time to act was tolled.

Nevertheless, while our time to act was tolled, applicant's petition was untimely filed and therefore subject to dismissal. 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, § 10605(a)(1).) 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, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, § 10940(a); § 10615(b).)

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 this case, the WCJ issued the Findings and Order on November 26, 2013. Based on the authority cited above, applicant had until Monday, December 23, 2013 to file a timely Petition for Reconsideration. Therefore, the Petition for Reconsideration filed on June 15, 2021 is untimely and must be dismissed.

In addition, Labor Code<sup>1</sup> section 5902 requires that a petition for reconsideration be verified. (Lab. Code, § 5902; see also Cal. Code Regs., tit. 8, § 10510(d).) In *Lucena v. Diablo Auto Body* (2000) 65 Cal.Comp.Cases 1425 (Significant Panel Decision), it was held that where a petition for reconsideration is not verified as required by section 5902, the petition may be dismissed if the petitioner has been given notice of the defect (either by the WCJ's report or by the respondent's answer) unless, within a reasonable time, the petitioner either: (1) cures the defect by filing a verification; or (2) files an explanation that establishes a compelling reason for the lack of verification and the record establishes that the respondents are not prejudiced by the lack of verification.

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<sup>1</sup> All further statutory references are to the Labor Code, unless otherwise noted.

Here, the Petition for Reconsideration is not verified and notice of this defect was specifically given in the PW CJ's June 29, 2021 Report. Moreover, a reasonable period of time has elapsed, but petitioner has neither cured the defect by filing a verification nor offered an explanation of why a verification cannot be filed.

Lastly, the Petition for Reconsideration was filed without proof of service on all adverse parties as required by section 5905. (Lab. Code, § 5905; see also Cal. Code Regs., tit. 8, §§ 10940(c); 10625). "The failure to serve documents in a WCAB proceeding in the manner required by statute or the board's regulations is not a 'mere irregularity' but rather an omission of substance which denies a fundamental right." (*Hartford Acc. & Indemnity Co. v. Workers' Comp. Appeals Bd. (Phillips)*). (1978) 86 Cal.App.3d 1, 3 [43 Cal.Comp.Cases 1193].) Dismissal is appropriate for the failure to serve a real party in interest. (*M.C.A., Inc. v. Workers' Comp. Appeals Bd. (Stott)*) (1981) 46 Cal.Comp.Cases 621 (writ den.); *Fisher v. Workers' Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 517 (writ den.).)

If we were not dismissing reconsideration on the procedural grounds noted above, we would deny it on the merits for applicant's failure to comply with the requirements of WCAB Rule 10974, which provides:

Where reconsideration is sought on the ground of newly discovered evidence that could not with reasonable diligence have been produced before submission of the case or on the ground that the decision had been procured by fraud, the petition must contain an offer of proof, specific and detailed, providing:

- (a) The names of witnesses to be produced;
- (b) A summary of the testimony to be elicited from the witnesses;
- (c) A description of any documentary evidence to be offered;
- (d) The effect that the evidence will have on the record and on the prior decision;
- and
- (e) As to newly discovered evidence, a full and accurate statement of the reasons why the testimony or exhibits could not reasonably have been discovered or produced before submission of the case.

A petition for reconsideration sought upon these grounds may be denied if it fails to meet the requirements of this rule, or if it is based upon cumulative evidence.

(Cal. Code Regs., tit. 8, § 10974.)

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/ CRAIG SNELLINGS, COMMISSIONER**

**JOSÉ H. RAZO, COMMISSIONER**  
**CONCUR NOT SIGNING**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 11, 2022**

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

**RODNEY ESPANA  
LAW OFFICES OF CLINTON & CLINTON**

**PAG/pc**

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