

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

GARY JOHNSON, *Applicant*

vs.

**LORRENA JOHNSON and ILLINOIS MIDWEST INSURANCE AGENCY, LLC on
behalf of PROCENTURY INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ10055263
Fresno District Office**

**OPINION AND
DECISION AFTER
RECONSIDERATION**

We granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant Lorrena Johnson seeks reconsideration of the Findings and Award issued by a workers' compensation arbitrator (WCA) on September 2, 2020, wherein the WCA awarded defendant Illinois Midwest Insurance Agency, LLC, on behalf of Pro Century Insurance Company, \$114,904.13 against AmGuard Insurance Company. Defendant contends that the award for medical expenses included legal fees, utilization fees, and discovery expenses that were not benefits to applicant and not recoverable under contribution proceedings.

We received an Answer from defendant. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCA, which recommends that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the Answer and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons stated in the Opinion on Decision and the WCA's Report, both of which we adopt and incorporate, and for the reasons stated below, we will affirm the F&A.

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, § 10507(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, § 10508.) To be timely,

however, a petition for reconsideration must be filed (i.e., received) within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10845(a), 10392(a).) Petitions for reconsideration are required to be filed at the district office, and not directly at the Appeals Board. (Cal. Code Regs., tit. 8, § 10995(b); see Cal. Code Regs., tit. 8, § 10205(l) [defining a “district office” as a “trial level workers’ compensation court.”].)

This time limit is jurisdictional and therefore, the Appeals Board has no authority to act upon or consider an untimely petition for reconsideration. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *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, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

Here, the WCA issued the decision on September 2, 2020, and defendant filed the Petition for Reconsideration on September 22, 2020 at the Fresno district office. Thus, the Petition was timely filed within 20 days of the decision.

As required by AD Rule 10205.4 (Cal. Code Regs., tit. 8, § 10205.4), defendant’s paper Petition was scanned into the Electronic Adjudication Management System (EAMS). (See Cal. Code Regs., tit. 8, §10206 [electronic document filing rules], § 10205.11 [manner of filing of documents].) The Division of Workers’ Compensation (DWC) is headed by the Administrative Director, who administers all 24 district offices with more than 190 WCJs, is responsible for maintenance of EAMS and is the custodian of all adjudication files. (See Cal. Code Regs., tit. 8, §§10205, 10205.4, 10206, 10208.5, 10208.7; see also Lab. Code §§ 110, 111 [delineating the powers of the Administrative Director and Appeals Board].)

WCAB Rule 10995 provides that if the arbitrator does not rescind the order, decision or award within 15 days of receiving the petition for reconsideration, the arbitrator is required to forward an electronic copy of their report and the complete arbitration file within 15 days after receiving the petition for reconsideration pursuant to WCAB Rule 10995(c)(3). (Cal. Code Regs., tit. 8, § 10995(c)(1)-(3).) WCAB Rule 10914 requires the arbitrator to make and maintain the record of the arbitration proceeding, which must include the following:

- (1) Order Appointing Arbitrator;
- (2) Notices of appearance of the parties involved in the arbitration;

(3) Minutes of the arbitration proceedings, identifying those present, the date of the proceeding, the disposition and those served with the minutes or the identification of the party designated to serve the minutes;

(4) Pleadings, petitions, objections, briefs and responses filed by the parties with the arbitrator;

(5) Exhibits filed by the parties;

(6) Stipulations and issues entered into by the parties;

(7) Arbitrator's Summary of Evidence containing evidentiary rulings, a description of exhibits admitted into evidence, the identification of witnesses who testified and summary of witness testimony;

(8) Verbatim transcripts of witness testimony if witness testimony was taken under oath.

(9) Findings, orders, awards, decisions and opinions on decision made by the arbitrator; and

(10) Arbitrator's report on petition for reconsideration, removal or disqualification.

(Cal. Code Regs., tit. 8, § 10914(c).)

The WCA issued the Report on October 16, 2020, however, filing of the arbitration file in EAMS was not completed as required by WCAB Rule 10995 until May 3, 2022.

Labor Code section 5909 provides that a petition is denied by operation of law if the Appeals Board does not act on the petition within 60 days after it is filed. Timely petitions for reconsideration filed and *received* by the Appeals Board are acted upon within 60 days from the date of filing pursuant to section 5909, by either granting, dismissing, or denying the petition. Thereafter, once a decision on the merits of the petition issues, the parties can then determine whether to seek review under section 5950. (See Lab. Code, § 5901.)

An exception occurs when a petition is *not received* by the Appeals Board within 60 days due to irregularities outside the petitioner's control. 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.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) Pursuant to the holding in *Shipley* allowing 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.

Here, according to Events in EAMS, which functions as the "docket," the district office transmitted the case to the Appeals Board on August 31, 2021. Thus, the first notice to the Appeals Board of the Petition was on August 31, 2021. Due to this lack of notice by the district office, the Appeals Board failed to act on the Petition within 60 days, through no fault of the parties. Therefore, considering that defendant filed a timely Petition for Reconsideration and that the Appeals Board's failure to act on that Petition was a result of administrative error, we conclude that our time to act on applicant's Petition was tolled until 60 days after August 31, 2021.

Accordingly, we affirm the Findings & Award.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on September 2, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 29, 2024

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

**GARY JOHNSON
COLEMAN CHAVEZ & ASSOCIATES
LAW OFFICES OF BRADFORD & BARTHEL
COLE, FISHER, COLE, O'KEEFE & MAHONEY
PARKER KERN NARD & WENZEL ATTN: DENNIS G. NARD (ARBITRATOR)**

AS/mc

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

OPINION AND DECISION

(EXCERPT FROM FINDINGS & AWARD AND DECISION OF ARBITRATOR 08/28/2020)

*** **

DISCUSSION

Having heard this matter on August 24, 2020, two exhibits were submitted to address the issue of the amount of dollars that were owed to Illinois Midwest Insurance Agency, LLC on behalf of Pro Century Insurance Company.

The first of these exhibits is the Order Approving Petition for Change of Administrators and for Reimbursement/Contribution signed by Workers’ Compensation Judge Geoffrey Sims on March 15, 2019. In that order it specifically states as follows: “Codefendant, AmGuard Insurance Company reimburse Illinois Midwest Insurance Agency on behalf of Pro Century Insurance Company 57% of all indemnity, medical and other expenses related to the litigation.” The Order does not appear to have been appealed and thus is a final order.

Medical:	\$42,323.43
Expenses:	\$2,250.00
TTD:	\$36,799.14
PPD:	\$12,014.29
Salary (TTD):	\$10,213.64
C&R (PPD):	\$97,985.71
Total:	\$201,586.21

Therefore, the arbitrator’s only option is to look at Exhibit B which is the benefits printout submitted by Illinois Midwest Insurance Agency, LLC on behalf of Pro Century Insurance Company to calculate the amount of money due. The calculations are as follows:

Fifty-seven percent of this amount is \$114,904.13. This amount is awarded to Illinois Midwest Insurance Agency, LLC on behalf of Pro Century Insurance Company for its reimbursement claim through August 24, 2020.

In addition, AmGuard Insurance Company is ordered to pay 50% of the arbitration costs in this matter pursuant to Labor Code section 5273.

Pursuant to Labor Code Section 5277 a copy of this Order is being filed with the Appeals Board Office in accordance with WCAB rules, practice and procedure. Review of an Award issuing from statutorily mandated arbitration is limited to grounds set forth in Code of Civil Procedure Section 1286.2 pursuant to Porter v. Golden Eagle Insurance Company (1996) 61 CCC 243.

Petitions for Reconsideration must be filed in accordance with the Workers' Compensation Laws of the State of California.

DATED: August 28, 2020

PARKER, KERN, NARD & WENZEL
Professional Corporation

By :

DENNIS G. NARD, ARBITRATOR

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendant, AmTrust Insurance Company, adjusted by AmGuard Insurance Company, has filed a Petition for Reconsideration dated October 1, 2020, seeking reconsideration of the September 2, 2020 Findings and Award and Decision of Arbitrator. The Petition for Reconsideration is verified but filed untimely.

The petitioner is specifically seeking relief from the order and asking for a recalculation of the amount awarded arguing that some of the expenses are not allowed by the law.

II

FACTS

The relevant facts in this matter are as follows:

1. The matter was heard via arbitration on August 24, 2020 on the issue of contribution and reimbursement to Illinois Midwest Insurance Agency, LLC;
2. No witnesses were produced at the hearing and the matter was submitted for a decision.

III

DISCUSSION

It does appear that the petitioner's request for reconsideration is untimely as the Order was served on September 2, 2020 and the petitioner's petition was not submitted until October 1, 2020.

Regarding the merits of their petition, the arbitrator feels that there is no merit to this as the petitioner has failed to show any evidence which would overturn the decision.

The only two exhibits in this case were the Order Approving Petition for Change of Administrators and for Reimbursement/Contribution which specified the percentage of benefits to be paid by each party and the benefit printouts submitted by Illinois Midwest Insurance Agency.

The arbitrator did and continues to feel that he is bound by the Order signed by Judge Sims on March 15, 2019, ordering 57% reimbursement of "all indemnity, medical and other expenses related to the litigation of this claim." The only thing that is excluded are the defense attorney fees.

The arbitrator did exclude what appeared to be medical records/subpoena costs as those are usually born by the party getting those records. The Arbitrator did include, to the objection of the petitioner, the medical/legal examination costs with Dr. Brox and the IMR charges.

It is the arbitrator's position that the IMR charges are related to the administration of the claim and to the provision of medical care. The Qualified Medical Evaluation charges would have probably been awarded as a split 50/50 between the parties, but Judge Sims's order already stated that the percentage for reimbursement was going to be 57%.

IV

CONCLUSION

Since no other argument was presented, the arbitrator had no choice but to affirm the Judge's findings and calculate the benefits that were due.

RECOMMENDATIONS

For the foregoing reason, I recommend that the Petition for Reconsideration be denied.

DATED: October 14, 2020

PARKER, KERN, NARD & WENZEL
Professional Corporation

By :

DENNIS G. NARD, ARBITRATOR