

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

**IAN KUTSUNAI, *Applicant***

**vs.**

**CASA RESORTS, INC.; ICW GROUP; LUNCH2YOU, EMPLOYERS  
COMPENSATION INSURANCE CO., SALAD REPUBLIC, TRAVELERS PROPERTY  
CASUALTY COMPANY, *Defendants***

**Adjudication Number: ADJ9773950  
Long Beach District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues in this case. <sup>1</sup> This is our Opinion and Decision After Reconsideration.

Defendant Employers Compensation Insurance Company (ECIC) seeks reconsideration of the Findings and Award (F&A) issued by a workers' compensation arbitrator (WCA) on November 23, 2020, wherein the WCA found that based upon the meritorious petition for contribution/reimbursement by ICW Group, ECIC is ordered to contribute \$29,596.47 to ICW Group. The WCA additionally found that based upon the meritorious petition for contribution/reimbursement by ICW Group, Travelers Property Casualty Company of America (TPCC) is ordered to contribute \$22,027.92 to IWC Group.

We received an Answer from defendant ICW.

The WCA filed a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCA's Report. Based on our review of the record, and for the reasons discussed below, we will rescind the F&A and return the matter to the arbitrator due to lack of a

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<sup>1</sup> Commissioner Lowe, who was a member of the panel that granted reconsideration, no longer serves on the Appeals Board. Another panel member has been appointed in her place.

proper record. When the WCA issues a new decision, any aggrieved person may timely seek reconsideration.

## I.

Labor Code section 5909<sup>2</sup> provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, “it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice....” (*Shiple*y, *supra*, 7 Cal.App.4th at p. 1108; see *Rea v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635 fn. 22 [70 Cal.Comp.Cases 312] [“irregularity which deprives reconsideration under the statutory scheme denies due process”].) In *Shiple*y, applicant sought a writ of review of a decision of the Appeals Board denying his petition for reconsideration by operation of law (Lab. Code, § 5909). The Court there granted a writ of review, stating that while the “language [section 5909] appears mandatory and jurisdictional, the time periods must be based on a presumption that a claimant’s file will be available to the board; *any other result deprives a claimant of due process and the right to a review by the board.*” (*Shiple*y, *supra*, 7 Cal.App.4th at pp. 1107-1108, italics added.)

In *Shiple*y, the Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced and unavailable to the Appeals Board. (*Shiple*y, *supra*, 7 Cal.App.4th at p. 1007.) The Court emphasized that “Shipley’s file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control.” (*Shiple*y, *supra*, 7 Cal.App.4th at p. 1007.) “Shipley’s right to reconsideration by the board is likewise statutorily provided and *cannot be denied him without due process*. Any other result offends not only elementary due process principles but common sensibilities. Shipley is entitled to the board’s review of his petition and its decision on its merits.” (*Id.*, at p. 1108, italics added.) The Court stated that its finding was also compelled by the fundamental principle that the Appeals Board “accomplish substantial justice in all cases...” (Cal. Const., art. XIV, § 4), and the policies enunciated by section 3202 “to construe the act liberally ‘with the purpose of extending their benefits for the protection of person injured in the course of their employment.’” (*Id.*, at p. 1107.) The Court in *Shiple*y properly recognized that in workers’ compensation, deprivation of reconsideration without due process – without this full de novo review of the

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<sup>2</sup> All further references are to the Labor Code unless otherwise stated.

record in the case – “offends” the fundamental right of due process, as well as the Appeals Board’s mandate to “accomplish substantial justice in all cases...” (*Shipley, supra*, 7 Cal.App.4th at p. 1107-1108.)

We note that all 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 denying or granting the petition. The exception to this rule are those petitions *not received* by the Appeals Board within 60 days due to irregularities outside the petitioner’s control. (See *Rea, supra*, 127 Cal.App.4th at p. 635, fn. 22.) Pursuant to the holding in *Shipley* allowing tolling of the 60- day time period in section 5909, the Appeals Board acts to grant or deny such petitions for reconsideration within 60 days of receipt of any such petition, and thereafter to issue a decision on the merits. By doing so, the Appeals Board also preserves the parties’ ability to seek meaningful appellate review. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra*, 68 Cal.2d at p. 753.) *Rea* and other California appellate courts have consistently followed *Shipley’s* lead when weighing the statutory mandate of 60 days against the parties’ constitutional due process right to a true and complete judicial review by the Appeals Board.

In this case, the WCA issued the Findings and Award on November 23, 2020, and defendant filed a timely petition on December 17, 2020. However, the first notice to the Appeals Board of the Petition was on May 19, 2021. Due to this lack of notice, 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 and that the Appeals Board’s failure to act on that petition was in error, we find that our time to act on defendant’s petition was equitably tolled until 60 days after May 19, 2021.

## II.

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).)

While the WCA issued the Report on January 8, 2021, filing of the arbitration file in EAMS was not completed as required by WCAB Rule 10995, as the *record does not include* all exhibits proffered, including, but not limited to, the August 6, 2014 report of panel qualified medical evaluator (PQME) Jeffrey Weil, M.D., referred to by the WCA in his opinion on decision.

Further, the proffered evidence is not properly described by the WCA in the transcript of proceedings by date and author, nor separately identified, separated and organized.

With certain limited exceptions, arbitrators shall have all of the statutory and regulatory duties and responsibilities of a workers' compensation judge. (Cal. Lab. Code § 5272.)

These duties and responsibilities include ensuring that the exhibits filed<sup>3</sup> by the parties are properly organized and separated so they may be electronically uploaded as part of the complete

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<sup>3</sup> Cal. Code Regs., tit. 8 § 10205(t) under the Electronic Adjudication Management System Rules states:  
(t) To "file" a document means to either deliver a document or cause it to be delivered to the district office with venue or to the appeals board for the purpose of having it included in the adjudication file or to electronically file a document via EAMS in accordance with these regulations.

arbitration file. Cal. Code Regs., tit. 8 §10205.12(b) may provide further guidance as to the proper filing of such exhibits.

As with a workers' compensation administrative law judge (WCJ), an arbitrator's decision must be based on admitted evidence and must be supported by substantial evidence. (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10566.) "It is the responsibility of the parties and the WCJ to ensure that the record is complete when a case is submitted for decision on the record. At a minimum, the record must contain, in properly organized form, the issues submitted for decision, the admissions and stipulations of the parties, and admitted evidence." (*Hamilton, supra*, 66 Cal.Comp.Cases at p. 475.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Id.* at p. 476 (citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350] [a full and complete record allows for a meaningful right of reconsideration]; *Lewis v. Arlie Rogers & Sons* (2003) 69 Cal.Comp.Cases 490, 494, emphasis in original ["decision [must] be based on an ascertainable and adequate record," including "an *orderly identification* in the record of the evidence submitted by a party; and *what evidence is admitted or denied admission*."].) "An organized evidentiary record assists an arbitrator in rendering a decision, informs the parties what evidence will be utilized by the arbitrator in making a determination, preserves the rights of parties to object to proffered evidence, and affords meaningful review by the Board, or reviewing tribunal." (*Id.*)

The Appeals Board may not ignore due process for the sake of expediency. (*Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 469 [83 Cal.Comp.Cases 1643] [claimants in workers' compensation proceedings are not denied due process when proceedings are delayed in order to ensure compliance with the mandate to accomplish substantial justice]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] [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].) "Even though workers' compensation matters are to be handled expeditiously by the Board and its trial judges,

administrative efficiency at the expense of due process is not permissible.” (*Fremont Indem. Co. v. Workers’ Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 [49 Cal.Comp.Cases 288]; see *Ogden Entertainment Services v. Workers’ Comp. Appeals Bd. (Von Ritzhoff)* (2014) 233 Cal.App.4th 970, 985 [80 Cal.Comp.Cases 1].)

The Appeals Board’s constitutional requirement to accomplish substantial justice means that the Appeals Board must protect the due process rights of every person seeking reconsideration. (See *San Bernardino Cmty. Hosp. v. Workers’ Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] [“essence of due process is . . . notice and the opportunity to be heard”]; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) In fact, “a denial of due process renders the appeals board’s decision unreasonable...” and therefore vulnerable to a writ of review. (*Von Ritzhoff, supra*, 233 Cal.App.4th at p. 985 citing Lab. Code, § 5952(a), (c).) Thus, due process requires a meaningful consideration of the merits of every case de novo with a well-reasoned decision based on the evidentiary record and the relevant law.

As with a workers’ compensation administrative law judge (WCJ), an arbitrator’s decision must be based on admitted evidence and must be supported by substantial evidence. (*Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Meaningful review of an arbitrator’s decision requires that the “decision be based on an ascertainable and adequate record,” including “an *orderly identification* in the record of the evidence submitted by a party; and *what evidence is admitted or denied admission.*” (*Lewis v. Arlie Rogers & Sons* (2003) 69 Cal.Comp.Cases 490, 494, emphasis in original.) “An organized evidentiary record assists an arbitrator in rendering a decision, informs the parties what evidence will be utilized by the arbitrator in making a determination, preserves the rights of parties to object to proffered evidence, and affords meaningful review by the Board, or reviewing tribunal.” (*Id.*; see also *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753 [a full and complete record allows for a meaningful right of reconsideration].)

We are unable to conduct meaningful review of the Petition or render a decision based on an incomplete record. Accordingly, as our decision after reconsideration, we will rescind the arbitrator’s decision and return the matter to the trial level. When the WCA issues a new decision, any aggrieved person may timely seek reconsideration.

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 WCA on November 23, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



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

**September 6, 2024**

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

**IAN KUTSUNAI  
PRATT LAW  
GREENUP HARTSTON & ROSENFELD  
TOBIN LUCKS  
DIMACULANGAN & ASSOCIATES  
MARK POLAN, ARBITRATOR**

**LAS/abs**

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