WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSEPH MAYOR, *Applicant*

vs.

ROSS VALLEY SANITARY DISTRICT, PERMISSIBLY SELF-INSURED, administered by SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ10036954
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We previously issued our Opinion and Decision After Reconsideration (ODAR) in this matter on January 26, 2024. However, upon further review, we observe that the ODAR did not address relevant issues pertaining to the timeliness of our August 14, 2023 Opinion and Order Granting Petition for Reconsideration (grant of reconsideration)[1]. (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493] (*Shipley*).) Additionally, upon further review, we overlooked a letter dated September 13, 2023 from applicant's counsel seeking clarification as to the basis for the August 24, 2023 grant of reconsideration, which we will treat as a supplemental pleading and consider. (Cal. Code Regs., tit. 8, § 10964(a).)

Pursuant to Labor Code[2] section 5906, the appeals board may, "with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge on the basis of the evidence previously submitted in the case…." (Lab. Code, § 5906.) In addition, section 5908.5 requires that "[a]ny decision of the appeals board granting or denying a petition for reconsideration

[1] Commissioner Dodd, who was previously a member of this panel, is not currently available. Another panelist has been assigned in her place.

[2] All further references are to the Labor Code unless otherwise noted.

or affirming, rescinding, altering, or amending the original findings, order, decision, or award following reconsideration … shall state the evidence relied upon and specify in detail the reasons for the decision." (Lab. Code, § 5908.5; *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 754-755.) Therefore, pursuant to our authority in sections 5900(b) and 5911, we will grant reconsideration on our own motion, rescind the January 26, 2024 ODAR, and reissue our decision as follows.

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant seeks reconsideration of the Findings, Award and Orders (F&A) issued on March 2, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a maintenance worker on December 9, 2013, sustained industrial injury to his cervical spine, thoracic spine, and right shoulder, and claims to have sustained injury to his right knee and in the form of cervicogenic headaches as a compensable consequence of his neck injury. The WCJ found that applicant sustained permanent and total disability based on the reporting of the evaluating physicians and applicant's vocational expert.

Defendant contends that applicant's vocational expert reached an unsubstantiated conclusion that failed to consider the entire medical record, and that the F&A does not discuss the apportionment identified by the evaluating physicians. Defendant also contends that vocational expert reporting is no longer admissible in workers' compensation proceedings pursuant to section 4660.1(a) and controlling case law authority.

We have received an Answer from applicant. Neither the WCJ nor the Presiding WCJ have prepared a Report and Recommendation on Petition for Reconsideration (Report).

We have reviewed the record in this matter, considered the allegations in the Petition for Reconsideration, the Answer, applicant's supplemental pleading, and the contents of the Report. For the reasons discussed below, we will grant reconsideration, rescind our January 26, 2024 ODAR and substitute a new ODAR wherein we will rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

FACTS

Applicant sustained injury arising out of and in the course of employment (AOE/COE) to the cervical spine, thoracic spine, and right shoulder, and claims to have sustained injury to the right knee and head in the form of headaches, while employed as a maintenance worker by defendant on December 9, 2013.

The parties have obtained reporting from Qualified Medical Evaluator (QME) Manijeh Ryan, M.D. Applicant's primary treating physician is Babak Jamasabi, M.D. Applicant has also obtained reporting from vocational expert Jeff Malmuth, while defendant has obtained reporting from vocational expert Emily Tincher.

On May 2, 2022, the parties proceeded to trial on issues including, in relevant part, the nature and extent of the injury (body parts), temporary and permanent disability, and attorney fees. (Minutes of Hearing and Summary of Evidence (Minutes), dated May 2, 2022, at p. 3:7.) The parties also placed in issue defendant's objection to the relevance of the entirety of the vocational evidence. The testimony of applicant and defense witness Steven MacKinnon was adduced over two trial settings, and the parties submitted the matter for decision on August 8, 2022.

On November 5, 2022, the WCJ issued Findings and Orders, determining in relevant part that the parties' stipulation regarding permanent disability levels needed to be clarified, as did issues concerning temporary disability and applicant's ongoing medical treatment authorization.

Pursuant to the WCJ's procedural history listed in the Opinion on Decision,[3] the WCJ conducted three additional hearings on November 22, 2022, December 6, 2022, and February 22, 2023. The record in the Electronic Adjudication Management System (EAMS) does not reflect a date when the matter was submitted for decision, or revisions to the issues submitted for decision.

On March 2, 2023, the WCJ issued the F&A, determining in relevant part that applicant had sustained permanent and total disability. The WCJ's Opinion on Decision noted that the stipulated rating of the medical-legal report was 53 percent permanent disability, but that the reporting of applicant's vocational expert Mr. Malmuth successfully rebutted the permanent disability ratings guide by establishing applicant's non-feasibility for vocational retraining. (Opinion on Decision, at pp. 20-21.)

[3] The Minutes for the hearing held on February 22, 2023 are not present in the Electronic Adjudication Management System (EAMS) Filenet.

On August 14, 2023, we granted reconsideration with regard to the decision filed on March 2, 2023, in order to further study the factual and legal issues of the case, with an attached "Notice Pursuant to Shipley v. Workers' Comp. Appeals Bd." The attached notice stated that defendant's petition, filed on March 23, 2023, was not received by the Appeals Board until June 15, 2023. (*Id.*) The notice observed that the grant of reconsideration may be considered timely if issued within 60 days of the Appeals Board receiving notice of the petition. (*Id*.)

Defendant's Petition avers that applicant's vocational expert did not adequately explain why he discounted 49 occupations into which applicant was otherwise capable of being retrained. (Petition, at 2:17.) Defendant contends the WCJ discounted the apportionment identified by the medical-legal evaluators without adequate explanation. (*Id.*, at p. 2:26.) Defendant further contends that case law has eliminated the relevance of vocational reporting altogether. (*Id.*, at p. 13:13.)

Applicant's Answer avers the finding of permanent and total disability is supported by the "work restrictions and functional losses identified by the (sic) Dr. Ryan and the FCE evaluator [which] were not based upon non-industrial conditions." (Answer, at p. 2:3.) Similarly, the vocational evidence demonstrates why applicant's disability was entirely caused by the industrial injury. Applicant also contends that defendant's argument for the inadmissibility of vocational reporting is contrary to the cases cited by defendant in support of its argument and ignores relevant statutory and case law authority. (*Id.*, at p. 9:20.)

DISCUSSION

I.

Section 5909 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…." (*Shipley, 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 *Shipley,* 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*." (*Shipley, supra,* 7 Cal.App.4th at pp. 1107-1108, italics added.)

In *Shipley,* 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. (*Shipley, 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." (*Shipley, 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 *Shipley* Court's holding is consistent with the unique role that reconsideration plays in the appeals process of workers' compensation claims in California. Under the grant of authority in the California Constitution, the Appeals Board operates as an appellate court of limited jurisdiction that reviews and decides appeals from decisions issued by workers' compensation administrative law judges. (Cal. Const., art. XIV, § 4; Lab. Code, §§ 111-116, 133-134, 3201, 5300-5302, 5900 et seq.; *Bankers Indemnity Ins. Co. v. Industrial Acc. Com.* (1935) 4 Cal.2d 89 [47 P.2d 719]; *Fremont Indemnity v. Workers' Comp. Appeals Bd*. (1984) 153 Cal.App.3d 965 [49 Cal.Comp.Cases 288]; *Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 376 [57 Cal.Comp.Cases 391] ["[t]he WCAB...is a constitutional court"].)[4] "[T]he procedure of reconsideration...is unlimited and independent of good cause (citations)..." and "fulfills substantially the same function as the new trial in civil proceedings..." (*United States Pipe & Foundry Co. v. Industrial Acci. Com.* (1962) 201 Cal.App.2d 545, 548-549, 552.) Of course,

[4] The Appeals Board is vested with full authority to determine its rules of procedure and practice, which apply to workers' compensation administrative law judges as well as to the Appeals Board, and which are not constrained by either the common law or the statutory rules of evidence except where specifically referenced. (Lab. Code, §§ 5307–10.)

parties are entitled to limited review by an appellate court. (Lab. Code, §§ 5950, 5955.) However, the Appeals Board is statutorily empowered to conduct a de novo review of the record in each case before it on reconsideration – *a power which it alone holds*. (See Lab. Code, § 5952 ["[n]othing...shall permit the {appellate} court {on writ of review} to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence."]; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 255 [54 Cal.Comp.Cases 349].)

Because of the unique role that reconsideration plays in the appeals process of workers' compensation claims in California, the Legislature enacted section 5908.5 in 1951. Section 5908.5 mandates that the Appeals Board provide detailed findings of fact and statements of reasons to support its decisions, and was intended to both "facilitate judicial review of decisions of the appeals board by affording the reviewing court detailed information about the basis for the appeals board's action," and to prevent "careless or arbitrary action" by the Appeals Board through "careful consideration of the facts and by reasoned analysis in support of any decision it may reach." (*Le Vesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 634 [35 Cal.Comp.Cases 16] citing *Evans, supra,* at p. 755.)

Therefore, the Court in *Shipley* properly recognized that in workers' compensation, deprivation of reconsideration without due process – without this full de novo review of the 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.[5] 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

[5] The Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909 based on the Supreme Court's holdings that summary denial of reconsideration is no longer sufficient after the enactment of section 5908.5. (*Evans, supra*, 68 Cal.2d at pp. 754-755, Le Vesque, supra, 1 Cal.3d at pp. 635 ["We hold that if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision." (See Lab. Code, § 5908.5.)"]; *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 893.)

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.) This approach is consistent with *Rea* and other California appellate courts,[6] which 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.[7]

In this case, defendant's petition was filed on March 23, 2023, but due to an administrative irregularity, the petition was not received and therefore unavailable to the Appeals Board until after 60 days from the time of filing. This administrative irregularity was not the fault of either party. Thus, pursuant to *Shipley*, the time within which the Appeals Board was to act on the petition for reconsideration was tolled until the petition became available to the Appeals Board. Thus, the order granting reconsideration issued by the Appeals Board on August 14, 2023 was timely filed within 60 days of the Appeals Board's receipt of the petition.

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[6] See e.g., *Hubbard v. Workers Compensation Appeals Bd. of California* (1993) 58 Cal.Comp.Cases 739 [writ of review granted to annul Appeals Board's denial of petition for reconsideration by operation of law (Lab. Code, § 5909)]; see also, *Frontline Medical Associates, Inc. v. W.C.A.B. (Lopez, Leonel; Sablan, Yolanda)* (2022) 87 Cal.Comp.Cases 314 (writ den.); *Entertainment by J & J, Inc. v. Workers' Comp. Appeals Bd. (Bernstein)* (2017) 82 Cal.Comp.Cases 384 (writ den.); *Bailey v. Workers Compensation Appeals Bd. of California* (1994) 59 Cal.Comp.Cases 350 (writ den.). Recent denials in all District Courts of Appeal include: First District, Div. 1 (*Scaffold Solutions v. Workers' Compensation Appeals Board and Angelo Paredes* (2023) (A166655)); First District, Div. 4 (*Kaiser Foundation Health Plan v. Workers' Compensation Appeals Board and Julie Santucci* (2021) (A163107)); Second District, Div. 3 (*Farhed Hafezi and Fred F. Hafezi, M.D., Inc. v. Workers' Comp. Appeals Bd.* (2020) (B300261)(SAU8706806)); Third District (*Reach Air Medical Services, LLC et al. v.Workers' Compensation Appeals Board. et al. (Lomeli)* (2022) (C095051)); Third District (*Ace American Insurance Company v. Workers' Compensation Appeals Board and David Valdez* (C094627) (2021)); Fourth District, Div. 2 (*Carlos Piro v. Workers' Compensation Appeals Board and County of San Bernardino* (2021) 86 Cal.Comp.Cases 599); Fourth District, Div. 3 (*Patricia Lazcano v. Workers' Comp. Appeals Bd*. (2022) 88 Cal.Comp.Cases 54); Fifth District (*Great Divide Insurance Company v. Workers' Compensation Appeals Board et al. (MelendezBanegas)* (2021) 86 Cal.Comp.Cases 1046); Sixth District (*Rebar International, Inc., et al. v. Workers' Comp. Appeals Board et al. (Hay*nes) (2022) 87 Cal.Comp.Cases 905).

[7] But see *Zurich American Ins. Co. v. Workers' Compensation Appeals Bd.* (2023) 97 Cal.App.5th 1213, wherein the Second District Court of Appeal, Division 7, concluded that the language of Labor Code section 5909 shows a clear legislative intent to terminate the Appeals Board's jurisdiction to consider a petition for reconsideration after 60 days, and therefore decisions on a petition for reconsideration made after that date are void as in excess of the Board's jurisdiction unless specified equitable circumstances are present. The Court's opinion in *Zurich* reflects a split of authority on the application of "*Shipley*" because it disagreed "with the conclusion in *Shipley* that a petitioner has a due process right to review by the Board of a petition for reconsideration even after 60 days has passed..." (*Id.*, at p. 1237.) The Court in *Zurich* did not indicate that its decision applies retroactively.

II.

As stated above, we accept applicant's September 14, 2023 letter, addressed to the Appeals Board, copied to defense counsel, raising arguments with regard to the timeliness of the August 14, 2023 grant of reconsideration as a supplemental pleading. (See Lab. Code, §§ 5708, 5709; Cal. Code Regs., tit. 8, §§ 10517, 10617.)

Any person aggrieved by a final order, award, or decision by the Appeals Board or a WCJ may timely file a verified petition for reconsideration, setting forth the grounds for review and the issues to be considered by the Appeals Board, and any adverse party may file a verified answer. (Lab. Code, §§ 5900(a); 5902, 5903, 5905; Cal. Code Regs., tit. 8, §§ 10940, 10945.) As explained above, the Appeals Board has the authority to review the entire record of proceedings and conduct a de novo review. Section 5906 provides that once the Appeals Board has taken jurisdiction by way of a timely filed petition or by its own motion, it may "with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge *on the basis of the evidence previously submitted in the case* . . ." (Italics added.)

WCAB Rule 10803(a)(2) defines the "record of proceedings" as:

> [T]he pleadings, minutes of hearing, summaries of evidence, certified transcripts, proofs of service, admitted evidence, exhibits identified but not admitted as evidence, notices, petitions, briefs, findings, orders, decisions and awards, opinions on decision, reports and recommendations on petitions for reconsideration and/or removal, and the arbitrator's file, if any. Each of these documents is part of the record of proceedings, whether maintained in paper or electronic form. *Documents that are in the adjudication file but have not been received or offered as evidence are not part of the record of proceedings.*
>
> (Italics added.) (Cal. Code Regs., tit. 8, § 10803(a)(2).)

Thus, while the Appeals Board's scope of review is broad, review is limited to the record of proceedings *at the time of the final order, award, or decision at issue*, unless the Appeals Board specifically provides notice and orders further proceedings to consider further evidence. (See Lab. Code, §§ 5906, 5907, 5908(a).)

Accordingly, once a case is pending at the Appeals Board, parties may not submit evidence, and may only raise an issue to the Appeals Board by following the procedure in WCAB Rule 10964. Rule 10964 provides in relevant part that:

> (a) When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board.
>
> (b) A party seeking to file a supplemental pleading shall file a petition setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading.
>
> (c) Supplemental petitions or pleadings or responses other than the answer shall neither be accepted nor deemed filed for any purpose except as provided by this rule.
>
> (Cal. Code Regs., tit. 8, § 10964.)

Thus, if a party receives an order granting reconsideration indicating that the Appeals Board has applied the analysis set forth in *Shipley*, the parties have a ready mechanism by which to substantively address the issue. After requesting permission, parties may present argument either in support of or in opposition to the Appeals Board's application of *Shipley* by filing a petition for supplemental pleading pursuant to WCAB Rule 10964. Therein, they may make reference to the record of the case, and under limited circumstances, the EAMS and Filenet record of entries and communications. Because the Appeals Board's review is limited to the existing record, if a party alleges a change of circumstances or in the law, it should be framed as an offer of proof, and no documents may be attached. (See Cal. Code Regs., tit. 8, § 10803; see generally § 10945.)

Here, neither party sought permission to file supplemental pleadings as required by WCAB Rule 10964. *While WCAB Rule 10964 does not require the Appeals Board to accept supplemental pleadings, the Appeals Board may exercise its discretion to choose to accept a supplemental pleading and consider it.* Here, we accept applicant's letter of September 14, 2023 for filing as a supplemental pleading, and consider it.

Applicant raises the following contention in the supplemental pleading: "Given these facts, why was the proper EAMS filing of the Petition for Reconsideration and Answer (both confirmed in FileNet) and the acknowledgement of receipt of the Answer by the DIR Control Unit on

4/4/2023 not sufficient notice?" As an initial matter, we find no "acknowledgement of receipt of the Answer" in the official record of this case.[8]

Next, there is a very simple reason why the filing of a petition for reconsideration and/or the filing of an answer in EAMS would not be "sufficient notice" to the Appeals Board that a petition for reconsideration had been filed – either in EAMS or at the district office where the case is venued: the Appeals Board does not receive direct notification of filings. (See Cal. Code Regs., tit. 8, § 10940.) In other words, when a party files a petition for reconsideration, the limitations of the EAMS system mean that the Appeals Board is *not independently notified* that the party has done so. Instead, whether a petition for reconsideration is filed in EAMS or with the district office where the case is venued, *the staff of that district office must transmit the case to the Appeals Board and must* ***manually*** *notify the Appeals Board that reconsideration is being sought*.[9] This is also true when any other document is filed in EAMS or at the district office, including an answer or request for supplemental pleading. As a result, and due to the nature of EAMS, which is outside the control of the parties and the Appeals Board, as well as due to normal human error, mistakes and/or delays in that manual transmission of information from the district offices to the Appeals Board do occur. (See *Shipley, supra*, 7 Cal.App.4th at p. 1108 citing *Carreiro v. Dixie Yams/Candlewick & American Mut. Liab. Ins. Co.* (1979) 44 Cal.Comp.Cases 1035 [there are situations where petitions are not processed at the district office and thus never reach the Appeals Board resulting in a denial by operation of law].)

We note that applicant does not contend that the petition for reconsideration was untimely filed. Once a petition for reconsideration is filed, there are no additional statutory or regulatory requirements to ensure a party its right to reconsideration. In other words, by timely filing its

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[8] As stated *supra*, the Appeals Board operates as an appellate court of limited jurisdiction. (Cal. Const., art. XIV, § 4; Lab. Code, §§ 111-116, 133-134, 3201, 5300-5302, 5900 et seq.) Section 111 provides that the Appeals Board's function is to "exercise judicial powers," and the scope of its powers are described in Labor Code sections 5300, 5301, and 5307. As a result, information known to the Appeals Board and documents in the possession of the Appeals Board are subject to judicial privilege and deliberative privilege, as well as to the attorney client and work product privileges. (Gov. Code, §§ 7927.200, 7927.205, 7927.500, 7927.705, 7930.000, 7930.005, 7930.110; Bus & Prof. Code, § 6068; Evid. Code, §§ 917, 952, 954.) Moreover, WCAB Rule 10410(c) prohibits discussion of "the merits of any case pending before the Appeals Board . . . without the presence of all necessary parties to the proceeding. . ." (Cal. Code Regs., tit. 8, § 10410(c).) All documents that are *not* privileged are publicly available and include the orders and decisions issued by the Appeals Board, which are in EAMS and on the Department of Industrial Relations' website, and pleadings before the Courts of Appeal.

[9] As explained in Footnote 8 herein, these communications are subject to judicial, deliberative, attorney client, and work product privileges

petition for reconsideration, defendant *secured* its statutory right to reconsideration. (Lab. Code, §§ 5900, 5903; *United States Pipe & Foundry Co. v. Industrial Acci. Com.* (1962) 201 Cal.App.2d 545 [reconsideration "is unlimited and independent of good cause"].) Thus, defendant, like any person seeking reconsideration had the right to rely to its detriment on the timely filing of its petition for reconsideration. As a result, defendant's conduct is not and should not be at issue. This is a matter of common sense: as with any court, a lack of certainty in filings would create absurd consequences and render adjudication of most matters impossible. Indeed, a petition date-stamped by the district office, or possession of an EAMS confirmation of filing is the *only* proof a person needs that they have secured their right to reconsideration. (Cal. Code Regs., tit. 8, § 10615.) To expect otherwise as a legal duty would most certainly constitute an impermissible, underground regulation. (Gov. Code, §§ 11340.5, 11342.600; Cal. Code Regs., tit. 1, § 250; e.g., *Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 429; *Rea, supra,* 127 Cal.App.4th at p. 635.)

Applicant's supplemental pleading does not affect any change in our application of *Shipley* in this matter.

III.

WCAB Rule 10961 provides that:

> Within 15 days of the timely filing of a petition for reconsideration, a workers' compensation judge shall perform one of the following actions:
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> (a) Prepare a Report and Recommendation on Petition for Reconsideration in accordance with rule 10962;
>
> (b) Rescind the entire order, decision or award and initiate further proceedings within 30 days; or
>
> (c) Rescind the order, decision or award and issue an amended order, decision or award. The time for filing a petition for reconsideration pursuant to Labor Code section 5903 will run from the filing date of the amended order, decision or award.
>
> After 15 days have elapsed from the filing of a petition for reconsideration, a workers' compensation judge shall not issue any order in the case until the Appeals Board has denied or dismissed the petition for reconsideration or issued a decision after reconsideration.
>
> (Cal. Code Regs., tit. 8, § 10961.)

WCAB Rule 10962 states:

> Petitions for reconsideration, petitions for removal and petitions for disqualification shall be referred to the workers' compensation judge from whose decisions or actions relief is sought. If the workers' compensation judge prepares a report, it shall contain:
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> (a) A statement of the contentions raised by the petition;
>
> (b) A discussion of the support in the record for the findings of fact and the conclusions of law that serve as a basis for the decision or order as to each contention raised by the petition, or, in the case of a petition for disqualification, a specific response to the allegations and, if appropriate, a discussion of any failure by the petitioner to comply with the procedures set forth in rule 10960; and
>
> (c) The action recommended on the petition.
>
> The workers' compensation judge shall submit the report to the Appeals Board within 15 days after the petition is filed unless the Appeals Board grants an extension of time. The workers' compensation judge shall serve a copy of the report on the parties and any lien claimant, the validity of whose lien is specifically questioned by the petition, at the time the report is submitted to the Appeals Board.
> If the workers' compensation judge assigned to the case is unavailable, the presiding workers' compensation judge shall prepare and serve the report.
>
> (Cal. Code Regs., tit. 8, § 10962.)

Here, defendant filed its Petition on March 23, 2023. However, the record does not reflect that the WCJ prepared a Report, or that the WCJ rescinded the F&A and initiated further proceedings or issued an amended decision. In addition, no Report has been filed by the Presiding Judge due to the WCJ's unavailability.

Section 5313 provides:

> The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.

As required by section 5313 and explained in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Bd. en banc) (*Hamilton*),

"the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.) A decision "must be based on admitted evidence in the record" (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque, supra,* 1 Cal.3d 627.) Section 5313 thus requires the WCJ to "file finding upon *all* facts involved in the controversy" and to issue a corresponding award, order or decision that states the "reasons or grounds upon which the [court's] determination was made." (Italics added; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622 (Appeals Board en banc).)

The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision…." (*Hamilton, supra,* at p. 476.) The Court of Appeal has further observed that pursuant to section 5908.5, decisions of the WCAB must state the evidence relied upon and specify in detail the reasons for the decision. (*Evans, supra,* 68 Cal.2d at p. 755.) The purpose of the requirement is "to assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful." (*Evans, supra*, at p. 755.)

Following our review of this matter occasioned by defendant's Petition, we observe that the WCJ's Opinion on Decision determines that "Dr. Ryan's opinions on apportionment involving the cervical and thoracic spine are substantial medical evidence and legally valid." (Opinion on Decision, at p. 18.) However, there is no further discussion of the identified apportionment, or its interaction with the findings of non-feasibility for vocational retraining by applicant's expert Mr. Malmuth. Moreover, although the Opinion on Decision acknowledges Mr. Malmuth's identification of 49 occupations that "might" be compatible with applicant's work restrictions, there is no discussion of why the vocational expert unilaterally deemed those occupations not feasible, and why the WCJ determined the reporting to be persuasive notwithstanding the conclusory nature of the findings. (Opinion on Decision, at p. 21.)

We also observe that the F&A appears to omit findings of fact with reference to the claimed body parts of right knee and cervicogenic headaches, noted to be "claimed" by applicant in Finding of Fact No. 1, but without a corresponding finding of fact as to their compensability. Notwithstanding the lack of a legal determination on the issue of these body parts, we note the

WCJ's Opinion on Decision describes his determinations as to the compensability of both body parts. (See Opinion on Decision, at pp. 11-12.)

Pursuant to Section 5313 and *Hamilton, supra*, the Opinion on Decision should explain the basis for the WCJ's decision in order to assist the reviewing court in ascertaining the principles relied upon by the lower tribunal. To the extent that the Opinion on Decision does not adequately explain the basis for the WCJ's findings, the WCJ's Report and Recommendation is necessary to explicate the issues raised on petition for reconsideration, and to make the appropriate recommendations to the Appeals Board, including rescission or amendment of the decision, as may be appropriate. (Lab. Code, § 5313; Cal. Code Regs., tit. 8, § 10962; *Hamilton, supra*, at p. 476.)

Subsequent to the F&A in this case, on June 23, 2023, we issued our en banc opinion in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (Appeals Board en banc) (*Nunes I*), and on August 29, 2024, we issued our en banc opinion denying reconsideration of the June 23, 2023 opinion (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 (Appeals Board en banc) (*Nunes II*). In *Nunes I*, we held that section 4663 "requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment … [t]he Labor Code makes no statutory provision for 'vocational apportionment.'" (*Id.*, at p. 743.) Additionally, with respect to vocational evidence, we held that "[v]ocational evidence may be used to address issues relevant to the determination of permanent disability." (*Ibid.*) Here, we emphasize that we issued *Nunes I, supra,* subsequent to the F&A in this case, and we issued *Nunes II, supra,* while the matter has been pending on reconsideration. Since defendant raises the issue of the admissibility of vocational evidence, we conclude that the parties must be given an opportunity to address the issue in the first instance at the trial level. Thus, given the complexity of the record and the statutory and decisional law, and the absence of a Report addressing the contentions raised by defendant's Petition, we must rescind the F&A.

Accordingly, we grant reconsideration, rescind our January 26, 2024 ODAR and substitute a new ODAR, wherein we rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion. Once the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the Opinion and Decision After Reconsideration issued by the Workers' Compensation Appeals Board on January 26, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Opinion and Decision After Reconsideration issued by the Workers' Compensation Appeals Board on January 26, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

> **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award & Orders issued on March 2, 2023 by the workers' compensation administrative law judge is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 2, 2024

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

JOPSEH MAYOR
SHOEMAKER LAW OFFICES
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN

SAR/abs

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