

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

DENNIS LINDSEY, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, legally
uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ9111192
Santa Ana District Office**

**OPINION AND ORDER
DISMISSING PETITION
FOR RECONSIDERATION**

Applicant, in pro per, seeks reconsideration of the Opinion and Order Dismissing Petition for Reconsideration (Opinion and Order) issued by the Appeals Board on January 12, 2024, wherein the Appeals Board dismissed applicant's Petition for Reconsideration filed on November 13, 2023, as untimely. In our Opinion and Order, we also noted that if the Petition had been timely, we would have denied it on the merits for the reasons stated in the WCJ's report.

Applicant's petition for reconsideration came in the form of a letter regarding "Rebuttal to recommended dismissal of my Petition for Reconsideration in the WCAB Case #ADJ 9111192." Pursuant to our authority to amend pleadings to conform to proof, we will treat the correspondence as a Petition for Reconsideration. (Cal. Code Regs., tit. 8, § 10517.)¹

We have considered the allegations in the Petition and the record in this matter. For the reasons discussed below, we will dismiss applicant's Petition.

I.

Former Labor Code section² 5909 provided that a petition was denied by operation of law if the Appeals Board did not "act on" the petition within 60 days of the petition's filing. When the Appeals Board does not review the petition within 60 days due to irregularities outside the

¹ Applicant's correspondence was addressed to Workers' Compensation Appeals Board, Office of the Commissioners, P.O. Box 429459, San Francisco, California 94142-94593. We note that the post office box is no longer a valid address. The Appeals Board's current mailing address is 455 Golden Gate Avenue, Suite 9328, San Francisco, CA 94102.

² All statutory references are to the Labor Code unless otherwise stated.

petitioner's control, and the 60-day period lapses through no fault of the petitioner, the Appeals Board must then consider whether circumstances exist to allow an equitable remedy, such as equitable tolling. Here, the Opinion and Order of the Appeals Board was served on January 12, 2024. But applicant's correspondence regarding "Rebuttal to recommended dismissal of my Petition for Reconsideration in the WCAB Case #ADJ 9111192," filed on March 5, 2024, was not a proper petition for reconsideration under section 5900, et seq., and thus was not immediately recognized as a petition for reconsideration.

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.)³

Consequently, even though we are dismissing the petition on other grounds, we apply the doctrine of equitable tolling pursuant to *Shipley* with respect to the issue of whether the petition was deemed denied. Under the circumstances, since the Appeals Board did not process the correspondence properly as a petition for reconsideration, the requirements for equitable tolling apply to the extent that the petition is not deemed denied. We now turn to consideration of applicant's petition.

II.

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).) Petitions for reconsideration of decisions of the Appeals Board shall be filed with the office of the Appeals Board. (Cal. Code Regs., tit. 8, § 10940(a).)

³ On December 11, 2024, the California Supreme Court granted review in *Mayor v. Workers' Compensation Appeals Bd.* (2024) 104 Cal.App.5th 713 [2024 Cal.App. LEXIS 531] ("*Mayor*"). One issue granted for review is the same issue present in this case, i.e., whether section 5909 is subject to equitable tolling.

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].)

The Opinion and Order was served on January 12, 2024. Based on the authority cited above, applicant had 25 days, or until Tuesday, February 6, 2024, to seek reconsideration on a timely basis. Therefore, the Petition for Reconsideration received by the Appeals Board 53 days later on March 5, 2024, is untimely and must be dismissed.

III.

It is well settled that where a party fails to prevail on a petition for reconsideration, the Appeals Board will not entertain a successive petition by that party unless the party is newly aggrieved. (*Goodrich v. Industrial Acc. Com.* (1943) 22 Cal.2d 604, 611 [8 Cal.Comp.Cases 177]; *Ramsey v. Workmen's Comp. Appeals Bd.* (1971) 18 Cal.App.3d 155, 159 [36 Cal.Comp.Cases 382]; *Crowe Glass Co. v. Industrial Acc. Com.* (*Graham*) (1927) 84 Cal.App.287, 293-295 [14 IAC 221]). As stated in our en banc opinion in *Navarro v. A & A Framing* (2002) 67 Cal.Comp.Cases 296, 299:

The general rule is that where a party has filed a petition for reconsideration with the Board, but the party does not prevail on that petition for reconsideration, the petitioning party cannot attack the [Appeal's] Board's action by filing a second petition for reconsideration; rather, the petitioning party must either be bound by the [Appeals] Board's action or challenge it by filing a timely petition for writ of review.

The only exception to this general rule occurs when, although the petitioning party does not prevail on its original petition for reconsideration, the Appeals Board's decision is based on some new and additional evidence not presented at the time of trial. In this limited circumstance only, the original petitioner may properly file a second petition for reconsideration because the Appeals Board's decision is based on a new record. (*Pacific Employers Ins. Co. v. Industrial Acc. Com.* (*Mazzanti*) (1956) 139 Cal.App.2d 22, 25-26 [21 Cal.Comp.Cases 46].)

Here, no new evidence was accepted or considered at the time of the Appeals Board's decision on the original petition. Further, the Petition for Reconsideration raises the same issues

and arguments that were raised in the earlier petition for reconsideration in which applicant did not prevail. Accordingly, even if the Petition for Reconsideration was timely, we would dismiss it as successive.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 21, 2025

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

**DENNIS LINDSEY
STATE COMPENSATION INSURANCE FUND
TOUS ASSOCIATES**

JB/pm

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