

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

SAGE O'CONNELL, *Applicant*

vs.

**DIRECTOR OF INDUSTRIAL RELATIONS as administrator of the
SUBSEQUENT INJURIES BENEFITS TRUST FUND, *Defendants***

**Adjudication Number: ADJ8958177
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

We have considered the allegations of the Petition for Removal and the contents of the Report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and based on the analysis in the WCJ's Report, we will deny the Petition as one seeking reconsideration.

I.

Only the Appeals Board is statutorily authorized to issue a decision on a petition for reconsideration. (Lab. Code, §§ 112, 115, 5301, 5901, 5908.5, 5950; see Cal. Code Regs., tit. 8, §§ 10320, 10330.) The Appeals Board must conduct de novo review as to the merits of the petition and review the entire proceedings in the case. (Lab. Code, §§ 5906, 5908; see Lab. Code, §§ 5301, 5315, 5701, 5911.) Once a final decision by the Appeals Board on the merits of the petition issues, the parties may seek review under section 5950, but appellate review is limited to review of the record certified by the Appeals Board. (Lab. Code, §§ 5901, 5951.) Thus, even though, as discussed below, the case should have promptly been transmitted to the Appeals Board so that the Appeals Board could properly take action on the Petition.

Former Labor Code section 5909¹ 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. However,

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

the Appeals Board cannot “act on” the petition if it has not received it, and if it has not received the case file. Transmission of the case to the Appeals Board is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.” When the Appeals Board does not receive the case file and does not review the petition within 60 days due to irregularities outside the 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.

It is well-settled that the Appeals Board has broad equitable powers. (*Kaiser Foundation Hospitals v. Workers’ Compensation Appeals Board* (1978) 83 Cal.App.3d 413, 418 [43 Cal.Comp.Cases 785] citing *Bankers Indem. Ins. Co. v. Indus. Acc. Com.* (1935) 4 Cal.2d 89, 94-98 [47 P.2d 719]; see *Truck Ins. Exchange v. Workers’ Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *State Farm General Ins. Co. v. Workers’ Comp. Appeals Bd. (Lutz)* (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758]; *Dyer v. Workers’ Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) It is an issue of fact whether an equitable doctrine such as laches applies. (*Kwok, supra* 2 Cal.App.5th at p. 402.) The doctrine of equitable tolling applies to workers’ compensation cases, and the analysis turns on the factual determination of whether an opposing party received notice and will suffer prejudice if equitable tolling is permitted. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 412 [39 Cal.Comp.Cases 624].) As explained above, only the Appeals Board is empowered to make this factual determination.²

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.) Pursuant to the holding in *Shipley* allowing equitable tolling of the 60-day time period in section 5909, the Appeals Board

² Section 5952 sets forth the scope of appellate review, and states that: “Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.” (Lab. Code, § 5952; see Lab. Code, § 5953.)

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.

“[I]t 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.) 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. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) “Due process requires notice and a meaningful opportunity to present evidence in regards to the issues.” (*Rea v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers’ Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].)

If a timely filed petition is never acted upon and considered by the Appeals Board because it is “deemed denied” due to an administrative irregularity and not through the fault of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) Just as significantly, the parties’ ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra*, 68 Cal.2d 753; see also *Rea, supra*, 127 Cal.App.4th at p. 643.)

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. The Supreme Court noted the conflict present in the published decisions of the Courts of Appeal, and in its order granting review of *Mayor*, stated as follows:

Pending review, the opinion of the Court of Appeal, which is currently published at 104 Cal.App.5th 1297, may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict. (See Standing Order Exercising Authority Under California Rules of Court, Rule 8.1115 (e)(3), Upon Grant of Review or Transfer of a Matter with an Underlying Published Court of Appeal Opinion, Administrative Order 2021-04-21; Cal. Rules of Court, rule 8.1115(e)(3) and corresponding Comment, par. 2.)

(Order Granting Petition for Review, S287261, December 11, 2024.)

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.) The touchstone of the workers’ compensation system is our constitutional mandate to “accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character.” (Cal. Const., art. XIV, § 4.) “Substantial justice” is not a euphemism for inadequate justice. Instead, it is an exhortation that the workers’ compensation system must focus on the *substance* of justice, rather than on the arcana or minutiae of its administration. (See Lab. Code, § 4709 [“No informality in any proceeding . . . shall invalidate any order, decision, award, or rule made and filed as specified in this division.”].) When a litigant is deprived of their due process rights based upon the administrative errors of a third party, for which they bear no blame and over whom they have no control, substantial justice cannot be compatible with such a draconian result.

In keeping with the WCAB’s constitutional and statutory mandate, all litigants before the WCAB must be able to rely on precedential authority, and all litigants must have the expectation that they will be treated equitably on issues of procedure and be accorded same or similar access to the WCAB. The Appeals Board has relied on the *Shiple* precedent for over thirty years, by continuing to consider all timely filed petitions for reconsideration on the merits, consistent with due process. Treating all petitions for reconsideration in the same or similar way procedurally promotes judicial stability, consistency, and predictability and safeguards due process for all litigants. We also observe that a decision on the merits of the petition protects every litigant’s right to seek meaningful appellate review after receiving a final decision from the Appeals Board.

Thus, as discussed below, we apply the doctrine of equitable tolling pursuant to *Shipley* to this case. Here, the WCA issued the Findings and Order on November 3, 2023. Defendant timely filed the Petition on November 28, 2023. According to Events in EAMS, the case was not transmitted to the Appeals Board until November 1, 2024 for reasons that are not entirely clear from the record. Consequently, the Appeals Board did not actually receive notice of and review the Petition until November 7, 2024. Accordingly, the Appeals Board failed to act on the Petition within 60 days, through no fault of the parties. Thus, we apply equitable tolling to conclude that our decision is due 60 days from November 7, 2024, or January 6, 2025.

II.

If a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers’ Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ’s determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ’s decision includes a finding regarding a threshold issue of injury arising out of and in the course of employment. Accordingly, the WCJ’s decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we will apply the removal standard to our review. (See *Gaona, supra*.)

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that significant prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra*; *Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).) Here, for the reasons stated in the WCJ's report, we are not persuaded that significant prejudice or irreparable harm will result if removal is denied and/or that reconsideration will not be an adequate remedy.

Therefore, we will deny the Petition as one seeking reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration/Removal is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 6, 2025

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

**SAGE O'CONNELL
ARJUNA FARNSWORTH, ESQ.
LAUGHLIN, FALBO, LEVY & MORESI, LLP
OFFICE OF THE DIRECTOR, LEGAL-OAKLAND**

AS/mc

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