

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

**LORENA HERNANDEZ (Deceased), *Applicant***

**vs.**

**ANGELA WHITE, an individual, doing business as LASHED LLC, *Defendants***

**Adjudication Numbers: ADJ11373827; ADJ11194133  
Van Nuys District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

On February 12, 2024, defendant filed a timely Petition for Removal in response to the Findings of Fact and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on January 18, 2024. By the F&O, the WCJ found that applicant claimed to have sustained injuries to various body parts while employed by defendant on December 18, 2017, resulting in her death on May 15, 2018. The WCJ also overruled defendant's objections to the admissibility of several exhibits offered by applicant. Specifically, the WCJ found that text messages from applicant, a signed statement from her surviving spouse, and a proposed advocacy letter to the Panel Qualified Medical Evaluator (QME) were admissible and ordered that these exhibits may be provided to the QME.

Defendant contends that WCJ failed to address its objections to applicant's exhibits on the grounds of lack of an adequate foundation, lack of authentication, and/or a violation of due process. Defendant contends that it will suffer significant prejudice and/or irreparable harm if these exhibits are provided to the QME before a ruling on its objections is issued.

We received an Answer from applicant. The WCJ submitted a Report and Recommendation on Petition for Removal (Report), indicating that the Petition 1) was untimely, and 2) lacks merit.

We have considered the allegations of defendant's Petition for Removal, applicant's Answer and the contents of the WCJ's Report with respect thereto. Based on our review of the

record, and for the reasons discussed below, we will deny the Petition as one seeking reconsideration.

## DISCUSSION

First, we note that defendant's Petition for Removal is timely. There are 20 days allowed within which to file a petition for removal from a "non-final" decision, plus 5 calendar days if a party has been served by mail upon an address in California. (Cal. Code Regs, tit. 8, §§ 10955(a), 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.) Here, the F&O was served by mail on January 18, 2024. The twenty-fifth day fell on Monday, February 12, 2024; according to the record, this is the day that defendant filed its Petition for Removal. As a result, its Petition was timely.

Second, 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].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075 [65 Cal.Comp.Cases 650] ("interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"); *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180 ("[t]he term ['final'] does not include intermediate procedural orders or discovery orders").) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues. 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 employment, which is a threshold issue. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, defendant's arguments only concern intermediate evidentiary findings/orders, which are interlocutory issues. 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. (Cortez)* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases]; *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (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).)

Next, we note that Labor Code<sup>1</sup> 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...." (*Shiple, 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*, 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;

---

<sup>1</sup> All further statutory references are to the Labor Code, unless otherwise noted.

*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 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. 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.) This approach is consistent with *Rea* and other California appellate courts, 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.

In this case, the WCJ issued the Findings of Fact and Order on January 15, 2024, and defendant filed a timely petition on February 12, 2024. Thereafter, the Appeals Board failed to act on defendant's petition within 60 days of its filing, through no fault of petitioner. Accordingly, considering that the Appeals Board's failure to act on the petition was in error, we find that our time to act was equitably tolled.

We now turn to the merits. Defendant contends that the decision did not address its objections to applicant's exhibits, which were based upon admissibility and due process issues. According to defendant, absent a ruling on these issues, there is a risk that inadmissible evidence could be provided to the QME, resulting in significant prejudice and irreparable harm.

Upon review, defendant's claim is refuted not only by the Minutes of Hearing issued during a trial held *specifically* on those objections, but also the contents of the WCJ's decision and Report resolving them.

First, on October 24, 2023, the parties proceeded to trial on the sole issue of defendant's objections to applicant's exhibits. The Minutes of Hearing issued during trial stated:

Defendant objects to Applicant's Exhibits 1 through 5 contending lack of foundation, authentication of those documents, identification of those documents, and defendant's due process rights to cross-examine the recipients of the text messages. Applicant's Exhibits 1 through 5 will be marked for identification and their admissibility will be ruled on at the time of the Finding and Decision.

(Minutes of Hearing, October 24, 2023, p. 3.)

Then, on January 18, 2024, the WCJ issued the disputed F&O, specifically finding: "Applicant's exhibits 1, 2, 3, 4, and 5 are admissible over Defendant's objection and are given the appropriate weight," and explained the reasons for his decision in the corresponding Opinion on Decision. (F&O, January 18, 2024, p. 2; Opinion on Decision, January 18, 2024, pp. 3-5.)

Finally, as explained in the Report issued February 27, 2024, the WCJ explained:

At trial, defendant objected to Applicant's Exhibits 1 through 5 contending lack of foundation, authentication of those documents, identification of those documents, and defendant's due process rights to cross-examine the recipients of the text messages. *The court carefully considered those objections*, listened to the un-rebutted and credible testimony of the decedent's husband on direct and cross, *reviewed the exhibits, and made orders accordingly*. The witness provided ample foundation and authentication of the text messages made from his deceased wife's account.

(Report, pp. 3-4, italics added.)

Thus, contrary to defendant's assertion, the WCJ did, in fact, rule upon its objections to applicant's exhibits in the F&O after careful review and consideration. Thus, defendant's claim that it will suffer significant prejudice and/or irreparable harm absent a ruling on its evidentiary objections is unfounded and does not warrant removal.

We also agree with the WCJ that any remaining assertions of significant prejudice or irreparable harm are conclusory and unconvincing. (Report, p. 3.)

Based on the foregoing, 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 if the matter ultimately proceeds to a final decision adverse to defendant. We will deny reconsideration accordingly.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings of Fact and Order issued on January 18, 2024 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



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

**JULY 24, 2024**

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

**RAUL CARRION on behalf of LORENA HERNANDEZ  
THE LAW OFFICES OF ROBERT OZERAN  
LAW OFFICES OF JESSE MARINO  
OFFICE OF THE DIRECTOR – LEGAL UNIT**

**AH/es**

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