

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

MELANIE SANCHEZ, *Applicant*

vs.

**MIANO'S FOOD CORPORATION dba IHOP; HARTFORD INSURANCE COMPANY
OF THE MIDWEST, administered by HARTFORD; *Defendants***

**Adjudication Number: ADJ2548586 (VNO 0557073)
Van Nuys District Office**

**OPINION AND ORDER GRANTING
PETITION FOR RECONSIDERATION AND
NOTICE OF INTENTION TO RESCIND
ARBITRATOR'S DECISION**

Defendant Travelers Casualty & Surety Co. (Travelers) seeks reconsideration of the Findings of Fact (Findings) issued by a workers' compensation arbitrator (WCA) on September 21, 2023, wherein the WCA found that the date of injury in this matter for the purposes of Labor Code¹ section 5500.5 liability is May 13, 2009 through May 13, 2010 in accordance with orthopedic agreed medical examiner Dr. Alexander Angerman. The WCA bifurcated the issue of actual amounts of contribution/reimbursement between the parties.

Defendant asserts that the petition for contribution filed by the Hartford Casualty Insurance Company (Hartford) against Travelers in 2021 was not timely, and further, that the WCA erred in his findings as to the one-year liability period under sections 5500.5 and 5412. Defendant further contends that the evidence supports a section 5500.5 finding of July 1, 2008 to July 1, 2009 as the one-year period of exposure for liability.

We received an Answer from defendant Hartford.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCA recommending denial of the petition.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the Report of the WCA. Based on our review of the record, and for the reasons discussed below,

¹ All further references are to the Labor Code unless otherwise noted.

we will grant the Petition and issue a Notice of Intention (NIT) that the September 21, 2023 decision by the WCA will be rescinded unless the required documents per WCAB Rule 10995(c)(3) are filed in the Electronic Adjudication Management System (EAMS) within thirty (30) days after service of this decision, plus an additional five (5) days for mailing per WCAB Rule 10605 (Cal. Code Regs., tit. 8, § 10605).

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.)

Former section 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 with the ‘appeals board’ and not within 60 days of its filing at a DWC district office. A petition for reconsideration of an arbitrator’s decision or award made pursuant to the mandatory or voluntary arbitration provisions of sections 5270 through 5275 shall be filed in EAMS or with the district office having venue in accordance with section 5501.5 so that the WCA may review the petition in the first instance and determine whether their decision is legally correct and based on substantial evidence. Then the WCA determines whether to timely rescind their decision, or to prepare a report on the petition and transmit the case to the Appeals Board to act on the petition. (Cal. Code Regs., tit. 8, § 10995.)

Once the Appeals Board receives the case file, it also receives the petition in the case file, and the Appeals Board can then “act” on the petition.

If the case file is never sent to the Appeals Board, the Appeals Board does not receive the petition contained in the case file. On rare occasions, due to an administrative error by the district office, a case is not sent to the Appeals Board before the lapse of the 60-day period. On other rare occasions, the case file may be transmitted, but may not be received and processed by the Appeals Board within the 60-day period, due to an administrative error or other similar occurrence. When the Appeals Board 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.

In *Shiple 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, especially in light of the fact that the Appeals Board had repeatedly assured the petitioner that it would rule on the merits of the petition. (*Id.*, at p. 1108.)

Like the Court in *Shiple*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) 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.”].)

With that goal in mind, 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].) If a timely filed petition is never considered by the Appeals Board because it is “deemed denied” due to an administrative irregularity not within the control 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, supra* 1 Cal.3d 627, 635.) 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.)

Substantial justice is not compatible with such a result. A litigant should not be 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.

In this case, the WCA issued the Findings of Fact on September 21, 2023. Per the verified Petition by defendant Travelers’ attorneys of record, Woolford Associates, both the Findings of Fact and minutes/transcript of the proceedings by the WCA were not properly served upon them at their official address of record in St. Paul, Minnesota, and they did not receive the minutes/transcript until it was requested on October 18, 2023.² (Petition, p. 5; 10-14.)

Where an order can be shown to have been defectively served, the time limit begins to run as of the date of receipt of the order. (*Hartford Accident & Indemnity Co. v. Workers’ Comp. Appeals Bd. (Phillips)* (1978) 86 Cal.App.3d 1 [43 Cal.Comp.Cases 1193].) Here, defendant met its burden to show that service of the WCA’s decision was defective.

Defendant Travelers filed their Petition for Reconsideration on October 20, 2023 at the Van Nuys district office. A petition for reconsideration must be filed and received by the Appeals

² The official address of record in EAMS for Woolford Associates notes the mailing address as: P.O. Box 64093, St. Paul, MN 55164, and while the Report of the WCA appears to have been served upon this address, Woolford was not served at their official address with the WCA’s Findings. We are unable to verify where the minutes and transcript of hearing of proceedings were served, if at all, due to lack of inclusion in the arbitration record. We further note that Travelers has never been added to the Official Address Record in this matter. Upon return of this case to the district office, the record must be properly updated. (Cal. Code Regs., tit. § 10390; see *Coldiron v. Compuware Corp.* (2002) 67 Cal.Comp.Cases 1466 (Appeals Bd. en banc).)

Board within twenty days of the service of the final order (plus an additional 10 calendar days if service of the decision is by any method other than personal service, including by mail, upon an address outside of California but within the United States. (Lab. Code, § 5903; Cal. Code Regs., tit. 8, § 10605(a)(2).)

Defendant Travelers' official address of record is outside of California, but within the United States, and service of the Findings of the WCA should have been served upon them at that address. As such, the petition was filed timely even had service not been defective. Under both scenarios, we conclude that the Petition was timely filed.

While the petition was timely filed, according to EAMS, the case file was not transmitted to the Appeals Board until September 26, 2024.

Accordingly, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. Under the circumstances stated above, the requirements for equitable tolling have been satisfied in this case. Thus, our time to act on defendant's petition was equitably tolled until 60 days after September 26, 2024, or by November 25, 2024. Because this decision is issued on or by November 25, 2024, our grant of reconsideration is timely, and we now issue our decision after reconsideration.

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).)

The WCA issued the Report on October 31, 2023, however, the arbitration record still lacks a copy of the transcript of arbitration proceedings occurring on both April 24, 2023 and August 22, 2023, without which we are unable to discern the stipulations, issues, and evidence offered and presented at both of the hearings.

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, supra*, 68 Cal.2d 753 [a full and complete record allows for a meaningful right of reconsideration].)

Further, with limited exceptions, arbitrators shall have all of the statutory and regulatory duties and responsibilities of a workers’ compensation judge. (Lab. Code, § 5272.) This may include delegation to the petitioner and/or the parties, the responsibility of ensuring that an electronic copy of a complete arbitration file is forwarded directly to the presiding workers’ compensation judge of the district office having venue over the matter. (Cal. Code. Regs., tit. 8, § 10995(c)(3).)

These duties and responsibilities further include ensuring that the exhibits filed by the parties are properly organized and separated so they may be electronically uploaded as part of the complete arbitration file. AD Rule 10205.12 (Cal. Code Regs., tit. 8, §10205.12(b)) may provide further guidance as to the proper filing of such exhibits, which may be accomplished by the arbitrator or the parties. *Documents and exhibits that are submitted in violation of AD Rule 10205.12 will not be accepted or considered.*³

³ The purpose of the email box (WCABArbitration@dir.ca.gov) is for parties and arbitrators to communicate with the Appeals Board regarding arbitration cases that are pending or will be pending at the Appeals Board. As a courtesy to

Here, we are unable to conduct meaningful review of the petition or render a decision until we have received a complete record. Thus, this is not a final decision on the merits of the Petition for Reconsideration, and once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to sections 5950 et seq.

Accordingly, grant the Petition for Reconsideration, and issue Notice of our Intention to rescind the arbitrator's decision and return the matter to the arbitrator if a complete record of the proceedings as stated in WCAB Rule 10995(c)(3) is not filed in EAMS within thirty (30) days after service of this Notice (plus additional time for mailing) in accordance with AD Rule 10205.12(b).

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the decision issued by the WCA on September 21, 2023 is **GRANTED**.

the parties and the arbitrator, *with the Appeals Board's permission*, documents may be submitted to the email box in EAMS compliant form as set forth in AD Rule 10205.12 (Cal. Code Regs., tit. 8 §10205.12(b)), and the Appeals Board will file the documents in EAMS. The Appeals Board is not responsible for separating, identifying, or otherwise organizing the documents and for any errors in filing in EAMS.

NOTICE IS FURTHER GIVEN that within thirty (30) days after service of this decision plus additional time for mailing per WCAB Rule 10605(a) the required documents per WCAB Rule 10995(c)(3) must be filed in the Electronic Adjudication Management System (EAMS). If all documents are not properly filed in EAMS by that date, the September 21, 2023 decision by the workers' compensation arbitrator will be **RESCINDED** and the matter will be **RETURNED** to the arbitrator for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSE A. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 25, 2024

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

**MELANIE SANCHEZ
LAW OFFICE OF DENNIS J. HERSHEWE
TESTAN LAW
LAW OFFICES OF WOOLDFORD & ASSOCIATES
MANNING & KASS, ELLROD RAMIREZ & TRESTER
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*