

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

RAFAEL HERRERA ARZATE, *Applicant*

vs.

ABM INDUSTRIES, INC., as administered by ESIS, *Defendants*

**Adjudication Number: ADJ11376123
Los Angeles District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to study the factual and legal issues in this case.¹

The Appeals Board has been advised that, while this matter has been pending on reconsideration, a proposed settlement has been reached. Since the District Office is precluded from acting on a case while it is pending on reconsideration (Cal. Code Regs., tit. 8, § 10961), in order to permit review of the proposed settlement, we will rescind the decision from which reconsideration is sought, and return this matter to the trial level for consideration of the proposed settlement. If the settlement is not approved, the workers' compensation arbitrator (WCA) may issue an order reinstating the original decision and any aggrieved person may timely seek reconsideration from the reinstated decision. This is not a final decision on the merits of any of the issues pending on reconsideration.

¹ Commissioner Lowe, who was a member of the panel that granted reconsideration, no longer serves on the Appeals Board. Another panel member was appointed in her place.

Labor Code 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 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 *Shiple*y 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.) *Rea* and other California appellate courts have consistently followed *Shiple*y’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 arbitrator issued the Findings and Order on November 9, 2020, and applicant filed a timely Petition for Reconsideration on November 30, 2020. Thereafter, the Appeals Board failed to act on applicant’s petition within 60 days of its filing, through no fault of petitioner. Therefore, considering that applicant filed a timely petition and that the Appeals Board’s failure to act on that petition was in error, we find that our time to act on applicant’s petition was equitably tolled until 60 days after April 23, 2021.

Therefore, we grant reconsideration, rescind the decision from which reconsideration is sought, and return this matter to the trial level for consideration of the proposed settlement. If the settlement is not approved, the WCA may issue an order reinstating the original decision and any aggrieved person may timely seek reconsideration from the reinstated decision. This is not a final decision on the merits of any of the issues pending on reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the WCA's decision of November 9, 2020 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY 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.

**RAFAEL HERRERA ARZATE
LAW OFFICES OF RAMIN R. YOUNESSI , APC
ALBERT & MCKENZIE
SOCHOCHET SOLOMON, LLP**

AS/mc

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