

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

**KELLY CLARK, *Applicant***

**vs.**

**CITY OF LOS ANGELES, permissibly self-insured, administered by  
INTERCARE HOLDINGS INSURANCE SERVICES, INC., *Defendants***

**Adjudication Number: ADJ10348223; ADJ10348225  
Van Nuys District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and the Opinion on Decision, both of which we adopt and incorporate, we will deny reconsideration.

Former Labor Code<sup>1</sup> 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. However, 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.

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

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.<sup>1</sup>

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 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.*

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<sup>1</sup> 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.)

*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 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 *Shipley*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shipley, 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 *Shipley* 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.

Consequently, we apply the doctrine of equitable tolling pursuant to *Shipley* to this case. Here, the WCA issued the decision on April 3, 2023. Defendant timely filed its Petition for Reconsideration on April 24, 2023. However, for reasons that are not entirely clear from the record, the Appeals Board did not actually receive notice of and review the petition until January 7, 2025. Accordingly, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties.

For the foregoing reasons,

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

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

**/s/ JOSE H. RAZO, COMMISSIONER**

**ANNE SCHMITZ, DEPUTY COMMISSIONER**  
**CONCURRING NOT SIGNING**



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

**March 10, 2025**

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

**PINNACLE LIEN SERVICES  
BASSO PHARMACY WOODLAND HILLS  
AM LIEN SOLUTIONS**

**PAG/bp**

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

**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION**

**INTRODUCTION:**

On April 24, 2023, the Defendant filed a timely and verified petition for reconsideration dated April 24, 2023, alleging that the undersigned WCJ erred in his Partial Joint Findings of Fact & Notice of Intention to Appoint Independent Bill Review Expert dated April 3, 2023. The Defendant contends that the billed dates of service by the lien claimant, Basso Pharmacy, Inc., were barred pursuant to Labor Code §4603.2(b)(1)(B).

**STATEMENT OF FACTS:**

The Applicant, while employed as a police officer on December 17, 2014, by the City of Los Angeles, sustained an industrial injury to her cervical spine, lumbar spine and right shoulder. The Applicant also sustained, on October 8, 2015, an industrial injury to her left knee and gastrointestinal system (in the form of gastroesophageal reflux disease).

On May 14, 2019, WCJ M. Victor Bushin, issued two Awards in the above-captioned cases.

On January 11, 2022, the lien claimant filed its notice and request for allowance of lien for \$32,814.14 for dates of service June 23, 2017 to January 10, 2019.

The parties appeared before the undersigned WCJ on March 27, 2023 for a lien trial. The Defendant contended as an affirmative defense that the lien claimant's lien was barred pursuant to Labor Code § 4603.2(b)(1)(B) alleging that the lien claimant's billing was not submitted to the Defendant within 12 months of the date of service. However, despite pressing by the undersigned WCJ, neither party was capable of producing evidence when the lien claimant served the billing or when the Defendant received the billing.<sup>1</sup>

On April 3, 2023, the undersigned WCJ issued his Partial Joint Findings of Fact & Notice of Intention to Appoint Independent Bill Review Expert dated April 3, 2023, finding that the Defendant did not meet its burden of proof that the lien claim submitted its billing more than 12 months of the date of service.

Aggrieved by the undersigned WCJ's order, the Defendant filed its petition for reconsideration.

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<sup>1</sup> The Defendant, in its petition for reconsideration dated April 24, 2023, claimed that, on June 20, 2020, its third party bill review company, medata, processed the billing by the lien claimant and should be the date the Defendant received the billing. (4:8-19)

**DISCUSSION:**

Pursuant to Labor Code § 4603.2(b)(1)(B):

“Effective for services provided on or after January 1, 2017, the request for payment with an itemization of services provided and the charge for each service shall be submitted to the employer within 12 months of the date of service or within 12 months of the date of discharge for inpatient facility services. The administrative director shall adopt rules to implement the 12-month limitation period. The rules shall define circumstances that constitute good cause for an exception to the 12-month period, including provisions to address the circumstances of a non-occupational injury or illness later found to be a compensable injury or illness. **The request for payment is barred unless timely submitted.**” (Emphasis added.)

In this case, the Defendant, as the party raising the affirmative defense of its immunity from reimbursement of authorized medical treatment, failed to produce any evidence that the lien claimant served its billing more than 12 months of the date of service. While the Defendant attempts to rely on the date its bill review company processed the billing, it failed to produce any testimonial or documentary evidence that it was the custom and practice of its former third party administrator to forward its billing for bill review processing on the same day that it would have received it.

Given that neither the lien claimant nor the Defendant provided any evidence regarding service or receipt of the disputed invoiced services, the undersigned WCJ did not err in finding that the billed dates of service by Basso Pharmacy, Inc., were not barred pursuant to Labor Code § 4603.2(b)(1)(B).

**RECOMMENDATION:**

The undersigned WCJ respectfully recommends that the Defendant’s petition for reconsideration dated April 24, 2023, be denied.

Date: April 25, 2023

**DAVID L. POLLAK**  
**WORKERS’ COMPENSATION**  
**ADMINISTRATIVE LAW JUDGE**

## **JOINT OPINION ON DECISION**

### **APPLICABILITY OF LABOR CODE § 4603.2(b)(1)(B)**

Pursuant to Labor Code § 4603.2(b)(1)(B):

“Effective for services provided on or after January 1, 2017, the request for payment with an itemization of services provided and the charge for each service shall be submitted to the employer within 12 months of the date of service or within 12 months of the date of discharge for inpatient facility services. The administrative director shall adopt rules to implement the 12-month limitation period. The rules shall define circumstances that constitute good cause for an exception to the 12-month period, including provisions to address the circumstances of a non-occupational injury or illness later found to be a compensable injury or illness. **The request for payment is barred unless timely submitted.**” (Emphasis added.)

Given that neither the lien nor the Defendant provided any evidence regarding service or receipt of the disputed invoiced services, the Defendant has failed to meet its burden of proof that the services were not served more than 12 months of the last date of service. Therefore, for that reason, the billed dates of service by Basso Pharmacy, Inc., are not barred pursuant to Labor Code § 4603.2(b)(1)(B).

### **REASONABLENESS OF THE MEDICAL TREATMENT**

Pursuant to the utilization review decisions by the Defendant dated May 2, 2016 to September 27, 2017, [Lien Claimant’s Exhibits “36” to “43”] the services by Basso Pharmacy, Inc., are reasonable medical treatment.

### **REASONABLENESS OF THE MEDICAL CHARGES, PENALTIES AND INTEREST**

Given the paucity of substantial bill review evidence from either party on this issue and consistent with the WCJ’s duty to further develop the record where there is insufficient evidence on an issue to meet his constitutional mandate to “ensure substantial justice in all cases,” [Kuykendall v. Workers' Comp. Appeals Bd. (2000) 65 Cal. Comp. Cases 264] the parties shall have until **Tuesday, March 7, 2023**, to notify the undersigned WCJ if they are agreeable to utilizing an agreed bill review expert to resolve the above disputed issue. Should the undersigned WCJ not receive notice of agreement between the parties at the conclusion of that time, the court will appoint an independent bill review expert pursuant to Labor Code § 5701.



Issues related to penalties and interest in accordance with Labor Code  
§ 4603.2(b)(1) and reimbursement of the \$150.00 filing fee are deferred pending  
receipt of additional bill review evidence.

Date: **April 3, 2023**

**DAVID L. POLLAK  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE**