WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LYNNIA RICHARD, *Applicant*

vs.

G2 SECURE STAFF, LLC; NEW HAMPSHIRE INSURANCE COMPANY (RUN-IN AIG), administered by GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Number: ADJ10616914
Los Angeles District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of defendants G2 Secure Staff, LLC, New Hampshire Insurance Company, administered by Gallagher Bassett Services' Petition for Removal, applicant Lynnia Richard's Answer to the Petition, 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 upon the WCJ's analysis of the merits of the petitioner's arguments in the WCJ's report, which we adopt and incorporate, we 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.)

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. 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.

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.[1]

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

[1] 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 *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 a 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 WCJ issued the Findings and Award on March 20, 2024. Defendants timely served their Petition on the Workers' Compensation Appeals Board (WCAB) on April 9, 2024. 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 March 19, 2025. Accordingly, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties. Moreover, according to Events in EAMS, the case was not transmitted to the Appeals Board until March 19, 2025.

Here, we intend to signal to the parties our intention to exercise jurisdiction and issue a decision on the merits of the petition. We note that neither party expressed any opposition to this

course of action, and it appears clear from the fact that neither party sought judicial review that both parties have acted in reliance that we will consider the merits of the Petition.

Under the circumstances, the requirements for equitable tolling have been satisfied in this case. Accordingly, our time to act on defendants' Petition was equitably tolled until 60 days after March 19, 2025, and 60 days from the date of transmission is Sunday, May 18, 2025. The next business day that is 60 days from the date of transmission is Monday, May 19, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, May 19, 2025, so that we have timely acted on the petition.

Accordingly, we now issue our decision.

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.

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[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

Here, the WCJ's decision includes a finding regarding 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, the petitioner is only challenging an interlocutory finding/order in the decision. Therefore, we 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, based upon the WCJ's analysis of the merits of the petitioner's arguments, 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 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/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 19, 2025

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

LYNNIA RICHARD
FENSTEN & GELBER
BONDY LAW GROUP, APLC

LSM/*pm*

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

REPORT AND RECOMMENDATION ON DEFENDANT'S PETITION FOR REMOVAL

I. INTRODUCTION

Applicant's Occupation	Greeter/Ways Finder
Date of Injury	September 6, 2016
Identity of Petitioner	**Defendant** New Hampshire Insurance Company (run-in AIG) Filed the petition
Timeliness: Verification:	The petition is timely filed
Date of Findings of Fact	March 19, 2024

Petitioner's contentions:
Defendant contends:
(a) the Court acted without or in excess of its powers;
(b) the findings of fact do not support the Order.

II. FACTS

Applicant, Lynnia Richard, born […..], while employed on September 6, 2016, as a greeter/ways finder, Occupational Group No. 213 at Los Angeles, California by G2 Secure Staff LLC, sustained an injury arising out of and in the course of employment to her brain, head, cervical spine, and lumbar spine (ADJ10616914). Applicant claims to have sustained an industrial injury to her psyche and functional movement disorder.

Following review of all evidence submitted at Trial, the Court found Labor Code Section 3208.3(d) applies to the applicant's alleged psyche claim and applicant may not recover compensation for her alleged psychiatric injury because she was not employed by the employer for at least six months, and her injury was not caused by a sudden and extraordinary event. The Court also found further development of the medical record is necessary to address the compensability of the alleged functional movement disorder injury. The Court found the parties' procedural stipulation to close discovery entered into at the Hearing on January 11, 2021 was premature and unreasonable because at the same Hearing the parties agreed the applicant needed to be examined by an additional Panel QME in Neurology to address the disputed functional movement disorder and brain injury.

The Court Ordered parties to meet and confer to schedule an examination of the applicant with neuropsychiatrist Dr. Charles Furst as the regular physician under Labor Code 5701. To avoid further delay and potential litigation regarding cover letters and medical records intended to be served on Dr. Furst, the Court instructed parties to treat Dr. Furst as if he were a Panel QME under Labor Code 4062.2 and 4062.3.

The Court agreed with the primary treating physician Dr. William Mealer' s reporting that applicant's admitted cervical spine and lumbar spine injury has not reached Permanent and Stationary status. The Court found applicant is entitled to further medical treatment to cure and/or be relieved from the effects of the industrial injury.

On April 9, 2024 defendant New Hampshire Insurance Company (run-in AlG) filed a Petition for Removal. Removal is sought as to the Order parties schedule an examination of the applicant with neuropsychiatrist Dr. Charles Furst as the regular physician under Labor Code 5701, to the finding applicant's condition has not reached Permanent and Stationary status, and to the finding the parties procedural stipulation to close discovery is overbroad and unenforceable.

III.
DISCUSSION

A Petition for Reconsideration is the appropriate mechanism to challenge a final order, decision, or award (Labor Code Section 5900). An order that resolves or disposes of the substantive rights and liabilities of those involved in a case is a final order. See Maranian v. Workers' Compensation Appeals Board (2000) 81 Cal. App. 4th 1068 [65 Cal. Comp. Cases 650; Safeway Stores, Inc. v. Workers' Compensation Appeals Board (Pointer) (1980) 104 Cal. App. 3d 528 {45 Cal. Comp Cases 410].

Removal is an extraordinary remedy that may be requested to challenge interim and non-final orders issued by a workers' compensation judge (Cortez v. Workers' Compensation Appeals Board (2006) 136 Cal. App. 4th 596, 600 fn 5, [71 Cal. Comp. Cases 155, 157, fn 5]; Kleeman v. Workers' Compensation Appeals Board (2005) 127 Cal. App. 4th 274,281, fn 2 [70 Cal. Comp. Cases 133, 136, fn 2]. The petitioning party must demonstrate that substantial prejudice or irreparable harm will result if removal is not granted (Title 8 Cal. Code Regulations, Section 10955(a)) and that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues.

In the present case defendant's Petition for Removal seeks enforcement of a broad and ambiguous procedural stipulation to close discovery entered into at the Trial Hearing on January 11, 2021 memorialized on the Minutes of Hearing as "DEFENDANT AGREES TO PANEL QME IN SPECIAL TY OF NUEROLOGY, ORDER ISSUED. PARTIES STIPULATE THE NEUROLOGY PQME IS NECESSARY TO ADDRESS WHETHER APPLICANT HAS AN INDUSTRIAL FUNCTIONAL MOVEMENT DISORDER AND WHETHER APPLICANT IS MMI FOR THAT ISSUE. PARTIES STIPULATE DISCOVERY REMAINS CLOSED ON ALL OTHER ISSUES (Exhibit B).

Generally stipulation of the facts by the parties are binding and encouraged; however, in the present matter defendant attempts to enforce a procedural stipulation that limit the Courts authority. At Trial the Court found the stipulation to close discovery was be premature and unreasonable considering the parties simultaneously stipulated the applicant needed to be examined by an additional Panel QME in Neurology to address the disputed functional movement disorder and brain injury. Following review of all medical reporting the Court agreed with Neurology QME Dr. Bronshvag's recommendation applicant be examined by a psychiatrist and or neuropsychiatrist to address whether or not applicant's functional movement disorder is industrially related.

Defendant agreed a Panel QME in Neurology was necessary to address the disputed functional movement disorder and brain injury, and received the reporting of Neurology QME Dr. Bronshvag that recommends applicant be examined by a psychiatrist and or neuropsychiatrist; however, defendant now argues the procedural stipulation to close discovery prohibits the Court from further development of the record.

The Court has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (McClune v. Workers' Comp. Appeals Bd. (1998) 62 Cal.App.4th 1117, 1121-1122 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; see also Tyler v. Workers' Comp. Appeals Bd. (1997) 56 Cal.App.4th 389,394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924]; §§ 5701, 5906.) The Court also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (Kuykendall v. Workers' Comp. Appeals Bd. (2000) 79 Cal.App.4th 396, 403-404 [94 Cal. Rptr. 2d 130, 65 Cal.Comp.Cases 264].) The Court "may act to develop the record with new evidence if, for

example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (San Bernardino Cmty.[*sic*] Hosp. v. Workers' Comp. Appeals Bd. (McKeman) (1999) 74 Cal. App. 4th 928, 937-938 [88 Cal. Rptr. 2d 516, 64 Cal.Comp.Cases 986].) The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (McDuffie v. Los Angeles County Metropolitan Transit Authority (2002) 67 Cal.Comp.Cases 138 (Appeals Board en bane [*sic*]).) Per McDuffie, if the existing physicians cannot cure the need for development of the record, then the WCJ can appoint a physician to evaluate applicant pursuant to section 5701.

In the present matter, both the Neurology QME Dr. Bronshvag and the Occupational/Internal medicine QME Dr. Cocciarrella recommended applicant be examined by a psychiatrist and or neuropsychiatrist. Additionally, the primary treating physician Dr. Mealer's report dated October 3, 2022 states a request for a neuropsychologist consult was " apparently authorized, but the insurance has not been able to find any in the network." Based on the medical evidence submitted at Trial and applicant's testimony at Trial the Court found defendant's refusal or neglect to schedule a consult with a neuropsychologist despite the overwhelming medical evidence a consult is necessary amounts to a bad faith tactic. The Court found defendants failed in their duty to investigate and complete the medical consultations necessary to address the medical disputes in this matter. It remains unclear why defendants have ignored the primary treating physician Dr. Mealer's repeated request for a neuropsychologist consult. Therefore pursuant to McDuffie and to avoid further delay in completion of necessary discovery the Court appointed neuropsychiatrist Dr. Charles Furst as the regular physician under Labor Code 5701, and parties were Ordered to meet and confer to schedule the initial appointment with Dr. Furst and serve Dr. Furst with all necessary records prior to the exam.

IV.
RECOMMENDATION

For the reasons stated above, it is respectfully requested that defendant's Petition for Reconsideration be denied.

Date: 04/17/2024

EDGAR MEDINA
Workers' Compensation Judge