

**S287261**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**JOSEPH MAYOR,**

*Petitioner,*

vs.

**WORKERS' COMPENSATION  
APPEALS BOARD,**

*Respondent and Appellant.*

**ROSS VALLEY SANITATION  
DISTRICT,**

*Real Party in Interest.*

**Civ. No. A169465**

**WCAB Case No. ADJ10036954**

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**PETITION FOR REVIEW**

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Following Issuance of the Opinion  
By the Court of Appeal  
First Appellate District, Division Four  
Court of Appeal Case No. A169465

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**PETITION FOR REVIEW**

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TO THE HONORABLE PATRICIA GUERRERO, CHIEF JUSTICE, AND  
TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME  
COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.500, California Rules of Court, the Workers' Compensation Appeals Board ("Appeals Board"), respondent and appellant, hereby petitions this Court to grant review of the decision of the Court of Appeal for the First Appellate District, Division Four, filed on August 28, 2024, (*Mayor v. Workers' Compensation Appeals Bd.* (2024) 104 Cal.App.5th 713 [2024 Cal.App. LEXIS 531] ("*Mayor*"), which granted a peremptory writ of mandate and ordered the Appeals Board to rescind its August 14, 2023 "Opinion and Order Granting Petition for Reconsideration";

January 26, 2024 “Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration”; and February 2, 2024 “Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration.”

The Appeals Board filed a petition for rehearing on September 12, 2024, which resulted in the Court of Appeal issuing an order on September 18, 2024, which modified its opinion, but otherwise denied rehearing.

### **ISSUES PRESENTED FOR REVIEW**

- I. May the Appeals Board apply equitable tolling to act upon a petition for reconsideration beyond the 60-day period provided in Labor Code<sup>1</sup> section 5909, when, through no fault of the parties, the Appeals Board did not receive the petition for reconsideration until after the 60-day period has elapsed?
- II. Did the *Mayor* court act in excess of its jurisdiction in granting relief under traditional mandate (Code of Civil Procedure section 1085), where petitioner failed to file a timely petition for writ of review as required by section 5950?

### **GROUNDINGS FOR REVIEW**

Pursuant to Rule 8.500(b), the Appeals Board respectfully requests that the court grant review to address (1) an important question of law and secure uniformity of law between conflicting decisions of the Courts of Appeal, and to address (2) the legal issue of whether the Court of Appeal exceeded its jurisdiction in granting relief under traditional mandate.

Former section 5909 deems petitions for reconsideration denied if the Appeals Board does not act upon them within 60 days of filing. For 30 years,

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<sup>1</sup> All future references are to the Labor Code unless noted.

the courts of this state followed the Fourth District's decision in *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107 ("*Shipley*"), holding that because section 5909 is premised upon the Appeals Board having possession of a petition for reconsideration, equitable tolling may apply to extend the 60-day deadline to act in cases where the Appeals Board does not have the petition.

Recently, in *Zurich v. Workers' Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213 ("*Zurich*"), the Second District expressed doubt as to part of *Shipley's* reasoning, while still acknowledging that the section 5909 deadline is not jurisdictional in the fundamental sense. *Zurich* therefore still allowed the application of equitable tolling in theory but found that it did not apply based on the particular facts of the case.

Now, in the instant *Mayor* decision, the First District rejected the Fourth District's analysis in *Shipley*, appearing to hold that the section 5909 deadline is jurisdictional in the fundamental sense, so that equitable tolling is entirely unavailable to extend the deadline as a matter of law, regardless of the circumstances. A significant consequence of finding that section 5909 is jurisdictional in the fundamental sense is that the *Mayor* decision potentially *voids* every decision issued by the Appeals Board in the past 30 years where equitable tolling was applied pursuant to *Shipley*. The *Mayor* decision created a split of authority on a fundamental question of Appeals Board jurisdiction, and review should be granted to secure uniformity of decision.

Additionally, review should be granted to clarify whether the Court of Appeal exceeded its jurisdiction in granting the untimely petition for writ of mandate, where a plain, speedy, and adequate remedy existed in law (writ of review), and exceeded its jurisdiction when it usurped the Appeals Board's

statutory role as the finder of fact and dictated the manner in which the Appeals Board could exercise its broad equitable powers to equitably toll the statute.

In the alternative, the Appeals Board requests that the court return the matter to the Court of Appeal to address the issues raised in the petition for rehearing.

### **STATEMENT OF FACTS**

On March 2, 2023, the workers' compensation administrative law judge ("WCJ") issued a "Findings, Award, and Orders," which found, in pertinent part, that petitioner was permanently totally disabled. (*Mayor, supra*, 104 Cal.App.5th at p. 718.)

On March 23, 2023, real party in interest, Ross Valley Sanitation District ("Ross Valley"), timely filed a petition for reconsideration with the District Office of the Division of Workers' Compensation ("DWC"). (*Mayor, supra*, 104 Cal.App.5th at p. 718.)

Within 15 days of filing a petition for reconsideration, a WCJ is required to prepare a report on the petition for reconsideration and transmit the petition for reconsideration and the accompanying report to the Appeals Board. (Cal. Code Regs., tit. 8, §§ 10961, 10962.) In this case, the administrative law judge failed to do so.

On June 5, 2023, Ross Valley wrote to the Appeals Board to inquire about its petition for reconsideration. (*Mayor, supra*, 104 Cal.App.5th at p. 718.) The Appeals Board first received notice of the petition on or about June 15, 2023. (*Ibid.*)

On August 14, 2023, the Appeals Board issued an "Opinion and Order Granting Petition for Reconsideration ("Order Granting Reconsideration")," which preliminarily granted reconsideration to study the issues raised.

(*Mayor, supra*, 104 Cal.App.5th at p. 718.) No party filed a petition for writ of review in response to the August 2023 order granting reconsideration.

In September 2023, petitioner wrote to the Appeals Board asking why the petition for reconsideration was not timely received. (*Mayor, supra*, 104 Cal.App.5th at p. 718.) The Appeals Board did not respond. (*Ibid.*)

On January 9, 2024, petitioner filed the petition for writ of mandate. (*Mayor, supra*, 104 Cal.App.5th at p. 719.)

On January 26, 2024, the Appeals Board issued its “Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (“January Decision”),” which rescinded the WCJ’s decision and returned the matter to the trial level for further development of the record. (*Mayor, supra*, 104 Cal.App.5th at p. 719.)

On February 2, 2024, the Appeals Board issued its “Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (“February Decision”),” which rescinded the January 26, 2024 decision in its entirety and issued a new decision, which included an explanation for why it exercised its discretion to find that equitable tolling was appropriate based on the factual record in this case. (*Mayor, supra*, 104 Cal.App.5th at p. 719.)

The *Mayor* court found that the Appeals Board exceeded its jurisdiction when it issued the order granting reconsideration beyond 60 days from the date the petition was filed with the DWC. (*Mayor, supra*, 104 Cal.App.5th at p. 725.) The court granted a writ of mandate and ordered that the Appeals Board rescind its order granting reconsideration and its January and February decisions. (*Id.* at p. 731.)

## ARGUMENT

- I. **Labor Code section 5909, which requires the Appeals Board to act upon a petition for reconsideration within 60 days of filing, is a nonjurisdictional statute, premised upon the Appeals Board’s ability to review the petition for reconsideration, and may be equitably tolled in cases where the Appeals Board is unable to review the petition for reconsideration.**

Consideration of this issue can be broken down into three subparts:

- A) Is section 5909 jurisdictional or nonjurisdictional?
- B) If section 5909 is nonjurisdictional, is the statute subject to equitable tolling?
- C) If section 5909 is subject to equitable tolling, do the facts of this case warrant it?

(See *Law Finance Group, LLC v. Key* (2023) 14 Cal.5th 932, 950-957.)

**A. Section 5909 is not jurisdictional.<sup>2</sup>**

At all times relevant to this case, section 5909 stated: “A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date of filing.” (Former § 5909, Stats 1992, ch. 1226, § 5.)<sup>3</sup>

Whether a statute is jurisdictional or nonjurisdictional is a complex analysis.

To be sure, mandatory procedural rules—like many statutes of limitations or other filing deadlines—serve important policy goals, and courts must enforce them when properly

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<sup>2</sup> As noted in *Law Finance Group, LLC, supra*, the term “jurisdiction” has many different meanings. (*Law Finance Group, LLC, supra*, at p. 949.) For purposes of this petition and the issue before us, the term “jurisdictional” is used to refer to the presence or absence of fundamental jurisdiction, in the absence of which equitable considerations cannot apply. (See *Id.* at pp. 949–950.)

<sup>3</sup> Section 5909 was recently amended, effective July 2, 2024. This case concerns the language as it existed prior to that amendment. Further references to section 5909 refer to the former section, unless noted.

raised. [Citation.] But we will not assume that the Legislature intended to imbue a time bar with jurisdictional consequences merely because the statute speaks in mandatory terms; as we have said, “jurisdictional rules are mandatory, but mandatory rules are not necessarily jurisdictional.” [Citation.] To establish that a particular filing deadline is jurisdictional, more is required. Much as the high court has said of Congress, our Legislature “must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional” in the fundamental sense.

(*Law Finance Group, LLC, supra*, 14 Cal.5th at p. 950.)

Examples of statutory language that is jurisdictional include the following:

. . . [T]he party’s time to file the notice “shall not be extended by order or stipulation” [Citation], and assuming the moving party files timely notice, “the power of the court to rule on a motion for a new trial shall expire” after a specified period. [Citation.] We have held that those limitations are “[C]lear markers of legislative intent that the respective deadlines are jurisdictional.” [Citation.]

(*Id.* at p. 951.)

Here, former section 5909 contained the provision that a petition for reconsideration is “deemed denied” if it is not acted upon within 60 days. (§ 5909.) Nowhere in the statute does it state that the power of the Appeals Board ceases at that point. To the contrary, the Legislature has expressly codified that the Appeals Board has “continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division[.]” (§ 5803.)

To further understand the Legislature’s intent behind section 5909, it is crucial to understand how petitions for reconsideration were handled at the time the statute was enacted and how that process has changed in response to various workers’ compensation reforms. In analyzing the statute’s history, the Legislature clearly intended that the Appeals Board act on petitions for reconsideration within 60 days of when the petitions are **received by the Appeals Board.**

Section 5909 was first enacted in 1937 as part of a comprehensive restatement of workers' compensation law. (§ 2.) The section originally stated:

A petition for a rehearing<sup>4</sup> is deemed to have been denied by the commission unless it is acted upon within thirty days from the date of filing. The commission may, upon good cause being shown therefor, extend the time within which it may act upon such petition for not exceeding thirty days.

(Former § 5909, Stats 1937, ch. 90.)

The commission referred to above is the Industrial Accident Commission ("IAC"), which was created in 1913 as part of the Boynton Act and is the precursor to the Appeals Board. (Stats 1913, ch. 176, § 3.)

When section 5909 was enacted, the IAC was responsible for and controlled all workers' compensation departments, including the present-day DWC. (Former § 111, Stats 1937, ch. 90; ["The Division of Industrial Accidents and Safety shall be under the control of and governed by the Industrial Accident Commission consisting of three members."]; Stats 1989 ch. 892 § 11 ["Existing workers' compensation law authorizes the Division of Industrial Accidents to administer the state workers' compensation system. This bill would change the name of this division to the Division of Workers' Compensation[.]".])

In addition to controlling the DWC, the IAC directly employed "referees," who are now referred to as "workers' compensation administrative law judges." (Former § 123, Stats. 1937, ch. 90, ["The commission may employ . . . referees . . . to perform the duties and exercise the powers which are under the jurisdiction of the commission."]; § 27

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<sup>4</sup> The term "petition for rehearing" was renamed as a "petition for reconsideration" as part of the 1951 workers' compensation reform bill. (Stats 1951, ch. 778, § 25.) In order to simplify this discussion, all further references are to a petition for reconsideration, even if filed before 1951.

[“Whenever the term “workers’ compensation judge” or “workers’ compensation referee” is used in this code in connection with the workers’ compensation law, the term shall mean “workers’ compensation administrative law judge.”].)

When the Legislature enacted section 5909 in 1937, petitions for reconsideration were directly filed with the IAC. Similar to today, the IAC would refer the petition for reconsideration back to the referee to draft a report. As explained in a 1953 treatise:

After receipt and formal filing in the Commission’s document register, each petition for reconsideration is ordinarily referred back to the concluding trial referee for review. He is also furnished with the answer to the petition, when it is received, and with any reply which may be filed. After a study of these documents, he prepares a report, together with an appropriate order granting or denying the petition (or other indicated action). (Section 10878 of the Commission’s Rules of Practice and Procedure.)

(1 Hanna, *The Law of Employee Injuries and Workmen’s Compensation* (1st ed. 1953), at p. 139.)

To summarize, in 1937, the IAC employed the referees, and it was the only workers’ compensation court. Petitions for reconsideration were filed directly with the IAC and then referred to the referee to issue a report. In drafting section 5909, the Legislature understood that petitions for reconsideration were filed directly with the IAC.

In 1965, as part of a restructuring of the department, the IAC was renamed the Workers’ Compensation Appeals Board. (§ 110(a), Stats. 1965, ch. 1513.) Authority over the administration of DWC was removed from the Appeals Board and transferred to the Administrative Director. (§ 111, Stats. 1965, ch. 1513.) Today, the DWC Administrative Director employs the WCJs and administers the trial court system as part of the DWC, which is a

separate division of government. (§ 123.) There is now a two-level system of adjudication beginning at the trial level before a WCJ at a DWC district office, and an appeal from the trial level to the Appeals Board through a petition for reconsideration. However, the procedure of the Appeals Board in obtaining a report from the WCJ has not changed.

The Appeals Board continues the same practice that has existed at least since 1953. Petitions for reconsideration are directly filed with the workers' compensation judge at the DWC district office that issued the order, decision, or award. (Cal. Code Regs., tit. 8, § 10940.) Thereafter, the WCJ has 15 days to review the petition and either rescind the original order, decision, or award, or prepare a report and recommendation on petition for reconsideration, which by law **shall be submitted** to the Appeals Board. (Cal. Code Regs., tit. 8, §§ 10961, 10962.)

In reviewing the Legislative history of section 5909, the phrase “from the date of filing” contains an understood term that requires the petition to be received by the Appeals Board.<sup>5</sup> This comports with common sense and was the basis for the Fourth District allowing equitable tolling *in Shipley*:

While [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. We emphasize *Shipley's* file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control. Surely the Legislature did not write the statute in anticipation of a system so inefficient that such gaffes were statutorily provided for.

(*Shipley, supra*, 7 Cal.App.4th at p. 1107 (emphasis added).)

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<sup>5</sup> “‘Filing’ a document means receipt and acceptance by the Workers’ Compensation Appeals Board of the document for the purpose of having it included in the adjudication file.” (Cal. Code Regs., tit. 8, § 10305(m).)

Understanding the Legislative history of section 5909 together with the changes to the structure of the Appeals Board further explains why the Legislature recently amended section 5909. Effective July 2, 2024, section 5909 was modernized to conform the statute to longstanding practice by making explicit that the 60-day period begins when the file is transmitted to the Appeals Board, not when the appeal is initially filed. (§ 5909, Stats 2024 § 27 (AB 171), effective July 2, 2024, repealed July 1, 2026.) Yet, the *Mayor* court opined, without citation to any evidence, that the Legislature was responding to *Zurich, supra*, which expressed a more limited view of equitable tolling than that advanced in *Shipley*. (*Mayor, supra*, 104 Cal.App.5th at p. 724.) In the Petition for Rehearing, the Appeals Board requested the opportunity to brief the issue in detail, to show why this was not the case. However, the *Mayor* court denied this request.

*Mayor* is analytically inconsistent because its holding appears to conflict with its reasoning. Nowhere does the court clearly state whether section 5909 is jurisdictional or nonjurisdictional. The court implies throughout its discussion that section 5909 imparts fundamental jurisdiction upon the Appeals Board to act on petitions for reconsideration. *Mayor* describes the Appeals Board's order granting reconsideration as a "void procedure." (*Mayor, supra*, 104 Cal.App.5th at p. 722.) *Mayor* then states that the Appeals Board's order granting reconsideration "did not depend on any exercise of discretion[.]" (*Id.* at p. 725.) This verbiage indicates that *Mayor* finds section 5909 jurisdictional.

Yet, the *Mayor* court relied upon the decision in *Zurich* to find that the Appeals Board’s grant was in “excess of the Board’s jurisdiction.”<sup>6</sup> (*Id.* at p. 722; see *Zurich, supra*, 97 Cal.App.5th at pp. 1233-1234.) Use of the term “excess of jurisdiction” could indicate that the *Mayor* court found section 5909 to be nonjurisdictional because “exceeding jurisdiction” necessarily means that the Appeals Board had jurisdiction to act but that the actions taken were in error. When timely review of an action is sought, and the action is found to be in error, the order is voidable, and the error can be corrected. Thus, it is important to reiterate that orders exceeding jurisdiction are **not void ab initio**, but **merely voidable**.

When a statute authorizes a prescribed procedure, and the court acts contrary to the authority thus conferred, it has exceeded its jurisdiction. [Citation.] When a court has fundamental jurisdiction, but acts in excess of its jurisdiction, its act or judgment is merely voidable. [Citations.] *That is, its act or judgment is valid until it is set aside, and a party may be precluded from setting it aside by principles of estoppel, disfavor of collateral attack or res judicata.* [Citation.]

(*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660-66, italics added.)

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<sup>6</sup> Unlike *Mayor*, *Zurich* was a dispute between two insurers, but it also dealt with the application of section 5909. (See generally, *Zurich, supra*.) However, *Zurich* suffers from the same flaws as *Mayor*, where it contains contradictory language indicating that section 5909 is jurisdictional (*id.* at pp. 1234-1235), while also holding that equitable exceptions to 5909 may exist in cases where the Appeals Board misleads a party. (*Id.* at p. 1237.) Contrary to *Mayor*, *Zurich* affirmed the holding in *Shipley*, but found that facts warranting equitable tolling did not exist in its case. (*Ibid.*) Ironically, both cases involved the unusual circumstances where the Appeals Board did not have a complete evidentiary and decisional record, and neither court requested a certified record. Since the Appeals Board is the final arbiter of fact (§§ 5951, 5952, 5953), if the Appeals Board fails to consider the complete record, it is a violation of due process. Thus, in both cases, the Appeals Board never reached the merits, and in both cases, the court of appeal proceeded without an evidentiary record in violation of sections 5951, 5952, and 5953.

The crux of the issue is that fundamental jurisdiction is *not the same* as acting in excess of jurisdiction because fundamental jurisdiction means that the Appeals Board *lost the power to act in any way* regardless of whether the actions taken were correct or incorrect. When the Appeals Board has no jurisdiction to make an order, it is void, and it is as if no order ever issued.

A lack of fundamental jurisdiction is an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. [Citations.] Because a lack of fundamental jurisdiction implicates the basic power of a court to act, courts must enforce jurisdictional limitations even if considerations of waiver, estoppel, consent, or forfeiture might otherwise excuse a party's failure to comply with them. [Citations.] In other words, when a party fails to comply with a jurisdictional time bar, the court has no choice but to dismiss the case for lack of jurisdiction, even if equitable concerns would support reaching the merits.

Because of those harsh consequences, we apply a presumption that statutes do not limit the courts' fundamental jurisdiction absent a clear indication of legislative intent to do so. [Citations.] This approach reflects a preference for the resolution of litigation and the underlying conflicts on their merits by the judiciary. [Citations.]

(*Law Finance Group, LLC, supra*, 14 Cal.5th at pp. 949-950.)

*Mayor's* use of contradictory reasoning, with no clear holding as to whether section 5909 is jurisdictional creates considerable uncertainty regarding the applicable law. Section 5909 should be read to require that the petition for reconsideration must be received by the Appeals Board before it can act, which is evidenced by the Legislature's expressed requirement that the Appeals Board, and not the WCJ, decide petitions for reconsideration. (§ 5908.5.)<sup>7</sup>

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<sup>7</sup> Pursuant to sections 5309 and 5310, authority is delegated to the WCJs to render trial level decisions, and under section 5315, if the Appeals Board does not disturb the trial level decision, it becomes the decision of the Workers' Compensation Appeals Board. The Appeals Board acknowledges that this gives rise to confusion since undisturbed decisions by the WCJ are identified as decisions of the Workers' Compensation Appeals Board.

Section 5909 is a nonjurisdictional statute. To hold otherwise would *void* every decision issued by the Appeals Board over the past 30 years where equitable tolling was applied pursuant to *Shipley*.

**B. Section 5909 is subject to equitable tolling.**

The Appeals Board is vested with “judicial” powers. (§ 111(a); see also *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 355-356 (the WCAB has “been legislatively endowed with judicial powers pursuant to a specific constitutional authorization”); *Bankers Indemnity Ins. Co. v. Industrial Acc. Com. (Merzoian)* (1935) 4 Cal.2d 89, 97 (“the legislative enactment conferring judicial powers upon the [IAC] is expressly authorized by the Constitution”).) For over 100 years, it has been repeatedly held that the Appeals Board (or the predecessor IAC) exercises a portion of the judicial powers of the State of California and, in legal effect, is a court. (See e.g., *Merzoian, supra*, 4 Cal. 2d at p. 97 (“the [IAC] in matters within its jurisdiction acts as a judicial body and exercises judicial functions and in legal effect is a court”); *Western Metal Supply Co. v. Pillsbury (Mason)* (1916) 172 Cal. 407, 411-412 (“The power granted to the [IAC] ... is judicial in its nature. ... Th[e] action[s] by such board would be an exercise of judicial power. For that purpose it is in legal effect a court.”))

The Appeals Board has a constitutional mandate to “ensure substantial justice in all cases.” (Cal. Const., art. XIV, § 4 [“[T]he administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character(.); *Kuykendall v. Workers’ Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403.)

It has also long been recognized that the Appeals Board has broad equitable powers. (*Merzoian, supra*, 4 Cal. 2d at p. 98 [Wherein the Supreme Court declared: “the Industrial Accident Commission of this state has been

invested with the power and authority to hear and determine equitable issues.”].) On multiple occasions, the California Supreme Court has acknowledged that the Appeals Board has equitable powers and should use equitable doctrines like estoppel and tolling to exert jurisdiction over claims past the statute of limitations. (See e.g., *Reynolds v. Workers’ Comp. Appeals Bd.*, (1974) 12 Cal.3d 726; *Elkins v. Derby* (1974) 12 Cal.3d 410, 420.)

Appellate courts have continually reaffirmed the Appeals Board’s broad equitable powers. (See e.g., *Dyer v. Workers’ Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 (“In general, the WCAB has broad equitable powers with respect to matters within its jurisdiction.”); *Maples v. Workers’ Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827, 837 (“Equitable principles ... have been frequently applied in workers’ compensation proceedings.”); *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Collins)* (1978) 83 Cal.App.3d 413, 418.)

Section 5909 sets a 60-day time period for deciding reconsideration. “Yet lurking in the backdrop for most limitations periods is equitable tolling: a judicially created doctrine allowing courts to toll the statute of limitations when justice so requires.” (*Saint Francis Memorial Hospital v. State Dept. of Public Health* (2020) 9 Cal.5th 710, 716-717.)

Equitable tolling is a “judicially created, nonstatutory doctrine” that “suspend[s] or extend[s] a statute of limitations as necessary to ensure fundamental practicality and fairness.” [Citation.] The doctrine applies “occasionally and in special situations” to “soften the harsh impact of technical rules which might otherwise prevent a good faith litigant from having a day in court.” [Citation.] Courts draw authority to toll a filing deadline from their inherent equitable powers—not from what the Legislature has declared in any particular statute. [Citation.] For that reason, we presume that statutory deadlines are subject to equitable tolling.

(*Id.* at pp. 719-720.)

The presumption that a statutory limitations period is subject to equitable tolling is rebuttable. (*Law Finance Group, LLC, supra*, 14 Cal.5th at pp. 952-953.) Whether the presumption is rebutted requires an examination of the explicit statutory language or the manifest policy underlying a statute. (*Ibid.*)

Given that the Appeals Board is constitutionally bound to achieve substantial justice, the manifest policy underlying every workers' compensation statute would appear to favor a hearing on the merits and that it is appropriate to err on the side of the due process rights of the litigants.<sup>8</sup>

The *Mayor* decision significantly misstates the Appeals Board's constitutional mandate as requiring "average or substantial, but expeditious, justice in workers' compensation proceedings[.]" (*Mayor, supra*, 104 Cal.App.5th at p. 730.) The Appeals Board is not familiar with the term "average justice" as it does not appear to exist in workers' compensation law.<sup>9</sup> Furthermore, the word "but" does not precede "expeditious" in the Constitution. To the contrary, the Constitution commands the Appeals Board to accomplish "substantial justice in all cases expeditiously, inexpensively,

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<sup>8</sup> Section 3202 states that Division Four, which exclusively governs the workers' compensation system "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment." This statutory mandate also appears to contemplate a system where equitable considerations are foremost.

<sup>9</sup> The *Mayor* court cites to the court in *Zurich, supra*, 97 Cal.App.5th at pp. 1233-1234; however, it appears that *Mayor* misquotes *Zurich* in suggesting that the goal of workers' compensation is "average justice." The full quote in *Zurich* included the following context: "In short, it is the purpose of the Commission to afford an object lesson as to how to determine **issues of minor consequence** with reasonable certainty and without delay or burdensome expenditure." (*Ibid.* (emphasis added).) The issue in *Mayor* is whether applicant is permanently totally disabled. It is not an issue of minor consequence. *Mayor's* assertion that a standard of "average justice" applies to such an analysis is contrary to the Constitution.

**and** without incumbrance of any character.” (Cal. Const., art. XIV, § 4 (emphasis added).) In misstating the Constitutional requirements, the *Mayor* decision incorrectly focuses on expeditious resolution of disputes regardless of the merits, which is the antithesis of substantial justice.

The holding of *Mayor* is that the Appeals Board “exceeded its jurisdiction.” (*Mayor, supra*, 104 Cal.App.5th at p. 717.) Excess of jurisdiction necessarily implies that the Appeals Board had fundamental jurisdiction to act. (*People v. American Contractors Indemnity Co., supra*, 33 Cal.4th at pp. 660-661.) Yet, the court did not discuss whether section 5909 is subject to equitable tolling, and without any analysis, it is impossible to determine why the *Mayor* court believed that section 5909 was not subject to equitable tolling. (*Mayor, supra*, 104 Cal.App.5th at p. 29, FN 6.)

The *Mayor* decision relies heavily upon the analysis in *Zurich*, which in turn, is based upon the Supreme Court’s analysis in *J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648. (*Zurich, supra*, 97 Cal.App.5th at pp. 1229-1230.) That case dealt with application of a deemed denied provision in the Government Claims Act. The Supreme Court held that: “The doctrine of equitable tolling may also apply to the limitation periods imposed by the claims statutes.” (*J.M., supra*, 2 Cal.5th at p. 657.) That is, even where the Government Claims Act deemed an application denied, the Supreme Court found that equitable tolling can apply. The conclusion that equitable tolling in *J.M.* was not warranted was simply based upon the facts of the case. (*Id.* at p. 657.)

The Supreme Court has provided examples of statutory language that it has found to indicate that a statute is not subject to tolling:

If the Legislature had intended to preclude equitable tolling or equitable estoppel, it could have done so expressly. (See, e.g., Code Civ. Proc., § 366.2, subd. (b) [providing a one-year

statute of limitations for a surviving action against a deceased person and stating that the period “shall not be tolled or extended for any reason” except as specified in the statute]; *Atwater Elementary School Dist. v. California Dept. of General Services* [(2007) 41 Cal.4th 227, 233] [“The Legislature could have easily stated it intended to abrogate long-established equitable principles [such as equitable estoppel]. It did not do so.”].)

(*Law Finance Group, LLC, supra*, 14 Cal.5th at p. 953.)

Similar to the statutes at issue in *Law Finance Group, LLC*, and *J.M., supra*, section 5909 contains no express limitations on the application of tolling, and thus, following the reasoning of those decisions, section 5909 is subject to equitable tolling.

- C. Equitable tolling is warranted here because the workers’ compensation administrative law judge did not transmit the petition for reconsideration to the Appeals Board as required by law, and by doing so, effectively denied an appeal of their own decision.**

Finally, the court must examine the facts of the case to determine whether equitable tolling is warranted. The most critical fact in this case, which the *Mayor* decision does not discuss, is that the WCJ failed to transmit the petition for reconsideration during the time that the Appeals Board had to act, which allowed the WCJ effectively to deny reconsideration of their own decision. (§§ 115, 5908.5; see also, Cal. Code Regs., tit. 8, §§ 10961, 10962.)

The *Mayor* decision requires the Appeals Board to deny reconsideration by operation of section 5909 even when it has never seen the petition. This holding violates the parties’ fundamental right to due process. “The one who decides must hear.” (*Morgan v. United States* (1936) 298 U.S. 468, 481.) When deciding reconsideration, the Appeals Board is required

“to achieve a substantial understanding of the record[.]” (*Allied Compensation Ins. Co. v. Industrial Acc. Com.* (1961) 57 Cal.2d 115, 120.)

The Appeals Board delegates its judicial authority to the WCJ to decide cases in the first instance, including *recommendations* on petitions for reconsideration. (§§ 5309, 5310.)<sup>10</sup> However, that delegation does not include the power to *decide* petitions for reconsideration, which is prohibited by statute. (§ 5908.5.) In addition, an exercise of that power even without deliberate intent usurps the authority conferred to the members of the Appeals Board by the Governor and the Legislature under sections 111, 112, 113, and 115.

Here, the WCJ received the petition for reconsideration and failed to complete a report and transmit the petition for reconsideration to the Appeals Board during the 60-day period that the Appeals Board had to act on the petition. In effect, **the WCJ denied reconsideration of their own decision.**

This violates section 5908.5, which states:

Any decision of the appeals board granting or denying a petition for reconsideration or affirming, rescinding, altering, or amending the original findings, order, decision, or award following reconsideration shall be made by the appeals board **and not by a workers’ compensation judge** and shall be in writing, signed by a majority of the appeals board members assigned thereto, and shall state the evidence relied upon and specify in detail the reasons for the decision.

(§ 5908.5 (emphasis added).)

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<sup>10</sup> In many instances, the DWC district office is incorrectly referred to as a district office of the Workers’ Compensation Appeals Board. To be clear, that is not the case. The district office is part of the DWC, and not the Appeals Board.

Moreover, denial by operation of section 5909 further violated the requirement that the Appeals Board state the evidence relied upon and specify in detail the reasons for the decision.<sup>11</sup>

The statutes in this case create an impossible situation. A grant of reconsideration beyond 60 days violates section 5909, but a denial of reconsideration by a WCJ violates section 5908.5. If it is determined that the Appeals Board exceeded its jurisdiction by the order granting reconsideration, it is just as likely that the denial of reconsideration exceeded jurisdiction. When faced with such an impossible situation, it is incumbent to apply principles of equity, especially given the constitutional mandate to accomplish substantial justice, which requires a hearing on the merits in keeping with due process. Under the facts of this case, the only reasonable conclusion is that the time for the Appeals Board to act on a petition for reconsideration is equitably tolled until it becomes aware of the petition.

A trial judge cannot deny an appeal of their own decision by failing to transmit the appeal when the members of the Appeals Board are the only individuals that are statutorily authorized to act on the petition. (See Lab. Code, §§ 111, 112, 113, 115.) Moreover, it is axiomatic that the only way

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<sup>11</sup> The Supreme Court previously addressed the interplay of sections 5908.5 and 5909 in *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627. *LeVesque* contains equivocal language as to whether the Appeals Board is permitted to issue a pocket denial under section 5909, and thus, violate the terms of 5908.5. However, *LeVesque* ultimately held that: “. . . if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision.” (*Id.* at p. 635.)

that the Appeals Board can act on the petition for reconsideration is by receipt and review of the petition by the members of the Appeals Board.<sup>12</sup>

**II. Traditional mandate cannot be applied in this case because a plain, speedy, and adequate remedy exists (writ of review), and because traditional mandate cannot be used to compel the exercise of discretion of the lower court on the issue of equitable tolling.**

The *Mayor* decision issued a peremptory writ of mandate and rescinded the Appeals Board’s August 2023 order granting reconsideration because it was “in excess of its jurisdiction[.]” (*Mayor, supra*, 104 Cal.App.5th at pp. 722-723.) Traditional mandate may only issue where there is not “a plain, speedy, and adequate remedy, in the ordinary course of law.” (Code Civ. Proc., § 1086.) Pursuant to Code of Civil Procedure section 1068, a writ of review is the proper avenue for relief where a party alleges that an order of the Appeals Board issued in excess of jurisdiction. (Code Civ. Proc., § 1068.)<sup>13</sup> Thus, if section 5909 is nonjurisdictional, then the Court of Appeal exceeded its jurisdiction in granting a writ of mandate.

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<sup>12</sup> Pursuant to its statutory authority in section 5301, the Appeals Board must conduct de novo review as to the merits of the petition and may order the “taking of further evidence.” (§§ 5906, 5908; see §§ 5315, 5701, 5911.) In other words, the Appeals Board is the final forum where a party in a workers’ compensation case may obtain a full merits review of the entire proceedings in their case.

In contrast, appellate review is limited to review of the record certified by the Appeals Board. (§ 5951.) 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.” (§ 5952.)

<sup>13</sup> (a) A writ of review may be granted by any court when an inferior tribunal, board, or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy. (Code Civ. Proc., § 1068, (emphasis added).)

Here, the *Mayor* court found that the August 2023 grant constituted a final order.<sup>14</sup> (*Id.* at 725.) *A petition for writ of review is the proper avenue of relief from final orders of the Appeals Board.* (§§ 5950, 5901.) But, such petitions must be filed within 45 days of the order issuing. (§§ 5950, 5901.) If the August 14, 2023 order granting reconsideration is a final order, then petitioner should have filed a petition for writ of review within 45 days, that is, on *September 30, 2023*. Instead, petitioner waited until *January 10, 2024* to file a petition for writ of mandate. “[W]hen a direct avenue of attack (such as appeal) is available, collateral attack on a judgment ‘in excess of jurisdiction’ is seldom, if ever, allowed.” (*Law Offices of Stanley J. Bell v. Shine, Browne & Diamond* (1995) 36 Cal.App.4th 1011, 1023.)

It may be that the decision confuses traditional mandate with administrative mandate. Only traditional mandate applies to the Appeals Board. (§ 5955; Code of Civ. Proc., § 1085.) Administrative mandate does not apply to the Appeals Board. (*Greener v. Workers’ Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1046.) Administrative mandate expressly allows a court to review whether a lower court exceeded its jurisdiction. (Code Civ. Proc., § 1094.5 [administrative mandate] “(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction[.]”.)

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<sup>14</sup> The Appeals Board does not concede that the August 2023 grant was a final order. However, if it is determined to be a final order, then *Mayor* should have addressed petitioner’s failure to timely seek writ of review. If the August 2023 order was a non-final order, as the Appeals Board contends, the appropriate course of action was to dismiss the January 2024 petition for mandate as not ripe for adjudication. Then, upon issuance of the Appeals Board’s February 2024 Decision, petitioner could have filed for writ of review. It would certainly appear to be within the court’s authority to treat the premature petition for writ of mandate as one seeking review and continue to decide the merits. However, this is only possible if the August 2023 grant was a non-final order.

Traditional mandate could be used to strike orders in excess of jurisdiction in some cases; however, that is only in cases where there is not “a plain, speedy, and adequate remedy, in the ordinary course of law.” (Code Civ. Proc., § 1086.) Given the expressed statutory remedy in the Labor Code for writ of review, writ of mandate is not available in this case.

Finally, if section 5909 is subject to equitable tolling, then *Mayor* was incorrect in stating that the Appeals Board had no discretion to find equitable tolling. A writ of mandate is improper as it cannot be used to compel a court to exercise its discretion in a particular manner or to achieve a particular result. (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd.* (2016) 248 Cal.App.4th 349, 370.) Here, the *Mayor* court exceeded its jurisdiction when it usurped the Appeals Board’s statutory role as the finder of fact and dictated the manner in which the Appeals Board could exercise its broad equitable powers to equitably toll the statute.

Accordingly, the *Mayor* court erred in finding that it had jurisdiction to issue a peremptory writ of mandate, which effectively permitted petitioner to collaterally attack the August 2023 order granting reconsideration well beyond the 45-day time limit for writ of review and compelled the Appeals Board to act in a particular manner.

## CONCLUSION

*Mayor* suggests that the parties should have known to seek review from a deemed denied order. While here the parties are represented, the Appeals Board frequently deals with self-represented, unsophisticated litigants. Requiring such litigants to understand their obligation to seek appellate review when a petition for reconsideration is denied by inaction and without notice is manifestly unjust, especially when the Appeals Board has subsequently acted to grant the petition, and thereby signaled to the

parties that it has assumed jurisdiction and will issue a final decision on the merits.

Section 5909 is nonjurisdictional, and the statute contains no language restricting the Appeals Board's jurisdiction to act after 60 days. The statute's history presumes that the Appeals Board is able to review the petition for reconsideration before acting upon it. Finding the statute jurisdictional would open the door to collateral attack of every similar decision of the Appeals Board, without time limit.

Ever since the Supreme Court's decisions in *Allied Compensation Ins. Co., supra*, 57 Cal.2d at p. 120 and *LeVesque, supra*, 1 Cal.3d at p. 635, the Appeals Board has abided by section 5908.5, and at a minimum three members have reviewed the file, achieved a substantial understanding of the issues presented, and provided reasons for granting or denying reconsideration, which may be accomplished by adopting and incorporating the report of the WCJ. Now, *Mayor* implies that the Appeals Board may ignore the requirements of section 5908.5 in denying reconsideration by operation of law. This does not comport with prior rulings of the Supreme Court.

The WCJ failed to draft a report and transmit the petition for reconsideration. The Appeals Board was not aware of the petition until after its time to act expired. In effect, the WCJ denied an appeal from their own decision. When the Constitution commands that the Appeals Board accomplish substantial justice (not average justice) there must be a remedy to correct such an egregious violation of due process, and that remedy is equitable tolling. All statutes are presumed to allow equitable tolling unless expressed language precludes it. No such express language exists in section 5909, and therefore section 5909 is subject to equitable tolling. Finally, for

the reasons stated above, the facts of this case clearly warrant the exercise of tolling.

Further, because section 5909 is nonjurisdictional, the *Mayor* court exceeded its jurisdiction in granting a writ of mandate, instead of writ of review. Accordingly, the Court of Appeal should not have permitted a collateral attack upon the order via mandate months after the period to seek writ review had passed.

A writ of mandate may not be used to compel the lower court to exercise its discretion in a particular manner. If section 5909 is subject to equitable tolling, it is for the Appeals Board to decide whether to apply such tolling, and the court may not mandate how the Appeals Board decides the issue. Of course, the court may review the Appeals Board's decision, but only if the parties timely seek review within 45 days of an order granting reconsideration under the clear procedures enshrined in the Labor Code.

For these reasons, the Appeals Board respectfully requests that the Supreme Court grant review to resolve the split of authority as to the Appeals Board's jurisdiction and to review whether the Court of Appeal exceeded its jurisdiction in granting a writ of traditional mandate.

Date: October 7, 2024

Respectfully submitted,  
ANNE SCHMITZ, State Bar No. 166664  
ERIC D. LEDGER, State Bar No. 273423  
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By /s/ \_\_\_\_\_  
ANNE SCHMITZ  
Secretary  
Workers' Compensation Appeals Board



**ATTACHMENT A**

Filed 8/28/24

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JOSEPH MAYOR,

Petitioner,

v.

WORKERS'  
COMPENSATION APPEALS  
BOARD,

Respondent;

ROSS VALLEY SANITATION  
DISTRICT,

Real Party in Interest.

A169465

(WCAB Case No.  
ADJ10036954)

Joseph Mayor seeks a writ of mandate directing the Workers' Compensation Appeals Board (Board) to rescind its order granting Ross Valley Sanitation District's (Ross Valley) petition for reconsideration of an award of permanent disability. When Ross Valley's petition was before the Board, former section 5909 of the Labor Code<sup>1</sup> (Stats. 1992, ch. 1226, § 5, p. 5766) (former section 5909) stated, "A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date of filing." The Board issued its order more than 60 days after Ross Valley filed its

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<sup>1</sup> Undesignated statutory citations are to the Labor Code.

petition. We agree with Mayor and the recent decision in *Zurich American Ins. Co. v. Workers' Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213 (*Zurich*) that the Board's action after 60 days exceeded its jurisdiction. While this appeal was pending, the Legislature amended section 5909 so that the 60-day deadline now starts when the Board receives the case file, not when the petition for reconsideration is filed. This amendment at once implicitly confirms *Zurich's* interpretation of the former statute and puts to rest the Board's concerns about the consequences of that interpretation for the future. We will therefore grant Mayor's petition and issue the requested writ of mandate.

### **BACKGROUND**

On March 2, 2023, a workers' compensation administrative law judge (WCJ) issued an award of total permanent disability in favor of Mayor based on an industrial injury he suffered in December 2013 during his employment by Ross Valley.

Ross Valley filed a petition for reconsideration with the Board on March 23, 2023. The Board's electronic filing system, Electronic Adjudication Management System (EAMS), showed it was received the same day. Mayor filed his answer to the petition on April 3, 2023.

At the time, former section 5909 stated, "A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date of filing." (Stats. 1992, ch. 1226, § 5, p. 5766.) On June 5, 2023, 74 days after Ross Valley filed its petition, Ross Valley wrote to the

Board, inquiring about the status of its petition and noting that it had been more than 60 days since Ross Valley had filed it.

On July 19, 2023, Mayor requested a hearing to enforce the WCJ's award.

On August 14, 2023, 144 days after Ross Valley filed its petition, the Board issued a document titled, "Opinion and Order Granting Petition for Reconsideration."<sup>2</sup> Attached to the Board's order granting reconsideration was a document titled, "Notice Pursuant to *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493]." This notice states, "Reconsideration has been sought with regard to the decision filed on March 2, 2023. Labor Code section 5909 provides that a petition for reconsideration is deemed denied unless the Workers' Compensation Appeals Board (Appeals Board) acts on the petition within 60 days of filing. (Lab. Code, § 5909.) The petition(s) was filed on March 23, 2023. The Appeals Board first received notice of the petition(s) on or about June 15, 2023. (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493] [allowing tolling as a matter of due process.]) The Opinion and Order Granting Petition for Reconsideration filed simultaneously with this Notice may be considered timely if issued within 60 days of the Appeals Board receiving notice of the petition(s). (*Id.*)"

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<sup>2</sup> We have omitted capitalization and boldface from all quotations from the board's orders in this case.

Mayor wrote to the Board in September 2023, asking it to clarify why it first received notice of the petition on June 15, 2023, when Ross Valley filed it on March 23, 2023.

After receiving no reply, Mayor filed his petition for writ of mandate on January 9, 2024, asking us to direct the Board to rescind its order granting reconsideration because former section 5909 dictated that the Board lost jurisdiction over the matter 60 days after Ross Valley filed its petition for reconsideration. On January 26, 2024, the Board issued a document titled, “Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration.” The Board then reconsidered and rescinded that order and issued a revised version on February 2, 2024. The revised order stated that the Board was rescinding the WCJ’s award and returning the matter to the trial level for further proceedings.

According to the revised order, “due to an administrative irregularity” that was not the fault of either party, the Board did not receive Ross Valley’s petition for reconsideration until more than 60 days after the date Ross Valley filed it, March 23, 2023. EAMS, which the Board does not control, does not give the Board direct notification of filings.<sup>3</sup> Instead, the staff of the district

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<sup>3</sup> According to a recent Board decision in another case, the Administrative Director of the Division of Workers’ Compensation is responsible for the EAMS software. (*Scheuing v. Lawrence Livermore National Laboratory* (2024) 89 Cal.Comp.Cases 325, 332; see also § 111 [Board “shall exercise all judicial powers vested in it under this code. In all other respects, the Division of Workers’ Compensation is under the control of the administrative director”].)

office must manually notify the Board that a party is requesting reconsideration and transmit the case to the Board. Mistakes and delays from “normal human error” can thwart the manual transmission of information from the district offices to the Board. When this occurred, the Board’s practice was to treat the 60-day deadline in former section 5909 as tolled and issue a decision on the petition within 60 days of receipt of the petition. The Board’s order stated that Ross Valley secured a statutory right to reconsideration upon timely filing its petition for reconsideration, so its conduct “is not and should not be at issue.”

We issued an order to show cause why Mayor’s petition should not be granted. The Board attached to one of its filings a copy of its February 2024 order.

While Mayor’s petition was pending in this court, the Legislature enacted Assembly Bill No. 171 (2023–2024 Reg. Sess.) (Assembly Bill 171), which amended former section 5909. (Stats. 2024, ch. 52, § 27.) Section 5909 now states, “(a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board. [¶] (b)(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board. [¶] (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice. [¶] (c) This section shall remain in effect only until July 1, 2026, and as of that date is repealed.”

The former version of section 5909 is currently set to be reinstated on July 1, 2026. (Stats. 2024, ch. 52, § 28.)<sup>4</sup>

## DISCUSSION

### I. Workers' compensation system and standard of review

The Board is a court of limited jurisdiction authorized by the California Constitution to exercise a portion of the state's judicial power. (Cal. Const., art. XIV, § 4; *Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 970; *Kaiser Co. v. Industrial Acc. Commission* (1952) 109 Cal.App.2d 54, 57–58.) The Board authorizes and empowers WCJs to hear and decide cases. (§§ 27, 5309, 5310, 5313; Cal. Code Regs, tit. 8, § 10330.) “Orders, findings, decisions and awards issued by a workers' compensation judge shall be the orders, findings, decisions and awards of the Workers' Compensation Appeals Board unless reconsideration is granted.” (Cal. Code Regs., tit. 8, § 10330.)

Within 20 days of an order or award by a WCJ, an aggrieved person may petition the Board for reconsideration. (§§ 5900, subd. (a), 5903.) Section 5903 specifies the following exclusive grounds for a petition for reconsideration: (1) the WCJ acted without or in excess of its powers; (2) the order or award was procured by fraud; (3) the evidence does not justify the findings of fact; (4) the petitioner has discovered new evidence that could not have been discovered and produced earlier; and

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<sup>4</sup> We invited the parties to submit supplemental briefing addressing the impact of the amendment.

(5) the findings of fact do not support the order or award. (§ 5903, subds. (a)–(e).) The Board can also grant reconsideration on its own motion within 60 days of the order or award. (§ 5900, subd. (b).)

Within 15 days of the filing of a petition for reconsideration, the WCJ must either prepare a report and recommendation on the petition, rescind the award or order and initiate further proceedings, or rescind the award or order and issue an amended award or order. (Cal. Code Regs., tit. 8, § 10961.)

The Board’s ruling on a petition for reconsideration, as well as any Board decision following reconsideration, must be in writing and specify the evidence relied upon and the reasons for the decision. (§ 5908.5.) If the Board grants reconsideration of a WCJ’s order or award, it can decide the matter on the existing record while resolving conflicts in the evidence and making its own credibility determinations, or it can return the case to the WCJ for further proceedings. (§ 5907; *Rubalcava v. Workers’ Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908.)

Section 5950 allows anyone affected by an order of the Board to file a petition for writ of review in the Court of Appeal or Supreme Court within 45 days of the denial of a petition for reconsideration or the filing of a decision after reconsideration. Judicial review “is limited to determining whether the Board acted ‘without or in excess of its powers’ and whether its decision was unreasonable, not supported by substantial evidence, or procured by fraud.” (*Department of Corrections & Rehabilitation*

*v. Workers' Comp. Appeals Bd.* (2018) 27 Cal.App.5th 607, 617; § 5952.) A court is not permitted “to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.” (§ 5952.) “The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review.” (§ 5953.)

“Unless clearly erroneous, the Board’s interpretation of workers’ compensation laws is entitled to great weight. [Citation.] ‘Nevertheless, issues of statutory interpretation and questions of law are subject to our independent review, and we need not defer to the [Board’s] legal determinations where they are contrary to the plain meaning of the statute or prevailing case law.’ [Citation.] When the statutory language is clear and unambiguous, there is no room for the Board’s interpretation.” (*Department of Corrections & Rehabilitation v. Workers’ Comp. Appeals Bd.*, *supra*, 27 Cal.App.5th at p. 617.)

## **II. The Board’s Jurisdiction to Order Reconsideration**

### ***A. Legal background and Zurich***

Mayor argues that when the Board failed to act on Ross Valley’s petition for 60 days, former section 5909 dictated that it was denied by operation of law. According to Mayor, the Board’s attempt to grant the petition on August 14, 2023, 144 days after it was filed, was therefore in excess of its jurisdiction and must be set aside. *Zurich* recently accepted this argument in factual and procedural circumstances essentially identical to those here, and Mayor urges us to follow it. The Board, conversely, seeks to minimize, distinguish, or refute *Zurich*’s reasoning on a variety of

grounds. Because *Zurich* is central to the parties' arguments, we begin by reviewing it and the legal principles it applied.

Statutory deadlines are either mandatory or directory. (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 340 (*Kabran*)). "Whether a requirement is mandatory or directory is determined largely by its effect: 'If the failure to comply with a particular procedural step does not invalidate the action ultimately taken, . . . the procedural requirement is referred to as "directory." If, on the other hand, it is concluded that noncompliance does invalidate subsequent action, the requirement is deemed "mandatory." ' " (*Ibid.*; *People v. Allen* (2007) 42 Cal.4th 91, 101 [directory statute can be enforced in ways other than invalidation of noncompliant action, " 'such as injunctive relief, mandamus, or monetary damages' "].)

Mandatory deadlines can be further classified depending on how a violation of the deadline affects a court's jurisdiction. Violations of some statutes affect a court's fundamental jurisdiction in the sense of entirely depriving the court of power to hear or determine the case or authority over the subject matter. (*Law Finance Group, LLC v. Key* (2023) 14 Cal.5th 932, 949; see *Zurich, supra*, 97 Cal.App.5th at pp. 1226–1227.) Actions in violation of these statutes are void and can be challenged for the first time on appeal or at any time by collateral attack. (*Kabran, supra*, 2 Cal.5th at p. 339.) Equitable doctrines cannot excuse the failure to comply with such deadlines. (*Law Finance Group*, at p. 950.) Other mandatory deadlines are jurisdictional in the sense that an action in violation can be set

aside, but the action “is ‘valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time.’ ” (*Kabran*, at p. 340; accord, *Law Finance Group*, at pp. 951–952.) Because of the harsh consequences of depriving a court of fundamental jurisdiction, the courts presume that statutes do not limit courts’ fundamental jurisdiction absent a clear indication of legislative intent. (*Law Finance Group*, at p. 950.)

In *Zurich*, the Board granted a petition for reconsideration more than nine months after it was filed. (*Zurich*, *supra*, 97 Cal.App.5th at p. 1224.) The opposing party filed a petition for writ of mandate challenging the order on jurisdictional grounds. (*Id.* at p. 1226.) *Zurich* first concluded that the litigant’s jurisdictional argument was “the proper subject of writ relief because the question involves statutory interpretation, not administrative discretion.” (*Ibid.*) *Zurich* also noted that the petition did not challenge the merits of the Board’s decision to grant reconsideration, merely its authority to rule on the petition once it was deemed denied under former section 5909. (*Zurich*, at p. 1226.) In *Zurich*’s view, the party opposing reconsideration “lacked an adequate remedy at law if it had to wait for the conclusion of a void procedure to seek relief in this court.” (*Ibid.*)

On the merits, *Zurich* held that former section 5909 was mandatory and actions in violation of it were in excess of the Board’s jurisdiction because it established a 60-day deadline and imposed the consequence that if the Board did not act by the deadline the petition was “deemed to have been denied.” (Former

§ 5909; *Zurich, supra*, 97 Cal.App.5th at pp. 1230–1231.) *Zurich* noted that the Supreme Court had held that the Legislature’s imposition of a consequence or penalty indicates an intent to make a deadline jurisdictional in either sense of the term. (*Id.* at p. 1231, citing *Kabran, supra*, 2 Cal.5th at p. 344.)

*Zurich* also relied on the California Constitution’s statement of the purpose of the workers’ compensation system, which is to “accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character.” (Cal. Const., art. XIV, § 4; see *Zurich, supra*, 97 Cal.App.5th at p. 1232.) The *Zurich* court found that a report by the Board’s predecessor entity, the Industrial Accident Commission, shortly after the creation of the current workers’ compensation system, elaborated on this purpose. (*Zurich*, at pp. 1233–1234.) That report explained, “It is better for the state and for the people of the state that what may be termed “average justice” shall be speedily and inexpensively administered than exact justice shall be striven for at a cost that, in many cases, would consume the entire amount involved and leave the applicant indebted for costs and expenses besides. [¶] . . . In short, it is the purpose of the Commission to afford an object lesson as to how to determine issues of minor consequence with reasonable certainty and without delay or burdensome expenditure.” (*Ibid.*) From these authorities, *Zurich* concluded the Legislature established former section 5909 to effectuate the purpose of ensuring that workers’ compensation cases do not consume too much time or leave claimants in debt. (*Zurich*, at

pp. 1234–1235.) *Zurich* also noted that if former section 5909 did not terminate the Board’s jurisdiction, aggrieved parties would not know when the 45-day deadline in section 5950 began to run for filing a petition for judicial review. (*Id.* at p. 1235.)

*Zurich* recognized that the Board relied on *Shiple v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 (*Shiple*). (*Zurich, supra*, 97 Cal.App.5th at p. 1237.) In that case, a petitioner timely filed a petition for reconsideration and was told before the 60-day deadline had passed that the file had been misplaced. (*Shiple, supra*, 7 Cal.App.4th at p. 1106.) The petitioner made multiple inquiries over the course of many months and was eventually allowed to reconstruct a duplicate of the file. (*Id.* at pp. 1106–1107.) After the reconstructed file was sent to the Board’s rehearing unit and over a year after the petitioner filed the petition for reconsideration, the Board issued an order stating the petition had been denied by operation of law under former section 5909. (*Shiple*, at p. 1107.)

*Shiple* reversed this denial, explaining that while the language of former 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.” (*Shiple, supra*, 7 Cal.App.4th at p. 1107.) The court emphasized that the petitioner’s file was lost “through no fault of his own and due to circumstances entirely beyond his control.” (*Ibid.*) The court did not believe the Legislature wrote former section 5909 to cover such gaffes. (*Shiple*, at p. 1107.)

*Shipley* noted that the petitioner had made “inquiries and received reassurances from the board that his petition would be considered either after his file was found or after he reconstructed a duplicate file” and concluded that “[a]llowing the board to subsequently deny the petition by operation of law under [former] section 5909 makes no sense.” (*Id.* at p. 1108.) The court concluded the petitioner’s statutory right to reconsideration by the Board could not “be denied him without due process. Any other result offends not only elementary due process principles but common sensibilities. [The petitioner] is entitled to the board’s review of his petition and its decision on its merits.” (*Ibid.*)

*Zurich* disagreed with *Shipley* that a petitioner had a due process right to reconsideration by the Board after 60 days, given former section 5909’s clear language and the fact that a petitioner could still seek judicial review after the denial of a petition by operation of law. (*Zurich, supra*, 97 Cal.App.5th at p. 1237.) *Zurich* concluded that even if *Shipley* could be read more narrowly to allow a form of equitable tolling, it did not support the Board’s contention that it could extend the former section 5909 deadline “any time the Board fails to act due to deficiencies in the administrative process.” (*Zurich*, at p. 1237.) *Zurich* contrasted the facts before it with the facts of *Shipley*, in that the petitioner in *Zurich* had made no inquiries of the Board and was not lulled or deceived like in *Shipley*. (*Id.* at pp. 1238–1239.) *Zurich* also emphasized that unlike in *Shipley*, the Board had not deprived the petitioner of the opportunity to petition the

Court of Appeal or Supreme Court for judicial review. (*Id.* at p. 1239–1240.)

*Zurich* was not swayed by the Board’s argument that judicial review was a statutorily inadequate substitute for reconsideration in that the Board and not the courts can take additional evidence and make credibility findings. (*Zurich, supra*, 97 Cal.App.5th at p. 1239, fn. 21.) *Zurich* surmised that the Legislature must have been aware that judicial review was more limited than reconsideration but nonetheless specified that a petition for reconsideration is denied if the Board does not act on it within 60 days. (*Ibid.*) *Zurich* also recognized that its refusal to allow the Board to reconsider the award in that case deprived the petitioner of judicial review, since the deadline to file a petition for review in the courts had lapsed. (*Id.* at p. 1239 & fn. 22.) But *Zurich* said it was objectively unreasonable to miss the readily calculable deadlines. (*Id.* at p. 1239, fn. 22.) *Zurich* also pointed out that former section 5909 protected the interests of parties opposing reconsideration, who had legitimate interests in finality and expeditious proceedings. (*Zurich*, at p. 1240.)

***B. Board’s attacks on Zurich***

For the reasons *Zurich* set forth at length, we agree with Mayor that former section 5909 was mandatory and the Board exceeded its jurisdiction in purporting to grant Ross Valley’s petition after 60 days had passed since Ross Valley filed it. The Board’s various attempts to avoid or defeat *Zurich*’s reasoning are unpersuasive.

## 1. Propriety of Writ Relief

As it did in *Zurich*, the Board preliminarily argues that this is not a proper case for writ relief. Section 5955 allows the Courts of Appeal to issue a writ of mandate in “all proper cases,” meaning all cases in which mandamus is available under Code of Civil Procedure section 1085. (§ 5955; *Greener v. Workers’ Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1046.) “The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law.” (Code Civ. Proc., § 1086.) But “ ‘mandamus may not be available to compel the exercise by a court or officer of the discretion possessed by them in a particular manner, or to reach a particular result.’ ” (*State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd.* (2016) 248 Cal.App.4th 349, 370.)

The Board complains that Mayor is seeking to compel it to exercise its *Shiple* tolling in a particular manner. But the Board’s grant of Ross Valley’s petition did not depend on any exercise of discretion. The Board’s position, as stated in its February 2024 order granting reconsideration and decision after reconsideration, is that Ross Valley secured a right to reconsideration merely by timely filing a petition, without needing to satisfy any other factual requirements. As the Board put it, Ross Valley’s “conduct is not and should not be at issue.” The Board’s decision to grant Ross Valley’s petition was based on its view of workers’ compensation litigants’ statutory and constitutional rights, not a discretionary weighing of equitable considerations.

The Board further argues that writ relief is premature because its August 2023 order was not an order granting Ross Valley’s petition for reconsideration or a final order determining jurisdiction, but rather a non-final grant of reconsideration to allow it to determine its jurisdiction. (See *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 303 [until a tribunal “determines that it has jurisdiction and does some act in consequence, there can be no injury to the party who denies its jurisdiction” and “no interference is permitted until it does decide the matter one way or the other”].) The Board’s August 2023 order belies this argument, since the title of the order is “Opinion and Order *Granting Petition* for Reconsideration.” (Italics added.) The Board’s February 2024 order is similarly titled, “Opinion and Order *Granting Petition* for Reconsideration and Decision After Reconsideration.” (Italics added.) In that order, the Board not only asserted jurisdiction but proceeded to rule on the merits. Writ relief is not premature.

Finally, the Board contends writ review is unnecessary because Mayor has an adequate remedy in the ordinary course of law in the form of judicial review after the further proceedings called for in the Board’s February 2024 decision after reconsideration. But as *Zurich* noted in rejecting the same argument, Mayor’s argument is that former section 5909 protected his right to an expeditious end to workers’ compensation proceedings. That right would be meaningless if Mayor were forced to wait to enforce it for months or years until the conclusion of further proceedings. (*Zurich, supra*,

97 Cal.App.5th at p. 1226.) Moreover, the facts and legal arguments surrounding this issue are fully developed. There is nothing to be gained from delaying consideration of this issue until after a WCJ or the Board issues yet another decision. (Cf. *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1255 [“courts have recognized that permitting early appellate review to resolve certain ‘threshold issues’ may enhance rather than detract from the expeditious resolution of workers’ compensation claims”].)

## 2. Distinguishing *Zurich*

The Board next seeks to minimize and distinguish *Zurich*, emphasizing that *Zurich* did not hold that former section 5909 implicated the Board’s fundamental jurisdiction. The Board argues that *Zurich* therefore is not inconsistent with *Shipley*’s holding that equitable considerations can excuse a grant of a petition for reconsideration after the former 60-day cutoff.<sup>5</sup> The Board asserts that *Shipley* was the only controlling authority on point that it had to follow.

The Board’s description of *Zurich* is inaccurate and incomplete. *Zurich* did decline to categorize violations of former

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<sup>5</sup> The Board briefly cites *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22, which cited *Shipley* for the proposition that “[i]rregularity which deprives reconsideration under the statutory scheme denies due process.” However, *Rea* was discussing whether the Board could grant reconsideration on its own motion even if a party had not timely filed a petition for reconsideration. (*Ibid.*) It did not uphold a grant of a petition for reconsideration after 60 days, so we need not discuss it. We also need not discuss unpublished Court of Appeal decisions that the Board cites.

section 5909 as depriving the Board of fundamental jurisdiction or merely exceeding the Board’s jurisdiction, and it assumed that *Shiple*y correctly decided that equitable considerations could avoid the running of the former section 5909 deadline. (*Zurich*, *supra*, 97 Cal.App.5th at pp. 1236, fn. 17, 1238–1240.) But *Zurich* explicitly “disagree[d] with the conclusion in *Shiple*y that a petitioner ha[d] a due process right to review by the Board of a petition for reconsideration even after 60 days has passed.” (*Id.* at p. 1237.) *Zurich* therefore rejected the Board’s position that *Shiple*y allowed it to extend the former section 5909 deadline “any time the Board fail[ed] to act due to deficiencies in the administrative process.” (*Zurich*, at p. 1237.) *Zurich* essentially limited *Shiple*y to its facts and read it as allowing equitable tolling only when the Board misled a diligent petitioner into missing the deadline for judicial review. (*Id.* at pp. 1238–1239 & fns. 19, 22.) The Board here maintains the same view of *Shiple*y and due process that it advanced in *Zurich*, so the two cases represent a split of authority and *Zurich* is not distinguishable. The facts here are also like *Zurich*, not *Shiple*y, since there is no suggestion that the Board here misled Ross Valley into disregarding the deadline for judicial review.<sup>6</sup>

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<sup>6</sup> *Zurich* noted that *Shiple*y did not mention equitable tolling or other equitable principles but did mention the unfairness of denying the petitioner’s petition. (*Zurich*, *supra*, 97 Cal.App.5th at p. 1237, fn. 18.) Like *Zurich*, we question whether *Shiple*y can be read as a case giving the board *discretion* to toll the former section 5909 deadline, rather than a case *requiring* the board to disregard former section 5909 because of due process. However, like *Zurich* we need not resolve the issue.

### 3. Statutory interpretation and practical considerations

The Board offers several reasons why it believes *Zurich* misconstrued former section 5909, its role in the workers' compensation system, and the legislative history and intent behind the relevant statutes. In brief, the Board contends that former section 5909 was directory, the Legislature could not have intended to cut off the Board's ability to consider petitions for reconsideration after 60 days, the Board lacked statutory authority to use former section 5909 to deny petitions for reconsideration, and judicial review is a statutorily inadequate substitute for Board reconsideration. (See *Kabran, supra*, 2 Cal.5th at p. 340 [a requirement is directory " '[i]f the failure to comply with a particular procedural step does not invalidate the action ultimately taken' "].) The Board further argues that the practical consequence of treating former section 5909 as mandatory will be a "time-consuming and expensive procedural roundabout" in which a party whose petition for reconsideration is deemed denied under former section 5909 files a petition for review in the courts to have the case remanded to the Board for consideration of the merits of the petition for reconsideration.

We need not address these arguments in detail, for two independent reasons. First, the Board raised many of the same arguments in *Zurich*, and *Zurich* already explained why those

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Even if *Shiple*y can be read as an equitable considerations case, as the Board argues, the facts here are more like *Zurich* than *Shiple*y.

arguments have no merit. (*Zurich, supra*, 97 Cal.App.5th at pp. 1230–1237.) We agree with *Zurich*'s reasoning. Second, Assembly Bill 171 essentially ratified *Zurich*'s interpretation of the governing statutes, thereby rejecting the Board's statutory interpretation arguments, and created a different rule for the immediate future that should avoid the practical consequences the Board fears.

*Zurich* was decided in December 2023. The Legislature enacted Assembly Bill 171 about six months later, with the Governor approving it on July 2, 2024. (Stats. 2024, ch. 52.) It took effect immediately as a bill providing appropriations and relating to the budget bill. (Stats. 2024, ch. 52, §30; see Cal Const., art. IV, § 12(e)(1).) The temporal proximity indicates the Legislature intended to respond to *Zurich*.

The nature of Assembly Bill 171's response to *Zurich* is also significant. When the California Supreme Court has not yet finally interpreted a statute, the Legislature may amend statutes to try to clarify their existing meaning without making any substantive change. (*McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 473.) Although such attempts to declare the existing meaning of a statute are not binding or conclusive on future courts when construing the statute, the courts will consider such enactments. (*Ibid.*)

Here, however, the Legislature did not try to clarify that former section 5909 was not mandatory or that *Zurich* had misconstrued the intent behind the relevant worker's compensation statutes. Instead, the Legislature simply changed

the trigger for the running of the 60-day deadline to have it run from the WCJ's transmission of the case file to the Board. This is a tacit acquiescence to *Zurich's* interpretation of former section 5909's rule as mandatory, since if the deadline was not mandatory and the Board's practice was permissible there would have been no reason to alter the deadline.

Assembly Bill 171's findings reinforce this interpretation. Assembly Bill 171's findings state that staffing emergencies at the Department of Industrial Relations created challenges for the enforcement of labor laws and the hiring emergency could not "immediately and adequately be addressed through standard civil service recruitment practices." (Stats. 2024, ch. 52, § 1.) The Board complained in *Zurich* and another recent case that it needed additional resources to adequately respond to petitions for reconsideration. (*Zurich, supra*, 97 Cal.App.5th at pp. 1224, 1239, fn. 20; *Earley v. Workers' Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1, 11 (*Earley*)). As Mayor argues, Assembly Bill 171's findings therefore indicate that its amendment to former section 5909 was connected to the Board's complaints about inadequate funding. The Legislature's choice to make its change to section 5909 temporary and have it expire on July 1, 2026, corroborates this view of the amendment as a short-term fix to the Board's need for resources to meet former section 5909's deadline, not a repudiation of *Zurich's* interpretation of the nature of that deadline.

The committee and floor analyses of Assembly Bill 171's effects on former section 5909 confirm that the Legislature

understood it was making substantive modifications to the law to avoid *Zurich*'s effects, not disagreeing with *Zurich*'s analysis. (See Sen. Com. on Budget and Fiscal Review, Rep. on Assem. Bill 171 June 22, 2024, p. 1 [bill “modifies procedures by which the appeals board must act on a petition for reconsideration”]; Sen. Floor Analysis of Assem. Bill 171 June 26, 2024, p. 2 [same]; Assem. Floor Analysis of Assem. Bill 171 June 26, 2024, p. 1 [“Existing law provides that . . . a petition for reconsideration is automatically considered denied if the WCAB does not to [*sic*] take action within 60 days from the date the petition was filed.” The bill “would instead deem a petition for reconsideration to have been denied by the WCAB unless it is acted upon by the appeals board within 60 days from the date a trial judge transmits a case to the appeals board”].)<sup>7</sup> Additionally, nothing

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<sup>7</sup> We grant the Board's request for judicial notice of the statutory evolution of the workers' compensation system, including the legislative committee and Legislative Counsel reports on the various bills that amended the relevant statutes. None of these materials demonstrates any flaws in *Zurich*'s conclusion that former section 5909 reflects and effectuates the Legislature's intent that the workers' compensation system achieve substantial justice expeditiously, especially in light of the Legislature's acquiescence in that interpretation. We deny the Board's request for judicial notice of the remaining materials attached to its request, such as various letters and memoranda urging the Governor to sign or veto those bills, letters to individual legislators, the Governor's press release when signing a bill, or news articles about a bill. Those documents do not constitute proper legislative history materials because there is no indication they were communicated to the Legislature as a whole. (See *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 37–39.)

in the text or history of Assembly Bill 171 suggests the Legislature intended the amended statute to cure lapses of the deadline retroactively, assuming that is even permissible. (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 936 [“New statutes are presumed to operate only prospectively absent some clear indication that the Legislature intended otherwise”].) *Zurich’s* interpretation of former section 5909 therefore governs this case.

For future cases, the new trigger for the deadline gives the Board the additional time to act on petitions review that it says it needs to resolve normal human errors or administrative irregularities. (*Zurich, supra*, 97 Cal.App.5th at pp. 1224–1225.) The Board’s concerns about the implications of *Zurich’s* reasoning and the need for procedural workarounds to resolve complications it creates are therefore groundless, to the extent they ever had any validity. The changes to former section 5909 are currently set to expire in July 2026, but the Legislature’s prompt response to the Board’s concerns should reassure the Board that the Legislature will continue to monitor the issue and address it again if it persists.

#### **4. Due process**

The Board also seeks to rebut *Zurich’s* analysis of former section 5909 by noting that as a court it is bound by the state and federal constitutions to provide due process. The Board asserts that parties have a due process right to a ruling by the Board on the merits of a petition for reconsideration. Though it does not say so in so many words, the upshot of this argument is that

former section 5909's "deemed to have been denied" provision is unconstitutional as *Zurich* interpreted it.

The Board relies on *Shiple*, *supra*, 7 Cal.App.4th at page 1107, which stated that former section 5909's deadline "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." The Board insists that it would violate due process for a litigant's petition for reconsideration to be denied without the Board even considering it. As it did in *Zurich*, the Board finally complains that judicial review is not a constitutionally adequate substitute for reconsideration by the Board, since the scope of judicial review is more limited than the complete reconsideration the Board can provide.

It would certainly be preferable for the Board to bring its expertise to bear on every litigant's case, with no exceptions. However, like *Shiple*, the Board fails to reckon with the fact that the workers' compensation system is intended to provide substantial justice quickly and expeditiously, not duplicate the formality of the courts. (*Zurich, supra*, 97 Cal.App.5th at pp. 1232–1234; see §§ 5708 [the Board and WCJs "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division"], 5709 ["No informality in any proceeding or in the manner of taking testimony shall invalidate

any order, decision, award, or rule made and filed as specified in this division”].) Nor did *Shipley* consider, as *Zurich* did, the interest of the opposing party in avoiding protracted proceedings. (*Zurich*, at p. 1240.) Given the goal of average or substantial, but expeditious, justice in workers’ compensation proceedings, opposing parties need not subordinate their rights to prompt resolution of disputes to accommodate open-ended delays that the Board claims are necessary for it to rule on petitions for reconsideration. As the Board itself notes, “reconsideration fulfills substantially the same function as the new trial in civil proceedings.” (*United States Pipe & Foundry Co. v. Industrial Acc. Commission* (1962) 201 Cal.App.2d 545, 549.) Due process does not prevent the Legislature from prioritizing the expeditious resolution of workers’ compensation proceedings and opposing parties’ interest in finality, with the possibility of limited judicial review, over what amounts to a request for a new trial and more extensive factual reconsideration by the Board.

### **5. Reliance interests**

The Board protests that *Zurich’s* order that the petition for reconsideration be deemed denied by operation of law was “draconian” and “drastic” because the Board had relied on *Shipley* to toll the former section 5909 deadline for over 30 years. The Board similarly urges us to respect the workers’ compensation community’s reliance on *Shipley* and uphold the Board’s practice of indefinitely tolling the former section 5909 deadline to avoid depriving parties of reconsideration by the Board. But as another court recently remarked about the Board’s

reconsideration practices, “a long-standing and incorrect procedure remains incorrect.” (*Earley, supra*, 94 Cal.App.5th at p. 11.) We cannot ignore former section 5909 and follow *Shipley* here merely because it has been followed in the past.<sup>8</sup>

### DISPOSITION

The petition is granted. A peremptory writ of mandate shall issue directing the Board to rescind its orders granting Ross Valley’s petition for reconsideration and its January 26 and February 2, 2024, opinions and decisions after reconsideration. Because Ross Valley’s petition for reconsideration was denied by operation of law under former section 5909 on May 22, 2023, the WCJ’s award of permanent disability and attorney’s fees issued on March 2, 2023, is now final.

BROWN, P. J.

WE CONCUR:

STREETER, J.  
GOLDMAN, J.

*Mayor v. WCAB* (A169465)

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<sup>8</sup> Because we grant Mayor’s writ petition based on former section 5909, we need not address his alternative argument that the board’s August 2023 grant of reconsideration violated section 5908.5 and *Earley, supra*, 94 Cal.App.5th at pages 10–12 by granting reconsideration for the purposes of further study without explaining why the case warranted further study and identifying the evidence supporting its decision.

Trial court:

Workers' Compensation Appeals Board

Counsel for Petitioner:

SHOEMAKER LAW OFFICES

Elizabeth Hudson

Counsel for and Respondents:

WORKERS' COMPENSATION

APPEALS BOARD

Anne Schmitz

Allison Fairchild

**ATTACHMENT B**

Filed 9/18/24

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JOSEPH MAYOR,  
Petitioner,

v.

WORKERS'  
COMPENSATION APPEALS  
BOARD,

Respondent;  
ROSS VALLEY SANITATION  
DISTRICT,

Real Party in  
Interest.

A169465

(WCAB Case No.  
ADJ10036954)

ORDER MODIFYING  
OPINION AND DENYING  
REHEARING; NO  
CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on August 28, 2024, be modified as follows:

On page 23, a footnote is inserted following the last sentence of the first full paragraph which reads, "The changes to former section 5909 are currently set to expire in July 2026, but the Legislature's prompt response to the Board's concerns should reassure the Board that the Legislature will continue to monitor the issue and address it again if it persists." This new footnote will be "footnote 8," and subsequent footnotes shall be renumbered accordingly. The new footnote 8 reads as follows:

"In a petition for rehearing, the Board makes an offer of proof that changes to section 5909 were recommended before

*Zurich* was decided and were intended to give the Board more time to consider all petitions for reconsideration due to workload issues, not just to avoid the problem of administrative irregularities like the ones in *Zurich* and here. The Board failed to submit any of this in response to our request for supplemental briefing, so we need not consider it. (*Samantha B. v. Aurora Vista Del Mar, LLC* (2022) 77 Cal.App.5th 85, 109.) However, we note that even if the Legislature did not specifically intend to respond to *Zurich*, according to the Board, it did intend to respond to the workload problem that *Zurich* identified. The Legislature also enacted the amendment after *Zurich* and expressed no disagreement with it. (*Blankenship v. Allstate Ins. Co.* (2010) 186 Cal.App.4th 87, 96 [“The Legislature is deemed to be aware of judicial decisions already in existence and to have enacted or amended a statute in light thereof”].) And in any event, even if it was unintentional, in the immediate future the change to section 5909 will avoid the risk of administrative irregularities depriving the Board of jurisdiction to rule on the merits of petitions for reconsideration. We remain confident, given the Legislature’s demonstrated responsiveness to these issues, that the Legislature will take any further action necessary to address the Board’s concerns about the impacts of the section 5909 deadline.”

There is no change in judgment.

The petition for rehearing is denied.

Date: 09/18/2024

Brown, P.J.

P. J.

**ATTACHMENT C**

(d) Indicate that reconsideration is granted (without mention of any restriction) and refer the case back to the hearing calendar for presentation of evidence upon any or all issues;

(e) Take such other action, in connection with the granting of reconsideration, as may be indicated or warranted by the facts or circumstances of the case.<sup>10</sup>

**Redetermination Forthwith**—The Commission may grant a petition for reconsideration and decide the matter forthwith where it appears to its satisfaction that no sufficient reason exists for the taking of further testimony.<sup>11</sup> Such action is usually the means adopted for the correction of palpable errors, particularly those of a mathematical character. It is also used as a means of correcting errors of law and other mistakes where the holding of a further hearing would serve no good purpose. The action taken in such cases is usually denominated as an "order granting reconsideration and decision forthwith."

**Order Granting Reconsideration Pending Further Study**—At times the Commission finds that its action upon a petition for reconsideration will depend upon the securing of certain additional information which is obtainable without need for a hearing. Such a situation may exist where an issue is involved that is under consideration in another case by the appellate court, making it desirable to grant reconsideration and hold the case at large until announcement of the applicable law by the appellate court.<sup>12</sup> Similarly, it may exist where uncertainty in reference to the correct disposition of a case involving the cause or extent of an employee's disability can best be resolved by an examination of the employee by an independent medical examiner or by a physician connected with the Commission. In such a situation, the Commission issues an "order granting reconsideration for the purpose of studying the record", and advises the parties of what it has in mind. Action is then completed by a later "decision after reconsideration".<sup>13</sup>

**Order Granting Reconsideration For Further Proceedings**—Reconsideration will be granted and further proceedings ordered where the case is believed by the Commission to merit further examination.<sup>14</sup> Whether such further proceedings are to be limited in scope will be indicated by the Order Granting Reconsideration. The matter is then returned to the regular calendar and the parties in due course are notified of a hearing date. Seldom are petitions granted with further hearing restricted to one or more issues. Not only are individual petitions usually granted or denied without limitation, but it is the practice, when more than one petition is filed, to treat all similarly. Thus, all petitions may be granted although possibly only one is deemed to have merit. To follow any other course would result in situations where a petitioner was before the appellate court on some points and still before the Commission on others, or where one party was seeking appellate

10. Section 10879 of the Commission's Rules of Practice and Procedure.

11. Labor Code section 5907. See Gold v. I.A.C., 17 I.A.C. 144 (1931); Pennings v. I.A.C., 3 Cal. Comp. Cases 174 (1938).

12. People v. L. A. Shipbldg. & Drydock Co., 8 I.A.C. 231 (1921).

13. This procedure would appear to be authorized by Labor Code section 5907.

14. Labor Code section 5906.

review while another was still pursuing a remedy before the Commission. So many procedural complications flow from granting reconsiderations piecemeal that such a policy is to be avoided in all cases.

**Method Of Handling Reconsideration Petitions**—After receipt and formal filing in the Commission's document register, each petition for reconsideration is ordinarily referred back to the concluding trial referee for review. He is also furnished with the answer to the petition, when it is received, and with any reply which may be filed. After a study of these documents, he prepares a report, together with an appropriate order granting or denying the petition (or other indicated action).<sup>15</sup> The report should show clearly and concisely:

- (a) Age and occupation of the injured and the cause and character of the injury;
- (b) Nature of the decision under attack and the contentions raised by petition for reconsideration;
- (c) Reasons supporting recommendations; and
- (d) Appropriate findings and conclusions and implementing orders.

The referee's recommendations receive the consideration of the panel. If the recommended action meets approval, the proposed order is signed; if unacceptable to the panel, the latter arranges for preparation of an appropriate order or refers the file back to the referee with instructions.

**Time Limits For Action On Petition For Reconsideration**—Action upon a petition for reconsideration may be taken by the Commission within the thirty days succeeding its filing,<sup>16</sup> or within a duly ordered extension of such period.<sup>17</sup> The Commission has power, for good cause, to extend the original period within which it may act for not to exceed an additional thirty days.<sup>18</sup> Such extensions are infrequent, and it is the practice to order them only in cases which are so involved as to require more than the usual period of time for adequate study and consideration of the existing record. Where such an extension becomes necessary, it is made without notice by an appropriate order which is served upon the parties. If no action be taken within thirty days, or within a maximum of sixty days after filing in the event of an extension, the petition is deemed to be denied by operation of law.<sup>19</sup> The Commission, however, is at great pains to act upon each petition and none, by intention at least, is denied by mere lapse of time. The statutory limitation of the Commission's jurisdiction to rescind, alter or amend its decisions within a period of 5 years after the injury is treated as inapplicable to action by the Commission on petitions for reconsideration from any otherwise timely decision.<sup>20</sup>

**Time Limits For Action After Granting Reconsideration**—The thirty-day limitation on action on reconsideration has no application once reconsideration

18. Labor Code section 5909.

19. Labor Code section 5909.

15. Section 10878 of the Commission's Rules of Practice and Procedure.

16. Labor Code section 5909.

17. Labor Code section 5909.

20. *Nomm v. I.A.C.*, 19 I.A.C. 112 (1933).

**PROOF OF SERVICE BY TRUEFILING**

(Code Civ. Proc., § 1010.6; Lab. Code, § 5954; Cal. Rules of Court, Rules 8.70 - 8.79)

STATE OF CALIFORNIA )  
 )ss.  
CITY AND COUNTY OF SAN FRANCISCO )

I am over 18 years of age and not a party to this action. I am employed in the county where the mailing took place. My business address is 455 Golden Gate Avenue, Suite 9328, San Francisco, CA 94102. My electronic name address is AAficial@dir.ca.gov.

On October 7, 2024 at 4:30 P.M., I electronically served the attached RESPONDENT WORKERS’ COMPENSATION APPEALS BOARD’S PETITION FOR REVIEW to the Supreme Court, in the matter of 1st Civil Case No. A169465, Joseph Mayor v. Workers’ Compensation Appeals Board; Ross Valley Sanitation District [WCAB Case No. ADJ10036954], and on the parties registered for electronic service through TrueFiling.

<p><b><u>Court (TrueFiling):</u></b> Charles D. Johnson, Clerk/Executive Officer Court of Appeal First Appellate District, Division Four 350 McAllister Street San Francisco, CA 94102</p>	<p><b><u>Counsel for Petitioner (TrueFiling):</u></b> Elizabeth Common, Esq. <a href="mailto:beth@shoemakerlawoffices.com">beth@shoemakerlawoffices.com</a> Shoemaker Law Offices 150 Glen Cove Marina Rd. E, Ste. 103 Vallejo, CA 94591</p>
<p><b><u>Counsel for Respondent (TrueFiling):</u></b> Christian Parker Kerry, Esq. <a href="mailto:ckerry@hannabrophy.com">ckerry@hannabrophy.com</a> Hanna Brophy MacLean McAleer &amp; Jensen LLP P.O. Box 12488 Oakland, CA 94604-2488</p>	

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed at San Francisco, California on October 7, 2024.

/s/ Annie Riza Afcial

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

Case Name: **Joseph Mayor vs. Workers' Compensation Appeals Board, Ross Valley Sanitation District**

Case Number: **TEMP-H3EORLMD**

Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **ASchmitz@dir.ca.gov**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
ISI_CASE_INIT_FORM_DT	Case Initiation Form
PETITION FOR REVIEW (FEE PREVIOUSLY PAID)	Mayor Petition for Review

Service Recipients:

Person Served	Email Address	Type	Date / Time
Anne Schmitz WCAB Commissioners 166664	ASchmitz@dir.ca.gov	e-Serve	10/7/2024 4:37:49 PM
Eric D. Ledger 273423	EDLedger@dir.ca.gov	e-Serve	10/7/2024 4:37:49 PM
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Christian Parker Kerry 213477	ckerry@hannabrophy.com	e-Serve	10/7/2024 4:37:49 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

10/7/2024

Date

/s/Annie Afcial

Signature

Schmitz, Anne (166664)

Last Name, First Name (PNum)

WCAB Commissioners

Law Firm

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