

S287261

In the
Supreme Court
of the
State of California

Joseph Mayor,
Petitioner,

v.

Workers' Compensation Appeals Board

Respondent and Appellant,

Ross Valley Sanitation District,

Real Party in Interest.

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR
CASE NUMBER A169465

WCAB CASE NUMBER ADJ10036954

HON. THOMAS J. RUSSELL

ANSWER TO PETITION FOR REVIEW

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I. CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

[California Rule of Court 8.208]

Name of Interested Entity or Person	Nature of Interest
Joseph Mayor	Petitioner and Applicant in WCAB Matter
Ross Valley Sanitation District (permissibly self-insured)	Employer and Defendant in WCAB Matter
Athens Administrators	Third Party Administrator and Defendant in WCAB Matter
Workers' Compensation Appeals Board	Respondent and Appellant

Respectfully submitted,

October 25, 2024

/s/ Elizabeth Hudson

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II. CERTIFICATION OF COMPLIANCE

[California Rule of Court 8.204]

I, Elizabeth Hudson, swear that I have read the within ANSWER TO PETITION FOR REVIEW and know the contents thereof; that the brief contains 5,555 words inclusive of tables, signature blocks, and these certificates, based on the automated word count of the computer word-processing program; that the facts stated therein are true and on those grounds allege that such matters are true, except to matters stated on information and belief, and as to those matters I believe them to be true; and that I make such verification because Petitioner is absent from the County where my office is located and is unable to verify the petition, and because as counsel for Petitioner I am more familiar with such facts than is Petitioner.

Sworn under penalty of perjury under the laws of the State of California this 25th day of October 2024 at Vallejo, California.

Respectfully submitted,

/s/ Elizabeth Hudson

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V. ANSWER TO PETITION FOR REVIEW

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

Petitioner Joseph Mayor (“Petitioner”) is in receipt of a Petition for Review filed by Respondent and Appellant Workers’ Compensation Appeals Board (“Appeals Board”) challenging the published decision below.¹ Petitioner hereby submits this Answer in reply, and in support thereof alleges as follows:

VI. GROUNDS FOR REVIEW

Petitioner asserts that there are insufficient grounds for this Court to grant review pursuant to Rule 8.500(b)(1) or (2).

Former Labor Code §5909 deems petitions for reconsideration denied if the Appeals Board does not act upon them within 60 days of filing.² Here, the Appeals Board purported to toll the 60-day period provided under Labor Code §5909, and asserted jurisdiction over a petition for reconsideration after the expiration of the 60-day period following the filing and receipt of the petition, as well as the expiration of the 45-day period in which to file a petition for writ of review pursuant to Labor

¹ *Mayor v. Workers’ Comp. Appeals Bd.* (2024) 104 Cal.App.5th 713, 89 Cal. Comp. Cases 853, 2024 Cal.App. LEXIS 531, *opinion modified and reh’g denied*, 104 Cal.App.5th 1297, 2024 Cal.App. LEXIS 607.

² Former Labor Code §5909 is applicable to all times relevant to this case. [Stats. 1992, ch. 1226, §5, p. 5766.] The statute was amended in 2024 (see fn. 12, *infra*), and the new version is discussed in detail in Part IX(A).

Code §5950 -- all based upon a practice that is not supported by the statutory or regulatory scheme, or prevailing case law.³

The decision of the Court of Appeal for the First Appellate District, Division Four, in *Mayor v. Workers' Comp. Appeals Bd.* (“*Mayor*”) is straightforward, and correctly concluded that the Appeals Board’s actions exceeded its jurisdiction.⁴

Further, as explained by the recent decision in the Court of Appeal for the Second District in *Zurich American Ins. Co. v. Workers' Comp. Appeals Bd.*⁵ (“*Zurich*”) and in *Mayor*, the Court of Appeal did not lack jurisdiction to issue a peremptory writ of mandate.⁶

The intervention of this Court is not necessary because there is no conflict in authority that the Appeals Board may apply equitable tolling of the former 5909 deadline under the extraordinary circumstances present in *Shipley v. Workers' Comp.*

³ *Mayor, supra*, 104 Cal.App.5th at 1301, 1309.

⁴ *Ibid.*

⁵ *Zurich American Insurance Company v. Workers' Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213, 316 Cal.Rptr.3d 265, 2023 Cal.App. LEXIS 968.

⁶ *Mayor, supra*, 104 Cal.App.5th at 1309-1310; *Zurich, supra*, 97 Cal.App.5th at 1225-1226, citing *Greener v. Worker's Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1046, and *Earley v. Worker's Comp. Appeals Board* (2023) 95 Cal.App.5th 1, 10, 311 Cal.Rptr.3d 760, 88 Cal. Comp. Cases 769, 2023 Cal.App. LEXIS 586.

*Appeals Bd.*⁷ (“*Shipley*”), but not present in either *Mayor* or *Zurich*.⁸ While both the *Shipley* and *Zurich* courts stated that the language of section 5909 may be mandatory and jurisdictional, both courts ultimately decided the jurisdictional issue while considering equitable principles.⁹ The *Zurich* court found that a grant of reconsideration after the expiration of the 60-day period was in excess of the jurisdiction conferred by Labor Code §5909,¹⁰ and the *Mayor* court agreed with this holding and rationale.¹¹ *Mayor* and *Zurich* are simply reminders that the Appeals Board’s practice of tolling the 60-day deadline in former section 5909 to rectify administrative failures in the Appeal’s Board’s internal processing of appeals with an

⁷ *Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 9 Cal.Rptr.2d 345, 1992 Cal.App. LEXIS 832, 72 CCC 493.

⁸ *Mayor* and *Zurich* involve essentially identical procedural circumstances, but both are distinguishable from *Shipley* because there was no evidence in *Mayor* or *Zurich* that the Board misled a party to disregard the deadline for judicial review. *Shipley, supra*, 7 Cal.App.4th at 1106-1107; *Mayor, supra*, 104 Cal.App.5th at 1302, 1311; *Zurich, supra*, 97 Cal.App. 5th at 1239-1240.

⁹ *Shipley, supra*, 7 Cal.App.4th at 1107; see also *Zurich, supra*, 97 Cal.App. 5th at 1236, fn 17: “We do not resolve this issue because even if the Board retained fundamental jurisdiction but acted in excess of its jurisdiction by purporting to decide CIGA’s petition after it was deemed denied under section 5909 ... equitable principles do not support the Board’s position.”

¹⁰ *Zurich, supra*, 97 Cal.App. 5th at 1230-1236. The *Zurich* court held: “We conclude the language and purpose of section 5909 show a clear legislative intent to terminate the board’s jurisdiction to consider a petition for reconsideration after the 60 days have passed, and thus decisions on the petition made after that date are void as in excess of the agency’s jurisdiction.” *Zurich, supra*, 97 Cal.App. 5th at 1221. The *Zurich* court explained: “...the plain language of section 5909 and its legislative history makes clear what the Board cannot do -- ignore the 60-day deadline and then rule on the petition for reconsideration -- because after 60 days, the Board no longer has jurisdiction to consider the petition.” *Zurich, supra*, 97 Cal.App. 5th at 1231.

¹¹ *Mayor, supra*, 104 Cal.App.5th at 1310-1311.

assertion of jurisdiction after an award becomes final is **unlawful** unless, as in *Shipley*, the paper-filed petition for reconsideration was lost or misplaced and/or the Appeals Board misleads a party to miss an appellate deadline. There is no division in appellate authority requiring this court’s intervention.

Nor is there an important question of law. Given the legislature’s recent amendment to Labor Code §5909,¹² *Mayor* involves facts not likely to recur. This new amendment confirms the *Mayor* and *Zurich* courts’ interpretation of former Labor Code §5909 as jurisdictional, and “puts to rest the board’s concerns about the

¹² Assembly Bill No. 171 became effective on July 2, 2024, and, as relevant here, made the following amendments to Labor Code §5909:

SEC. 27. SECTION 5909 OF THE LABOR CODE IS AMENDED TO READ:

5909.

(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.

SEC. 28. SECTION 5909 IS ADDED TO THE LABOR CODE, TO READ:

5909.

(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 of filing.

(b) This section shall take effect on July 1, 2026.

[Stats. 2024, ch. 52, §§27 and 28.]

consequence of that interpretation for the future.”¹³ And critically, as the *Mayor* court correctly observed, there would be no reason for the legislature to alter the trigger which starts the 60-day deadline under Labor Code §5909 if the Appeals Board’s sweeping equitable tolling practice were permissible.¹⁴ As such, there is no unsettled important question of law that requires this Court’s intervention.

The Appeals Board’s fear 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*”¹⁵ is speculative and not supportable. In practice, a strong argument could be made that *Mayor* should only apply to procedural circumstances which do involve electronically-filed reconsiderations, which means that reconsideration grants issued prior to the launch of the Appeals Board’s Electronic Adjudication Management System (“EAMS”) in 2008 would not be affected. From November 2008 until the end of 2019, it was permissible to file a petition for reconsideration of a decision by a workers’ compensation administration

¹³ *Mayor, supra*, 104 Cal.App.5th at 1301. “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.” *Mayor, supra*, 104 Cal.App.5th at 1311-1312.

¹⁴ *Mayor, supra*, 104 Cal.App.5th at 1303-1304, 1311-1314. “The Board’s concerns about the implications of *Zurich*’s reasoning in the need for procedural work-arounds to resolve complications it creates are therefore groundless, to the extent they ever had any validity.” *Mayor, supra*, 104 Cal.App.5th at 1313.

¹⁵ Petition for Review, p. 10.

law judge (“WCJ”) directly with the Appeals Board in San Francisco,¹⁶ in which case equitable tolling under *Shipley* would not be necessary. Although the Appeals Board apparently does not track when reconsideration grants are made using equitable tolling pursuant to *Shipley*,¹⁷ the Appeals Board offered an estimate in 2023 of the frequency of administrative failures in the internal processing of appeals as 1% before the COVID-19 pandemic and 5% thereafter.¹⁸ Finally, once a final award of compensation is issued, the Appeals Board’s continuing jurisdiction is limited, and prevents a party from re-litigating a final order, award or settlement absent good cause.¹⁹ As pointedly noted by the court below, the Appeals Board cannot ignore the

¹⁶ Effective November 17, 2008, the governing regulation provided that petitions for reconsideration “may be filed with any district office of the Workers’ Compensation Appeals Board or with the office of the Appeals Board in San Francisco” or that registered EAMS filers “may file petitions for reconsideration ... electronically within EAMS.” Cal. Code Regs., tit. 8, 10840. Effective January 1, 2020, Reg. 10840 was replaced and renumbered as Cal. Code Regs., tit. 8, Reg. §10940, and now provides that petitions for reconsiderations “shall be filed in EAMS or with the district office having venue....”

¹⁷ Exhibit 13 to Petition for Writ of Mandate dated January 9, 2024 (email exchange regarding CPRA request dated December 28, 2023).

¹⁸ In *Zurich*, while explaining the irregularity that lead the Appeals Board to assert jurisdiction over a reconsideration beyond the 60-day deadline under *Shipley*, the Appeals Board was able to confirm that that delays in the transmission of reconsiderations (filed either electronically or at the district office having venue) from the WCAB District Office to the Appeals Board “arose in approximately 1 percent of petitions before the COVID-19 pandemic and 5 percent thereafter.” *Zurich, supra*, 97 Cal.App. 5th at 1224.

¹⁹ The Appeals Board does not have jurisdiction to rescind, alter or amend other final awards where the 5-year statute of limitations to file a petition to reopen has expired. Once the 5-year period following the date of injury has expired, the Appeals Board only has jurisdiction to enforce a final Award and correct clerical errors, absent good cause to disturb a final award of compensation. Labor Code §§5803, 5804 and 5410; *Nickelsberg v. Workers’ Comp. Appeals Bd.* (1991) 54 Cal.3d 288, 297-300, 285 Cal.Rptr. 86, 1991 Cal.

former section 5909 and invoke *Shipley* “merely because it has been followed in the past.”²⁰

The Appeals Board’s allegation of the importance of the workers’ compensation community’s reliance upon its practice of indefinitely tolling the former Labor Code §5909 deadline does not further the interests of injured workers in the State of California.²¹ Unlike employers and insurance carriers, injured workers cope with often devastating financial losses caused by an industrial injury. Delays in the reconsideration process necessarily delay the provision of benefits to injured workers.²² Indeed, it must be considered whether or not employers and insurance carriers have been relying upon the delays in the reconsideration process and equitable tolling practices of the Appeals Board to delay the payment of benefits. “(A)s another court recently remarked about the Board’s reconsideration practices, ‘a long-standing and incorrect procedure remains incorrect.’”²³

LEXIS 3746; *Bland v. Workers’ Comp. Appeals Bd.* (1970) 3 Cal.3d 324, 329, 90 Cal.Rptr. 431, 1970 Cal. LEXIS 211.

²⁰ *Mayor, supra*, 104 Cal.App.5th at 1315.

²¹ *Ibid.*

²² Mr. Mayor has been waiting for years for a final adjudication of his career-ending injury sustained almost 11 years ago, after a trial that was completed over 2 years ago and a petition for reconsideration that was filed and received over 18 months ago. These delays have not only been financially devastating for Mr. Mayor and his family, but have prevented adjudication of medical treatment denials because the WCJ has had no jurisdiction while appeals have been pending.

²³ *Mayor* at 1315, citing *Earley, supra*, 94 Cal.App.5th at 11.

VII. ISSUES PRESENTED FOR REVIEW

In the event that this Court find compelling grounds to grant review pursuant to Rule 8.500(b)(1) or (2) , Petitioner hereby submits the following additional issues for consideration pursuant to Rule 8.504(c):

1. Does the Appeals Board’s practice of applying equitable tolling to extend the former Labor Code §5909 deadline any time the Appeals Board’s failure to act was due to deficiencies in the administrative process violate the constitutional mandate and public policy to decide cases “expeditiously, inexpensively, and without encumbrance of any character,”²⁴ and does this practice exceed the Appeals Board’s statutorily-granted powers?

2. Should equitable tolling of former Labor Code §5909 be limited to extraordinary circumstances where a petition for reconsideration has been lost or misplaced before it was successfully transmitted to the Appeals Board’s electronic file repository and/or the Appeals Board’s actions have mislead a party to miss an appellate deadline?

VIII. STATEMENT OF FACTS

On March 23, 2023, Defendant and Real Party in Interest Ross Valley Sanitation (“Ross Valley”) filed a timely Petition for Reconsideration, challenging the administrative law judge’s Award of total permanent disability in favor of

²⁴ CAL. CONST. ART. XIV, §4.

Petitioner issued on March 2, 2023.²⁵ It is an important distinction that the Petition for Reconsideration was not filed with the district office having venue as alleged in the pending Petition for Review,²⁶ but rather was electronically filed in EAMS (the Appeal Board’s own electronic file repository).²⁷ The Petition for Reconsideration was confirmed as filed and received in the electronic case repository called FileNet the same day it was filed.²⁸ The Appeals Board received the Petition for Reconsideration when electronic transmission of the Petition for Reconsideration into EAMS was complete.²⁹

The Appeals Board has stated that the WCJ did not “prepare a report on the petition for reconsideration and transmit the petition for reconsideration and the

²⁵ *Mayor, supra*, 104 Cal.App.5th at 1301-1302.

²⁶ Petition for Review, p. 11.

²⁷ *Mayor, supra*, 104 Cal.App.5th at 1302. “Petitions for reconsideration ... shall be filed in EAMS *or* with the district office having venue ... [emphasis added].” Cal. Code of Regs., tit. 8, §10940(a).

²⁸ *Mayor, supra*, 104 Cal.App.5th at 1302. See Cal. Code of Regs., tit. 8, §10206.3(a) (“An electronically transmitted document shall be deemed to have been received by EAMS with the electronic transmission of the document into EAMS is complete ...”).

²⁹ “When a paper document is filed, the Workers’ Compensation Appeals Board shall affix on it an appropriate endorsement as evidence of receipt. The endorsement may be made by handwriting, hand-stamp, electronic date stamp or by other means. The endorsement shall serve as confirmation of successful filing unless otherwise notified by the Workers’ Compensation Appeals Board or the Administrative Director.” Cal. Code of Regs., tit. 8, §10615(c). On the other hand, “(w)hen a document is filed electronically, it shall be deemed to have been received by the Workers’ Compensation Appeals Board when the transmission of the document is complete. Receipt shall constitute confirmation of successful filing unless otherwise notified by the Workers’ Compensation Appeals Board or the Administrative Director. Confirmation of successful filing in EAMS shall be made in the manner described by rule 10206.3.” Cal. Code of Regs., tit. 8, §10615(d).

accompany report to the Appeals Board” within 15 days of the filing of the Petition for Reconsideration.³⁰ Although Petitioner questions whether this fact has any bearing on the trigger to start the 60-day timeline under the former version of Labor Code §5909, it is notable that Ross Valley made *no* inquiries about the absence of a report and recommendation from the WCJ before July 6, 2023, at which point the 45-day time period to file a petition for writ of review with the Court of Appeal expired pursuant to Labor Code §5950.³¹

As the Award became *final* pursuant to Labor Code §§5909 and 5950, Petitioner requested a hearing on July 19, 2023 to enforce the Award.³² A hearing was scheduled before the WCJ, but was cancelled after the Appeals Board issued its Opinion and Order Granting Petition for Reconsideration (“Order Granting Reconsideration”) on August 14, 2023. Reconsideration was granted to allow the Appeals Board the opportunity to further study the factual and legal issues, citing the statutory time constraints on which the Appeals Board had to act. The Order Granting Reconsideration further stated that “(t)he Appeals Board first received notice of the petition(s) on or about June 15, 2023. (*Shiple v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 ...[allowing tolling as a matter of due

³⁰ Petition for Review, p. 11.

³¹ *Mayor, supra*, 104 Cal.App.5th at 1302. Ross Valley compounded this error by failing to file a Petition for Writ of Review within that 45-day time period.

³² *Mayor, supra*, 104 Cal.App.5th at 1302.

process].)”³³ The Appeals Board considered its Order Granting Reconsideration to be “timely if issued within 60 days of the Appeals Board receiving notice of the petition(s).”³⁴

On December 28, 2023, counsel for Petitioner submitted a California Public Records Act (CPRA) request to the Appeals Board, and requested copies and itemization of any reconsideration grants with a citation to *Shipley* during a specified period of time. In reply, the Appeals Board advised that it did not organize or create compilations in the manner described, but only a list of open grants of reconsideration for study.³⁵

After Petitioner filed a Petition for Writ of Mandate on January 9, 2024, the Appeals Board issued additional Opinions and Decisions after Reconsideration on January 26, 2024 and February 2, 2024. The Award was rescinded, and the matter was returned to the WCJ for further proceedings. The revised Order of February 2, 2024, provided an explanation of why the Appeals Board found that equitable tolling of the 60-day period outlined by Labor Code §5909 was appropriate:

“[D]ue 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

³³ *Mayor, supra*, 104 Cal.App.5th at 1302.

³⁴ *Ibid.*

³⁵ Exhibit 13 to the Petition for Writ of Mandate dated January 9, 2024 (email exchange regarding CPRA request dated December 28, 2023).

of filings. Instead, the staff of the district 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.”³⁶

IX. ARGUMENT

A. With the Recent Amendment to Labor Code §5909 the Legislature has Ratified the *Mayor* and *Zurich* Court’s Interpretation of the Governing Statutes and Their Holdings that the Appeals Board Has No Jurisdiction to Consider a Petition for Reconsideration After the Expiration of the 60-day Jurisdictional Limit Set Forth in Former Labor Code §5909.

The plain language of former Section 5909 establishes a jurisdictional 60-day deadline for the Appeals Board to act after a petition for reconsideration is filed. Former Section 5909 itself does not refer to *receipt*, *notice*, or *possession* of a petition for reconsideration, only to the “*date of filing*.”³⁷ Former Section 5909 set forth a specific consequence for failure of the Appeals Board to act within 60 days -- the petition for reconsideration was *deemed to have been denied*.³⁸ It is difficult to conceive of a statute making its intent more clear.

³⁶ *Mayor, supra*, 104 Cal.App.5th at 1303.

³⁷ Former Labor Code §5909: “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.”

³⁸ *Ibid.*

The *Zurich* court’s review of relevant legislative history pertaining to Section 5909 demonstrates that the Appeals Board does not have jurisdiction over a reconsideration if not acted upon within the time limits set forth by the Legislature. Since the Legislature’s enactment of the first compulsory workers’ compensation system in 1917, there has been a provision that reconsiderations (originally called rehearings) are *deemed denied* when not acted upon within the statutory deadline.³⁹ The legislature was aware that if the Board takes no action within 60 days, the remaining judicial review would be more limited.⁴⁰

It is axiomatic that the Appeals Board’s interpretation of workers’ compensation laws is entitled to great weight.⁴¹ But as the *Mayor* court pointedly observed, “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

³⁹ *Zurich, supra*, 97 Cal.App. 5th at 1232-1234, citing to §§81 and 82 enacted as part of the Boynton Act in 1917, the enactment of the former Labor Code §5909 in 1937, the changes surrounding the separation of the administrative and judicial functions of the Industrial Accident Commission with authority over judicial functions placed in the newly created WCAB, in 1965, the changes made to the statutory deadline in Labor Code §5950 in 1978 and the last amendment to Labor Code §5909 in 1992, which reflects the current 60-day jurisdictional deadline.

⁴⁰ *Zurich, supra*, 97 Cal.App.5th at 1239, fn 21.

⁴¹ *Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1331, 57 Cal. Rptr. 3d 644.

prevailing case law.’ ... When the statutory language is clear and unambiguous, there is no room for the Board’s interpretation.”⁴²

The Legislature’s recent amendment to Section 5909, effective July 2, 2024, is significant. As the *Mayor* court correctly observed: “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.”⁴³

This legislative amendment underscores the error of the Appeals Board’s assertion that phrase “from the date of filing” in former Section 5909 contains an “understood term that requires the petition to be received by the Appeals Board.”⁴⁴ If the Legislature intended this interpretation, they could have amended Section 5909 to read “receipt” and did not.⁴⁵ As the *Mayor* court pointed out:

(T)he 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

⁴² *Mayor, supra*, 104 Cal.App.5th at 1305, citing *Department of Corrections & Rehabilitation v. Workers’ Comp. Appeals Bd.* (2018) 27 Cal.App.5th 607, 617, 238 Cal.Rptr.3d 224.

⁴³ *Mayor, supra*, 104 Cal.App.5th at 1311-1312.

⁴⁴ Petition for Review, p. 17.

⁴⁵ The legislature “enacted the amendment after *Zurich* and expressed no disagreement with it.” *Mayor, supra*, 104 Cal.App.5th at 1314, fn. 8, citing *Blankenship v. Allstate Ins. Co.* (2010) 186 Cal. App.4th 87, 96, 111 Cal.Rptr.3d 528 [“The Legislature is deemed to be aware of judicial decisions already in existence and to have enacted or amended a statute in light thereof.”].

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.

...

The Legislature's choice to make its change to section 5909 temporary and have it expire on July 1, 2026, corroborates the 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.⁴⁶

The plain meaning of the statute and the legislative intent demonstrate that the Appeals Board has overstepped its authority by tolling the jurisdictional limit of former Section 5909.

B. The Appeals Board's Practice of Applying Equitable Tolling to Extend the Former Labor Code §5909 Deadline At Any Time When Its Failure to Act Was Due to Deficiencies in the Administrative Process is Unlawful.

The Appeal's Board's assertion that the trigger to start the 60-day time period under former Section 5909 is the receipt of a reconsideration filing after the district office transmits the file is not only contrary to the plain language (date of filing) and legislative intent of section 5909, but the trigger suggested by the Appeals Board also does not exist in the regulatory scheme. In its broad application of *Shipley*, the Appeals Board has impermissibly substituted what appears to be an underground regulation in place of the plain language of the statute and the applicable regulations.

⁴⁶ *Mayor, supra*, 104 Cal.App.5th at 1312.

1. THE APPEALS BOARD’S OWN REGULATIONS SPECIFICALLY STATE THAT THE APPEALS BOARD “RECEIVES” AN ELECTRONICALLY-FILED PETITION UPON SUCCESSFUL TRANSMISSION INTO EAMS.

Petitions for reconsideration “shall be filed in EAMS or with the district office having venue.”⁴⁷ Here, the petition was filed electronically in EAMS (not in paper form at the district office having venue).

“Filing” a document is defined as “receipt and acceptance by the Workers’ Compensation Appeals Board of the document for the purpose of having it included in the adjudication file.”⁴⁸ An electronically filed document is “deemed to have been received by EAMS when the electronic transmission of the document into EAMS is complete.”⁴⁹ An electronically filed document is also “deemed to have been received by the Worker’s Compensation Appeals Board when transmission of the document is complete.”⁵⁰ As there is no dispute that the reconsideration here was successfully transmitted into EAMS on the date it was electronically filed,⁵¹ the Appeals Board “received” the reconsideration well before the 60-day deadline under former Labor Code §5909.

⁴⁷ Cal. Code of Regs., tit. 8, §10940(a).

⁴⁸ Cal. Code of Regs., tit. 8, §10305(m).

⁴⁹ Cal. Code of Regs., tit. 8, §10206.3(a).

⁵⁰ Cal. Code of Regs., tit. 8, §10615(d).

⁵¹ *Mayor, supra*, 104 Cal.App.5th at 1302.

2. THERE IS NO REGULATORY OR STATUTORY SUPPORT FOR THE APPEALS BOARD'S POSITION THAT EQUITABLE TOLLING IS AUTHORIZED FOR INTERNAL ADMINISTRATIVE FAILURES.

While the WCJ is required to prepare a Report and Recommendation on Petition for Reconsideration,⁵² and is required to submit that report to the Appeals Board within 15 days,⁵³ there is nothing in the Regulations which states that the Appeals Board receives a petition for reconsideration only after transmission of the case from the district office to the Appeals Board. Until the recent amendment to Section 5909 by the Legislature, transmission of the case from the district office to the Appeals Board had no statutory or regulatory impact on the trigger of the 60-day deadline under Section 5909. Indeed, the *Mayor* court was aware of and considered the Appeals Board's argument concerning the effect of Cal. Code Regs., tit. 8, §10961,⁵⁴ and nevertheless did not adopt the Appeals Board's position that it had authority to toll the 60-day deadline of former Section 5909 for failures relating to the Report and Recommendation on Petition for Reconsideration.⁵⁵

The Appeals Board recently issued a significant panel decision outlining its interpretation of the time in which it has to act on reconsideration under Labor Code

⁵² Cal. Code of Regs., tit. 8, §10961(a).

⁵³ Cal. Code of Regs., tit. 8, §10962.

⁵⁴ *Mayor, supra*, 104 Cal.App.5th at 1304.

⁵⁵ Petition for Review, pp. 17, 25.

§5909 in circumstances involving administrative processing failures.⁵⁶ In *Ja'Chim Scheuing v. Lawrence Livermore National Laboratory*, the Appeals Board relied on its broad interpretation of *Shipley* in concluding that its time to act on a petition for reconsideration was tolled beyond 60 days until the Appeals Board was notified of a reconsideration filing.⁵⁷ In reaching this conclusion, the Appeals Board observed the following about the administrative processing of reconsideration filings:

When a petition is filed, a task is sent to the WCJ through EAMS so that the WCJ receives notice that a Report is required. (See Cal. Code Regs., tit. 8, §10206; 10962.) No such notice is provided to the Appeals Board. Thereafter, the district office electronically transmits the case to the Appeals Board through EAMS and notifies the Appeals Board that it has been transmitted.⁵⁸

The Appeals Board has similarly justified its broad application of *Shipley* in the present case.⁵⁹

Electronic filing must follow the procedures set forth in the EAMS

Reference Guide and Instructional Manual for Electronic Filing E-Form Filers

⁵⁶ Pursuant to Cal. Code of Regs., tit. 8, §10325(b), “significant panel decisions” of the Appeals Board involve an issue of general interest to the workers’ compensation community but are not binding precedent.

⁵⁷ *Ja'Chim Scheuing v. Lawrence Livermore National Laboratory* (2024) 89 Cal. Comp. Cases 325, 330-334, 2024 Cal. Wrk.Comp. LEXIS 11. (There appears to be an error in the LEXIS citation, as all page references within the online LEXIS document run consecutively from “1” rather than “11.”)

⁵⁸ *Ja'Chim Scheuing, supra*, 89 Cal. Comp. Cases at 332.

⁵⁹ *Mayor, supra*, 104 Cal.App.5th at 1302-1303.

(“EAMS Reference Guide”).⁶⁰ The EAMS Reference Guide defines a task as “a piece of work a user is expected to complete,” and does not state that a task includes the provision of notice of a filing, including the section pertaining to filing of reconsiderations.⁶¹ The suggestion that notice occurs upon receipt of an internal EAMS task is not supported by the statutory or regulatory scheme and should not toll the 60-day requirement of former Section 5909. To find otherwise would violate the Labor Code §5307, as regulations of the Appeals Board can only be adopted after public hearing.

3. THE APPEALS BOARD HAS THE POWER TO ADDRESS ITS OWN ADMINISTRATIVE FAILURES WITHOUT RESORTING TO A SWEEPING ASSERTION OF JURISDICTION AFTER AN AWARD BECOMES FINAL.

The *Zurich* court observed that the Appeals Board is not powerless to address these administrative failures.⁶² If certain procedures do not reasonably effectuate the purpose of section 5909, the Appeals Board has the power to adopt Regulations,⁶³ or

⁶⁰ Cal. Code Regs., tit. 8, §10206.

⁶¹ See pp. 37 and p. 88 of EAMS Reference Guide, which is located at https://www.dir.ca.gov/dwc/eams/eams_electronicfilingformfilersguide.pdf.

⁶² “The Board asserts the workers’ compensation appeals process system is inefficient, with petitions electronically filed or submitted to a district office being lost or, as here, the arbitrator filing to submit the arbitration record to the Board. We reject the Board’s assertion it is powerless to address these failures. Nor is the remedy for the Board to ignore the Constitutional mandate in article XIV, section 4 that the Board ‘expeditiously’ determine matters under the Workers’ Compensation Act (§3201 et. seq.)” *Zurich, supra*, 97 Cal.App. 5th at 1221-1223.

⁶³ Labor Code §5307.

invalidate Regulations when they are ultimately found to conflict with the Labor Code.⁶⁴ But the remedy cannot be an expansive assertion of jurisdiction over a reconsideration after an award becomes final.

C. Equitable Tolling of the 60-day Deadline for the Appeals Board to Act on a Petition for Reconsideration Under Former Labor Code §5909 Should Not be Extended When the Appeal’s Boards Own Internal Procedures Have Failed, and Must Instead be Limited to the Extraordinary Circumstances Present in *Shipley*.

In this case, the Appeals Board has asserted: “For 30 years, 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.”⁶⁵ However, as expertly outlined in *Mayor* and *Zurich*, the exception available under *Shipley* must be limited to the facts and circumstances of that case.

⁶⁴ Govt. Code §§11342.1, 11342.2; see, e.g., *Dennis v. State of California (en banc)* (2020) 85 CCC 389, 2020 Cal.Wrk.Comp. LEXIS 19; *Mendoza v. Huntington Hospital (en banc)* (2010) 75 CCC 634, 2010 Cal.Wrk.Comp. LEXIS 78.

⁶⁵ Petition for Review, pp. 9-10.

Equitable considerations under *Shipley* may exist to toll the 60-day time limit of section 5909 when a timely filed petition for reconsideration is lost or misplaced,⁶⁶ or has not been successfully transmitted into EAMS. However, ignoring the Constitutional mandate of expeditious determination of workers' compensation matters to extend the applicable deadlines to a properly filed and received reconsideration which been maintained in the Appeals Board's electronic file repository is not warranted absent *Shipley's* extraordinary circumstances.

Unlike the facts in *Shipley*, Ross Valley never raised or alleged that Appeals Board's conduct deprived it of an opportunity to seek appellate review, nor did Ross Valley seek leave in the lower proceedings to file a petition for writ of review. Ross Valley was not misled to believe that a petition for writ of review was unnecessary, yet did not seek timely appellate review under section 5950.⁶⁷ A diligent practitioner cannot and should not rely upon the hope of a "*Shipley* save."

⁶⁶ *Shipley* is a pre-EAMS case where the paper file and timely-filed petition for reconsideration were physically lost or inadvertently misplaced, and it took multiple inquiries by the injured worker before the Board created a duplicate file more than a year later. After repeatedly assuring the injured worker that his petition would be considered once the file was recreated, the Board nevertheless denied the petition on the grounds that the petition was deemed denied by operation of law with no action by the Board within the Labor Code §5909 deadline. *Shipley, supra*, 7 Cal.App.4th at 1106-1108. In contrast here, the Appeals Board's failure to review a successfully-filed petition for reconsideration until after the 60-day deadline expired was due to the functioning and structure of its own internal procedures.

⁶⁷ *Mayor, supra*, 104 Cal.App.5th at 1311.

D. In Applying *Shiple*, the *Zurich* and *Mayor* Courts Properly Balanced Due Process Rights to Appellate Review with Rights to Substantial Justice Delivered Expeditiously, Inexpensively and Without Encumbrance, Decisional Finality, and Certainty of Appellate Deadlines.

While it is undoubtedly true that the right to appellate review must be protected, Petitioner’s constitutional right to “substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character”⁶⁸ must be also considered. The promotion of consistency in the finality of awards has been a longstanding and fundamental tenet that affords all users of the system reasonable certainty as to the appellate deadlines that apply to their cases.⁶⁹

The legislature has already struck a balance of these interests in the plain language of section 5909.⁷⁰ As the *Mayor* court observed, “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.”⁷¹

The failures of the EAMS system are commonplace, and external users of this system are aware of its pitfalls. In ordinary circumstances, the application of *Shiple*

⁶⁸ CAL. CONST. ART. XIV, §4.

⁶⁹ *Zurich, supra*, 97 Cal.App. 5th at 1221, 1232-1235.

⁷⁰ *Zurich, supra*, 97 Cal.App. 5th at 1234-1235.

⁷¹ *Mayor, supra*, 104 Cal.App.5th at 1315.

to invoke jurisdiction beyond the 60 days outlined in former Section 5909 cannot be the remedy. Delay to accomplish “substantial justice” in the face of the plain language of Section 5909 and the directives of *Zurich* and *Mayor* is a violation of Petitioner’s right to due process, the tangible impacts of which have been especially detrimental to Mr. Mayor.

E. A Peremptory Writ of Mandate Was Proper as Petitioner Had No Plain, Speedy, and Adequate Remedy in the Ordinary Course of Law.

Pursuant to Labor Code §5955, and Code of Civil Procedure §§1085 and 1086, the Court of Appeal below correctly granted the requested writ of mandate to address fundamental questions of jurisdiction and procedural due process surrounding the lawfulness of the Appeals Board’s assertion of jurisdiction over a petition for reconsideration after the expiration of the 60 days in which it had to act under former Labor Code §5909, and the Appeal’s Board’s application of *Shipley* to extend the 60-day deadline.⁷² Petitioner properly sought and obtained a remedy to compel the Appeals Board to perform its legally-required duties under former Labor Code §5909.⁷³

⁷² Here, the Appeals Board’s grant of reconsideration “was based on its view of workers’ compensation litigants’ statutory and constitutional rights, not a discretionary weighing of equitable considerations.” *Mayor, supra*, 104 Cal.App.5th at 725.

⁷³ *Zurich, supra*, 97 Cal.App.5th at 1225-1226, citing *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 539-540; see also *Earley, supra*, 95 Cal.App.5th at 10.

The issues decided by the court below were the proper subject of mandamus relief because the questions involved “statutory interpretation, not administrative discretion.”⁷⁴ Petitioner demonstrated that there was no other plain, speedy, or adequate remedy, as well as the resulting prejudice if Mr. Mayor were forced to wait until the conclusion of further proceedings.⁷⁵ Therefore, the writ relief granted in *Mayor* was appropriately provided.

X. CONCLUSION

The Appeals Board no longer had jurisdiction over the issues relating to the petition for reconsideration filed on March 23, 2023, and the Award of March 2, 2023, became *final* with the expiration of the jurisdictional deadlines of Labor Code §5909 and §5950. The *Mayor* court correctly decided that the Appeals Boards actions on the reconsideration filed were in excess of jurisdiction provided under former Section 5909. The Legislature’s recent amendment to Labor Code §5909 underscores the validity of the *Mayor* and *Zurich* courts’ statutory interpretations and holdings.

⁷⁴ *Zurich, supra*, 97 Cal.App.5th at 1226, citing *Earley, supra*, 95 Cal.App.5th at 10 [writ of mandate was proper to compel Board to comply with its duty under section 5908.5 to explain its reasons for granting reconsideration and identify the evidence supporting its decision], and *Rea v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 632-633, 643 [granting writ relief under section 5950 and annulling Appeals Board’s new procedures involving the Uninsured Employers Fund].

⁷⁵ *Mayor, supra*, 104 Cal.App.5th at 1310.

The Appeals Board's practice of tolling the 60-day deadline in former section 5909 to rectify administrative failures in the internal processing of appeals with an assertion of jurisdiction after an award becomes final is unlawful unless, as in *Shipley*, the petition for reconsideration was lost or misplaced and/or the Appeals Board misleads a party to miss an appellate deadline -- circumstances which did not exist here.

There are insufficient grounds for this Court to grant review pursuant to Rule 8.500(b)(1) or (2). The Petition for Review should be denied.

Respectfully submitted,

October 25, 2024

/s/ Elizabeth Hudson
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Counsel for Petitioner

XI. CERTIFICATE OF SERVICE

I certify that on October 25, 2024, I electronically filed the foregoing

ANSWER TO PETITION FOR REVIEW

with the Clerk of the Supreme Court of the State of California by using the appellate TrueFiling system. The following case participants were served electronically through the TrueFiling system:

Charles D. Johnson, Clerk/Executive Officer Court of Appeal First Appellate District, Division Four 350 McAllister Street San Francisco, CA 94102	Anne Schmitz, Esq. Eric D. Ledger, Esq. Andrew A. Wood, Esq. Workers' Compensation Appeals Board 455 Golden Gate Avenue, 9 th Floor San Francisco, CA 94102 <i>Respondent and Appellant</i>
Christian Kerry, Esq. Hanna Brophy MacLean McAleer & Jensen, LLP P.O. Box 12488 Oakland, CA 94604-2488 <i>Counsel for Defendant / Real Party in Interest Ross Valley Sanitation District, administered by Athens Administrators</i>	

I certify that, unless otherwise noted, all participants in the case are registered TrueFiling users and that service will be accomplished by the appellate TrueFiling system. 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 Vallejo, California.

Respectfully submitted,

October 25, 2024

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S287261

In the
Supreme Court
of the
State of California

Joseph Mayor,
Petitioner,

v.

Workers' Compensation Appeals Board
Respondent and Appellant,

Ross Valley Sanitation District,
Real Party in Interest.

COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR
CASE NUMBER A169465

WCAB CASE NUMBER ADJ10036954
HON. THOMAS J. RUSSELL

PROOF OF SERVICE

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Attorney for Petitioner, Joseph Mayor

CERTIFICATE OF SERVICE

I certify that on October 25, 2024, I electronically filed the foregoing
ANSWER TO PETITION FOR REVIEW
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Respectfully submitted,

October 25, 2024

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **MAYOR v. W.C.A.B. (ROSS VALLEY SANITATION DISTRICT)**

Case Number: **S287261**

Lower Court Case Number: **A169465**

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10/25/2024

Date

/s/Elizabeth Hudson

Signature

Hudson, Elizabeth (161391)

Last Name, First Name (PNum)

Shoemaker Law Offices

Law Firm