

**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.*

**Supreme Court No. S287261**

**First District Case No. A169465**

**WCAB Case No. ADJ10036954**

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**APPELLANT'S REPLY**

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**Supreme Court No. S287261**

**Civ. No. A169465**

**WCAB Case No. ADJ10036954**

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**APPELLANT'S REPLY**

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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(a)(3), California Rules of Court, the Workers' Compensation Appeals Board ("Appeals Board"), respondent and appellant, hereby files this Reply to the Answer to Petition for Review filed by petitioner, Joseph Mayor, on October 25, 2024.

## ARGUMENT

- I. **Petitioner has significantly changed his argument from a legal argument of jurisdiction to a factual argument of equitable tolling, which the Court of Appeal did not address and could not address, because the Court of Appeal never requested a certified record.**

In his Answer, petitioner asserts that review is not warranted “. . . because there is no conflict in authority that the Appeals Board may apply equitable tolling of the former 5909 deadline[.]” (Answer to Petition for Review, October 25, 2024, p. 9.) Petitioner further asserts: “Equitable considerations under *Shiple*y may exist to toll the 60-day time limit of section 5909 when a timely filed petition for reconsideration is lost or misplaced.” (*Id.* at p. 28.) Petitioner argues that the facts of this case are distinguished from those of *Shiple*y and do not warrant equitable tolling. (See generally, *id.*; *Shiple*y v. *Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104.)

There are two problems with petitioner’s argument: 1) it represents a significant change in position from the writ of mandate proceedings, and 2) it presents this case as an issue of fact, but fails to acknowledge that no certified record exists upon which any fact can be reviewed.

Petitioner’s argument has changed. Before the Court of Appeal, petitioner argued: “The plain language of Labor Code §5909 establishes a mandatory jurisdictional 60-day deadline for the appeals board to act on a petition for reconsideration.” (Petition for Writ of Mandate, January 9, 2024, pp. 24-25.) It appears that the Court of Appeal agreed with this argument as language within the opinion indicates that Labor Code section 5909 is jurisdictional and not subject to equitable tolling. (See generally, *Mayor v. Workers’ Compensation Appeals Bd.* (2024) 104 Cal.App.5th 713.)

Petitioner further argued to the Court of Appeal that: “Respondent’s duty to act within 60 days of the filing of a petition for reconsideration pursuant to Labor Code §5909 is the proper subject of writ relief because ‘the question involves statutory interpretation, not administrative discretion.’” (*Id.* at p. 16.) In sum, petitioner presented his argument as a jurisdictional issue of law at the Court of Appeal.

Now, before the Supreme Court, petitioner raises a new argument and recharacterizes his position as an issue of a fact relating to application of equitable tolling. Thus, it appears that petitioner has significantly changed his position, which warrants review.

To the extent that petitioner argues that the facts of this case do not warrant equitable tolling, the *Mayor* decision failed to analyze whether equitable tolling was proper in this case. **It could not have done this because the *Mayor* court did not request a certified record upon which any factual finding could be reviewed.**<sup>1</sup> The Court did not hold oral argument. Instead, the Court issued its decision upon legal briefing alone. Petitioner’s argument that this case merely involves application of fact is contrary to his argument at the Court of Appeal and undermines the basis for the *Mayor* decision.

Further, neither the *Mayor* court, nor petitioner can properly make any assertion as to why the Legislature amended section 5909.<sup>2</sup> No factual record

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<sup>1</sup> Moreover, the Court of Appeal is statutorily prohibited from “tak[ing] evidence or exercise[ing] its independent judgment on the evidence.” (Lab. Code, § 5952.) Only the Appeals Board is statutorily empowered to make findings of fact. (Lab. Code, § 5953.)

<sup>2</sup> The argument of legislative intent is further muddled by the fact that the Legislature included a sunset provision in the amendment, which reverts Labor Code section 5909 back to its prior language in 2026. (Lab. Code, § 5909, Stats 2024 § 27 (AB 171), effective July 2, 2024, repealed July 1, 2026.) It is arguable that if the Legislature intended to respond to the Court

was created. In its petition for rehearing, the Appeals Board expressly requested the opportunity to create a record and provided an offer of proof that the process for amending the statute began long before the *Zurich* opinion issued; however, the *Mayor* court disregarded this request. (Order Modifying Opinion and Denying Rehearing; No Change in Judgment, September 18, 2024; *Zurich v. Workers' Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213.)

No certified record exists in this matter. Petitioner has changed his argument from one based upon legal analysis, to one based upon factual analysis. Accordingly, petitioner's change of position and the lack of a certified record further support the Appeals Board's request for review.

## **II. Filing a petition for reconsideration does not mean that the Appeals Board receives the petition.**

Petitioner misconstrues the act of filing a petition for reconsideration in the Electronic Adjudication Management System (EAMS)<sup>3</sup> as equivalent to receipt of the petition by the Appeals Board. This is a common misconception.

As explained in detail in the Petition for Review, the Workers' Compensation Appeals Board and the Division of Workers' Compensation (DWC) are two separate entities. (Lab. Code, § 111.) The DWC employs the workers' compensation administrative law judges (WCJs). (Lab. Code, § 123.) The DWC and WCJ correctly use the term "Workers' Compensation

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of Appeal's decision in *Zurich*, a sunset provision reverting the statute back to its original form would not have been included.

<sup>3</sup> "Electronic Adjudication Management System' or 'EAMS' means the computerized case management system **used by the Division of Workers' Compensation** to electronically store and maintain adjudication files and to perform other case management functions." (Cal. Code Regs., tit. 8, § 10305(j) (emphasis added).)

Appeals Board” on their forms and pleadings as they are acting under the *delegated judicial authority* of the Appeals Board. (Lab. Code, §§ 5309, 5310.) However, it is important to be clear that the Appeals Board’s constitutional and statutory authority is to exercise all judicial powers in all workers’ compensation cases, including delegation to the WCJs to act, while responsibility for all administrative functions lies solely with the DWC. (Lab. Code, § 111.)

Moreover, the Appeals Board does not share electronic files with the DWC District Office. There is *one* electronic adjudication file in EAMS, which is maintained by the DWC. Although it is statutorily authorized under Labor Code section 5301 to act on any case, the only way that the Appeals Board receives a case after a petition for reconsideration is filed is when the case is sent to the Appeals Board.

When a petition for reconsideration is filed from an order, award, or decision of a WCJ, the petition is filed at the DWC district office. This is true regardless of whether the petition is filed in paper form or electronically. That is because the DWC District Office is charged with managing the EAMS file. (*Ibid.*) The WCJ is required to complete a report on the petition and transfer the petition and report along with the DWC’s adjudication file to the Appeals Board. (Cal. Code Regs., tit. 8, §§ 10961, 10962.) Only then is the electronic file in the Appeals Board’s possession and only then can the Appeals Board act on the petition.<sup>4</sup>

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<sup>4</sup> Petitioner appears to confuse the ministerial act of accepting a pleading for filing by a clerk or in EAMS and the judicial act of reviewing the petition for reconsideration by the commissioners. (See Lab. Code, §§ 111, 112, 113, 115, 121.) The Appeals Board is responsible for review of a petition for reconsideration, and this responsibility may not be delegated. (Cal. Code Regs., tit. 8, § 10320; see Cal. Code Regs., tit. 8, § 10330.)

Before EAMS, the DWC's entire adjudication file was physically transferred to the Appeals Board by mail, and once the Appeals Board issued a decision on a petition, the entire physical file was mailed back to the district office. Today, the file is transferred electronically at the click of a button. The change in the manner of file transfer in no way altered DWC's ownership and maintenance of the adjudication file. While it is true that the Appeals Board uses electronic files today, it is equally true that electronic files may be lost, destroyed, misplaced, or misfiled just as easily as paper files. The logic of *Shipley* does not change because the file format changed.

Filing a petition for reconsideration in EAMS ensures that a party has complied with the 20-day time limit of Labor Code section 5903. Filing the petition in EAMS does not mean that the petition and the adjudication file were transferred to the Appeals Board for review.<sup>5</sup> That act of transmission, that is, sending the file to the Appeals Board must be done by a human being at the DWC District Office. In this case, it was not done, which is why the Appeals Board found equitable tolling existed.

### CONCLUSION

Petitioner has significantly changed their argument. Before the Court of Appeal, petitioner argued a legal issue of jurisdiction. Now, petitioner argues a factual distinction from *Shipley's* application of equitable tolling. Further, no record was certified before the Court of Appeal. Petitioner's significant change of position warrants review.

As detailed in the Petition for Review, the WCJ failed to prepare a report and transfer the petition for reconsideration and the case to the Appeals

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<sup>5</sup> The Appeals Board cannot review what it has not received, regardless of timely filing at the District Office.

Board within 60 days of its filing in EAMS. In effect, the WCJ denied reconsideration of their own decision in violation of Labor Code section 5908.5. Filing a petition in EAMS is not equivalent to receipt of the petition by the Appeals Board. Instead, it is equivalent to a party filing a document with a clerk, who thereafter loses the document and never provides it to the judge.

For all of the above reasons, the Appeals Board continues to respectfully request that review be granted in this matter.

Date: November 4, 2024

Respectfully submitted,  
ANNE SCHMITZ, State Bar No. 166664  
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ANDREW A. WOOD, Cal. State Bar No. 280901

By /s/  
ANNE SCHMITZ  
Secretary  
Workers' Compensation Appeals Board



**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 AOficial@dir.ca.gov.

On November 4, 2024 at 2:00 P.M., I electronically served the attached APPELLANT’S REPLY to Jorge E. Navarrete, Clerk/Executive Officer, in the matter of Supreme Court Case No. S287261, *Joseph Mayor v. Workers’ Compensation Appeals Board and Ross Valley Sanitation District* [First District Case No. A169465 / WCAB Case No. ADJ10036954] and on the parties registered for electronic service through TrueFiling.

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|--|---|
| <p><b><u>Court (TrueFiling):</u></b><br/>         Jorge E. Navarrete<br/>         Clerk/Executive Officer<br/>         Supreme Court of California<br/>         350 McAllister Street<br/>         San Francisco, CA 94102-4797</p>  | <p><b><u>Counsel for Petitioner (TrueFiling):</u></b><br/>         Elizabeth Hudson, Esq.<br/> <a href="mailto:beth@shoemakerlawoffices.com">beth@shoemakerlawoffices.com</a><br/>         Shoemaker Law Offices<br/>         150 Glen Cove Marina Rd. E, Ste. 103<br/>         Vallejo, CA 94591</p> |
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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 November 4, 2024.

/s/ Annie Riza AOficial

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

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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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WCAB Commissioners

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