

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.

Case No. S287261

**RESPONDENT'S OPENING BRIEF
ON THE MERITS**

First Appellate District, Division Four, Case No. A169465
Workers' Compensation Appeals Board, Case No. ADJ10036954

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INTRODUCTION

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

For over 30 years, the courts of this state have held that equitable tolling may be applied to the statutory deadline for the Workers' Compensation Appeals Board ("Appeals Board") to act upon petitions for reconsideration. Under former Labor Code¹ section 5909, (Stats. 1992, ch. 1226, § 5), the Appeals Board must act on petitions for reconsideration – appeals from the decisions of workers' compensation administrative law judges ("WCJs") – within 60 days of filing, and failure to act within 60 days

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

means a petition is deemed denied by operation of law. (Former § 5909, Stats. 1992, ch. 1226, § 5.)²

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107 (“*Shipley*”), the Fourth District held 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 did not timely receive the petition, and the petitioning party’s due process rights were therefore abridged through no fault of their own. The Appeals Board urges this Court to endorse *Shipley*’s common-sense resolution of this issue.

This case perfectly illustrates why the holding of *Shipley* is sound. Here, the petition for reconsideration of the WCJ’s decision was timely and properly filed at the Department of Workers’ Compensation (“DWC”) district office – an independent agency over which the Appeals Board does not exercise direct control – as required by the governing regulations. Unfortunately, the assigned WCJ did nothing in response to the petition for reconsideration for more than 60 days. Most importantly, as explained below, the petition for reconsideration, and the case file, were not sent to the Appeals Board, as the governing regulations require. Thus, the Appeals Board was not aware of the petition for reconsideration and could not act upon the petition during the 60-day period. After the 60 days had elapsed, the Appeals Board was made aware of the petition and issued an order granting reconsideration. In its subsequent decision after reconsideration, the Appeals Board concluded that pursuant to *Shipley*, equitable tolling was appropriate because the petition was timely and properly filed, but due to the WCJ’s error

² 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.

the Appeals Board was not aware of its existence and could not act upon it within 60 days of its filing.

Nonetheless, in this case the First District rejected the Fourth District's analysis in *Shiple*, 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. (*Mayor v. Workers' Comp. Appeals Bd.* (2024) 104 Cal.App.5th 1297 (“*Mayor*”).) Essentially, the Court enabled the WCJ to ensure – by inaction and in the absence of any statutory authority or the Appeals Board's knowledge – the denial of the timely filed petition for reconsideration of the WCJ's own decision. Such a result is not compatible with even the most rudimentary notions of due process. Moreover, a significant consequence of finding that section 5909 is jurisdictional in the fundamental sense is that the Court of Appeal creates a mechanism for collateral attack of every decision issued by the Appeals Board in the past 30 years where equitable tolling was applied pursuant to *Shiple*.

In so holding, the Court of Appeal also exceeded its jurisdiction in granting the petition for writ of mandate where a plain, speedy, and adequate remedy existed in law: writ of review under section 5950. The Appeals Board therefore also urges this Court to clarify that a writ of mandate is not the proper procedural vehicle for a party to seek review of the Appeals Board's finding that the section 5909 deadline has been equitably tolled.

For these reasons, and for the reasons stated below, the Appeals Board respectfully asks this Court to hold that the *Mayor* decision was wrongly decided and should be reversed.

ISSUES PRESENTED FOR REVIEW

- I. May the Workers' Compensation Appeals Board apply equitable tolling to act upon a petition for

reconsideration beyond the 60-day period provided in section 5909, when the Appeals Board did not receive the petition for reconsideration until after the 60-day period has elapsed?

- II. Did the Court of Appeal act in excess of its jurisdiction in granting relief under traditional mandate (Code of Civil Procedure, § 1085), where petitioner did not file a timely petition for writ of review pursuant to section 5950?

STATEMENT OF THE CASE

On March 2, 2023, the 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. 1301.)

On March 23, 2023, real party in interest, Ross Valley Sanitation District (“Ross Valley”), timely filed a petition for reconsideration at the DWC district office. (*Mayor, supra*, 104 Cal.App.5th at p. 1302.)

Absent any order rescinding or amending the Findings, Award, and Orders within the first 15 days of filing, the WCJ was required to prepare a report on the petition for reconsideration and transmit the petition for reconsideration to the Appeals Board. (Cal. Code Regs., tit. 8, §§ 10961, 10962.) In this case, however, the WCJ failed to take any action in response to the petition.

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. 1302.) 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. 1302.) No party filed a petition for writ of review in response to the August 14, 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. 1302.) 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. 1302.)

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 pp. 1302-1303.)

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. 1303.)

The Court of Appeal found that the Appeals Board exceeded its jurisdiction when it issued the August 14, 2023 order granting reconsideration more than 60 days after the date the petition was filed at the DWC district office. (*Mayor, supra*, 104 Cal.App.5th at p. 1309.) 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. 1316.)

RELEVANT HISTORICAL AND PROCEDURAL BACKGROUND

Before addressing the legal issues, it is critical to understand how petitions for reconsideration were handled at the time section 5909 was enacted and how that process has changed in response to various workers' compensation legislative reforms. In analyzing the statute's history, the Legislature clearly intended that the Appeals Board act on petitions for reconsideration within 60 days of *the date a petition is received by the Appeals Board*.

The California Constitution states in relevant part that: "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation[.]" (Cal. Const., art. XIV, § 4.) Thus, the workers' compensation system is entirely created by statute via its constitutional mandate and is the exclusive remedy for injuries in the workplace. (§§ 3201, 3602, 5300.)

The workers' compensation system began with the establishment of the Industrial Accident Commission ("IAC") in 1913 as part of the Boynton Act and is the precursor to California's modern workers' compensation framework. (Stats. 1913, ch. 176, § 3.) The IAC was responsible for and controlled all aspects of workers' compensation, including both adjudication and administration of claims.³

³ 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.

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 rehearing⁴ 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.)

When section 5909 was enacted, the IAC directly employed “referees,” the historical equivalent of WCJs.⁵ 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, a single body.

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.)⁶

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

⁴ 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.) To simplify this discussion, all further references are to a petition for reconsideration, even if filed before 1951.

⁵ 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.”). See Footnote 6, *infra*.

⁶ In 1955, the Legislature amended section 5908.5 to state that only the IAC and not the referee could decide a petition for reconsideration. (Stats. 1955, ch. 1822, § 1.)

In 1965, a significant restructuring led to the creation of two separate entities: the Appeals Board and the DWC. (Former § 110, subd. (a), Stats. 1965, ch. 1513.) Authority over administration was removed from the Appeals Board and transferred to the Administrative Director at the DWC. (*Id.*; see also, § 111.) Today, the Appeals Board is vested with the judicial power to adjudicate workers' compensation cases. (§ 111.)

Administration of the trial-level system for workers' compensation cases is through the DWC, and the DWC employs the WCJs. (§ 123.)⁷ The two divisions share a single system of adjudication, beginning at the trial level before a WCJ employed by the DWC at a DWC district office, and followed by an appeal from the trial level to the Appeals Board through a petition for reconsideration. (§§ 5308, 5309; see §§ 27, 123, 123.5, 123.6.) All documents, including petitions for reconsideration, are filed directly at the DWC district office with venue because the DWC maintains the case files.⁸

Under the statutory framework, only the Appeals Board may rule on an appeal of a trial-level decision, and this authority may not be delegated to

⁷ Pursuant to section 123.5, workers' compensation judges are administrative law judges as defined by the State Civil Service Act (Govt. Code, §§ 18500, et seq.) and additionally, must have experience in workers' compensation law. Prior to 1998, workers' compensation judges were referred to as 'referees.' (§ 27 ["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."].) As the terms 'workers' compensation judge' and 'referee' are synonymous, and to avoid confusion, we use the term 'WCJ' as referring to both.

⁸ The DWC, and not the Appeals Board, is tasked with creating and maintaining all case files. (Cal. Code Regs., tit. 8, § 10205, subd. (p) ["Electronic Adjudication Management System" or "EAMS" means the computerized case management system used by the Division of Workers' Compensation to store and maintain adjudication files and to perform other case management functions."].)

a WCJ. (§ 5908.5.) Parties aggrieved by a trial-level decision by the WCJ may seek timely appeal to the Appeals Board by way of a petition for reconsideration. (§ 5903.) However, as explained above, a petition for reconsideration is filed at the DWC district office that issued the challenged decision and is not filed directly with the Appeals Board. (Cal. Code Regs., tit. 8, § 10940.)⁹ Unlike during the time of the IAC, the Appeals Board does not refer the petition for reconsideration to the WCJ to prepare a report. *Instead, the petition for reconsideration is automatically referred by EAMS to the WCJ before the Appeals Board is ever aware of it.* Thereafter, the WCJ has 15 days to review the petition in the first instance and amend or rescind the original order, decision, or award. (See Cal. Code Regs., tit. 8, §§ 10961, 10962.) Otherwise, the WCJ must prepare a report and recommendation and transfer the petition and the case file to the Appeals Board to determine the appeal. (*Ibid.*)¹⁰

In reviewing the legislative history of section 5909, the phrase “from the date of filing” implicitly assumes the petition is received by the Appeals

⁹ “‘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, subd. (m).)

¹⁰ Through EAMS, the WCJ “transmits” the petition to the Appeals Board and transfers ownership and control of the entire case file to the Appeals Board. If the case is not transmitted, ownership and control of the entire case file remains at the DWC district office. Separate case files are not created for appellate proceedings on reconsideration.

Similarly, before EAMS, entire paper case files traveled back and forth from the DWC district office to the Appeals Board, and while the matter was pending on reconsideration, the Appeals Board had ownership and control of the entire paper case file.

Therefore, for ease of discussion, where we refer to transmission of the petition for reconsideration, it necessarily includes transferring ownership and control of the entire case file to the Appeals Board.

Board. This comports with common sense and was the basis for the Fourth District allowing equitable tolling in *Shiple*:

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 *Shiple*'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.

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

To summarize, section 5909 was enacted when the Appeals Board was the sole entity in charge of workers' compensation. The Appeals Board hired and supervised the referees. The Appeals Board was responsible for receiving filings and maintaining the court record. Today, the Appeals Board continues to be responsible for adjudication of cases, but all administrative functions are placed in the DWC, which is a separate division of government. The Legislature split the functions of the Appeals Board in 1965, but did not predict how that change would affect adjudication of cases such as the case at bar, where a DWC district office receives a petition for reconsideration as part of its administration of a case, but fails to transmit it to the Appeals Board for a decision on the petition.

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 petition is initially filed. (§ 5909, Stats. 2024, ch. 52, § 27 (AB 171), effective July 2, 2024, repealed July 1, 2026.) Fully understanding this process further calls into question the Court of Appeal's

supposition that the Legislature was responding to the holding in *Zurich v. Workers' Comp. Appeals Bd. (Uribe)* (2023) 97 Cal.App.5th 1213 (“*Zurich*”).

ARGUMENT

I. **Labor Code section 5909 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 (“*Law Finance Group*”).)

A. **Labor Code section 5909 is nonjurisdictional.**

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.)

As noted in *Law Finance Group, LLC, supra*, 14 Cal.5th at p. 949, the term “jurisdiction” has many different meanings. Here, 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.)

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 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 provided that the Appeals Board has “continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division[.]” (§ 5803.) While the ability to alter a final award five years after the date of injury requires good cause under sections 5410 and 5804, *at no time does the Appeals Board lose jurisdiction.*

Turning now to the opinion below in this case, the opinion is analytically inconsistent because its holding appears to conflict with its

reasoning. Furthermore, the opinion appears to conflate lack of fundamental jurisdiction with acting in excess of jurisdiction.

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. The Court of Appeal describes the Appeals Board's order granting reconsideration beyond 60 days as a "void procedure." (*Mayor, supra*, 104 Cal.App.5th at p. 1306.) It then states that the Appeals Board's order granting reconsideration "did not depend on any exercise of discretion[.]" (*Id.* at p. 1309.) This verbiage indicates that the Court of Appeal considered section 5909 to be jurisdictional.

Yet, the Court of Appeal improperly relied upon the decision in *Zurich* to find that the Appeals Board's grant was in "excess of the Board's jurisdiction."¹¹ (*Id.* at p. 1306; see *Zurich, supra*, 97 Cal.App.5th at pp. 1233-1234.) Use of the term "excess of jurisdiction" could indicate that the Court of Appeal instead considered 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 excess of that jurisdiction. The Court of Appeal's use of contradictory reasoning, with no clear holding as to whether section 5909 is jurisdictional, creates considerable uncertainty regarding the applicable law.

¹¹ 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 *Shiple*, but found that facts warranting equitable tolling did not exist in its case. (*Ibid.*)

It is important to differentiate between orders issued without, or in the absence of, fundamental jurisdiction, which are *void ab initio*, and orders exceeding jurisdiction, which are *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, 661 (emphasis added).)

Fundamental jurisdiction is not the same as acting in excess of jurisdiction because fundamental jurisdiction means that the Appeals Board lacks the power to act regardless of whether the actions taken were correct or incorrect. When the Appeals Board has no fundamental 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 (emphasis added).)

Section 5909 is a presumptively nonjurisdictional statute. Nowhere in the statute does it preclude action by the Appeals Board beyond 60 days. To hold otherwise would provide a basis for collateral attack of every decision issued by the Appeals Board over the past 30 years where equitable tolling was applied pursuant to *Shipley*.

Nothing in the statute or legislative history indicates an intent for the 60-day requirement in section 5909 to limit jurisdiction in a fundamental sense. In fact, the Legislature’s understanding that the petition for reconsideration must be *received* by the Appeals Board before it can act, undermines any such argument. Further the Legislature’s expressed requirement that the Appeals Board, not the WCJ, decide petitions for reconsideration, confirms that the Appeals Board has jurisdiction to address petitions outside of the 60-day window where appropriate. (§ 5908.5.)¹²

B. Labor Code section 5909 is subject to equitable tolling.

The Court must next analyze whether section 5909 is subject to equitable tolling.

First, it is important to understand that unlike many other administrative agencies or boards, the Appeals Board is vested with judicial powers. (§ 111; see §§ 52, 5300, 5301, 5302; see also *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 355-356 [the Appeals Board “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

¹² 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. This gives rise to confusion since undisturbed decisions by the WCJ are identified as decisions of the Workers’ Compensation Appeals Board.

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 is, in legal effect, 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[.]”]; *Kaiser Co. v. Industrial Acc. Com. (Baskin)* (1952) 109 Cal.App.2d 54, 58-59; *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.”].) ¹³

It has also long been recognized that the Appeals Board has broad equitable powers. (*Merzoian, supra*, 4 Cal.2d at p. 98 [“[T]he Industrial Accident Commission of this state has been invested with the power and authority to hear and determine equitable issues.”].) On multiple occasions, this Court and the Courts of Appeal have acknowledged that the Appeals Board has equitable powers and should use equitable doctrines like estoppel, laches, and tolling to exert jurisdiction over claims past the statute of limitations. (See, e.g., *Reynolds v. Workers’ Comp. Appeals Bd.* (1974) 12

¹³ Under this constitutional grant of plenary power to the Legislature, the California Workers’ Compensation Act (§§ 3200, et seq.) was enacted “to establish a complete and exclusive system of workers’ compensation including ‘full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation, to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character; all of which matters are expressly declared to be the social public policy of this State’” (*Crawford v. Workers’ Comp. Appeals Bd.* (1989) 213 Cal.App.3d 156, 163 citing Cal. Const., art. XIV, § 4; § 3201; *Graczyk v. Workers’ Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997, 1002.)

Cal.3d 726 [tolling statute of limitations where an employer fails to give adequate notice of right to benefits]; *Truck Ins. Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [acknowledging that the equitable doctrine of laches may be found by the Appeals Board].) Additionally, 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 period for acting on a petition for 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.*)

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.) Given that the Appeals Board is constitutionally bound to achieve substantial justice, the manifest policy underlying every workers’ compensation statute is that the Appeals Board must ensure due process for all persons.¹⁴ Moreover, express statutory mandates in the Labor Code contemplate a system where equitable considerations are foremost. For example, 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.” Section 5506 allows the Appeals Board to grant relief under Code of Civil Procedure section 473, an express acknowledgement that errors are inevitable. (*Fox v. Workers’ Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196, 1206.)

¹⁴ All parties to a workers’ compensation proceeding retain the fundamental right to due process, including notice and an opportunity to be heard, and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158; see *Rea v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643; *Katzin v. Workers’ Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710; *Fox v. Workers’ Comp. Appeals Bd.* (1992) 4 Cal.App.4th 1196, 1204-1206; *Fortich v. Workers’ Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454; *Pacific Employee Ins. Co. v. Industrial. Acc. Com.* (Gale) (1941) 47 Cal.App.2d 713, 715; *Walker Mining Co. v. Industrial. Acc. Com.* (Galeazzi) (1939) 35 Cal.App.2d 257, 263.)

The decision below significantly misstates the manifest policy of workers' compensation law by concluding that the Appeals Board's constitutional mandate requires "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 concept of "average . . . justice" as it does not appear to exist in workers' compensation law.¹⁵ 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, **and** without incumbrance of any character." (Cal. Const., art. XIV, § 4 (emphasis added).) "[T]he right to due process is **paramount** to the goal of conducting workers' compensation proceedings expeditiously." (*Beverly Hills Multispecialty Group, Inc. v. Workers' Comp. Appeals Bd. (Pinkney)* (1994) 26 Cal.App.4th 789, 806 (emphasis added).) In misstating the Constitutional requirements, the decision below incorrectly focuses on expeditious resolution of disputes regardless of the outcome, which is the antithesis of substantial justice and contrary to the manifest policy of workers' compensation law.

The Court of Appeal's holding is that the Appeals Board "exceeded its jurisdiction." (*Mayor, supra*, 104 Cal.App.5th at p. 1309.) "Excess of jurisdiction" necessarily implies that the Appeals Board had fundamental

¹⁵ The *Mayor* court cites to *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.

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 precisely why the Court believed that section 5909 was not subject to equitable tolling. (*Mayor*, *supra*, 104 Cal.App.5th at p. 1311, fn. 6.)

The decision below relies heavily upon the analysis in *Zurich*, which in turn, is based upon this 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 a deemed denied provision in the Government Claims Act. This 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, this Court found that equitable tolling could apply. The conclusion that equitable tolling in *J.M.* was not warranted was simply based upon the specific facts of the case. (*Ibid.*)

This Court has observed:

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 WCJ did not transmit the petition for reconsideration to the Appeals Board as required by law.

The most critical fact in this case, which the Court of Appeal's decision does not discuss, is that the WCJ failed to transmit the petition for reconsideration during the statutory 60-day period 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.)

It appears that the Court of Appeal may have mistakenly treated possession of the petition for reconsideration *by the DWC* as equivalent to possession of the petition *by the Appeals Board*. However, as explained above, by statute the Appeals Board and the DWC are two separate entities, and petitions for reconsideration are filed with the DWC, the entity that maintains all case files and controls administration of all cases at the trial level. A petition must be transferred by the WCJ, with a report, to the Appeals Board to decide the appeal. (Cal. Code Regs., tit. 8, § 10962.)

The decision below requires the Appeals Board to deny reconsideration by operation of section 5909 even when it has never seen the petition and is unaware of its existence. 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. (Lintz)* (1961) 57 Cal.2d 115, 120.)

The Appeals Board delegates its judicial authority to the WCJ to decide cases in the first instance, including the ability to make *recommendations* on petitions for reconsideration. (§§ 5309, 5310; Cal. Code Regs., tit. 8, §§ 10961(a), 10962(c).)¹⁶ However, nothing in the statutory framework allows delegation of the power to *decide* petitions for reconsideration; as a matter of law, this power rests solely with the Appeals Board. (§ 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 Legislature under sections 111, 112, 113, and 115.

Here, the WCJ received the petition for reconsideration, yet 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, under the Court of Appeal's interpretation, **the WCJ's actions ensured the denial of 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).)

¹⁶ 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. A district office is part of the DWC, and not the Appeals Board.

Moreover, denial by operation of section 5909 further violated the requirement in section 5908.5 that the Appeals Board state the evidence relied upon and specify in detail the reasons for the decision.¹⁷

The Court of Appeal's decision gives rise to 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 acted without jurisdiction by the order granting reconsideration, then the denial of reconsideration by the WCJ was without 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 decision on the merits in keeping with due process.

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 hear the appeal. (See §§ 111, 112, 113, 115.) Moreover, it is axiomatic that the only way 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.¹⁸ Under the facts of this

¹⁷ 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.) Here, there was no report.

¹⁸ 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. (See §§ 5301, 5302.)

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.

II. Writ of Mandate is not the Appropriate Vehicle for Review in this Case.

The Court of Appeal 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.) This action was not proper for four reasons:

1) it appears that the Court of Appeal may be confusing traditional mandate with administrative mandate, which does not apply to workers' compensation proceedings;

2) traditional mandate requires the absence of a plain, speedy, and adequate remedy at law, but section 5950 expressly provides that petitioner could have sought a writ of review;

3) the Court of Appeal reasoned that petitioner had no speedy remedy at law because petitioner had to wait for a decision of the Appeals Board before seeking review, but such reasoning applies in all cases; and finally,

4) traditional mandate may not be used to compel the exercise of discretion of the lower court.

A. Only traditional mandate applies to the Appeals Board, not administrative mandate.

The logic used by *Mayor* and *Zurich* in granting writ relief is significantly flawed and expands the scope of review for traditional mandate beyond what is available in the Code of Civil Procedure and appears to conflate the relief available via administrative mandate with traditional mandate.

The Court of Appeal relied upon the holding in *Zurich*; however, *Zurich's* reasoning is not sound and should not be relied upon. (*Mayor, supra*, at pp. 1309-1310.) In finding that mandate is appropriate, the *Zurich* court flipped the clauses in section 5955 and interpreted it as follows: “Section 5955 provides the Supreme Court and Courts of Appeal have jurisdiction to issue a writ of mandate ‘in all proper cases’ to, among other things, ‘review, reverse, correct, or annul any order, rule, decision, or award’ of the Board.” (*Zurich, supra*, 97 Cal.App.5th at p. 1225.) *Zurich's* interpretation of section 5955 is flatly incorrect and constitutes a classic logical fallacy of converse error.

Section 5955 states:

No court of this state, except the Supreme Court and the courts of appeal to the extent herein specified, has jurisdiction to review, reverse, correct, or annul any order, rule, decision, or award of the appeals board, or to suspend or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the appeals board in the performance of its duties **but** a writ of mandate shall lie from the Supreme Court or a court of appeal in all proper cases.

(§ 5955 (emphasis added).) Thus, section 5955 provides that (1) only the Supreme Court and the Courts of Appeal, and no other courts, have jurisdiction to “review, reverse, correct, or annul” an order of the Appeals Board; and (2) this provision does not disturb the availability of a writ of mandate. These are two separate ideas, and this section does not provide that writ of mandate is the appropriate mechanism for seeking to “review, reverse, correct, or annul” a decision of the Appeals Board. Section 5955 in no way expands the scope of traditional mandate contained in Code of Civil Procedure section 1085 to include the ability to review, reverse, correct, or

annul decisions of the Appeals Board. This logic further appears to conflate traditional mandate with administrative mandate.

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

In contrast, traditional mandate is used “. . . to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled, and from which the party is unlawfully precluded by that inferior tribunal, corporation, board, or person.” (Code Civ. Proc., § 1085.)

In relying upon the flawed logic of *Zurich*, it appears that the Court of Appeal believed that traditional mandate may be used to review decisions of the Appeals Board when that is flatly untrue. This appears to conflate administrative mandate with traditional mandate, which warrants reversal.

B. Traditional mandate is not available in this case because a plain, speedy, and adequate remedy in the law exists, which is writ of review.

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.)¹⁹

The statutory writ process found in sections 5950, et seq. expressly allows a direct attack upon any *final order* of the Appeals Board via writ of review. (§ 5950; see §§ 5301, 5302.)

Here, a writ of mandate should have been unavailable, and a writ of review was premature because no *final* order was issued by the Appeals Board. Jurisdictional attacks may be presented only after a final order issues. (*Gumilla v. Industrial Acc. Com.* (1921) 187 Cal. 638, 640; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535.)

A “final” order has long been defined in case law as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Pointer, supra*, 104 Cal.App.3d at pp. 534–535; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45) or determines a “threshold” issue that is fundamental to the claim for benefits. (*Maranian v.*

¹⁹ This argument assumes that the Court finds section 5909 nonjurisdictional. The Appeals Board agrees that an order issued without fundamental jurisdiction is subject to direct or collateral attack *at any time*. (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 119.) This is different than the issue of whether the denial of the petition by operation of law is a final order. If it is a final order, then review can only be sought within 45 days of the expiration of the 60-day period for the Appeals Board to act.

As a technicality, the appropriate relief for an order issued without fundamental jurisdiction is a writ of prohibition and not traditional mandate. (Compare Code Civ. Proc., § 1102, with § 1085.) Again, it is important not to confuse *traditional* mandate (Code Civ. Proc., § 1085), which does not contain provisions for reviewing jurisdictional arguments, with *administrative* mandate, which allows review of jurisdictional arguments. (Code Civ. Proc., § 1094.5.) However, it is clearly within a court’s authority to treat a petition for writ of mandate as one seeking prohibition and continue to decide the merits.

Workers' Comp. Appeals Bd. (2000) 81 Cal.App.4th 1068, 1070, 1075). Interlocutory procedural or evidentiary decisions, including pre-trial orders regarding evidence, discovery, trial setting, or venue, issued in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id.* at p. 1075; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

The Court of Appeal found that the August 2023 order granting reconsideration constituted a final order. (*Mayor, supra*, at p. 1310.) Yet, petitioner did not seek a writ of review within 45 days of the August 2023 order as required by section 5950. If the Court of Appeal correctly concluded that the August 2023 order was final, then the petition for writ of mandate should have been dismissed as untimely.

However, the Appeals Board respectfully disagrees with the Court of Appeal's conclusion. The August 2023 order was a non-final order because it granted reconsideration only to study the issues presented. No threshold issue was decided in August 2023. The decision below misconstrues the case caption on the order as asserting jurisdiction; but it is axiomatic that courts have jurisdiction to determine jurisdiction, because that determination necessarily includes review of the particular facts of the case in the first instance. To the extent that the Appeals Board granted reconsideration to study the issues, including whether equitable tolling was appropriate, the August 2023 order did not resolve any threshold issue. The August 2023 order was an interlocutory procedural order, not subject to the statutory writ process of sections 5950, et seq. Accordingly, any statutory writ relief was premature.

The text of section 5950 sets forth the proper avenue of relief from both the original order granting reconsideration, and any decision after reconsideration:

Any person affected by an order, decision, or award of the appeals board may, within the time limit specified in this section, apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration.

The application for writ of review must be made within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration.

(§ 5950 (emphasis added).)

Section 5950 dictates that review must be sought 45 days after reconsideration is denied, or, if granted, the statute requires the party to wait until *after* the order, decision, or award following reconsideration is issued. This text precludes petitioner from collaterally attacking initial orders granting reconsideration via writ of mandate and further supports the requirement that the order be final prior to seeking review. “[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.)

In every workers’ compensation case, every party has a statutory mechanism to seek a writ of review, but only after a final order issues. This constitutes a plain, speedy, and adequate remedy at law, and thus, the Court of Appeal exceeded its jurisdiction in granting a writ of mandate.

C. The Court of Appeal’s application of mandate opens the door to collateral attack of any non-final order of the Appeals Board.

The Court of Appeal granted mandate by finding that petitioner was entitled to expeditious resolution of his case and that requiring petitioner to wait for a decision to issue means that no speedy remedy existed. (*Mayor, supra*, at p. 1310.) This reasoning creates an exception that swallows the rule.

As noted by the Second District, allowing premature collateral attacks is more likely to delay resolution of cases:

Support for the proposition that review should await decision after remand may be found in article XIV, section 4 of the California Constitution, to the effect that the administration of the workers’ compensation laws shall accomplish justice in all cases “*expeditiously, inexpensively, and without incumbrance of any character.*” *Allowing parties to utilize the appellate process on individual issues in a single compensation claim could create a danger of defeating that constitutional objective.* Arguably employers and their carriers, with relatively superior financial position vis-a-vis the average injured worker, could take advantage of the opportunity for purposes of delay and force piecemeal litigation.

(*Pointer, supra*, 104 Cal.App.3d at p. 533 (emphasis added).)

While the *Pointer* court then allowed review of the threshold issue of whether an industrial injury occurred (a “final” order), such review only occurred *after* the Appeals Board decided that issue.

“The power to reconsider affords the WCAB an opportunity to review its own decisions and the decisions of the WCJ’s [*sic*] ‘in house,’ by applying the Board’s administrative expertise to rectify errors, when required, prior to judicial involvement.” (*Maranian, supra*, 81 Cal.App.4th at p. 1074.) Allowing collateral attack on a non-final order precludes the Appeals Board from correcting its own mistakes and more significantly, provides the

appellate courts with little guidance as to how the Appeals Board would otherwise rule on the merits. (*Heath v. Workers' Comp. Appeals Bd.* (1967) 254 Cal.App.2d 235, 239 [explaining that the policy of reconsideration is to give the Appeals Board an opportunity to correct any errors made]; *accord, U.S. Auto Stores v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 469, 477.)

The decision below further determined that requiring petitioner to wait for the final decision after reconsideration to issue would violate petitioner's right to an "expeditious end to workers' compensation proceedings." (*Mayor, supra*, at p. 1310.) However, this justification is true of every case and of every order granting reconsideration issued by the Appeals Board, or any lower court or adjudicative body. It may be faster to proceed directly to appeal; however, that does not mean it is a wiser policy for the limited judicial resources of this state.

Allowing collateral attacks on non-final orders precludes the Appeals Board from providing any guidance in the case or development of any record on appeal. In some cases, collateral attacks will preclude the Appeals Board from correcting its own errors. In other cases, the Appeals Board may rule in favor of the party seeking preliminary review, rendering any technical appeal moot. The decision below encourages parties to use the appellate court system to decide issues in the first instance, such as here, where the Court of Appeal decided jurisdiction in the first instance. Such a policy does not promote efficient use of judicial resources or expeditious resolution of disputes.²⁰

²⁰ In fact, one of the unintended consequences raised by the *Pointer* court can be seen in the instant case. Petitioner objected, in part, to the Appeals Board's request to extend time to file this initial opening brief because petitioner is frustrated by the significant delay caused by their own premature collateral attack on a non-final order. This same frustration will be shared throughout

A petition for writ of review from a final order pursuant to the existing statutory remedy in section 5950 is the appropriate method for challenging the initial order granting reconsideration. Pursuant to section 5950, the parties must wait until the decision after reconsideration issues to file their appeal.

D. Traditional mandate cannot be used to review whether equitable tolling is warranted.

Finally, because section 5909 is subject to equitable tolling, the Court of Appeal was incorrect in stating that the Appeals Board had no discretion to find equitable tolling. A writ of mandate 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. (Margaris)* (2016) 248 Cal.App.4th 349, 370.)

Whether equitable tolling applies is a question of fact, which must be decided by the Appeals Board. (§ 5953 [“The findings and conclusions of the appeals board on questions of fact are conclusive and final and are not subject to review.”]; see also, *Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 755, [noting that whether equitable tolling applies is a question of fact; whether a factual finding is legally sufficient to support a legal conclusion, is a question of law].) While the appellate courts are certainly free to review whether a decision is supported by substantial evidence and whether the findings of fact by the Appeals Board support the order, the courts are not free to usurp the power of the Appeals Board to find facts in the first instance. (See § 5952 [“Nothing in this section shall permit the court to hold a trial de

the workers' compensation system should the doors to collateral attack be wide open.

novo, to take evidence, or to exercise its independent judgment on the evidence.”]; see also § 5951 [appellate review is limited to review of the record certified by the Appeals Board].)

Here, the Court of Appeal 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 section 5909. This was not an appropriate use of mandate and thus, the decision below should be reversed.

CONCLUSION

Section 5909 is nonjurisdictional, and the statute contains no language restricting the Appeals Board’s continuing jurisdiction to act after 60 days. The history of section 5909 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.

Following this Court’s decisions in *Allied Compensation Ins. Co.*, *supra*, 57 Cal.2d at p. 120 and *LeVesque*, *supra*, 1 Cal.3d at p. 635, under section 5908.5, the Appeals Board acts on every petition for reconsideration by issuing a final decision that includes the reasons for the decision, which can then be appealed through section 5950. Now, *Mayor* implies that the Appeals Board may ignore the requirements of section 5908.5 in denying

reconsideration by operation of law.²¹ This does not comport with prior rulings of this 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 acted on the petition and denied an appeal of 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, if the August 2023 order granting reconsideration was a final order, as *Mayor* found, then petitioner had an obligation to file a petition for writ of review within 45 days. If the August 2023 order was not a final order, as the Appeals Board contends, then a writ of mandate should not have issued as there exists a plain, speedy, and adequate remedy in the ordinary course of law: a statutory petition for writ of review that requires a petitioner to wait for a final order to issue before seeking review. (§ 5950.) Nonetheless, the Court of Appeal, in essence, found that the requirement to wait for a decision of the Appeals Board left petitioner without a ‘speedy’ remedy. This

²¹ *Mayor* suggests that the parties should have known to seek review from a deemed denied order. While the parties here 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.

conclusion far expands the scope of mandate, without limits, and leads to absurd results.

For these reasons, the Appeals Board respectfully requests that the Court reverse the decision below and find that section 5909 is a non-jurisdictional statute, which is subject to equitable tolling, and that equitable tolling exists in cases where the Appeals Board does not timely receive the petition for reconsideration. The Appeals Board further requests that the Court find that an order granting reconsideration is a non-final order, which, pursuant to section 5950, is subject to review only after a decision after reconsideration issues.

Date: February 10, 2025

Respectfully submitted,
ANNE SCHMITZ, State Bar No. 166664
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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 AAfficial@dir.ca.gov.

On February 10, 2025 at 8:50 P.M., I electronically served the attached RESPONDENT WORKERS’ COMPENSATION APPEALS BOARD’S OPENING BRIEF ON THE MERITS to Jorge E. Navarrete, Clerk/Executive Officer, in the matter Supreme Court Case No. S287261, 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><u>Supreme Court (TrueFiling):</u> Jorge E. Navarrete Clerk/Executive Officer Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4797</p>	<p><u>Counsel for Petitioner (TrueFiling):</u> Elizabeth Common, Esq. beth@shoemakerlawoffices.com Shoemaker Law Offices 150 Glen Cove Marina Rd. E, Ste. 103 Vallejo, CA 94591</p>
<p><u>Counsel for Respondent (TrueFiling):</u> Christian Parker Kerry, Esq. ckerry@hannabrophy.com Hanna Brophy MacLean McAleer & Jensen LLP P.O. Box 12488 Oakland, CA 94604-2488</p>	<p><u>One Copy – Hand Delivered</u> Office of the Attorney General 455 Golden Gate Avenue, Suite 11000 San Francisco, CA 94102-7004</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 February 10, 2025.

/s/ Annie Riza Afcial

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**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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2/10/2025

Date

/s/Annie Aficial

Signature

Schmitz, Anne (166664)

Last Name, First Name (PNum)

WCAB Commissioners

Law Firm