

S287261

In the
Supreme Court
of the
State of California

Joseph Mayor,
Petitioner,

v.

Workers' Compensation Appeals Board
and
Ross Valley Sanitation District,
Respondents.

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

WCAB CASE NUMBER ADJ10036954
HON. THOMAS J. RUSSELL

PETITIONER'S OPENING BRIEF ON THE MERITS

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I. CERTIFICATION OF COMPLIANCE

[California Rule of Court 8.204]

I, Elizabeth Hudson, swear that I have read the within PETITIONER'S OPENING BRIEF ON THE MERITS and know the contents thereof; that the brief contains 8,478 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 10th day of March 2025 at Vallejo, California.

Respectfully submitted,

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IV. INTRODUCTION

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

Respondent Workers' Compensation Appeals Board ("Appeals Board") has challenged the published decision below.¹

For over three decades, the Appeals Board has applied equitable tolling to the statutory deadline for it to act upon petitions for reconsideration as set forth in Labor Code §5909,² pursuant to *Shipley v. Workers' Comp. Appeals Bd.*³ While *Shipley* did not mention equitable tolling or other equitable principles,⁴ the Appeals Board has since read *Shipley* as a case requiring it to disregard the plain language of Section 5909 as a matter of due process, even absent the extraordinary circumstances present in *Shipley*.⁵ As will be

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 [no change in judgment] 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, and provides in part: "A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date of filing." [Stats. 1992, ch. 1226, §5, p. 5766.] Section 5909 was recently amended, effective July 2, 2024 until July 1, 2026. [Stats. 2024, ch. 52, §27 (AB 171)]. This case concerns the language as it existed prior to that amendment. Further references to section 5909 refer to the former section, unless noted.

³ *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; see Respondent WCAB's Opening Brief on the Merits, pp. 9-11.

⁴ *Mayor, supra*, 104 Cal.App.5th at 1311 fn. 6.

⁵ In *Shipley*, the Court of Appeal for the Fourth District considered the language of Labor Code §5909, and while stating that "this language appears mandatory and jurisdictional," held that "the time period after which a petition for reconsideration is deemed denied by operation of law was tolled while the board misplaced Shipley's file and led him to believe his petition would eventually receive consideration." *Shipley, supra*, 7 Cal.App.4th at 1107.

illustrated below, the Appeals Board’s sweeping use of *Shipley* as a procedural workaround to Labor Code §5909 is unlawful. As another appellate court recently remarked about the Appeals Board’s reconsideration practices, “a long-standing and incorrect procedure remains incorrect.”⁶ This Court should not “ignore former section 5909 and follow *Shipley* here merely because it has been followed in the past.”⁷

Labor Code §5909 deems petitions for reconsideration denied if the Appeals Board does not act upon them within 60 days of filing.⁸ 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 based upon a practice that is not supported by the statutory⁹ or regulatory¹⁰ scheme, the constitutional mandate for the workers’ compensation system,¹¹ or prevailing case law.¹²

In the decision below, the Court of Appeal for the First Appellate District correctly concluded that the Appeals Board’s actions on reconsideration exceeded its jurisdiction.¹³

⁶ *Earley v. Workers’ Comp. Appeals Bd.* (2023) 95 Cal.App.5th 1, 11, 311 Cal.Rptr.3d 760, 88 Cal. Comp. Cases 769, 2023 Cal.App. LEXIS 86.

⁷ *Mayor, supra*, 104 Cal.App.5th at 1315.

⁸ Labor Code §5909.

⁹ Labor Code §§5909 and 5950.

¹⁰ Cal. Code of Regs., tit. 8, §§10206, 10206.3(a), 10305(m), 10615(d), 10940(a).

¹¹ CAL. CONST. ART. XIV §4.

¹² *Mayor, supra*; *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; *United States Pipe & Foundry Co. v. Industrial Accident Commission* (1962) 201 Cal.App.2d 545, 20 Cal.Rptr. 395, 1962 Cal.App.LEXIS 2626.

¹³ *Mayor, supra*, 104 Cal.App.4th at 1301.

This decision mirrored and relied upon the recent decision in the Court of Appeal for the Second Appellate District in *Zurich American Ins. Co. v. Workers' Comp. Appeals Bd.*, which made the same finding in essentially identical procedural circumstances.¹⁴ *Mayor* and *Zurich* are both distinguishable from *Shiple* because there was no evidence in either case that the Appeals Board had misled a party to disregard the deadline for judicial review.¹⁵

The *Mayor* and *Zurich* courts both found that the Labor Code §5909 deadline was mandatory.¹⁶ Based upon *Zurich* court's comprehensive statutory interpretation of Labor Code §5909,¹⁷ and its own finding that the Legislature's recent amendment Labor Code §5909¹⁸ "essentially ratified *Zurich's* interpretation of the governing statutes,"¹⁹ the *Mayor* court concluded that the grant of reconsideration after the expiration of the 60-day deadline specified in Section 5909 exceeded the Appeals Board's jurisdiction.²⁰ Because the extraordinary procedural circumstances present in *Shiple* were undisputedly not present in

¹⁴ *Zurich, supra*, 97 Cal.App.5th at 1230-1231.

¹⁵ *Shiple, 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.

¹⁶ *Mayor, supra*, 104 Cal.App.5th at 1309; *Zurich, supra*, 97 Cal.App.5th at 1230-1231.

¹⁷ *Zurich, supra*, 97 Cal.App. 5th at 1230-1237.

¹⁸ Stats. 2024, ch. 52, §§27 and 28.

¹⁹ *Mayor, supra*, 104 Cal.App.5th at 1311-1312.

²⁰ *Mayor, supra*, 104 Cal.App.5th at 1301, 1309.

Mayor and *Zurich*, neither the *Mayor* nor *Zurich* courts found it necessary to conclusively address the question of whether the Section 5909 was jurisdictional.²¹

The Appeals Board has now asked this Court to rule that the statutory deadline in Labor Code §5909 is non-jurisdictional.²² But other deadlines for seeking and deciding reconsideration of a workers' compensation award have been found to be mandatory and jurisdictional.²³ As illustrated by *Zurich* and *Mayor*, the plain text of the statute, the structure of the statutory scheme, and the legislative history all lead to the conclusion that Labor Code §5909 is both mandatory and jurisdictional.

Even if this Court finds that Section 5909 is not jurisdictional in the sense that equitable tolling is somehow permitted, this Court should not disturb Petitioner's final award of compensation in this case because the petition for reconsideration was not lost or

²¹ *Mayor, supra*, 104 Cal.App.5th at 1311 and fn 6 [court agreed with *Zurich's* rejection of Board arguments that Section 5909 was merely directory]; *Zurich, supra*, 97 Cal.App.5th at 1236, and fn 17 ["no exception applied to extend jurisdiction."].

²² Respondent WCAB's Opening Brief on the Merits, pp. 19-23.

²³ Labor Code §§5900(a) and 5903, which together set forth the 20-day deadline for an aggrieved party to file a reconsideration are mandatory and jurisdictional. *Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076; *Rymer v. Hagler* (1989) 211 Cal.App.3^d 1171, 1182; *United States Pipe & Foundry, supra*, 201 Cal.App.2^d at 548-549.

Labor Code §5900(b), which sets forth the 60-day deadline for the Appeals Board to grant reconsideration on their own motion, have has been determined to be mandatory and jurisdictional. *United States Pipe & Foundry, supra*, 201 Cal.App.2^d at 548-549.

Labor Code §5950, which sets forth the 45-day deadline for an aggrieved party to file a petition for writ of review with the Court of Appeal has also been found to be jurisdictional. *Camper v. Workers' Comp. Appeals Bd.* (1992) 3 Cal.4th 679, 687, 12 Cal.Rptr.2^d 101; 1992 Cal. LEXIS 4797.

misplaced, and there are no equitable circumstances present here²⁴ which would allow equitable tolling.²⁵ If equitable tolling of Section 5909 is permissible, the Appeals Board must be compelled to carve out only *limited* exceptions that align with the statutory scheme, the constitutional mandate for the workers’ compensation system, and Supreme Court precedent.²⁶ The Appeals Board’s extension of equitable tolling any time its failure to act was due to internal deficiencies in the administrative process is not justified.

Finally, as explained by *Mayor*, the Court of Appeal did not lack jurisdiction to issue a peremptory writ of mandate pursuant to Labor Code §5955 and Cal. Code of Civ. Proc. §1085 because the issue here is one of statutory interpretation, not administrative

²⁴ There has been no suggestion by *either* the Appeals Board or Respondent Ross Valley that Ross Valley was misled to disregard the deadline for appellate review. Further, Respondent Ross Valley did not participate in the lower proceedings, nor have they participated in these proceedings.

²⁵ *Law Finance Group, LLC v. Key* (2023) 14 Cal.5th 932, 953-954, 309 Cal.Rptr.3d 796, 2023 Cal. LEXIS 3531; *Saint Francis Memorial Hospital v. State Dept. of Public Health* (2020) 9 Cal.5th 710, 729-730 [equitable tolling is a narrow remedy for unusual circumstances and must not serve as a “cure-all for an entirely common state of affairs”]; *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370-371, 2 Cal.Rptr.3d 655, 2003 Cal. LEXIS 5379 [equitable tolling should be applied only “in carefully considered situations”]; *Lambert v. Commonwealth Land Title Ins. Co.* (1991) 53 Cal.3d 1072, 1080-1081, 282 Cal. Rptr. 445; *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 105, 84 Cal.Rptr.3d 734, 2008 Cal. LEXIS 12468; *Addison v. State* (1978) 21 Cal.3d 313, 316-319, 146 Cal.Rptr. 224, 1978 Cal. LEXIS 232 [equitable tolling should only be applied “occasionally and in special situations”]. Critically, *Mayor* correctly identified that there were *no* equitable circumstances present or alleged in this case which would justify the extension of the narrow remedy of equitable tolling. *Mayor, supra*, 104 Cal.App.5th at 1311.

²⁶ *Law Finance, supra*, 14 Cal.5th at 953-954; *Saint Francis, supra*, 9 Cal.5th at 729-730.

discretion.²⁷ The Appeals Board had a clear ministerial duty to follow the mandate of Labor Code §5909, and Petitioner does not have a plain, speedy and adequate remedy and has suffered irreparable harm.

V. ISSUES PRESENTED

1. Is the 60-day deadline for Appeals Board action on a petition for reconsideration pursuant to Labor Code §5909 mandatory and jurisdictional?

2. If Section 5909 is not jurisdictional in the sense that equitable tolling is somehow permitted, does the Appeals Board's practice under *Shipley* exceed its authority, and should this Court refuse to disturb the final compensation award in *Mayor* when the petition for reconsideration was not lost or misplaced and it is undisputed that Respondent Ross Valley was not misled to miss the appellate deadline set forth in Labor Code §§5909 and 5950?

3. Is a peremptory writ of mandate proper when the Appeals Board failed to perform its legally-required duties by considering a petition for reconsideration after it was deemed denied by operation of law, and Petitioner has no other plain, speedy and adequate remedy?

²⁷ *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.

VI. STATEMENT OF THE CASE

On March 23, 2023, Respondent Ross Valley filed a timely Petition for Reconsideration, challenging an Award of total permanent disability issued by an administrative workers' compensation judge ("WCJ") in favor of Petitioner.

It is an important distinction here that the Petition for Reconsideration was not filed "at the DWC district office" as alleged by the Appeals Board.²⁸ In fact, the Petition was electronically filed and successfully transmitted to the Appeal Board's own electronic file repository – the Electronic Adjudication Management System ("EAMS").²⁹ As such, it was properly filed pursuant to applicable regulations.³⁰

Most importantly, the Appeals Board received the Petition when electronic transmission of the Petition for Reconsideration to EAMS was complete. As in the lower proceedings, the Appeals Board has not addressed Cal. Code of Regs., tit. 8, §10615(d), which by its explicit terms defines that an electronically-filed petition for reconsideration is

²⁸ Respondent WCAB's Opening Brief on the Merits, pp. 12, 17.

²⁹ *Mayor, supra*, 104 Cal.App.5th at 1302.

³⁰ An electronically filed document is "deemed to have been received by EAMS when the electronic transmission of the document into EAMS is complete." Cal. Code of Regs., tit. 8, §10206.3(a). Indeed, in a recent panel decision, the Appeals Board acknowledged that a "petition for reconsideration is deemed filed on the day that it was actually received at the appropriate WCAB office or filed electronically...." *Wies v. State of California* (ADJ11101301, dated November 12, 2024) 2024 Cal.Work.Comp.P.D. LEXIS ___, attached for the Court's convenience as Exhibit 1.

deemed to be received by the Appeals Board when the transmission of the document was complete.³¹

On April 3, 2023, Petitioner electronically filed a timely Answer to Petition for Reconsideration. On that same date, Petitioner complied with the EAMS Reference Guide³² by emailing the “Recon Unit” of the Appeals Board to inform them that the Answer had been filed electronically,³³ and received confirmation of receipt on April 4, 2023.³⁴

The parties did not receive a report on the petition for reconsideration from the administrative workers’ compensation judge (“WCJ”) within 15 days of the filing. Although Petitioner contends that the WCJ’s issuance of a report and recommendation on

³¹ “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) [emphasis added].

³² Cal. Code of Regs., tit. 8, §10206 requires a party filing electronically to follow the procedures set forth in Electronic Adjudication Management System (EAMS) Reference Guide and Instructional Manual for E-Form Filers (“EAMS Reference Guide”).

³³ See p. 37 of EAMS Reference Guide pertains to the filing of petitions for reconsideration and answers thereto, attached as Exhibit 5 to Petition for Writ of Mandate dated 1/9/2024. The complete EAMS Reference Guide can also be found at https://www.dir.ca.gov/dwc/eams/eams_electronicfilingformfilersguide.pdf.

³⁴ See emails to and from Control Unit, attached as Exhibits 7 and 8 to Petition for Writ of Mandate dated 1/9/2024.

reconsideration has no bearing on the trigger to start the 60-day timeline under former Section §5909,³⁵ it is notable that Respondent 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. Ross Valley compounded this error by failing to file a Petition for Writ of Review within that 45-day deadline.³⁶

As the Award became *final* pursuant to Labor Code §§5909 and 5950, Petitioner requested a hearing to enforce the Award on July 19, 2023.³⁷ 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. The Order Granting Reconsideration stated that “(t)he Appeals Board first received notice of the petition(s) on or about June 15, 2023. (*Shipley v. Workers’ Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 ...[allowing tolling as a matter of due process].)”³⁸

Notably, the Appeals Board has alleged it is unable to process a petition for reconsideration without receipt of a report and recommendation from the WCJ and without the transmission of the file from the DWC district office.³⁹ Yet, the Order Granting Reconsideration of August 14, 2023 was somehow issued by the Appeals Board without a

³⁵ Cal. Code of Regs., tit. 8, §§10961, 10962.

³⁶ *Mayor, supra*, 104 Cal.App.5th at 1302.

³⁷ *Mayor, supra*, 104 Cal.App.5th at 1302.

³⁸ See Exhibit 11 to Petition for Writ of Mandate dated 1/9/2024.

³⁹ Respondent WCAB’s Opening Brief on the Merits, pp. 17-18, fn 10, and p. 29; see also *Ja’Chim Scheuing v. Lawrence Livermore National Laboratory* (2024) 89 Cal. Comp. Cases 325, 332, 2024 Cal.Wrk.Comp. LEXIS 11.

report and recommendation from the WCJ and without the case having been transmitted by the DWC district office.⁴⁰ As will be illustrated below, an internal EAMS task pertaining to the processing of reconsiderations has no bearing on the trigger to start the 60-day timeline under Section §5909.⁴¹

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. In these subsequent orders, the Award was rescinded and the matter was returned to the WCJ for further proceedings. The revised Order of February 2, 2024 tolled the 60-day period outlined by Section 5909, stated that the Appeals Board did not receive the petition for reconsideration until more than 60 days after it was filed, made reference to mistakes and delays in the transmission of information from the DWC district office to the Appeals Board, and stated that Ross Valley had nonetheless “secured a statutory right to reconsideration upon timely filing its petition for reconsideration.”⁴²

⁴⁰ The Events page in EAMS, which functions as the “docket,” confirms when the DWC district office transmits the case to the Appeals Board after reconsideration. *Ja’Chim Scheuing, supra*, 89 Cal. Comp. Cases at 333. A copy of the Events page for the instant case is attached for the Court’s convenience as Exhibit 2.

⁴¹ See pp. 37 and 88 of EAMS Reference Guide (attached as Exhibit 5 to Petition for Writ of Mandate dated 1/9/2024), which defines a task as “a piece of work a user is expected to complete,” and makes no reference that the task constitutes notice of a filing, including the section pertaining to filing of reconsiderations. The EAMS Reference Guide can also be found at https://www.dir.ca.gov/dwc/eams/eams_electronicfilingformfilersguide.pdf.

⁴² *Mayor, supra*, 104 Cal.App.5th at 1303.

The Court of Appeal granted the Petition for Writ of Mandate, and issued a published decision in favor of Petitioner reinstating the WCJ’s award of 100% permanent and total disability. Respondent WCAB has now appealed to this Court.

VII. ARGUMENT

A. Labor Code §5909 is Mandatory and Jurisdictional, and the Appeals Board Does Not Have Fundamental Jurisdiction to Consider a Petition for Reconsideration After the Expiration of the 60-day Limit Set Forth in the Statute.

Usually, the Appeals Board’s interpretation of workers’ compensation laws is entitled to great weight.⁴³ But as this Court recently noted in *Dept. of Corrections v. Workers’ Comp. Appeals Bd. (Ayala)*,⁴⁴ deference to the Appeals Board’s interpretation of a statute is not warranted when its position is “contrary to the plain language of the statute.”⁴⁵ As explained by the *Mayor* court, deference to the Appeals Board is not warranted for its statutory interpretation Section 5909 because the statutory language is clear and unambiguous and its interpretation is contrary to prevailing case law.⁴⁶ While the Appeals Board has extensive expertise in workers’ compensation matters, it does not have any

⁴³ *Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1331, 57 Cal. Rptr. 3d 644.

⁴⁴ *Dept. of Corrections and Rehabilitation v. Workers’ Comp. Appeals Board (Ayala)* (2025) 2025 Cal. LEXIS 860 (Sl. Op., February 20, 2025).

⁴⁵ *Ayala, supra*, Sl. Op. at 26.

⁴⁶ *Mayor, supra*, 104 Cal.App.5th at 1305, citing *Department of Corrections & Rehabilitation v. Workers’ Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607, 617, 238 Cal.Rptr.3d 224.

particular expertise in whether a statute is jurisdictional in the fundamental sense, and should not be provided deference to an interpretation that is erroneous.⁴⁷

The Supreme Court in *Law Finance Group, LLC v. Key* recently outlined the analytical framework required to determine whether a statutory time bar has jurisdictional consequences.⁴⁸ The plain language of the statute and the legislative intent to remove the issue from a court or agency’s fundamental jurisdiction must be examined.⁴⁹ There is a “presumption that statutes do not limit the courts’ fundamental jurisdiction absent a clear indication of legislative intent to do so,” and “our Legislature ‘must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional’ in the fundamental sense.”⁵⁰ That is precisely what has occurred here.

1. THE PLAIN TEXT OF LABOR CODE §5909 DEMONSTRATES THAT THE STATUTE IS JURISDICTIONAL.

At all times relevant, Section 5909 provides: “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.”⁵¹ It is difficult to conceive of a statute that is more concise and which makes its intent more clear.

⁴⁷ *Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1265, 8 Cal.Rptr.3d 740, 2003 Cal. LEXIS 9847.

⁴⁸ *Law Finance, supra*, 14 Cal.5th at 945-946, 950 [examining jurisdictional issues raised by statutory scheme governing judicial proceedings over private arbitration, and concluding that CCP §1288.2 was not jurisdictional because statute made no reference to power of courts].

⁴⁹ *Law Finance, supra*, 14 Cal.5th at 946-947; *Bonnell, supra*, 31 Cal.4th at at 1261-1262.

⁵⁰ *Law Finance, supra*, 14 Cal.5th at 950 [citation omitted].

⁵¹ Labor Code §5909.

As *Law Finance* noted, factors such as whether the statute “speaks only to the obligations of the litigants” or whether the statute “makes reference to the power of the courts” are relevant considerations of “the Legislature’s intent to remove a class of cases from the court’s fundamental jurisdiction.”⁵² Section 5909’s phrase “deemed to have been denied by the appeals board unless acted upon” solely and expressly speaks to power of the Appeals Board to act on a petition for reconsideration. This is a clear marker that the statute is jurisdictional.

Other statutory signals which render a time deadline to be jurisdictional include the absence of express language allowing for an extension of the deadline by either a party by stipulation or the court by order, or language which limits the power of a court to rule after a specified time period expires.⁵³ Here, there is no mechanism in Section 5909 for a litigant or the Appeals Board to extend the time to act.

In *Kabran v. Sharp Memorial Hospital*, Supreme Court addressed jurisdictional issues in the context of the statutory scheme governing a party’s right to file a motion for a new trial.⁵⁴ As noted in *Kabran*, the inclusion of a consequence or a penalty for non-compliance, or whether the consequences of “holding a time limitation mandatory or jurisdictional ‘would defeat or promote the purpose of the enactment’” is also indicia of a

⁵² *Law Finance, supra*, 14 Cal.5th at 946-947, 950.

⁵³ *Law Finance, supra*, 14 Cal.5th at 951.

⁵⁴ *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 335; 212 Cal.Rptr.3d 361, 2017 Cal. LEXIS 80 [examining jurisdictional nature of statutory scheme for procedures and deadlines associated with litigating new trial motion].

jurisdictional statute.⁵⁵ As specified in Section 5909, the consequence of the Appeals Board’s failure to timely act is that the petition for reconsideration is “deemed to have been denied” by operation of law.

Importantly, statutes governing the court’s power to act beyond a specified time limit after which the request was statutorily “deemed denied” have been found to be outside the court or agency’s jurisdiction.⁵⁶ Here, two Supreme Court cases are particularly instructive because of the similarities in statutory language to Section 5909. In *J.M. v. Huntington Beach Union High School District* (“*J.M.*”)⁵⁷ this Court rejected a minor’s request for relief filed more than 6 months from which an administrative claim was “deemed denied” because this language could not be “construed away,” despite the liberal construction afforded to minors.⁵⁸ And in *Bonnell v. Medical Board*⁵⁹ this Court found the deemed

⁵⁵ *Kabran, supra*, 2 Cal.5th at 343.

⁵⁶ *J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal. 5th 648, 651-652, 214 Cal.Rptr.3d 494, 2017 Cal. LEXIS 1609. *J.M.* addressed jurisdictional issues relating to Government Code §911.6(c) [application deemed denied where agency fails to act within 45 days].

⁵⁷ *J.M., supra*, 2 Cal. 5th at 651-652. *J.M.* involved a minor who sustained a head injury during a high school football game, and did not file a timely claim against the public entity (school district) within the required six months. Through counsel, the minor then submitted a timely application to file a late claim. The school district took no action within the 45-day time period in which they had to act on the late claim application. The minor then petitioned the superior court for relief to present a claim before bringing suit, but relief was denied because the request for relief was filed more than 6 months from which the claim was denied or deemed denied. The Court found that “by operation of law, *J.M.*’s application was deemed denied.”

⁵⁸ *J.M., supra*, 2 Cal.5th at 654.

⁵⁹ *Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 8 Cal.Rptr.3d 532, 2003 Cal. LEXIS 9847. *Bonnell* involved Government Code §11521(a), which in relevant part states: “If no action is taken on a petition within the time allowed for ordering reconsideration, the petition shall be deemed denied.”

denied language of the statute to be “unambiguous and allows a maximum 10-day stay for agency review of an already filed petition for reconsideration. As a result, the Board’s decision to order a reconsideration is void for lack of jurisdiction.”⁶⁰

The Legislature’s specification of a time limit for a court to act has significance. As noted in *J.M.*,

In all circumstances, a late claim application is deemed denied after 45 days, even though section 911.6(b)(2) would entitle the minor to relief if the application had merit. By placing this limitation on the entity’s time to act, the Legislature ensured that applications would not languish.⁶¹

The court in *Zurich* made the same observation about section 5909, finding that the statute also ensured that reconsiderations would not languish:

A similar construction here is the most consistent with the Constitutional directive for the workers’ compensation system to accomplish substantial justice expeditiously and inexpensively.⁶²

The “deemed denied” language present in Section 5909 strongly supports the inference that the Legislature has “done something special, beyond setting an exception-free deadline.”⁶³ The statute specifies a clear consequence for the Appeals Board’s failure to act. Language granting the power to extend the deadline is absent. These legislative choices ensure that action on reconsideration will be prompt, and advance the constitutional mandate that workers’ compensation claims be decided expeditiously and inexpensively.

⁶⁰ *Bonnell, supra*, 31 Cal.4th at 1265 [agency’s order of reconsideration was made without jurisdiction where statutory deadline had already expired and rendered petition deemed denied].

⁶¹ *J.M., supra*, 2 Cal.5th at 653.

⁶² *Zurich, supra*, 97 Cal.App.5th at 1235.

⁶³ *Law Finance, supra*, 14 Cal.5th at 950.

2. THE STRUCTURE OF THE RELEVANT STATUTORY SCHEME
DEMONSTRATES THAT SECTION 5909 IS JURISDICTIONAL.

The statutory scheme governing reconsideration by the Appeals Board can be found in Labor Code §§5900 through 5911, and the statutory scheme governing judicial review of workers' compensation orders, decisions or awards can be found in Labor Code §§5950 through 5956.⁶⁴ Sections 5900, 5903 and 5909 all specify the times for seeking and granting reconsideration.⁶⁵ Section 5950 specifies the time for filing a petition for writ of review.⁶⁶ Section 5909, which expressly specifies a consequence for the Appeals Board's non-compliance with the statutory deadline, takes a step further than the jurisdictional indicia included in Sections 5900 and 5903, which mention deadlines but no consequence.

The filing deadlines in Labor Code §§5900(a), 5903, and 5950 are mandatory and jurisdictional.⁶⁷ Moreover, Labor Code §5900(b), which sets forth the power of the Appeals Board to grant reconsideration on their own motion within a 60-day deadline, has been also determined to be mandatory and jurisdictional.⁶⁸ When making its determination that Labor Code §5900(b) is mandatory and jurisdictional, the Court in *United States Pipe & Foundry Co.* noted:

⁶⁴ Labor Code, Division 4, Part 4, Chapter 7, Reconsideration and Judicial Review.

⁶⁵ Labor Code §§5900, 5903 and 5909.

⁶⁶ Labor Code §5950.

⁶⁷ Labor Code §§5900(a) and 5903, which together set forth the 20-day deadline for an aggrieved party to file a reconsideration, have been found to be mandatory and jurisdictional. *United States Pipe & Foundry, supra*, 201 Cal.App.2d at 548-549. Labor Code §5950, which sets forth the 45-day deadline for an aggrieved party to file a petition for writ of review with the Court of Appeal has also been found to be jurisdictional. *Camper, supra*, 3 Cal.4th 679 at 687.

⁶⁸ *United States Pipe & Foundry, supra*, 201 Cal.App.2d at 548-549.

We conclude that the statute precludes the commission's grant of reconsideration after the lapse of 60 days. The language clearly states that “within 60 days after the filing of an order ... the commission may ... grant reconsideration”; such language suggests no hint of ambiguity. It is no different in effect than the provision fixing the time for filing a petition for reconsideration “within 20 days after the service of any final order” The commission properly treats the latter procedure as mandatory and did so in the instant case. The fact that the former procedure is self-generated does not serve to distinguish it, and we must accordingly apply the legislative mandate in both instances.⁶⁹

Section 5909 must be construed in light of the holding in *United States Pipe & Foundry Co.* and also be determined to be jurisdictional.

While the text of Section 5909 may not contain an express prohibition on equitable tolling, equitable exceptions are inconsistent with this statutory scheme. Section 5909 is not a filing deadline and does not speak to obligations of the litigants, but it does inform litigants as to when their filing obligation ends under Section 5950.⁷⁰ If the language of Section 5909 is not read to mean what it plainly says, the statutory deadline for filing a petition for writ of review set forth in Section 5950 becomes unclear. As significantly noted in *Zurich*, “an aggrieved party, even a self-represented employee, has the ability to calculate when the 60-day period runs under section 5909, as well as the 45-day deadline for filing a petition for review under section 5950.”⁷¹

⁶⁹ *United States Pipe & Foundry, supra*, 201 Cal.App.2d at 550-551.

⁷⁰ *Zurich, supra*, 97 Cal.App.5th at 1235 [legislative history behind Section 5909 supports interpretation that “under the current statutory scheme, sections 5909 and 5950 work in tandem, providing certainty in section 5909 as to when the deadline for seeking judicial review under section 5950 commences.”].

⁷¹ *Zurich, supra*, 97 Cal.App.5th at 1239 fn. 22.

The Appeals Board has suggested that its continuing jurisdiction under Labor Code §§5410 and 5804 somehow illustrates that Section 5909 does not have jurisdictional consequences.⁷² However, the Appeals Board’s continuing jurisdiction after five years from the date of injury is limited and not determinative of the issues presented in this case.⁷³ While the Appeals Board has continuing jurisdiction to enforce an Award and correct clerical errors, it is impermissible to disturb a final award of compensation after five years.⁷⁴

3. THE LEGISLATIVE HISTORY DEMONSTRATES THAT SECTION 5909 STATUTE IS JURISDICTIONAL.

The court in *Zurich* conducted a comprehensive review of the legislative history behind Labor Code §5909, demonstrating that the Appeals Board does not have jurisdiction over a reconsideration if not acted upon within the time limits set forth by the Legislature.⁷⁵

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.⁷⁶ The

⁷² Respondent’s Opening Brief on the Merits, pp. 20 and 41.

⁷³ Five years from the date of Petitioner’s injury expired on December 9, 2018; therefore, pursuant to Labor Code §5804, the Appeals Board does not have jurisdiction to rescind, alter or amend Mr. Mayor’s final Award of March 2, 2023. Labor Code §§5803, 5804, 5410.

⁷⁴ *Barnes v. Workers’ Comp. Appeals Bd.* (2000) 23 Cal.4th 679, 681, 686-687, 97 Cal.Rptr.2d 638, 2000 Cal. LEXIS 780 [Labor Code §5804 deprives Appeals Board of jurisdiction over final award of compensation after five years “consistent with the purpose of the limitation period to foster both certainty and finality in the law”].

⁷⁵ *Zurich, supra*, 97 Cal.App.5th at 1232-1236.

⁷⁶ *Zurich, supra*, 97 Cal.App. 5th at 1232-1234.

legislature was aware that if the Appeals Board takes no action within 60 days, the remaining judicial review would be more limited.⁷⁷

Equitable exceptions to Section 5909 are inconsistent with the Legislative history, which demonstrates the Legislature’s intent to remove a petition for reconsideration from the Appeals Board’s jurisdiction after the expiration of the statutory deadline to adhere to “the constitutional goal that the system ‘accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character.’”⁷⁸ To interpret the Legislative history otherwise would result in open-ended and undefined delays, which are the antitheses of the policy goals for the workers’ compensation system. As this Court recently emphasized in *Dept. of Corrections and Rehabilitation v. Ayala*, the worker’s compensation statutory scheme is designed to provide “prompt compensation” for the costs of industrial injuries, and afford employees “relatively swift and certain payment of benefits.”⁷⁹ Accordingly, *Mayor* correctly relied upon the *Zurich*’s comprehensive discussion of statutory interpretation of Section 5909 and the supporting legislative history.⁸⁰

While it is undoubtedly true that the right to appellate review must be protected, a party does not have a stand-alone due process right to review on reconsideration by the

⁷⁷ *Zurich, supra*, 97 Cal.App.5th at 1239 fn 21.

⁷⁸ *Zurich, supra*, 97 Cal.App.5th at 1232-1234.

⁷⁹ *Ayala, supra*, Sl. Op. at p. 6.

⁸⁰ *Mayor, supra*, 104 Cal.App.5th at 1311-1312; *Zurich, supra*, 97 Cal.App. 5th at 1230-1237.

Appeals Board after the 60-day deadline.⁸¹ Petitioner’s constitutional right to “substantial justice in all cases expeditiously, inexpensively and without encumbrance of any character”⁸² must be a primary consideration. Moreover, the promotion of consistency in the finality of awards, which is longstanding and fundamental tenet that affords all users of the system reasonable certainty as to the appellate deadlines that apply to their cases, must also be a consideration.⁸³ And 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.⁸⁴

In enacting Section 5909, the Legislature struck a balance between the policy goals of speedy and inexpensive claim administration, providing finality to workers’ compensation decisions by trial judges, setting time limits for review of a petition for reconsideration, and providing further appellate review upon expiration of those limits.⁸⁵ *Mayor* and *Zurich* correctly promote the interests of all litigants in the State of California to expeditious and inexpensive adjudication of workers’ compensation matters. This is particularly true in the case of injured workers where delays in the reconsideration process

⁸¹ *Zurich, supra*, 97 Cal.App.5th at 1221.

⁸² CAL. CONST. ART. XIV, §4.

⁸³ *Zurich, supra*, 97 Cal.App. 5th at 1221, 1232-1235.

⁸⁴ *Mayor, supra*, 104 Cal.App.5th at 1315.

⁸⁵ *Zurich, supra*, 97 Cal.App. 5th at 1234-1235.

necessarily delay the prompt provision of benefits.⁸⁶ With its sweeping practice of indefinitely tolling the Section 5909 deadline under *Shipley*, especially to disturb a final award of compensation, this is a balance that the Appeals Board has not properly considered. Because the policies underlying Section 5909 cannot be reconciled with permitting equitable tolling,⁸⁷ the Appeals Board has overstepped its authority by tolling the mandatory and jurisdictional limit of Section 5909.

⁸⁶ Mr. Mayor has been waiting for years for a final adjudication of his career-ending injury sustained over 11 years ago, after a trial that was completed over 2½ years ago and a petition for reconsideration that was filed and received nearly 2 years 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 no jurisdiction while appeals are pending. While the Appeals Board implies (Respondent WCAB's Opening Brief on the Merits at p. 39 fn. 20) that the continuing delays are somehow the fault of Mr. Mayor, surely an injured worker cannot be blamed for (successfully) seeking reinstatement of a 100% award that was erroneously set aside by the Appeals Board.

⁸⁷ *Saint Francis, supra*, 9 Cal.5th at 719-720.

4. THE LEGISLATURE’S RECENT AMENDMENT TO LABOR CODE §5909 FURTHER DEMONSTRATES THAT THE STATUTE IS JURISDICTIONAL.

The Legislature’s amendment to Section 5909, effective July 2, 2024, is significant.⁸⁸ As the *Mayor* court 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.”⁸⁹

The very existence of this amendment underscores the error in 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.”⁹⁰ Not only is this position explicitly contradicted by the current applicable regulations for

⁸⁸ As relevant here, the Legislature 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.]

⁸⁹ *Mayor, supra*, 104 Cal.App.5th at 1311-1312.

⁹⁰ Respondent WCAB’s Petition for Review, p. 17.

electronic filing,⁹¹ but if the Legislature wanted to endorse the Appeal’s Board’s interpretation that the trigger under Section 5909 is “receipt” and not “filing,” it surely would have used this opportunity to do so -- and did not.⁹²

Likewise, with this amendment the Legislature had the opportunity to disavow *Zurich*⁹³ and clarify that the Section 5909 deadline was discretionary and not intended to have jurisdictional consequences but did not.⁹⁴ Although the Appeals Board has alleged that with this amendment the Legislature intended to modernize Section 5909 to conform with longstanding practice that the 60-day period begins when the file is transmitted to the Appeals Board and not when reconsideration is filed,⁹⁵ this interpretation is contradicted by the Legislative history for this amendment, which clearly illustrates the intent to alter the Appeals Board’s existing timelines and procedures for handling petitions for

⁹¹ Cal. Code of Regs., tit. 8, §10615(d).

⁹² *Mayor, supra*, 104 Cal.App.5th at 1312-1314.

⁹³ 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.”].

⁹⁴ *Mayor, supra*, 104 Cal.App.5th at 1312 [“Here, however, the Legislature did not try to clarify that former section 5909 was not mandatory or that *Zurich* had misconstrued the intent behind the relevant worker’s compensation statutes. Instead, the Legislature simply changed the trigger for the running of the 60-day deadline to have it run from the WCJ’s transmission of the case file to the Board. This is a tacit acquiescence to *Zurich’s* interpretation of former section 5909’s rule as mandatory, since if the deadline was not mandatory and the Board’s practice was permissible there would have been no reason to alter the deadline.”].

⁹⁵ Respondent WCAB’s Petition for Review, pp. 17-18.

reconsideration.⁹⁶ The Legislature’s choice to modify the trigger for the start of the 60-day deadline for only a specified two-year period further demonstrates that the amendment was a “short-term fix to the Board’s need for resources to meet former section 5909’s deadline, not a repudiation of the mandatory nature of that deadline.”⁹⁷

And critically, 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.⁹⁸ Instead of codifying equitable exceptions to Section 5909, the Legislature chose a short-term modification of the trigger that starts the deadline. This is perhaps the strongest evidence that the Legislature intended to preclude equitable exceptions to the statutory deadline in Section 5909.⁹⁹

⁹⁶ *Mayor, supra*, 104 Cal.App.5th at 1312-1314 [“The committee and floor analyses of Assembly Bill 171’s effects on former section 5909 confirm that the Legislature understood it was making substantive modifications to the law...”]. This legislative history also confirms that the bill “**modifies** procedures by which the appeals board must act on a petition for reconsideration” and that “**existing law provides** that ... a petition for reconsideration is automatically considered denied if the WCAB does not to [sic] take action within 60 days from the date the petition was filed.” *Mayor, supra*, 104 Cal.App.5th at 1313. The bill “would **instead** deem a petition for reconsideration to have been denied by the WCAB unless it is acted upon by the appeals board within 60 days from the date a trial judge transmits a case to the appeals board”] [emphasis added]. *Ibid*.

⁹⁷ *Mayor, supra*, 104 Cal.App.5th at 1312.

⁹⁸ *Mayor, supra*, 104 Cal.App.5th at 1312-1313 [“[I]f the deadline was not mandatory and the Board’s practice was permissible there would have been no reason to alter the deadline....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.”].

⁹⁹ *Saint Francis, supra*, 9 Cal.5th at 719-720.

B. The *Mayor* and *Zurich* Courts Correctly Decided that the Appeals Board Exceeded its Authority to Act under Section 5909, Rendering its Orders Granting Reconsideration Void for Lack of Jurisdiction.

Whether or not the statute is jurisdictional in the fundamental sense, the *Mayor* court correctly followed Supreme Court precedent in concluding that the jurisdictional bounds of Section 5909 were exceeded and that the Appeals Board’s grant of reconsideration was void as in excess of jurisdiction.¹⁰⁰

As the Supreme Court explained in *People v. Chavez*, the term “jurisdiction” carries two distinct meanings: “One refers to ordinary acts in excess of jurisdiction. The other concerns so-called fundamental jurisdiction, the quality that dictates whether a court has any power at all to resolve a case.”¹⁰¹

The Appeals Board has alleged that the decision below is “analytically inconsistent because its holding appears to conflict with its reasoning,” and that the decision “appears to conflate lack of fundamental jurisdiction with acting in excess of jurisdiction.”¹⁰² In fact, the *Mayor* court recognized the distinction between the concepts of “fundamental jurisdiction” and “in excess of jurisdiction,” and correctly applied the governing rules.¹⁰³

¹⁰⁰ *Kabran, supra*, 2 Cal.5th at 339-340; *Law Finance, supra*, at 951-952.

¹⁰¹ *People v. Chavez* (2018) 4 Cal.5th 771, 780, 787-788, 231 Cal.Rptr.3d 834, 2018 Cal. LEXIS 2980 [Court acted in excess of jurisdiction under the terms of Penal Code §1385 to dismiss defendant’s criminal convictions that are no longer pending after completion of probation].

¹⁰² Respondent’s Opening Brief on the Merits, pp. 20-21.

¹⁰³ *Mayor, supra*, 104 Cal.App.5th at 1306.

The jurisdictional analysis here properly includes an examination of whether the court has authority to act under a particular statute. “Even when there is no question that a court’s action is well within the scope of its fundamental jurisdiction, the court may still exceed constraints placed on it by statutes, the Constitution, or common law.”¹⁰⁴

Applying these rules, the court below classified the Section 5909 deadline as mandatory, requiring the Appeals Board to act.¹⁰⁵ The court below then analyzed how a violation of this deadline affected the Appeals Board’s jurisdiction.¹⁰⁶ Using this framework, the court below then concluded that the Appeals Board had acted in excess of the statutory constraints of Section 5909 and the constitutional mandate applicable to the workers’ compensation system,¹⁰⁷ thereby rendering its action in “excess of jurisdiction.”¹⁰⁸

The Appeals Board has exceeded the constraints of its statutory authority under Section 5909, so its actions pursuant to its assertion of jurisdiction beyond the 60-day deadline are void.¹⁰⁹ *Mayor* is not analytically inconsistent; because the extraordinary procedural circumstances present in *Shiple*y were undisputedly not present in *Mayor*, it was simply not necessary for the court below to directly address the question of whether the

¹⁰⁴ *Chavez, supra*, 4 Cal.5th at 780-781; See also *Mayor, supra*, 104 Cal.App.5th at 1305-1307; *Zurich, supra*, 97 Cal.App.5th at 1229; *Kabran, supra*, 2 Cal.5th at 339-340; *Law Finance, supra*, 14 Cal.5th at 951-952; *Bonnell, supra*, 31 Cal. 4th 1 at 1265.

¹⁰⁵ *Mayor, supra*, 104 Cal.App.5th at 1309; see also *Zurich, supra*, 97 Cal.App.5th at 1230-1231.

¹⁰⁶ *Mayor, supra*, 104 Cal.App.5th at 1305-1307.

¹⁰⁷ *Mayor, supra*, 104 Cal.App.5th at 1309.

¹⁰⁸ *Mayor, supra*, 104 Cal.App.5th at 1307; see also *Kabran, supra*, 2 Cal.5th at 339-340; *Law Finance, supra*, 14 Cal.5th at 951-952.

¹⁰⁹ *Mayor, supra*, 104 Cal.App.5th at 1306; *Zurich, supra*, 97 Cal. App. 5th at 1221.

Section 5909 impacted the Appeals Board’s fundamental jurisdiction.¹¹⁰ Now that the Appeals Board has requested clarification of this jurisdictional question from this Court, it has invited a ruling which may invalidate its tolling practice relating to Section 5909.

C. Even if Equitable Tolling of Section 5909’s Statutory Deadline is Permissible, Equitable Tolling Here is Invalid and Must be Limited to the Extraordinary Circumstances Present in *Shipley*.

The Appeals Board’s sweeping practice of tolling the statute’s 60-day deadline under *Shipley* for internal administrative processing errors, especially to disturb a final award of compensation while ignoring the plain language of Section 5909 and the Constitutional mandate of expeditious and inexpensive determination of workers’ compensation matters, is not warranted under *Saint Francis Memorial Hospital v. State Dept. of Public Health*.¹¹¹

This Court has repeatedly confirmed that equitable tolling can only excuse noncompliance in unusual or exceptional circumstances.¹¹² Moreover, equitable exceptions to a statutory deadline cannot be “inconsistent with the statutory text or the legislative policy reflected in the statutory scheme.”¹¹³ Pursuant to this prevailing caselaw, and as

¹¹⁰ *Mayor, supra*, 104 Cal.App.5th at 1311 and fn 6.

¹¹¹ *Saint Francis Memorial Hospital v. State Dept. of Public Health* (2020) 9 Cal.5th 710, 265 Cal.Rptr.3d 121, 2020 Cal. LEXIS 3978 [equitable tolling is unavailable in most cases and must be narrowly applied in only special situations].

¹¹² *Saint Francis, supra*, 9 Cal.5th at 724, 729 [equitable tolling cannot be “a cure-all for an entirely common state of affairs”]; *Law Finance, supra*, 14 Cal.5th at 954 [equitable tolling is the exception rather than the norm]; *Lantzy, supra*, 31 Cal.4th at 370 [equitable tolling should be applied only “in carefully considered situations”].

¹¹³ *Law Finance, supra*, 14 Cal.5th at 953; *Saint Francis, supra*, 9 Cal.5th at 724-725; *Lantzy, supra*, 31 Cal.4th at 371; *McDonald, supra*, 45 Cal.4th at 105; *Addison, supra*, 21 Cal.3d at 319.

expertly outlined in *Mayor* and *Zurich*,¹¹⁴ any exception available under *Shipley* must be narrowly limited to unusual or exceptional facts and circumstances, which are not present in this case.

1. THE STATUTORY DEADLINE FOR APPEALS BOARD ACTION UNDER SECTION 5909 PROPERLY STARTS WHEN EITHER A PAPER COPY OF A PETITION FOR RECONSIDERATION IS FILED AND ENDORSED AT THE DWC DISTRICT OFFICE OR IS PROPERLY ELECTRONICALLY FILED IN EAMS.

Section 5909 explicitly identifies the trigger for the start of its 60-day deadline as the “date of filing.” The assertion that the deadline starts with the receipt of a reconsideration is contrary to the plain language and legislative intent of section 5909, as well as applicable regulations.¹¹⁵ Further, legal support for the Appeals Board’s contention that the trigger to start the deadline is the district office manually notifying the Board that a party is requesting reconsideration and transmitting the case to the Board,¹¹⁶ simply did not exist in former Section 5909 or the regulatory scheme.

¹¹⁴ The *Zurich* court correctly applied the standards enunciated in *St. Francis* when defining the permissible exceptions to equitably toll the jurisdictional deadline of Section 5909 as being limited to “(1) where a diligent petitioner’s rights were violated due to the fault of the Board (such as a lost petition), and (2) the Board misled the petitioner in a manner that deprived the petitioner of a right to review by the Board or the appellate courts.” *Zurich, supra*, 97 Cal.App.5th at 1221; see also *Mayor, supra*, 104 Cal.App.5th at 1311.

¹¹⁵ Cal. Code of Regs., tit. 8, §§10206, 10206.3(a), 10305(m), 10615(d) [“(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... ”]; 10940(a). See also Exhibit 5 to Petition for Writ of Mandate dated 1/9/2024, p. 37 of EAMS Reference Guide.

¹¹⁶ *Mayor, supra*, 104 Cal.App.5th at 1303, citing the revised Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration issued by the Appeals Board issued on this case on February 2, 2024.

Electronic filing must follow the procedures set forth in the EAMS Reference Guide.¹¹⁷ The EAMS Reference Guide defines a task as “a piece of work a user is expected to complete,” and makes no reference that the task constitutes notice of a filing, including the section pertaining to filing of reconsiderations.¹¹⁸ Any suggestion that notice by the Appeals Board occurs upon the completion of an internal workflow procedure is not supported by the statutory or regulatory scheme and is not a sufficient (or extraordinary) basis to toll the 60-day requirement of Section 5909.¹¹⁹

The Appeals Board’s position that it had authority to toll the 60-day deadline of former Section 5909 for failures relating to the WCJ’s Report and Recommendation on Petition for Reconsideration¹²⁰ is also unsupported. While the WCJ is required to prepare and submit that report to the Appeals Board within 15 days, regulations do not specify that a petition for reconsideration is deemed received by the Appeals Board only after a WCJ issues a report and/or transmits the case from the DWC district office to the Appeals Board.¹²¹ Here, the Orders Granting Reconsideration were all issued in the absence of a report and recommendation from the WCJ. Crucially, until the Legislature’s recent amendment to Section 5909, the WCJ’s report and recommendation and the transmission of the case from the DWC district office to the

¹¹⁷ Cal. Code of Regs., tit. 8, §10206.

¹¹⁸ See pp. 37 and 88 of EAMS Reference Guide, attached as Exhibit 5 to Petition for Writ of Mandate dated 1/9/2024. A complete copy of the EAMS Reference Guide can be found at https://www.dir.ca.gov/dwc/eams/eams_electronicfilingformfilersguide.pdf.

¹¹⁹ *Ja’Chim Scheuing, supra*, 89 Cal. Comp. Cases at 334-335.

¹²⁰ Respondent WCAB’s Opening Brief on the Merits, pp. 29-30.

¹²¹ Cal. Code of Regs., tit. 8, §10961(a), §10962.

Appeals Board had no impact on the trigger of the statutory 60-day deadline under Section 5909. Regulations 10961 and 19062 have no bearing on the issues presented here, and the *Mayor* court correctly rejected this argument.¹²²

In its broad application of *Shipley*, the Appeals Board has impermissibly substituted an unauthorized procedural practice in place of the plain language of the statute and the applicable regulations. To find otherwise would violate the Labor Code §5307, as regulations of the Appeals Board can only be adopted after public hearing.

2. THIS COURT MUST REFUSE TO DISTURB THE FINAL COMPENSATION AWARD IN *MAYOR* BECAUSE THE PETITION FOR RECONSIDERATION WAS NOT LOST OR MISPLACED AND EQUITABLE CONSIDERATIONS IN FAVOR OF ROSS VALLEY ARE ABSENT.

Even if equitable tolling of Section 5909 is permissible, the 60-day deadline of Section 5909 cannot be extended here because the Appeals Board purportedly did not receive the petition for reconsideration on June 15, 2023, as asserted in the Order granting reconsideration.¹²³ The fact is that the petition was properly electronically filed and received by the Appeals Board on March 23, 2023, as explicitly defined by Section 5909 and applicable regulations. The petition was then deemed denied by operation of Section 5909 upon the expiration of the 60-day deadline before action by the Appeals Board on

¹²² *Mayor, supra*, 104 Cal.App.5th at 1304.

¹²³ See Order Granting Reconsideration, dated August 14, 2023 [Exhibit 11 to Petition for Writ of Mandate, dated 1/9/2024].

August 14, 2023 (144 days after filing).¹²⁴ The petition for reconsideration in this case was not lost or misplaced, as it was in *Shiple*.¹²⁵

Unlike the facts in *Shiple*, it is undisputed that Respondent 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 5950.¹²⁶ Ross Valley is an experienced litigant who knew of the readily calculable appellate deadlines, yet did not pursue a timely remedy. A practitioner who relies upon the hope of a “*Shiple* save” after the 45-day deadline to file a petition for writ of review under Section 5950 has expired is not diligent. Just as the court rejected the equitable relief to the injured minor in *J.M.* for his failure to pursue an alternate remedy,¹²⁷ Ross Valley is likewise not entitled to equitable relief.

Critically, Ross Valley has never raised or alleged that the Appeals Board’s conduct deprived it of an opportunity to seek appellate review or violated its right to due process. Ross Valley did not seek leave in the lower proceedings to file a late petition for writ of review. Ross Valley did not participate in or cite any equitable considerations on its own behalf during the appellate proceedings below. As it is undisputed that there are no equitable reasons to justify the Appeals Board’s tolling of Section 5909 in favor of Ross Valley, the equitable relief provided by the Appeals Board cannot be sustained.

¹²⁴ *Mayor, supra*, 104 Cal.App.5th at 1302.

¹²⁵ *Shiple* was decided in 1992, at a time when the Appeals Board’s files were strictly maintained in paper form. EAMS became operational in 2008.

¹²⁶ *Mayor, supra*, 104 Cal.App.5th at 1311.

¹²⁷ *J.M., supra*, 2 Cal.5th at 657.

Accordingly, the *Mayor* court correctly identified that there were *no* equitable circumstances present or alleged *in this case* to support the extension of the narrow remedy of equitable tolling.¹²⁸

3. THE ROUTINE APPLICATION OF EQUITABLE TOLLING TO CURE SYSTEMIC AND INTERNAL ADMINISTRATIVE PROCESSING DEFICIENCIES IS IMPERMISSIBLE.

With its practice of equitable tolling under *Shipley*, the Appeals Board has created an impermissible cure-all where equitable tolling is the norm rather than the exception.¹²⁹

When the Appeals Board encounters administrative failures relating to the internal processing of reconsiderations (including failures relating to the EAMS tasking system, the timely preparation of the WCJ’s reconsideration report, and the transmission of the case through EAMS to the Appeals Board), the Appeals Board has liberally applied equitable tolling to extend its 60-day deadline.¹³⁰

In the significant panel decision¹³¹ of *Ja’Chim Scheuing v. Lawrence Livermore National Laboratory*, the Appeals Board addressed procedurally similar circumstances involving an untimely report and recommendation on reconsideration by a WCJ, and referenced the failure of an EAMS task as a relevant consideration for the application of

¹²⁸ *Mayor, supra*, 104 Cal.App.5th at 1311.

¹²⁹ *Saint Francis, supra*, 9 Cal. 5th at 724, 730.

¹³⁰ Respondent WCAB’s Opening Brief on the Merits, p.17; *Mayor, supra*, 104 Cal.App.5th at 1303; *Zurich, supra*, 1223-1224; *Ja’Chim Scheuing, supra*, 89 Cal. Comp. Cases at 332-333; *Hall v. DHL Express* (2024) 2024 Cal.Wrk.Comp. P.D. LEXIS 336 (Sl. Op.).

¹³¹ 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.

equitable tolling. 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 such time that the Appeals Board was notified of a reconsideration filing.¹³² The Appeals Board similarly justified its broad application of *Shipley* in the present case.¹³³

Even when the Appeals Board encounters external failures where litigants have not followed easily ascertainable procedural rules, equitable tolling is being applied. In *Hall v. DHL Express*, the Appeals Board addressed a procedurally similar circumstance involving the failure of a party who was newly aggrieved by a reconsideration decision of the Appeals Board, and was thus required to *directly* file the petition with the Appeals Board pursuant to Cal. Code. Regs., tit. 8, §10940(a) but failed to do so.¹³⁴ In *Hall*, the Appeals Board asserted that *Mayor* was wrongly decided and should be limited to its facts.¹³⁵ Then the Appeals Board considered the merits of petition for reconsideration by applying equitable tolling under *Shipley* beyond the 60-day deadline of Section 5909 even though the party seeking reconsideration misfiled the petition for reconsideration at “the DWC District Office in violation of our regulation.”¹³⁶ In applying equitable tolling in *Hall*, the Appeals Board again referenced the failure of the

¹³² *Ja’Chim Scheuing, supra*, 89 Cal. Comp. Cases at 330-334. In reaching this conclusion, the Appeals Board made no mention of Cal. Code. Regs., tit. 8, §10615(d), which confirms receipt by the Appeals Board upon successful electronic filing.

¹³³ *Mayor, supra*, 104 Cal.App.5th at 1302-1303.

¹³⁴ *Hall, supra*, Sl. Op. at 2.

¹³⁵ *Hall, supra*, Sl. Op. at 5.

¹³⁶ *Hall, supra*, Sl. Op. at. 4-8.

transmission of the case through EAMS to the Appeals Board as a relevant consideration for the application of equitable tolling.

These cases underscore the extent to which the Appeals Board is using its perceived equitable powers as the rule rather than the exception, instead of confronting the administrative and design flaws in the system through alternate means. Because the Appeals Board’s equitable tolling practice does not comport with prevailing case law,¹³⁷ the circumstances for which the Appeals Board permitted equitable tolling in this case and in *Ja’Chim Scheuing* and *Hall* do not warrant such relief.

D. A Peremptory Writ of Mandate Was Proper to Compel the Appeals Board to Perform its Statutory Duties Under Section 5909, and Petitioner Had No Other Plain, Speedy, and Adequate Remedy.

Pursuant to Labor Code §5955,¹³⁸ and Code of Civil Procedure §§1085¹³⁹ and 1086,¹⁴⁰ the Court of Appeal below correctly granted the requested writ of mandate to address fundamental questions of jurisdiction and procedural due process surrounding the

¹³⁷ *Law Finance, supra*, 14 Cal.5th at 953-954; *Saint Francis, supra*, 9 Cal.5th at 729-730.

¹³⁸ Labor Code §5955 [A writ of mandate is permissible in “all proper cases.”].

¹³⁹ Proper cases are those in which mandamus is available under Cal. Code of Civ. Proc. §1085, including “to compel the performance of an act which the law specifically enjoin....”; see also *Mayor, supra*, 104 Cal.App.5th at 1309-1310; *Zurich, supra*, 97 Cal.App.5th at 1225-1226.

¹⁴⁰ Cal. Code of Civ. Proc. §1086 [“The writ must be issued in all cases where there is not a plain, speedy, and adequate remedy, in the ordinary course of law....”].

lawfulness of the Appeals Board’s assertion of jurisdiction over a petition for reconsideration.¹⁴¹

The writ relief sought in the lower proceedings was not a challenge to the merits of the compensation award for which the reconsideration was sought and granted on August 14, 2023,¹⁴² but rather to the Appeals Board’s assertion of jurisdiction.¹⁴³ The court below did not conflate administrative and traditional mandate. The scope of traditional mandate has not been expanded by *Mayor*, but was correctly applied to address the Appeals Board’s statutory interpretation of Section 5909 and whether it violated its clear, present, and ministerial duty to follow the plain language of that statute in granting reconsideration.¹⁴⁴

In the lower proceedings, Petitioner demonstrated that there was no other plain, speedy, or adequate remedy.¹⁴⁵ Petitioner continues to be harmed financially by the delay in the payment of the 100% disability award issued over two years ago, and continues to be

¹⁴¹ *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 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 Uninsured Employers Fund].

¹⁴² The Order Granting Reconsideration deferred a decision on the substantive issues to provide the Appeals Board more time to further study the factual and legal issues, and Petitioner disagrees with Respondent WCAB’s contention that the *Mayor* court somehow construed this Order as a “final” order of compensation, therefore requiring a petition for writ of review under Section 5950 (Respondent WCAB’s Opening Brief on the Merits, p. 36).

¹⁴³ *Mayor, supra*, 104 Cal.App.5th at 1309-1310.

¹⁴⁴ *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.

¹⁴⁵ *Mayor, supra*, 104 Cal.App.5th at 1310.

harmful by the inability to seek adjudication of medical treatment disputes during these appeals. Because Petitioner is entitled to expeditious resolution of his claim, seeking mandamus relief was Petitioner's only plain, speedy, and adequate remedy.¹⁴⁶

A writ of review under Section 5950 following the conclusion of further proceedings is not a plain, speedy, or adequate remedy.¹⁴⁷ Petitioner should not be forced to wait until the conclusion of further proceedings, which will certainly take years. Waiting for the conclusion of void proceedings to raise the jurisdictional issue in a writ of review under Section 5950 runs counter to the fundamental policies behind the workers' compensation scheme, which affords Petitioner the right to receive benefits promptly and swiftly.¹⁴⁸

As the court below observed, the facts and legal arguments surrounding the jurisdictional questions presented here are "fully developed,"¹⁴⁹ so further proceedings before the Appeals Board on the jurisdictional issue are pointless. Therefore, the writ relief granted by the Court of Appeal here was appropriately provided.

¹⁴⁶ *Mayor, supra*, 104 Cal.App.5th at 1310 [Petitioner's right to "an expeditious end to workers' compensation proceedings ... would be meaningless if Mayor were forced to wait to enforce it for months or years after further proceedings"], citing *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1255, 219 Cal. Rptr. 3d 654, 2017 Cal. App. LEXIS 572 [courts have recognized that permitting early appellate review to resolve certain 'threshold issues' may enhance rather than detract from the expeditious resolution of workers' compensation claims].

¹⁴⁷ Respondent WCAB's Opening Brief on the Merits, p. 37.

¹⁴⁸ *Ayala, supra*, Sl. Op. at 6.

¹⁴⁹ *Mayor, supra*, 104 Cal.App.5th at 1310.

VIII. CONCLUSION

The Appeals Board no longer has jurisdiction over the issues relating to the petition for reconsideration filed on March 23, 2023 because the petition was denied by operation of Section 5909's mandatory and jurisdictional 60-day deadline. Because the Appeals Board exceeded the statutory authority provided by Section 5909, the *Mayor* court was correct in deciding that its action on reconsideration here was in excess of jurisdiction provided by the statute. The Legislature's recent amendment to Labor Code §5909 underscores the validity of the *Mayor* and *Zurich* courts' statutory interpretations and holdings.

The Appeals Board has the power to address its own administrative failures without resorting to a sweeping assertion of jurisdiction under Section 5909 after an award becomes final.¹⁵⁰ Along with the recent amendment to Section 5909, the Legislature also provided the Appeals Board with funding to alleviate staffing and workload concerns.¹⁵¹

If existing procedures do not reasonably effectuate the purpose of Section 5909, the Appeals Board has the power to adopt Regulations pursuant to Labor Code §5307, or

¹⁵⁰ “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.

¹⁵¹ *Zurich, supra*, 97 Cal.App.5th at 1224-1225; *Mayor, supra*, 104 Cal. App. 5th at 1312-1313.

invalidate Regulations when they are ultimately found to conflict with the Labor Code.¹⁵²

If “mistakes and delay from ‘normal human error’... thwart the manual transmission of information from the district offices to the Board,”¹⁵³ then perhaps the best way to effectuate the intent and purpose of Section 5909 is a regulatory change resurrecting the procedure which allowed the *direct* filing of all petitions for reconsideration with the Appeals Board. But the Appeals Board may not usurp the Legislature’s role by revamping Section 5909 to resolve administrative deficiencies.

Finally, the Appeals Board has the power to resolve a petition for reconsideration by taking no action within 60 days, thereby denying the reconsideration by operation of Section 5909.¹⁵⁴ Although the Appeals Board has alleged that denial by operation of law under section 5909 is not permissible,¹⁵⁵ “pocket denials” are indeed valid.¹⁵⁶ In *Levesque*

¹⁵² 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.

¹⁵³ *Mayor, supra*, 104 Cal.App.5th at 1303, citing to Appeals Board’s revised Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration dated February 2, 2024.

¹⁵⁴ *Levesque v. Workman’s Comp. App. Bd.* (1970) 1 Cal.3d 627, 83 Cal.Rptr. 208, 463 P.2d 432.

¹⁵⁵ Respondent WCAB’s Opening Brief on the Merits, p. 31.

¹⁵⁶ “Indeed, as the Supreme Court observed in *Levesque v. Workman’s Comp. App. Bd.* [citation], the Board may ‘simply by pocket denial dispose of cases under section 5909,’ that is, the Board may resolve an appeal by not acting on the petition within 60 days despite the lack of any substantive consideration.” *Zurich, supra*, 97 Cal.App.5th at 1237.

v. Workman's Comp. App. Bd.,¹⁵⁷ the Supreme Court reiterated the Appeals Board's legislative authorization to issue pocket denials by operation of section 5909.¹⁵⁸ Labor Code §§5908 and 5908.5 apply to "orders" and "decisions" of the Appeals Board; necessarily, no such order or decision is required for the application of section 5909, where a petition for reconsideration is deemed denied by operation of law upon expiration of the 60-day deadline. The correct interpretation of *Levesque* -- one that gives full weight and meaning to all of its sentences -- is that the Supreme Court in *Levesque* held that the Appeals Board may *either* deny a petition for reconsideration by simply not acting upon the petition within the statutory deadline of Section 5909 *or* it may deny a petition for reconsideration by formal decision or order incorporating the report of the referee, so long as that report details the facts and reasons upon which it relies.¹⁵⁹ The Appeals Board therefore has the ability to be selective by resolving meritless petitions for reconsiderations

¹⁵⁷ *Levesque v. Workman's Comp. App. Bd.* (1970) 1 Cal.3d 627, 633-635, 83 Cal.Rptr. 208, 463 P.2d 432 [holding that an order of the Appeals Board denying reconsideration must state the evidence relied upon and the reasons for the Board's decision, and that an order denying complies with this mandate when it incorporates the workers' compensation judge's report and recommendation, provided that such report and recommendation itself provides adequate guidance for appellate review].

¹⁵⁸ "[W]e must read section 5908.5 together with section 5909 of the Labor Code. **Section 5909 permits the appeals board to deny a petition for reconsideration by simply not acting upon the petition for 30 days from the date of filing. The Legislature has thus provided that in denying a petition for reconsideration the appeals board need not detail its factual and rational basis for so doing.** If we were to conclude that section 5908.5 required detailed findings and statements of reasons, the appeals board could simply by pocket denial dispose of cases under section 5909." *Levesque, supra*, 1 Cal.3d at 634-635.

¹⁵⁹ This interpretation is further by supported the fact that the Legislature has had opportunities to amend section 5909 to comport to clarify *Levesque* since was decided in 1970, but has not done so.

by operation of Section 5909, the effect of which may also alleviate some of the workload concerns the Appeals Board expressed in *Zurich* and *Mayor*.¹⁶⁰

This Court should uphold the lower court’s reinstatement of the WCJ’s award of permanent disability and attorney fees of March 2, 2023,¹⁶¹ because it is undisputed that equitable tolling is invalid in this case. If there is a finding that Section 5909 is jurisdictional in the fundamental sense which prohibits equitable exceptions,¹⁶² even under extraordinary administrative circumstances like those present in *Shiple*y, any future alterations to the unambiguous text of Section 5909 must appropriately be left to the Legislature.

Petitioner respectfully requests that this Court uphold the published decision below.

Respectfully submitted,

March 10, 2025

/s/ Elizabeth Hudson

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Counsel for Petitioner

¹⁶⁰ *Zurich, supra*, 97 Cal.App.5th at 1224-1225; *Mayor, supra*, 104 Cal. App. 5th at 1312-1313.

¹⁶¹ *Mayor, supra*, 104 Cal.App.5th at 1316.

¹⁶² *Law Finance, supra*, 14 Cal.5th at 949-950 [“Because a lack of fundamental jurisdiction implicates ‘the basic power of a court to act,’ courts must enforce jurisdictional limitations even if consideration of waiver, estoppel, consent, or forfeiture might otherwise excuse a party’s failure to comply with them (citations omitted).”]; *Saint Francis, supra* 9 Cal.5th at 719-720, 265 [“Equitable tolling ... is not immune from the operation of statute (citation). A court may conclude that explicit statutory language or a manifest policy underlying a statute simply cannot be reconciled with permitting equitable tolling, ‘even in the absence of an explicit prohibition.’ (citation).”].

EXHIBIT 1

Wies v. State of California (ADJ11101301, dated November 12, 2024)

2024 Cal.Work.Comp.P.D. LEXIS ____

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JOHN WIES, *Applicant*

vs.

STATE OF CALIFORNIA, Legally Uninsured, *Defendant*

**Adjudication Number: ADJ11101301
(Marina Del Rey District Office)**

**OPINION AND ORDER DISMISSING
PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of our Decision After Reconsideration of June 24, 2024 where we rescinded a workers' compensation administrative law judge's (WCJ) Findings & Award of November 6, 2023, which had found that while employed during a cumulative period ending on November 10, 2017 as an auto tech/mechanic, applicant sustained industrial injury in the form of Parkinson's Disease. We returned the matter to the trial level for further development of the record and decision.

Applicant contends that we erred in issuing our Decision of June 24, 2024 arguing that we had no jurisdiction to issue the decision and arguing that we were incorrect on the merits in finding that the current record did not support a finding of industrial injury in the form of Parkinson's Disease. We have received an Answer from defendant.

As explained below, we dismiss the applicant's Petition because it was not timely filed.

Preliminarily, we note that former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

- (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.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on September 10, 2024, and 60 days from the date of transmission is Saturday, November 9, 2024. The next business day that is 60 days from the date of transmission is Tuesday, November 12, 2024.¹ (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Tuesday, November 12, 2024, so we have timely acted on the petition as required by Labor Code section 5909(a).

Here, according to our review of the record, we did not receive a Report and Recommendation by a workers’ compensation administrative law judge, and no other notice to the parties of the transmission of the case to the Appeals Board was provided by the district office. Thus, we conclude that the parties were not provided with the notice of transmission required by Labor Code section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on September 10, 2024.

Labor Code section 5903 states, in pertinent part, that a petition for reconsideration may only be filed “within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers’ compensation judge.” A petition for reconsideration is deemed filed on the day it was actually received at the appropriate WCAB office or filed electronically and not on the date it was deposited in the mail. (Cal. Code Regs., tit. 8, § 10615, sub. (b); *Thermador*

¹ Monday, November 11, 2024 was the Veterans Day holiday.

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

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

Waste King v. Workers' Comp. Appeals Bd. (Heine) (1995) 60 Cal.Comp.Cases 450, 451 [writ den.]; *Oliver v. Structural Services* (1978) 43 Cal.Comp.Cases 596, 598 [Appeals Bd. panel.] Labor Code section 5900, for its part, makes clear that the Appeals Board has no discretion to entertain untimely petitions, and mandates that a petition shall be made “only within the time ... specified in [Labor Code § 5903].” (*Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *United States Pipe & Foundry Co. v. Industrial Accident Commission (Hinojoza)* (1962) 201 Cal.App.2d 545, 548-549 [27 Cal.Comp.Cases 73] [“the provisions of [Labor Code §§ 5900 and 5903] are mandatory and jurisdictional”]; *Cavanaugh v. Workmen's Comp. Appeals Bd.* (1967) 255 Cal.App.2d 181 [32 Cal.Comp.Cases 445]; *Northrup Grumman Corp. v. Workers' Comp. Appeals Bd. (Clark)* (1999) 64 Cal.Comp.Cases 1416 [writ denied]; *Cal. Ins. Guarantee Assoc. v. Workers' Comp. Appeals Bd. (Sadeque)* (2003) 68 Cal.Comp.Cases 239, 241 [writ denied] [(time limit set forth in Labor Code § 5903 is jurisdictional].)

In this case, the decision in question was served by email on applicant's attorney on June 24, 2024. Therefore, applicant had the 20 days specified in section 5903 plus a five-day extension specified in WCAB Rule 10605(a)(1) (Cal. Code Regs., tit. 8, § 10605(a)(1).) This period expired on July 19, 2024, which was a Friday. However, the Petition was not received by the Appeals Board until Monday, July 22, 2024.

Since applicant's Petition was not filed within the period established by Labor Code § 5903, we have no jurisdiction to entertain the petition, and the same must therefore be dismissed.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of our Decision After Reconsideration of June 24, 2024 is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 12, 2024

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

**JOHN WIES
GOLDSCHID, SILVER & SPINDEL
STATE COMPENSATION INSURANCE FUND**

DW/oo

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

EXHIBIT 2

EAMS Case Events: (ADJ10036954)

Case Events: Adjudication Case Events ADJ10036954

Event Description	Additional Information	Unit	Created By	Deleted By	Event Date	Event Entry Date	Action
O&O Granting Recon & Decision After Recon	on Board Motion	Reconsideration Board	annie santiago		2/2/2024 00:00	2/2/2024 00:00	Delete...
Recon Decision Received: Judge Action	The case is returned from the Recon board requiring Judge action	Reconsideration Board	annie santiago		1/26/2024 16:07	1/26/2024 16:07	Delete...
O&D After Recon		Reconsideration Board	annie santiago		1/26/2024 00:00	1/26/2024 00:00	Delete...
Sent to Recon	The case is sent to the Recon board	Reconsideration Board	annie santiago		1/25/2024 13:24	1/25/2024 13:24	Delete...
Writ Filed	Petition for Writ of Mandate, filed by Elizabeth Hudson, Esq.	Reconsideration Board	brian livingston		1/9/2024 00:30	1/9/2024 00:30	Delete...
Writ Filed	Erroneously	Reconsideration Board	brian livingston	brian livingston	1/9/2024 00:00	1/9/2024 00:00	Delete...

Event Description	Additional Information	Unit	Created By	Deleted By	Event Date	Event Entry Date	Action
	entered event deleted.	Board					
Typed or Written Letter Filed.		DWC Headquarters	EAMSBA TCH		9/14/2023 11:35	9/14/2023 11:35	Delete...
Hearing Cancelled		Adjudication	robin oosterbaan		8/17/2023 09:21	8/17/2023 09:21	Delete...
Interim Order: Taking Off Calendar (OTOC)		Adjudication	robin oosterbaan		8/15/2023 00:00	8/17/2023 09:21	Delete...
Opinion and Order Granting Reconsideration		Reconsideration Board	oksana osachiy		8/14/2023 00:00	8/14/2023 00:00	Delete...
Objection to DOR Filed		DWC Headquarters	EAMSBA TCH		8/2/2023 11:31	8/2/2023 11:31	Delete...
DOR Filed - MSC		DWC Headquarters	WEBSVC S		7/19/2023 09:34	7/19/2023 09:34	Delete...
MSC Scheduled		DWC Headquarters	WEBSVC S		7/19/2023 09:34	7/19/2023 09:34	Delete...

Event Description	Additional Information	Unit	Created By	Deleted By	Event Date	Event Entry Date	Action
Hearing Completed	ADJ	Adjudication	robin oosterbaan		7/19/2023 09:18	7/19/2023 09:18	Delete...
Petition for Penalties Filed.		DWC Headquarters	EAMSBA TCH		7/17/2023 15:32	7/17/2023 15:32	Delete...
Answer To Petition for Reconsideration Filed		DWC Headquarters	EAMSBA TCH		4/3/2023 16:33	4/3/2023 16:33	Delete...
Petition for Reconsideration Filed		DWC Headquarters	EAMSBA TCH		3/23/2023 11:37	3/23/2023 11:37	Delete...
Petition for Commutation Filed		DWC Headquarters	EAMSBA TCH		3/8/2023 11:33	3/8/2023 11:33	Delete...
Findings and Award Sent		Adjudication	robin oosterbaan		3/2/2023 20:04	3/2/2023 20:04	Delete...
Closing Order: Findings and Award	3/2/2023; WCJ Russell - Findings, Award and Orders	Adjudication	robin oosterbaan		3/2/2023 00:00	3/2/2023 20:06	Delete...

IX. CERTIFICATE OF SERVICE

I certify that on March 10, 2025, I electronically filed the foregoing
PETITIONER’S OPENING BRIEF ON THE MERITS
with the Clerk of the Supreme Court of the State of California by using the appellate
TrueFiling system. The following case participants were served:

Counsel for Respondent WCAB: 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	Counsel for Respondent Ross Valley: Christian Kerry, Esq. Hanna Brophy MacLean McAleer & Jensen, LLP P.O. Box 12488 Oakland, CA 94604-2488
--	--

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,

March 10, 2025

/s/ Elizabeth Hudson
Elizabeth Hudson / Shoemaker Law Offices
beth@shoemakerlawoffices.com
Counsel for Petitioner

S287261

In the
Supreme Court
of the
State of California

Joseph Mayor,
Petitioner,

v.

Workers' Compensation Appeals Board

and

Ross Valley Sanitation District,
Respondents.

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

WCAB CASE NUMBER ADJ10036954
HON. THOMAS J. RUSSELL

PROOF OF SERVICE

Elizabeth Hudson, Esq. (SBN: 161391)
Shoemaker Law Offices
150 Glen Cove Marina Rd. E, Ste. 103
Vallejo, CA 94591
Telephone (707) 552-1000 / Facsimile: (707) 552-1445
Email: beth@shoemakerlawoffices.com

Attorney for Petitioner, Joseph Mayor

CERTIFICATE OF SERVICE

I certify that on March 10, 2025, I electronically filed the foregoing
PETITIONER’S OPENING BRIEF ON THE MERITS
with the Clerk of the Supreme Court of the State of California by using the appellate
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--	--

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,

March 10, 2025

/s/ Elizabeth Hudson
Elizabeth Hudson / Shoemaker Law Offices
beth@shoemakerlawoffices.com
Counsel for Petitioner

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.
2. My email address used to e-serve: **beth@shoemakerlawoffices.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
PROOF OF SERVICE	03.10.25 PROOF OF SERVICE ON OPENING BRIEF ON MERITS joseph mayor
BRIEF	03.10.25 PETITIONERS OPENING BRIEF ON THE MERITS joseph mayor

Service Recipients:

Person Served	Email Address	Type	Date / Time
Anne Schmitz Workers Compensation Appeals Board 166664	ASchmitz@dir.ca.gov	e-Serve	3/10/2025 4:18:17 PM
Elizabeth Hudson Shoemaker Law Offices 161391	beth@shoemakerlawoffices.com	e-Serve	3/10/2025 4:18:17 PM
Christian Kerry Hanna Brophy MacLean McAleer & Jensen LLP 213477	ckerry@hannabrophy.com	e-Serve	3/10/2025 4:18:17 PM
Eric Ledger 273423	EDLedger@dir.ca.gov	e-Serve	3/10/2025 4:18:17 PM
Andrew Wood 280901	AWood@dir.ca.gov	e-Serve	3/10/2025 4:18:17 PM

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

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

3/10/2025

Date

/s/Elizabeth Hudson

Signature

Hudson, Elizabeth (161391)

Last Name, First Name (PNum)

Shoemaker Law Offices

Law Firm