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Supreme Court of California
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S287261

IN THE SUPREME COURT OF CALIFORNIA

JOSEPH MAYOR,
Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD and ROSS VALLEY SANITATION DISTRICT,
Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION FOUR
CASE NO. A169465
WORKERS' COMPENSATION APPEALS BOARD, CASE NO. ADJ10036954

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER JOSEPH MAYOR

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f)(1), American Property Casualty Insurance Association (APCIA) requests permission to file the attached amicus curiae brief in support of petitioner Joseph Mayor.

APCIA is the primary national trade association for home, auto, and business insurers, with a legacy dating back 150 years. APCIA's members represent 65 percent of the United States property-casualty insurance market and write more than $65 billion in premiums in the State of California annually, including over 71 percent of the workers' compensation insurance market. On issues of importance to the property and casualty insurance industry, APCIA advocates sound public policies on behalf of its members and their policyholders in legislative and regulatory forums at the state and federal levels and files amicus curiae briefs in significant cases before state and federal courts.

APCIA is interested in this case because the Workers' Compensation Appeals Board's months-long delay in ruling on the petition for reconsideration here is part of a widespread and damaging practice. Labor Code section 5909 requires the WCAB to rule on a petition for reconsideration within 60 days.[1] Under the version that applies to this case, that 60-day window begins running from the time a petition is *filed*; the Legislature temporarily modified the statute so that, from 2024 to 2026, the

[1] All further statutory references are to the Labor Code unless otherwise indicated.

window begins running from time the WCAB *receives* the petition. Under both versions of section 5909, if the WCAB does not timely act, the petition is deemed denied by operation of law.

But relying on the Court of Appeal's decision in *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, the WCAB has for decades invoked "*Shipley* tolling" to delay substantively ruling on such petitions long past section 5909's 60-day deadline. The WCAB evades the deadline by regularly issuing boilerplate orders within 60 days stating vaguely that "further study" is needed, before issuing a merits ruling on the petition months or even years later.

When petitions are not promptly resolved, all parties to the workers' compensation system suffer—employees, employers, and insurers alike. Employees experience unneeded delays in receiving benefits, while employers and insurers cannot assess their payment obligations with any reasonable certainty. Therefore, APCIA—whose members issue workers' compensation insurance policies to *employers*—supports Joseph Mayor, an *employee* and applicant for workers' compensation benefits, in this case seeking to enforce section 5909's plain text.

APCIA's proposed amicus brief explains that, while the parties' briefs have focused on whether section 5909's deadline is jurisdictional, this Court need not reach that issue to disapprove the WCAB's practice of "*Shipley* tolling." Regardless of whether it is jurisdictional, section 5909's deadline is mandatory and is not extended by equitable tolling as the result of the WCAB's

unilateral action. "*Shipley* tolling" is, moreover, far afield from the rarely applied doctrine of equitable tolling.

But if this Court were to reach the question of whether section 5909's deadline is jurisdictional, it should draw on its precedents relating to a court's deadline to rule on a new trial motion to hold section 5909's deadline is similarly jurisdictional.[2]

June 2, 2025

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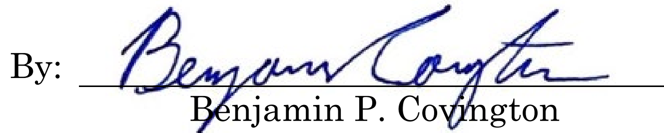
By: 
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[2] No party or counsel for a party in the pending appeal authored this proposed brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the proposed brief. No person or entity other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of the proposed brief. (See Cal. Rules of Court, rule 8.520(f)(4).)

AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER JOSEPH MAYOR

INTRODUCTION

From the time the Workmen's Compensation, Insurance, and Safety Act was enacted in 1913, the Legislature has expressed its expectation that the Workers' Compensation Appeals Board resolve petitions for reconsideration quickly—consistent with California's constitutional mandate that workers' compensation benefits determinations be made "expeditiously." And since 1913, the law has effectuated this goal in part by setting a deadline for the WCAB to act on a reconsideration petition—which is similar to a motion for a new trial following proceedings before a workers' compensation judge. Under Labor Code section 5909, the WCAB must rule on such a petition within 60 days or it is "deemed to have been denied."

For decades, the WCAB has invoked *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 (*Shipley*) in an attempt to excuse its regular circumvention of section 5909's deadline. Exercising so-called "*Shipley* tolling," the WCAB issues a boilerplate order within 60 days stating simply that the petition merits "further study." The practice is perplexing, since workers' compensation proceedings by design tend to be short, often involving straightforward factual disputes and settled legal principles. The WCAB nonetheless uses the "further study" device to grant itself an open-ended extension of time and then issues its merits ruling on the petition months or even years later. Here, for example, the WCAB issued a "further study"

order within 60 days of receiving the petition for reconsideration. The WCAB then purported to grant the petition nearly eleven months after it was filed and over seven months after it was received by the WCAB—violating both the pre- and post-amendment version of section 5909.

This case is far from unique. One appellate court noted that, as of November 2021, there were *over 500 pending cases* in which the WCAB had invoked "*Shipley* tolling" and issued a boilerplate "further study" order. The practice since then has continued unabated, often ending in simple affirmances in unremarkable cases.

When petitions for reconsideration languish long past section 5909's deadline, benefits determinations sit in limbo and all parties to the workers' compensation system—employees, employers, and insurers—are disserved. That is why amicus American Property Casualty Insurance Association—a trade association that represents insurers who issue workers' compensation policies to *employers*—supports in this case Joseph Mayor, an *employee* and applicant for workers' compensation benefits. The Court should take this opportunity to clarify that the Legislature meant what it said when it enacted section 5909, and should hold that the WCAB's regular practice of avoiding section 5909's plain language is unlawful.

While the parties' briefs focus on whether section 5909's 60-day limit is jurisdictional, this Court need not reach that question. Both here and in another recent decision, the Court of Appeal disapproved of "*Shipley* tolling" while expressly declining

to address whether the deadline is jurisdictional. The question is immaterial because section 5909 sets a mandatory deadline that cannot be equitably tolled. Its text attaches a consequence to its deadline, leaving no room for discretionary extensions: After 60 days, the petition "is deemed to have been denied." Section 5909's purpose of facilitating "expeditious[ ]" benefits determinations likewise forecloses equitable tolling.

Even if section 5909 did allow equitable tolling, "*Shipley* tolling" does not meet the elements of that doctrine. Equitable tolling applies in limited circumstances to prevent litigants from losing their day in court through no fault of their own. But petitioners who timely seek reconsideration of a workers' compensation ruling have preserved their right to judicial review. It is the WCAB that purports to set up its own mechanism to *delay* review. That bears no resemblance to equitable tolling. Accordingly, the WCAB is acting unlawfully when issuing orders on reconsideration long after the statutory deadline for doing so.

If this Court were inclined to address whether Labor Code section 5909's deadline is jurisdictional, its precedents construing the statutory deadline for a court to rule on a new trial motion provide a ready analogy. This Court has held that Code of Civil Procedure section 660's deadline for a trial court to rule on a motion for a new trial is jurisdictional. In both contexts, the consequence for the tribunal's failure to timely act is the same—the request for relief is deemed denied by operation of law. And in both situations, review is available in the Court of Appeal. Indeed, the WCAB conceded below that a petition for

reconsideration “fulfills substantially the same function” as a new trial motion. This Court should treat like statutes alike and hold Labor Code section 5909 is similarly jurisdictional.

LEGAL ARGUMENT

I. Regardless of whether Labor Code section 5909 is jurisdictional, the Workers’ Compensation Appeals Board’s practice of “*Shipley* tolling” is unlawful.

A. For over a century, the Legislature has limited the time within which the WCAB must act on a reconsideration petition.

The California Constitution provides that the workers’ compensation system “shall accomplish substantial justice” for all parties before it “expeditiously, inexpensively, and without incumbrance of any character.” (Cal. Const., art. XIV, § 4.) Consistent with that constitutional mandate, the version of section 5909 that applied to the workers’ compensation proceedings in this case provided that a reconsideration petition “is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date of filing.”

As the WCAB recognizes in its opening brief, section 5909 establishes a statutory time limit for resolving reconsideration petitions that has been in place for more than a century. (*Zurich American Ins. Co. v. Workers’ Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213, 1233 (*Zurich*); accord, OBOM 14–15.) That time limit has been subject only to a few minor substantive amendments over its century-plus history.

In 1992, the Legislature tweaked section 5909’s original language requiring the WCAB to rule on petitions for

reconsideration within 30 days, subject to an extension for "good cause" of no more than an additional 30 days. (See *Zurich*, *supra*, 97 Cal.App.5th at p. 1234.) The Legislature did away with the "good cause" extension but afforded the WCAB a total of 60 days from filing to rule on such petitions in all cases. This version of section 5909 applies here, with the deadline to rule running from the date on which the reconsideration petition was filed.

Then, just last year, the Legislature changed the trigger date for the 60-day window. The current version now states that the deadline runs "from the date a trial judge transmits a case to the appeals board." That version remains in effect until July 2026, when section 5909 is set to revert back to the date-of-filing trigger. (*Mayor v. Workers' Comp. Appeals Bd.* (2024) 104 Cal.App.5th 1297, 1303–1304 (*Mayor*).)

B. The Legislature has defined how the WCAB may act on a reconsideration petition.

As this Court has recognized, if the WCAB believes a workers' compensation judge's benefits determination is correct, the WCAB need not issue any decision on a petition for reconsideration. After 60 days, the petition "is deemed to have been denied." (§ 5909, subd. (a).) As a result, the WCAB can "simply by pocket denial dispose of cases under section 5909." (*LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 635 (*LeVesque*); *Zurich*, *supra*, 97 Cal.App.5th at p. 1237 ["the Board may resolve an appeal by not acting on the petition within 60 days"].)

But if the WCAB believes the judge below erred and reconsideration is warranted, the Labor Code dictates both *when* and *how* the WCAB must act. The WCAB must both act within 60 days, and it must issue a substantive, case-specific order on the merits. "Any decision of the appeals board granting *or* denying a petition for reconsideration . . . *shall state the evidence relied upon and specify in detail the reasons for the decision*." (§ 5908.5, emphasis added.)

The WCAB's reasons must, in turn, be based on the five exclusive grounds petitioners may raise under section 5903. (§ 5903 [reconsideration must be "upon one or more of the following grounds and no other"];[3] *Hall v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 850, 856–857 [describing section 5903 and noting it is "essential" that "the Board *specify in detail* the reasons for its decision to grant reconsideration" (emphasis added)]; see *id.* at pp. 857–858 [citing cases in which reconsideration orders were found inadequate].)

The WCAB's ability to rescind an order is similarly one of the five statutorily enumerated procedural options that track the standard appellate dispositions of affirming, reversing, or remanding for further proceedings. (§ 5906 [the WCAB can "[1] affirm, [2] rescind, [3] alter, or [4] amend" a judge's order

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[3] Section 5903 permits a reconsideration petition only on these grounds: (a) that the tribunal issuing the order "acted without or in excess of its powers"; (b) that the order was procured by fraud; (c) that the evidence does not justify the tribunal's findings of fact; (d) that the petitioner has discovered new evidence warranting a different outcome; and (e) that the findings of fact do not support the order.

"without further proceedings" or it may [5] "grant reconsideration and direct the taking of additional evidence"].) Section 5906 does not contain a sixth procedural option of issuing a placeholder order to kick the can down the road for later issuance of one of the approved dispositions.

Denial by operation of law under section 5909 "affirms" the order as to which reconsideration is sought, and ensures timely disposition of all petitions in one of the ways contemplated by section 5906. The WCAB briefly—and oddly, in the face of the plain language of section 5909—argues it lacks the power to "pocket deny" a petition under section 5909. (OBOM 31 & fn.17 ["denial by operation of [law] further violate[s] the requirement in section 5908.5 that the Appeals Board state the evidence relied upon and specify in detail the reasons for the decision"].) The WCAB's argument violates precedent—though it attempts, without explanation, to dismiss as "equivocal" this Court's *approval* of pocket denials in *LeVesque*. (OBOM 31, fn.17.) It also violates the canon against superfluity, rendering section 5909's deemed-denied language meaningless. (See *Brennon B. v. Superior Court* (2022) 13 Cal.5th 662, 691.) This Court should reject the WCAB's argument that it lacks authority the Legislature has expressly given and this Court has already recognized.

C. Section 5909 is mandatory and not subject to equitable tolling.

1. A mandatory but nonjurisdictional statute can preclude equitable tolling.

The parties' briefs focus on whether section 5909's deadline is jurisdictional or merely mandatory. (OBOM 19–29; ABOM 18–31; RBOM 5–10.) However, the Court need not reach that question to resolve this case. Either way, the WCAB's practice of "*Shipley* tolling" violates section 5909.

The jurisdictional-or-mandatory distinction has important consequences for how a party can raise noncompliance with the deadline. (See *Law Finance Group, LLC v. Key* (2023) 14 Cal.5th 932, 950 (*Law Finance*); *Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 342 (*Kabran*).) An argument about a mandatory deadline can be forfeited or waived, while an argument about a jurisdictional requirement cannot—and instead can be asserted for the first time on appeal or in a collateral attack. (See *Kabran*, at pp. 339–342.)

Here, Mayor timely filed a writ petition challenging the WCAB's violation of section 5909, so there is no contention that Mayor forfeited or waived that issue. (See generally OBOM.) Instead, the only merits question presented is whether the Labor Code allows the WCAB to unilaterally toll section 5909's deadline. (See OBOM 11–12 [question 1].) As this Court has recognized, that issue does not turn on whether a statute is jurisdictional. "Even if a [deadline] is nonjurisdictional, the Legislature still may preclude the court from applying equitable

doctrines like tolling and estoppel." (*Law Finance*, *supra*, 14 Cal.5th at p. 952.)

Like the Court of Appeal in *Zurich* and below, this Court can assume without deciding that section 5909 is nonjurisdictional. (*Zurich*, *supra*, 97 Cal.App.5th at p. 1236, fn.17 ["We do not resolve this issue" because, even if section 5909 is mandatory, "equitable principles do not support the Board's position"]; *Mayor*, *supra*, 104 Cal.App.5th at p. 1310 [following *Zurich*, which "decline[d] to categorize violations of former section 5909 as depriving the Board of fundamental jurisdiction or merely exceeding the Board's jurisdiction"].)[4] Doing so would accord with this Court's reluctance to reach "in the first instance" an issue not decided below. (*Central Coast Forest Assn. v. Fish & Game Com.* (2017) 2 Cal.5th 594, 606.)

Declining to rule in this case on the jurisdictional question would also obviate the need to address the WCAB's (undeveloped) policy argument that a ruling against it could open the flood gates to collateral attacks on workers' compensation benefits

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[4] Despite both *Zurich* and *Mayor* declining to resolve the jurisdictional-versus-mandatory issue, the WCAB's petition for review painted them as "creat[ing] a split of authority" on that issue. (PFR 10 [asserting *Zurich* "acknowledg[ed] that the section 5909 deadline is not jurisdictional in the fundamental sense," while asserting the Court of Appeal here "appear[ed] to hold that the section 5909 deadline is jurisdictional"].) Now, in its merits briefing, the WCAB contends that *Zurich* and the decision below are internally "inconsistent" or "contradictory" because they issued no "clear holding" on the jurisdictional-versus-mandatory issue. (OBOM 20–21, fn. 11.) But declining to reach a nondispositive issue is standard fare for appellate courts.

determinations. (PFR 10, 21, 31; OBOM 11, 23, 39, 41.) The point seems far-fetched. But in any event, this Court may address that concern if and when a collateral attack presents itself.

2. The statutory text precludes the WCAB from equitably tolling section 5909's deadline.

Equitable tolling does not apply if " 'explicit statutory language' " or a " 'manifest policy underlying' " a statute displaces it. (*Law Finance*, *supra*, 14 Cal.5th at p. 953.) The question is whether something in the statute's "language" or "structure" makes it "different from that of other statutes of limitations" that merely "set[ ] forth a deadline" by which an act must occur. (*Saint Francis Memorial Hospital v. State Department of Public Health* (2020) 9 Cal.5th 710, 720 (*Saint Francis*).)

That is the situation here. The Labor Code precludes equitable tolling of section 5909's 60-day deadline twice over—through both its text and purpose.

Section 5909, unlike run-of-the-mill deadlines, establishes a consequence for the WCAB's failure to act within 60 days: The petition for reconsideration is "deemed to have been denied." Under the *Saint Francis* framework, this deemed-denied language makes section 5909's 60-day deadline "different from" standard litigation deadlines. The WCAB does not cite a single statutory deadline with deemed-denied language that has been interpreted as subject to equitable tolling—nor is amicus aware of any. Instead, glossing over this language, the WCAB just

makes the unsupported assertion that "section 5909 contains no express limitations on the application of tolling." (OBOM 28–29.)

The text of related Labor Code sections also precludes the WCAB's practice—exemplified here—of attempting to equitably toll section 5909's deadline by issuing a nonsubstantive boilerplate order. (See *John v. Superior Court* (2016) 63 Cal.4th 91, 96 (*John*) [a court must "construe the statute's words in context, and harmonize statutory provisions to avoid absurd results"].) The WCAB is "a tribunal of limited jurisdiction," possessing only "those powers conferred upon it by the Constitution and the statutes of California." (*Fremont Indemnity Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 970.) The Labor Code, in turn, sets the timing for the WCAB's orders (§ 5909); limits the types of orders the WCAB can issue (§ 5906); and specifies the contents of those orders, requiring them to "state the evidence relied upon" and "the reasons for the decision" (§ 5908.5). The WCAB's "*Shipley* tolling" orders, often issued on the 60th day, violate both the Labor Code's order-type and order-contents requirements—providing further textual evidence that the Legislature did not intend for section 5909 to be equitably tolled.

3. The statute's purpose also precludes equitable tolling.

Equitable tolling of section 5909's deadline is also precluded by the " 'manifest policy' " (*Law Finance*, *supra*, 14 Cal.5th at p. 953) of making workers' compensation benefits determinations "expeditiously, inexpensively, and without

incumbrance of any character" (Cal. Const., art. XIV, § 4; *John*, *supra*, 63 Cal.4th at p. 95 [a court's " 'primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose' "]). By placing a time limit, the Legislature sought to ensure that reconsideration petitions " 'would not languish.' " (*Zurich*, *supra*, 97 Cal.App.5th at p. 1235.)

The WCAB does not dispute that "expeditious[ ]" benefits determinations are an express policy goal of the workers' compensation system. Nor does the WCAB seriously contend that its practice of delaying its merits rulings on reconsideration petitions by months or years is consistent with that goal.

Instead, the WCAB insists that reading section 5909 to mean what it says would somehow elevate the goal of "expeditious[ ]" resolution over the goal of achieving "substantial justice." (OBOM 27.) To begin, it is the Legislature's job—not the WCAB's—to decide how to best strike "th[e] balance" between those goals. (*Zurich*, *supra*, 97 Cal.App.5th at p. 1235.)

In any event, the WCAB's argument is based on an incorrect premise. The WCAB suggests that, if reconsideration petitions were deemed denied after 60 days, then any decision would be affirmed "regardless of the outcome" that should have been reached. (OBOM 27.) But that argument overlooks two important points. First, the WCAB can correct errors that fall within its scope of authority—it just needs to do so within 60 days. The WCAB's argument is, in essence, that because it does not do its job, it should not be required to do its job, or else some

litigants who might be entitled to reconsideration will suffer. The answer is not for courts to allow the WCAB to wave away statutory requirements. *All* litigants suffer from the WCAB's delays.

Second, a party aggrieved by a trial judge's decision can seek judicial review after denial of reconsideration by order *or* by operation of law. (See § 5950 [a petition for writ of review can be filed in the Court of Appeal "within 45 days after a petition for reconsideration is denied"]; *Mayor*, *supra*, 104 Cal.App.5th at p. 1308 ["a petitioner could still seek judicial review after the denial of a petition by operation of law"].) Just like the WCAB, an appellate court can review whether the ruling from which reconsideration is sought was "without or in excess of its powers" or "procured by fraud." (Compare § 5952, subds. (a) & (b) [court] with § 5903, subds. (a) & (b) [WCAB]; see *State Farm Ins. Co. v. Workers' Comp. Appeals Bd.* (2011) 192 Cal.App.4th 51, 58 [" 'Interpretation of governing statutes or [the] application of the law to undisputed fact is decided de novo by the reviewing court' "].) Similar to the WCAB, a court of appeal can also deferentially review the factual findings underpinning the ruling. (Compare § 5952, subd. (d) [court: "substantial evidence" review] with *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 256 [WCAB: trial judge's factual findings are "accorded great weight by the Board" and can be "rejected only on the basis of contrary evidence of considerable substantiality"]; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 319 [vacating the WCAB's grant of reconsideration because "the

board failed to accord to the referee's findings the great weight to which they were entitled"].) The availability of judicial review therefore provides a further safeguard to ensure that erroneous determinations do not stand.

The WCAB also makes the fallback argument that Labor Code section 5909 must be subject to equitable tolling because courts have held that different deadlines in the workers' compensation process are subject to equitable principles. (See OBOM 24–25 [citing, for example, *Reynolds v. Workmen's Comp. Appeals Bd.* (1974) 12 Cal.3d 726, which held that a defendant could be equitably estopped from raising Labor Code section 5405's statute of limitations for commencing proceedings].) But this Court rejected that in-gross approach to determining the effect of statutory deadlines. In *Kabran*, the Court held that Code of Civil Procedure "[s]ections 657, 659, and 660, which govern on what ground and in what time period a litigant may seek a new trial, fall into the jurisdictional category." (*Kabran*, *supra*, 2 Cal.5th at p. 342.) But it went on to hold that Code of Civil Procedure section 659a, which governs when a party must file supporting affidavits, is *not* jurisdictional. (*Ibid.*) Under *Kabran*, it does not matter whether *other* Labor Code provisions can be tolled—the focus here is on section 5909. And both that statute's text and its purpose preclude equitable tolling.

D. The WCAB's regular issuance of "further study" orders is not equitable tolling.

Even if section 5909's deadline could be equitably tolled (it cannot), the WCAB's practice of "*Shipley* tolling" is far afield from the doctrine of equitable tolling.

Mayor's employer filed a reconsideration petition in March 2023. (*Mayor*, *supra*, 104 Cal.App.5th at p. 1302.) The WCAB received the petition "on or about" June 15, 2023. (*Ibid.*) 60 days later, the WCAB issued a boilerplate order that stated the filing and receipt dates before citing *Shipley*, *supra*, 7 Cal.App.4th 1104, with an explanatory parenthetical that read: "allowing tolling as a matter of due process." (*Mayor*, at p. 1302.) Although that boilerplate order purported to "grant[ ]" the petition, it actually took no action on the petition but instead ordered "further study" of the issues presented in the petition—without explaining what issues merited a prolonged review. (*Id.* at p. 1315, fn. 9.) Then, in late January 2024, nearly eleven months after the petition was filed and over seven months after the WCAB received the petition, the WCAB purported to grant reconsideration. (*Id.* at pp. 1302–1303.)

As the WCAB concedes, equitable tolling is a doctrine that, even when available under a statute, applies only " 'occasionally and in special situations.' " (*Saint Francis*, *supra*, 9 Cal.5th at p. 719; OBOM 25.) It is intended to prevent a good-faith litigant from unwittingly losing their " 'day in court' " (*Saint Francis*, at p. 719) or forfeiting their "causes of action" (*Law Finance*, *supra*, 14 Cal.5th at p. 954). Equitable tolling requires "careful[ ]

consider[ation]" of a case's facts and circumstances, and it is "not ' "a cure-all for an entirely common state of affairs." ' " (*Ibid.*)

The WCAB defends its reliance on *Shipley* to issue placeholder "further study" orders as a form of equitable tolling. (See, e.g., OBOM at 9–11 [citing *Shipley* and contending "equitable tolling may be applied to the statutory deadline" in section 5909].) But several aspects of "*Shipley* tolling" establish that practice is not, in reality, a form of equitable tolling.[5]

First**,** equitable tolling is applied only "occasionally" (*Saint Francis*, *supra*, 9 Cal.5th at p. 719), but the WCAB regularly attempts to toll section 5909's deadline. From 2015 to 2019, the WCAB issued a boilerplate "further study" order in 19 percent of cases. (*Earley v. Workers' Comp. Appeals Bd.* (2023) 94 Cal.App.5th 1, 9 (*Earley*).) In 2020 and 2021, that figure jumped to over 38 percent. (*Ibid.*) As of November 2021, there were *over 500 pending cases* in which the WCAB had issued a placeholder

[5] *Shipley* never mentioned equitable tolling. *Shipley* was instead an as-applied due process case arising from bizarre facts, where the WCAB "*misled* the petitioner in a manner that deprived the petitioner of a right to review by the [WCAB] *or* the appellate courts." (*Zurich*, *supra*, 97 Cal.App.5th at p. 1221, emphasis added; see *Shipley*, *supra*, 7 Cal.App.4th at p. 1108.) The WCAB lost the pro per petitioner's case file; the petitioner inquired whether the WCAB would rule on it; the WCAB provided the petitioner "reassurances" that it would address his petition on the merits after his case file was found or reconstructed; yet the WCAB then proceeded to deny the petition as untimely under section 5909—long after the petitioner's time to seek appellate review had already lapsed. *Shipley* addressed those narrow facts. It did not announce an across-the-board grant of authority for the WCAB to toll deadlines that the Legislature imposed on it.

Shipley tolling order. (*Ibid.*) The numbers are borne out by the experience of APCIA's member insurance companies. These statistics undermine the WCAB's unsupported assertion that it applies tolling "rarely and appropriately." (RBOM 13, boldface omitted.)

Second, there is a fundamental mismatch between the ground the WCAB invokes to justify tolling and the time the WCAB takes to issue its merits orders. Throughout its briefs, the WCAB insists that the delays in its orders are linked solely to its delay in receiving the reconsideration petitions. (See, e.g., OBOM at 11–12 [question presented: whether tolling applies "when the Appeals Board did not receive the petition" in a timely manner], 14, 17, 23 [arguing "filed" means "*received*"], 42–43 [arguing equitable tolling applies "where the Appeals Board does not timely receive the petition for reconsideration"].) But the main delay here, and in most if not all of the other hundreds or thousands of "further study" cases, comes *after* the WCAB receives the petition. The WCAB here purported to grant reconsideration over seven months after it received Mayor's petition. (*Mayor*, *supra*, 104 Cal.App.5th at p. 1302.) Other cases feature similar post-receipt delays. (See *Earley*, *supra*, 94 Cal.App.5th at p. 9 ["The time between the filing of the grant-for-study orders and the Board's final decisions ranged from five to 21 months"].) Those delays are unmoored from any delays in the WCAB's initial receipt of reconsideration petitions.

As for any pre-receipt delay (such as occurred in *Shipley*), the Legislature has already addressed that issue—revising

section 5909 so that, at least until July 2026, the 60-day period does not start to run until the workers compensation judge transmits the petition to the WCAB. That revision gives the WCAB time to address any staffing shortages or e-filing hiccups that might have previously prevented it from resolving petitions within 60 days of filing. (See *Mayor*, *supra*, 104 Cal.App.5th at p. 1312.) Moreover, the Legislature can keep the revision in place if the facts warrant it. The WCAB's concern about delays in receiving petitions thus has no bearing here. And in any event, the WCAB cannot invoke equitable tolling as a " ' "a cure-all" ' " for the " ' "entirely common state of affairs" ' " of having a heavy workload. (*Law Finance*, *supra*, 14 Cal.5th at p. 954.)

Third**,** the WCAB's practice of tolling section 5909's deadline does not prevent a good-faith litigant from unwittingly losing their " 'day in court' " (*Saint Francis*, *supra*, 9 Cal.5th at p. 719) or forfeiting "causes of action" (*Law Finance*, *supra*, 14 Cal.5th at p. 954). As explained, when a reconsideration petition is denied by operation of law, a litigant simply directs its assertions of error to a different appellate tribunal: the Court of Appeal or this Court, instead of the WCAB.

II. If this Court chooses to resolve the fundamental-or-mandatory question, its new trial precedents establish that section 5909's deadline is jurisdictional.

As explained, the Court need not decide whether section 5909 is jurisdictional or merely mandatory. Whether jurisdictional or not, section 5909 is not subject to equitable tolling. (*Ante*, section I.C.) And beyond that, what the WCAB

has for decades labeled as equitable tolling does not resemble that doctrine as this Court has articulated it. (*Ante*, section I.D.) But if the Court does reach that question, it can resolve it by comparing section 5909's 60-day deadline to trial courts' 75-day statutory deadline to rule on new trial motions, which this Court has held is jurisdictional. (See *Law Finance*, *supra*, 14 Cal.5th at p. 951; *Kabran*, *supra*, 2 Cal.5th at p. 342.)

Code of Civil Procedure section 660, subdivision (c) sets a 75-day deadline for trial courts to rule on motions for a new trial. A court's failure to comply with that deadline comes with the same consequence as the WCAB's failure to timely rule on a petition for reconsideration: The "effect shall be a denial of the motion without further order of the court." (*Ibid.*) This Court has recognized that this language is a "clear marker[ ]" of jurisdictional effect. (*Kabran*, *supra*, 2 Cal.5th at p. 344.) Instead of being directed at litigants, this language "speaks directly to the . . . court's power." (*Law Finance*, *supra*, 14 Cal.5th at p. 951.) Neither a trial court nor the WCAB has the power to grant a request for relief after the statutory deadline—in both situations, such relief is unavailable by operation of law.

Code of Civil Procedure section 660 and Labor Code section 5909 also serve similar purposes. Code of Civil Procedure section 660 reflects the Legislature's choice that "trial courts should promptly dispose of cases where judgments have been entered." (*Barrese v. Murray* (2011) 198 Cal.App.4th 494, 506; accord, *Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 14 [noting a "legislative policy calling for prompt determinations of

new trial motions"].) Labor Code section 5909 likewise reflects the Legislature's choice that workers' compensation benefits determinations be made "expeditiously." (Cal. Const., art. XIV, § 4; *ante*, section I.A.) Indeed, the WCAB conceded below that " 'reconsideration fulfills substantially the same function as the new trial in civil proceedings.' " (*Mayor*, *supra*, 104 Cal.App.5th at p. 1315.) Given these two provisions' overlapping language, purpose, and function, they should be given the same jurisdictional effect if the Court reaches that question.

In its reply brief, the WCAB briefly argues that Labor Code section 5909's "deemed denied" language does not indicate a statute is jurisdictional. (RBOM 7.) But the WCAB does not acknowledge *Kabran*, which highlighted such language as one of multiple "clear markers" that Code of Civil Procedure section 660 is jurisdictional. (*Kabran*, *supra*, 2 Cal.5th at p. 344.)

The WCAB instead cites *J.M. v. Huntington Beach Union High School Dist.* (2017) 2 Cal.5th 648 (*J.M.*) as purportedly holding that equitable tolling was available under a section of the Government Claims Act with similar deemed-denied language. (RBOM 7.) But that argument misreads *J.M.*, which—if anything—supports Mayor's position in this case.

J.M. involved two different statutory provisions. One provision stated that, if a public entity does not act on a minor's "late claim application, it is deemed denied on the 45th day after it was presented." (*J.M.*, *supra*, 2 Cal.5th at p. 652.) Another provision required that a minor must file a petition in superior court "within six months after a late claim application is either

denied or deemed denied." (*Ibid.*) Addressing the latter deadline, this Court held that the facts of that case did not justify equitably tolling the six-month deadline to file a petition in the superior court. (See *id.* at pp. 656–658 ["the statutes provide no recourse for counsel's failure to petition the court within six months of the deemed denial of J.M.'s late claim application"].)

To the extent this Court discussed the former 45-day deadline with the deemed-denied language, its reasoning undermines the WCAB's position here. *J.M.* noted that a government entity may fail to timely act "for a variety of reasons"—it might have "uncertainty" on the merits, it might be "unable to complete its investigation within the allotted time," or it might fail to timely act "through inadvertence." (*J.M.*, *supra*, 2 Cal.5th at p. 653.) But none of the *reasons* for failing to timely act warrant dispensing with the statutory deadline: "*In all circumstances*, a late claim application is deemed denied after 45 days, even though [Government Code] section 911.6(b)(2) would entitle the minor to relief if the application had merit." (*Ibid.*, emphasis added.) "By placing this limitation on the entity's time to act," with judicial review available after the deadline lapses, "the Legislature ensured that applications would not languish." (*Ibid.*) The same is true here, and the WCAB's cited authority—when properly read—actually supports Mayor.

Analogizing Labor Code section 5909 to Code of Civil Procedure section 660 also undermines the WCAB's main argument against recognizing section 5909's jurisdictional effect. The WCAB contends that Labor Code section 5909's deadline for

granting a reconsideration petition cannot be jurisdictional because the Labor Code grants the WCAB "continuing jurisdiction" to alter or set aside workers' compensation determinations for "good cause." (OBOM 20, 41; see §§ 5803–5804.)[6] But that's true of trial courts too. Trial courts have continuing jurisdiction to set aside judgments for statutorily enumerated grounds. (See Code Civ. Proc., § 473, subds. (b) ["mistake, inadvertence, surprise, or excusable neglect"], (d) ["void judgment[s]"].) Yet this Court has never suggested that trial courts' Code of Civil Procedure section 473 authority somehow renders the deadline on their new trial authority under section 660 nonjurisdictional.

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[6] The WCAB also seems to take the position that it "*at no time*" loses jurisdiction over a workers' compensation determination—even when a petition for a writ of review has been filed. (OBOM 20.) But that position violates the black-letter rule that a perfected appeal "depriv[e]s the trial court of jurisdiction during the pending appeal" in order to "protect the appellate court's jurisdiction." (*Elsea v. Saberi* (1992) 4 Cal.App.4th 625, 629.)

CONCLUSION

For the above reasons, the Court should affirm the decision of the Court of Appeal and hold that section 5909 does not permit equitable tolling, much less what the WCAB has for decades referred to as "*Shipley* tolling." And if the Court reaches the question of whether section 5909's deadline is jurisdictional, the Court should draw on its new trial precedents to hold that it is.

June 2, 2025

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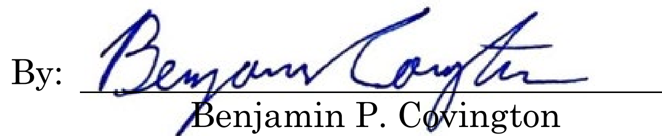
By: 
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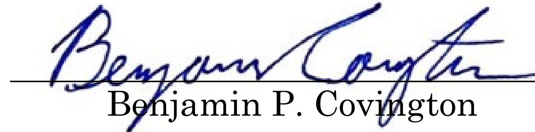

Benjamin P. Covington

PROOF OF SERVICE

Mayor v. Workers' Compensation Appeals Board et al.
Case No. S287261

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3601 West Olive Avenue, 8th Floor, Burbank, CA 91505-4681.

On June 2, 2025, I served true copies of the following document(s) described as **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF PETITIONER JOSEPH MAYOR** on the interested parties in this action as follows:

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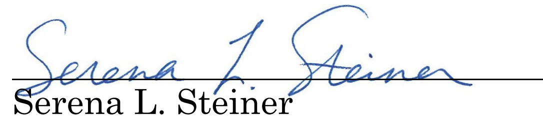

Serena L. Steiner

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Case No. S287261

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STATE OF CALIFORNIA
Supreme Court of California

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Lower Court Case Number: **A169465**

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Date

/s/Benjamin Covington
Signature

Covington, Benjamin (340180)
Last Name, First Name (PNum)

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