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Supreme Court of California
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FILED WITH PERMISSION

No. S287261

IN THE
SUPREME COURT
OF THE STATE OF CALIFORNIA

JOSEPH MAYOR,
Petitioner,

vs.

WORKERS' COMPENSATION APPEALS BOARD, et al.,
Respondents,

After a Decision by the Court of Appeal, First Appellate District,
Appeal No. A169465
Workers' Compensation Appeals Board, Case No. ADJ10036954

APPLICATION FOR RELIEF FROM DEFAULT TO FILE AMICUS BRIEF; PROPOSED AMICUS BRIEF ON BEHALF OF PETITIONER JOSEPH MAYOR

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APPLICATION

Pursuant to Cal. Rules of Court, rules 8.520(f)(1) and 8.60(d), proposed amicus curiae Mashallah Ishal respectfully requests permission to file the attached amicus brief on behalf of petitioner Joseph Mayor. Ishal has a particular interest in the outcome of this appeal because this Court has granted review in Ishal's case, pending the disposition of Mayor's appeal.[1]

As discussed in the attached declaration, there is good cause to grant relief because Ishal could not file the amicus brief earlier as his counsel was pursuing public record requests from the WCAB and the DWC in order to obtain statistical data regarding the number of grant-and-study orders issued by the Board (among other data). Having recently received their responses, Ishal is submitting this brief at this time. There is no prejudice to the other parties because this court has already extended the deadline for the submission of another amicus brief to today.

The attached amicus brief "will assist the court in deciding the matter" (rule 8.520(f)(3)) by augmenting the discussion of the

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[1] The order granting review states as follows: "The petition for review is granted. Further action in this matter is deferred pending consideration and disposition of a related issue *in Mayor v. W.C.A.B. (Ross Valley Sanitation District)*, S287261 (see Cal. Rules of Court, rule 8.512(d)(2)), or pending further order of the court. Submission of additional briefing, pursuant to California Rules of Court, rule 8.520, is deferred pending further order of the court." (*Ishal v. Workers' Compensation Appeals Board* (S288364; Feb. 19, 2025.)

case law addressing jurisdictional rules. In addition, while the grant-and-study order in Mayor's case was issued after the 60-day period specified in Labor Code section 5909, such an order was issued on the last possible day (i.e., on the 60th day) in Ishal's case. The proposed amicus brief refutes the arguments raised by the Board in other cases in which the Board has rejected the case law construing section 5909 as jurisdictional for fact patterns in which the grant-and-study order was issued on or before the 60th day.

To our knowledge, Ishal's case is the only grant-and-held case in which the Board's grant-and-study order was issued on or before the 60th day. Accordingly, Ishal has a particular interest in refuting the arguments raised by the Board against the application of the recent authorities adopting a jurisdictional view (cases where the grant-and-study order was issued *beyond* the 60-day deadline).

For the reasons discussed above, the court should grant relief to file the attached amicus brief. [2]

[2] No person or entity made a monetary contribution intended to fund the preparation or submission of the brief. (Cal. Rules of Court, rule 8.520(f)(4)(B).) No "party or any counsel for a party in the pending appeal" (S287261) "[a]uthored the proposed amicus brief in whole or in part" or "[m]ade a monetary contribution intended to fund the preparation or submission of the brief." (*Id.*, rule 8.520(f)(4)(A).)

Respectfully submitted,

Dated: June 2, 2025 DBL LAW GROUP

By *_/s/ Darren LeMontree_*
Darren LeMontree
Attorneys for Amicus Curiae
MASHALLAH ISHAL

DECLARATION

I, Darren LeMontree, declare:

1. I am an attorney admitted to practice law in California. I represent Mashallah Ishal in *Ishal v. WCAB* (S288364) in this court, as well as in the lower courts (e.g., before the Board).

2. The procedural history of Ishal's case is discussed at length in the writ petition that I filed in the Court of Appeal (B340479), challenging the Board's failure to adjudicate the petition for reconsideration that was filed by Ishal's workers' compensation insurer. In a nutshell, Ishal initiated a workers' compensation claim in 2018, seeking benefits based on work-related strokes (and other health impairments). [3]

3. The issue of coverage was submitted to an arbitrator in 2021. The arbitrator found coverage around May 2021. After the insurer filed its reconsideration petition to challenge the arbitrator's coverage decision, the Board issued a perfunctory grant-and-study order on the last possible day based on the 60-day deadline in 2021. The Board, however, failed to specify the reasons (other than stating it needs more time, in a generic fashion, to study the file).

4. After waiting literally three years, the Board then issued an order, indicating that it was missing some items from

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[3] Applicant Mashallah Ishal died in 2021. His son, Ardeshir Ishal, was appointed as the guardian ad litem before his death. His wife, Rachel Ishal, has also filed a claim for death benefits that is the subject of this litigation.

the file that precluded it from deciding the reconsideration petition on the merits. As a result, the Board purported to “rescind” the arbitrator’s Findings of Fact in 2024.

5. Ishal filed a writ petition, challenging the Board’s 2024 “decision.” After the Court of Appeal summarily denied the writ petition, Ishal successfully sought review in this court.

6. Because this court has issued a grant-and-hold order in Ishal’s case, this amicus brief is being submitted to amplify and augment the arguments presented by the petitioner in this case. The brief will also assist the court in refuting the Board’s position as to whether the recent case authorities apply to fact patterns where the grant-and-study order was issued by the 60-day deadline.

7. I could not file the amicus brief earlier as I was pursuing public record requests from the WCAB and the DWC in order to obtain statistical data regarding the number of grant-and-study orders issued by the Board (among other data). Having recently received their responses, I am now processing the information obtained. I could not file this brief while I was focused on such a time-consuming endeavor.

8. I have no reason to believe the other side would be prejudiced, especially given that the briefing will not be completed for another month in this case. Specifically, assuming another amicus brief will be filed today (based on the April 16 order extending the deadline for submission of the other amicus brief by APCIA), the Board will have 30 days to respond to that brief.

Therefore, the briefing will not be completed for at least another month in any event.

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

Executed on June 2, 2025, at Los Angeles, California.

By */s/ Darren LeMontree*
Darren LeMontree

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AMICUS BRIEF BY MASHALLAH ISHAL ON BEHALF OF PETITIONER JOSEPH MAYOR

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INTRODUCTION

This case involves one of those rare situations where litigants on both sides share the same view on the issue presented. While the Board is the only party seeking to justify its systemic failure to decide reconsideration petitions on time, the applicant's bar as well as the defense bar oppose the Board's creative arguments in seeking to maintain the status quo. [4]

Under the Board's radical theory, the Board can unilaterally render both Labor Code sections 5909 and 5908.5 toothless by merely sending a computer-generated letter in literally every single case, simply advising the parties that it needs more time to study the reconsideration petition and the record. Every litigant would then be at the mercy of the Board by having to wait years to get a decision on the merits. In amicus Ishal's case, for example, the Board issued a perfunctory grant-and-study order on the 60th day after the workers' compensation insurer filed its reconsideration petition, claiming that the Board needs more time to study the petition. Subsequently, it took the Board literally *three years* – meaning 36 months, 156 weeks or 1,095 days – just to "decide" the insurer's petition for reconsideration. This decision, of course, was a non-decision because it simply indicated that the Board did not have access to a few items from the coverage

---

[4] See *Zurich American Ins. Co. v. Workers' Comp. Appeals Board* (2023) 97 Cal.App.5th 1213 [employer's insurer challenging the Board's view]; *Earley v. Workers' Comp. Appeals Bd*. (2023) 94 Cal.App.5th 1 [applicants challenging the Board's view].

arbitration. In other words, it took the Board three years to conduct a ten-minute review of the file to ascertain that it was missing a few items from the file!

Whether issued before or after the 60-day deadline imposed by section 5909, the perfunctory grant-and-study orders routinely issued by the Board violate the specification-of-reasons requirement imposed by section 5908.5. All such orders are inherently deficient. As explained below, the Board should not be given *carte blanche* authority to emasculate these two key statutes designed to ensure expeditious resolution of reconsideration petitions. Instead, a review of these statutes and their companion statutes compels the conclusion that the 60-day deadline is jurisdictional in the fundamental sense, thereby eliminating the various excuses offered by the Board to justify its bureaucratic inertia.

Otherwise, judging by Ishal's case and the fact pattern in *Zurich* where the Board blamed the arbitrator once again for "failing to submit the arbitration record to the Board" (*Zurich, supra,* 97 Cal.App.5th at p. 1221) – despite the Board's own regulation imposing this burden on the district office – the Board can repeat the same cycle. (8 Cal. Code Regs., § 10995(c)(3).) Adopting the Board's view would thus encourage the Board to preempt the constitutional requirement to decide reconsideration petitions expeditiously by merely issuing a summary order on the 60th day in each case—as it did in Ishal's case. (Cal. Const., art. XIV, § 4.)

Based on the grounds articulated below, the court should reject the Board's arguments.

LEGAL DISCUSSION

I. Synopsis of the statutory reconsideration process

A few statutes address the process for seeking and ruling on reconsideration petitions. Each is discussed below.

Once a decision is issued by the WCJ – or, in amicus Ishal's case, by an arbitrator – an aggrieved party may challenge a final order/decision by filing a reconsideration petition with the Board. (§ 5900; Cal. Code Regs., tit. 8, § 10995(a).) The petition must be filed within 20 days after the adverse decision is issued. (§ 5903.)

After an answer is filed by the prevailing party within the statutory ten-day period (§ 5905), the Board must timely act on the petition. Section 5906 gives the Board various options in response to reconsideration petitions:

> "Upon the filing of a petition for reconsideration, or having granted reconsideration upon its own motion, the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge on the basis of the evidence previously submitted in the case, or may grant reconsideration and direct the taking of additional evidence. Notice of the time and place of any hearing on reconsideration shall be given to the petitioner and adverse parties and to other persons as the appeals board orders." (§ 5906.)

If the Board does not need further testimony in order to adjudicate a petition for reconsideration, the Board may employ one of the following approaches:

> "If, at the time of granting reconsideration, it appears to the satisfaction of the appeals board that no sufficient reason exists for taking further testimony, the appeals board may affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge and may, without further proceedings, without notice, and without setting a time and place for further hearing, enter its findings, order, decision, or award based upon the record in the case." (§ 5907.) [5]

The disposition timeframe is governed by section 5909 as follows: "A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date of filing." (Former § 5909.) [6]

In addition to the timing requirement, the Board is subject to specification requirements in deciding reconsideration petitions. Section 5908.5 imposes such requirements on the Board as follows:

> "Any decision of the appeals board granting or denying a petition for reconsideration or affirming, rescinding, altering, or amending the original findings, order, decision, or award following

[5] Alternatively, pursuant to section 5908, the Board may take additional evidence in order to decide the petition.

[6] The legislature recently changed the trigger for the disposition deadline. As explained in *Mayor v. Workers' Comp. Appeals Bd.* (2024) 104 Cal.App.5th 1297, review granted Dec. 11, 2024, S287261, the exclusive focus here is on the version in effect prior to this statutory amendment. (*Id.* at pp. 1303-1304.)

> reconsideration shall be made by the appeals board and not by a workers' compensation judge and shall be in writing, signed by a majority of the appeals board members assigned thereto, and ***shall state the evidence relied upon and specify in detail the reasons*** for the decision." (§ 5908.5.)

To summarize, there are two statutory requirements that the Board must fulfill in order to render a valid reconsideration decision. The Board must (1) "act upon" the reconsideration petition within 60 days after it is filed (§ 5909) and (2) it must specify in detail the reasons for its decision (§ 5908.5). When the Board issues a perfunctory grant-and-study order, it violates these requirements, even if such an order is issued during the 60-day period.

II. The deadline to rule on petitions for reconsideration is jurisdictional in the fundamental sense of the term.

"If the time limit or procedural step an agency is required to take is both mandatory and jurisdictional, a failure to meet the deadline or take the step invalidates the administrative action. In addition, the defect is nonwaivable (i.e., it can be raised at any time)." Asimow, et al., Cal. Practice Guide: Administrative Law (The Rutter Group 2024) ¶ 10:230.) The following discussion explains why this rule applies to petitions for reconsideration.

A. By prescribing the consequence for the Board's failure to grant reconsideration on time, the legislature has made section 5909 a jurisdictional statute.

"A petition for reconsideration is deemed to have been *denied* by the appeals board unless it is acted upon within 60 days from the date of filing." (Former § 5909.) The threshold question presented here is whether this is a jurisdictional deadline.

"Legislative intent that a time limit be jurisdictional may be signaled where the statute sets forth time limits … by asserting that no relief shall be allowed" after the prescribed deadline. (*Kabran v. Sharp Memorial Hospital* (2017) 2 Cal.5th 330, 343 [cleaned up].) Section 5909 meets this test easily because it explicitly precludes relief beyond the prescribed deadline: the petition is "deemed to have been denied" unless it is acted upon within 60 days of filing.

"The language in Labor Code section 5909 is similar to Code of Civil Procedure former section 660 … in including the deemed-denied language as a 'consequence ... for failure to do the act within the time commanded.'" (*Zurich, supra,* 97 Cal.App.5th at p. 1228.) As with motions for new trial under section 660, once the disposition deadline has passed for a petition for reconsideration, "the Board no longer has jurisdiction to consider the petition." (*Id.* at p. 1231; see *Kabran, supra,* 2 Cal.5th at p. 344 [applying this rule to decisions on motion for new trial].) Because the grant-and-study order was issued in *Mayor* more than 60 days after the reconsideration petition was filed, "decisions made after the

deadlines are *void* as in excess of jurisdiction." (*Zurich,* at p. 1228 [citing cases].)

It makes sense to apply the rules governing motions for new trial here because "reconsideration fulfills substantially the same function as the new trial in civil proceedings." (*U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (1962) 201 Cal.App.2d 545, 549; see *id.* at p. 547 [the Board's failure to grant reconsideration on its own motion, in response to such request by the applicant, within statutory 60-day deadline precluded the Board from granting such relief].)

To summarize, when the Board fails to grant reconsideration within 60 days after a petition for reconsideration is filed, the petition is deemed denied by operation of law. The Board no longer has jurisdiction to resurrect its jurisdiction after the 60th day has passed. "Since no effective order granting [reconsideration] was rendered within the statutory period, the [petition for reconsideration] was denied by operation of law, the judgment has become final, and respondent court is without jurisdiction to proceed." (*Siegal v. Superior Court* (1968) 68 Cal.2d 97, 103 [addressing denial of motion for new trial].) "It would be inappropriate for us to attempt to revive that jurisdiction by vacating" the appealed decision. (*Lippold v. Hart* (1969) 274 Cal.App.2d 24, 27 [same]; *Andersen v. Howland* (1970) 3 Cal.App.3d 380, 385 [same].)

B. When the Board issues a perfunctory grant-and-study order on or before the 60th day, the reconsideration petition is still deemed denied by operation of law.

1. The Board refuses to accept or apply *Mayor* and *Zurich* in cases where its terse order is issued *within* 60 days, even though this fact pattern is believed to be more common than the one presented in *Mayor.*

While the Board issued its first ruling/order in *Mayor* for the first time after the 60th day had expired, there are a large number of cases in which the Board seeks to bypass the 60-day rule by issuing a perfunctory grant-and-study order on or before the 60th day. Such decisions by the Board are equally invalid—i.e., jurisdictionally defective.

Seeking to immunize its systemic failure to timely decide reconsideration petitions from appellate reversal, the Board has taken the extreme position that the published cases it recently lost do not apply to this frequent fact pattern (where the Board simply issues a terse grant-and-summary order by the 60th day):

> "*Zurich* invalidated only a single grant of reconsideration, specifically because it issued beyond 60 days. [However], all the grants issued in the cases at bar were timely. Thus, the holding in *Zurich* is not applicable.

> "Similarly, the *Mayor* decision only addressed the question of whether an order granting reconsideration is valid when issued beyond 60 days from the filing of the petition for reconsideration. [¶]
>
> "*Mayor* invalidated only a single order granting reconsideration, specifically because the order issued beyond the 60-day period in violation of section 5909. Petitioners misrepresented *Mayor*'s holding as applicable to these cases" as "these cases do not involve orders grating reconsideration beyond 60 days." (*Alegria v. Workers' Comp. Appeals Board* (B342117, Dec. 2, 2024) 2024 WL 5160371 at ** 13-14 [WCAB's answer to applicants' writ petition]; brackets added.)

Against this backdrop, the issue presented in Ishal's case is whether the Board's order summarily granting reconsideration on the 60th day can satisfy the jurisdictional requirements for granting reconsideration. As explained below, such an order is just as invalid as an order issued after the 60th day.

2. An order summarily granting reconsideration is invalid, whether issued before or after the 60-day period.

The Board's position requires a brief review of the decision in *Earley, supra,* 94 Cal.App.5th 1. In that case, the court held that section 5909 does not apply when the Board issues a perfunctory grant-and-study order. (*Id.* at p. 11 ["Section 5909 does not apply here because in each of these cases the Board rendered some decision, not no decision"].) Based on this language, *Earley* can be (mis)construed to hold that if the Board issues a perfunctory grant-

and-study order (the same one that was invalidated by *Earley* for violating the specification requirements imposed by section 5908.5), the Board can bypass the 60-day rule imposed by section 5909. Such a holding (to the extent *Earley* can be read this way) is flawed for multiple reasons.

First, a reconsideration petition is legally deemed denied unless "acted upon within 60 days" after filing. (Former § 5909.) To act upon, in this context, requires something other than a deferral. While "the Board is not required to issue a final ruling on the merits within 60 days" (*Earley*, at p.12), to act means, in essence, to render, and not to defer, a decision. A preliminary decision that comports with the specification requirements imposed by section 5908.5 suffices—meaning no final merits decision is required within the 60-day period.

By contrast, issuing a three-sentence grant-and-study order does not constitute "acting upon" the petition, thereby triggering a denial by operation of law. (See, e.g., *Klitgaard & Jones Inc. v. San Diego Coastal Regional Com.* (1975) 48 Cal.App.3d 99, 106, 110-111 [where statute required defendant to "affirm, reverse or modify the decision of the regional commission" such that the failure "to act within 60 days" rendered the appealed decision final, "to act" meant the act of affirming, reversing or modifying the decision].) Reading section 5909 together with its companion statutes, "to act" means to affirm, rescind, alter or amend the lower court's findings/award—the language used in sections 5906, 5907 and 5908.5. Conversely, if the Board fails "to act" by engaging in any of these actions, the petition is denied. (See *LeVesque v.*

Workmen's Comp. App. Bd. (1970) 1 Cal.3d 627, 635 ["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"].)

As for *Earley*'s statement that section 5909 "does not apply here because in each of these cases the Board rendered some decision, not no decision" (*Earley,* at p. 11), this statement does not support the Board's attempt to distinguish cases where the grant-and-study order was issued *before* the 60-day deadline expired. The *Earley* opinion does not indicate whether the grant-and-study orders issued in the five cases covered in that opinion were issued before or after 60 days, following the filing of the reconsideration petitions. Instead, the court identified the time gap "between the filing of the grant-for-study orders and the Board's final decisions," noting this time gap "ranged from five to 21 months." (*Id.* at p. 9.) Section 5909, by contrast, focuses on the 60-day time gap between *the filing of the reconsideration petition* and the Board's action/inaction in response to the petition. Accordingly, *Earley* cannot be read to uphold the Board's grant-and-study order just because such a terse order is issued on or before the 60-day deadline.

To the extent the Board has invoked *Zurich* and *Mayor* to support its view that such orders are valid (when issued by or before the 60th day), the Board is wrong. Neither decision expressly limited its holding to the fact pattern where the grant-and-study order is issued after the 60th day.

Furthermore, a grant-and-study order issued by the 60th day is equally void as one issued after the 60th day. Regardless of their timing, a three-sentence order indicating the Board needs more time to study the file violates the specification requirements imposed by section 5908.5. *Earley* confirmed that the entire "grant-for-study procedure is an unauthorized way to extend the 60-day deadline" in the first place. (*Earley, supra,* 94 Cal.App.5th at p. 7.) In abrogating this procedure itself, *Earley* did not carve out an exception for orders issued by the 60th day. Because this mechanism inherently violates the specification-of-reasons requirement imposed by section 5908.5 (by merely stating the Board needs more time to study the file instead of itemizing case-specific reasons for requiring more time to decide), all perfunctory grant-and-study orders are per se void.

Consistent with *Earley*, *Zurich* reaffirmed that "section 5908.5 requires the Board to state what evidence it relies on and the reasons for its decision" in granting reconsideration—without making a distinction between grant-and-study orders issued before or after the 60-day deadline. (*Zurich*, at p. 1231.) Emphasizing the importance of the specification of reasons, other courts have similarly precluded the Board from diluting this critical procedural safety valve, holding the Board's feet to the fire by mandating unadulterated compliance with the specification requirement. (See *Solomon v. Workmen's Comp. Appeals Bd.* (1972) 24 Cal.App.3d 282, 288 ["Noncompliance with section 5908.5 in a decision *granting* reconsideration is not cured by subsequent compliance therewith in a decision *following*

reconsideration, for the section requires compliance in both instances"]; emphasis in original; see also *LeVesque, supra,* 1 Cal.3d at p. 635, fn. 11 ["If the appeals board grants reconsideration, and without taking further evidence, affirms, rescinds, or amends the original award," such an order "requires *full compliance* with section 5908.5"]; emphasis added.) [7]

Highlighting the importance and the onerous nature of the specification-of-reasons requirement, courts justify it because this "procedural demand aims at revealing the basis of the Board's action, at avoidance of careless or arbitrary action, and at assisting meaningful judicial review." (*Patterson v. Workers' Comp. Appeals Bd.* (1975) 53 Cal.App.3d 916, 924.) Deeming it necessary to "repeat a proposition that this court has stated on numerous occasions [that] the board must observe the mandate of section 5908.5" (*Goytia v. Workmen's Compensation Appeals Bd.* (1970) 1 Cal.3d 889, 893), this court has found this statute to be violated where the "board's conclusionary statement does not suffice to inform this court of its specific holding or the basis for it." (*Id.*) Applying this principle, lower courts have refused to accept anything less than full compliance. For example, "statements of the board in its order granting reconsideration that it is 'not completely satisfied with the medical evidence in the record at present as it pertains to the issues raised in the petition,' and that

[7] Similarly, if a new trial is granted but the "statement of reasons is insufficient, an appellate court cannot remand the case to permit the trial court to correct the error but must reverse the new trial order with the result that the judgment is automatically reinstated." (*Estes v. Eaton Corp.* (2020) 51 Cal.App.5th 636, 649.)

'an independent medical evaluation would be of assistance to us in resolving these issues,' does not comply with section 5908.5…." (*Solomon, supra,* 24 Cal.App.3d at p. 287.)

In sum, while the Board has taken the position that a grant-and-study order issued during the 60-day period is valid, the Board is simply wrong. Other cases have rejected the Board's approach in the analogous context involving post-trial motions, by deeming an order extending the jurisdictional period for deciding such motions to be void, even where the order was issued ***before*** the 60-day deadline expired. (See *Garibotti v. Hinkle* (2015) 243 Cal.App.4th 470, 479 [rejecting the identical argument that the "court did not act beyond its authority because it entered an order extending the 60-day period ***before*** it lapsed"]; emphasis added.)

Otherwise, the Board can undermine and circumvent section 5908.5 by merely issuing a three-sentence order on the last possible day allowed by section 5909, indicating that the Board needs more time to review the record. This would effectively eliminate the specification-of-reasons requirement while also diluting the importance of the 60-day deadline imposed by section 5909. Such statutory construction would violate the basic principle that "we must read section 5908.5 together with section 5909." (*LeVesque, supra,* 1 Cal.3d at pp. 634-635; see *id.* at fn. 11 ["reading and construing sections 5909 and 5908.5 together we cannot believe the legislature intended by section 5908.5 to require detailed findings and reasons upon a denial of reconsideration if the appeals board can avoid the requirement so easily under section 5909"].)

Accordingly, a perfunctory grant-and-study order issued on or by the 60th day is per se invalid.

III. The Board's counter-arguments are flawed, yielding practical nightmares for litigants on both sides, particularly impecunious employees.

A. Due process principles do not excuse the Board's violations of the jurisdictional deadline to decide cases.

The justifications offered by the Board for artificially extending the jurisdictional deadline set forth in section 5909 are flawed. Repeatedly using the "due process" excuse to justify its failure to rule on reconsideration petitions within the 60-day deadline (by claiming the petitioner has a due process right to appellate review at any cost), the Board's position assumes that a party seeking reconsideration has a due process right to perpetual or prolonged delays in adjudicating its reconsideration petition. This is a false assumption.

The constitutional grant of power to the legislature to enact workers' compensation laws "supersedes the state Constitution's due process clause with respect to legislation passed under the Legislature's plenary powers over the workers' compensation system." (*Stevens v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1074, 1093 [collecting cases]; see Cal. Const., art. XIV, § 4 ["The Legislature is hereby expressly vested with plenary power, *unlimited by any provision of this Constitution*, to create, and enforce a complete system of workers' compensation"].) Accordingly, the Legislature's enactment of the disposition

deadline is not subject to due process exceptions in the first place. To the extent these rules collide, "article XIV, section 4, granting the Legislature plenary power over the workers' compensation system, controls where there is any conflict between article XIV, section 4 and the due process clause." (*Ramirez v. Workers' Comp. Appeals Board* (2017) 10 Cal.App.5th 205, 227.)

In any event, even if due process principles could somehow override this constitutional mandate to enact workers' compensation laws/procedures, the Board's position assumes that the party seeking reconsideration is the only one that has a due process right—e.g., the right to receive a merits-based determination of such a petition. The Board assumes such a right exists and is paramount, even if it takes three years for the Board to perform a cursory review of the record to ascertain if a particular item is missing from the record. This view, in and of itself, represents the ultimate form of due process violation: it violates the constitutional right of the other side to have a timely decision on his adversary's reconsideration petition. (See Cal. Const., art. XIV, § 4 [the Board's constitutional mandate, as delineated in the Labor Code, is to "accomplish substantial justice in all cases *expeditiously*"]; *Jones v. Sieve* (1988) 203 Cal.App.3d 359, 369 ["The purpose of strict time limits is, of course, to avoid undue delays in finalizing judgments"].)

Just as the "involuntary dismissal of an appeal operates as an affirmance of the judgment below" (*County of Fresno v. Shelton* (1998) 66 Cal.App.4th 996, 1005), the denial of a reconsideration petition by operation of law yields an affirmance of the lower

court's compensation award—the judgment, that is. "A judgment is property, so taking it away requires due process of law." (*Kingvision Pay-Per-View Ltd. v. Lake Alice Bar* (9th Cir. 1999) 168 F.3d 347, 352.) By violating the statutory limitations on granting reconsideration, as set forth in sections 5909 and 5908.5 (whether deemed jurisdictional or otherwise), the Board violates the due process rights of the previously-prevailing party by vacating the underlying decision, even after the reconsideration petition is denied by operation of law.

In sum, to the extent the due process framework is relevant here at all, it provides another basis to reject the Board's arguments because "excessive delay in the resolution of an appeal … can give rise to a cognizable claim of denial of due process." (*Daniel v. State* (Wy. 2003) 78 P.3d 205, 219 [addressing criminal appeals]; accord, *U.S. ex rel. Green v. Washington* (N.D. Ill. 1996) 917 F.Supp. 1238, 1272 ["Delays of such magnitude produce an unacceptable threat to the integrity of the appellate process"].)

Therefore, far from justifying the Board's delays in deciding reconsideration petitions, due process principles preclude its lackadaisical approach to adjudication.

B. The *Gonzales* decision previously invoked by the Board does not justify its systemic delays.

Although the Board does not invoke *Gonzales v. Industrial Acc. Com.* (1958) 50 Cal.2d 360 in its merits briefs in Mayor's case, the Board has previously invoked this case to justify its failure to decide reconsideration petitions on time. Citing this case, the

Board has argued that *Gonzales* "determined that there is no time limitation within which the Appeals Board must issue its final decision following reconsideration." (*Ishal v. Workers' Comp. Appeals Board* (Sept. 20, 2024) 2024 WL 4444557, at *5 [Board's response to writ petition filed in Court of Appeal].)

The Board is completely wrong. In *Gonzales*, the applicant challenged the Board's decision on reconsideration based on a different statute, one that imposes a five-year deadline (following the date of injury) for rescinding or modifying an award. Basing his challenge on section 5804 (rather than section 5909's 60-day deadline), the applicant argued "the commission was without jurisdiction to make the order of January 23, 1957, since more than five years had elapsed after the injury occurred." (*Gonzales*, at p. 363.) Rejecting the applicant's argument, this court concluded "[t]here is no provision in Chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory limitation none will be implied." (*Id.* at p. 364.)

Because the court's terse comment has been used by the Board as a *carte blanche* to justify its delays, the court may wish to address this issue to preclude the Board from doing so in other cases. The Board already concedes that the statute requiring adjudication of reconsideration petitions has been on the books for nearly a century. (OBOM 15 ["Section 5909 was first enacted in 1937"].) According to the Board, under this initial version, a rehearing petition was "deemed to have been denied by the

commission unless it is acted upon within thirty days from the date of filing. The commission may, upon good cause being shown therefor, extend the time within which it may act upon such petition for not exceeding thirty days." (*Id.* [citing former § 5909, Stats. 1937, ch. 90].) Judging by this statutory deadline, the comment from *Gonzales* (that there is no time limit to decide reconsideration petitions) cannot be used by the Board as a sword to justify its delays. Furthermore, this court's subsequent decision in *LeVesque, supra,* 1 Cal.3d 627 repudiated the notion that the Board faces no deadline to decide whatsoever. (See *id.* at p. 635 ["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"].)

In sum, the Board's reliance on *Gonzales* to justify its delays is analytically flawed.

IV. Because the statutory deadline implicated here is jurisdictional, equitable tolling does not apply.

Equitable tolling is a judicially created, non-statutory doctrine that allows courts to suspend or extend a deadline for practical or equitable reasons. As a court-created doctrine, equitable tolling cannot extend a jurisdictional statutory deadline. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674 [courts cannot extend jurisdictional notice-of-appeal deadline absent statutory authorization, regardless of "considerations of estoppel or excuse"]; *Garibotti, supra,* 243 Cal.App.4th at p. 482 ["[b]ased on the jurisdictional nature" of the deadline to rule on a new trial motion, "courts have rejected

requests to create equitable exceptions or provide equitable relief from the harsh consequences of the trial court's failure to rule timely"]; cf. *U.S. v. Wong* (2015) 575 U.S. 402, 408-409 [a deadline is not subject to equitable tolling if "Congress made the time bar at issue jurisdictional"; rather, court must enforce limitation "even if equitable considerations would support extending the prescribed time period"].)

This rule follows from the nature of jurisdictional statutory deadlines: They are limits that the Legislature has imposed on the courts' power. If courts could simply extend jurisdictional deadlines based on a court-created doctrine, then "jurisdictional" would have no meaning.

As noted by other courts, there is no reason to "believe the equitable relief is available. The law has long been settled that the 60-day statutory period is mandatory and jurisdictional.…If the statute is to provide exceptions, the job is for the Legislature, not the courts, to carve them out." (*Dodge v. Superior Court* (2000) 77 Cal.App.4th 513, 524 [addressing motion for new trial]; *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 500-502 [rejecting equitable estoppel argument where motion for new trial was denied by operation of law].)

Consistent with these cases, equitable tolling does not apply here to modify the statutory deadline set by the legislature. "The obvious intent underlying these time requirements is to assure that the aggrieved party has a hearing and decision within a limited period of time. If these provisions were treated as directory rather than mandatory, this process becomes meaningless: an

agency could simply delay a decision by deciding to hear the case on the record but not ordering a transcript of the proceedings. Such 'administrative limbo' is at odds with the purposes of the statute." (*Matus v. Board of Administration* (2009) 177 Cal.App.4th 597, 610 [citation omitted].)

Other practical consequences ignored by the Board compel this result. "The longer that an employer may string out the process by filing a [reconsideration petition]…, the longer and more expensive the process for the employee (and the court) and the greater the opportunity for the employer to avoid the consequences and purpose of the [compensation award], either by dallying, running up litigation costs in the [remand] procedure, or divesting itself of assets to deprive the employee of any possibility of enforcement." (*Palagin v. Paniagua Construction, Inc.* (2013) 222 Cal.App.4th 124, 137; see *id.* at p. 131 [deeming statutory deadline to post *Berman* appeal bond jurisdictional even though the statute "does not expressly state that this requirement is 'jurisdictional'"].)

To the extent the Board suggests that denial by operation of law can result in injustice, this justification to apply equitable estoppel has been soundly rejected by courts. While the Board did not make a decision to grant reconsideration in Mayor's case during the 60-day period, courts have eliminated an "injustice" exception even where the court had actually granted a motion for new trial but failed to make it effective for technical reasons. For example, despite "the injustice section 660 can cause when a trial court decides to grant a new trial but, for whatever reason, fails to

'determine' that motion" within the statutory period," courts have upheld such a denial by operation of law. (*Bunton v. Arizona Pacific Tanklines* (1983) 141 Cal.App.3d 210, 216.) Because this deadline is "mandatory and jurisdictional" (*Dodge, supra,* 77 Cal.App.4th at p. 524), "[f]airness has little to do with it. With jurisdictional deadlines, the rule, like the song, is what a difference a day makes. If the statute is to provide exceptions, the job is for the Legislature, not the courts, to carve them out." (*Ibid.*)

Finally, the argument that the Board led Mayor's employer to believe that the Board would timely process the reconsideration petition is irrelevant. In *Muller v. Municipal Court* (1959) 176 Cal.App.2d 156, for example, the plaintiff tried, without success, to have the clerk confirm that his motion for new trial was set for hearing. (*Id.* at pp. 158-159.) The motion was denied by operation of law because no hearing was set by the clerk. Rejecting the plaintiff's reliance on the court clerk's violation of a statutory obligation "to call the matter to the judge's attention," the court held that this "is not a function that can be performed solely by the clerk" and that plaintiff's failure to call the clerk "day by day" as the deadline approached contributed to the denial by operation of law, precluding relief on appeal. (*Id.* at pp. 161-162.)

In sum, the Board's attempt to justify its conduct based on the contrivance of an equitable-tolling exception by *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 should be summarily rejected.

CONCLUSION

The Court of Appeal's decision should be affirmed. Whether the perfunctory grant-and-study order is issued during or after the 60-day statutory deadline, such orders are per se invalid. Because the 60-day deadline is jurisdictional, it is not subject to equitable estoppel or other exceptions (e.g., injustice exception, etc.).

Respectfully submitted,

Dated: June 2, 2025 DBL LAW GROUP

By *<u>/s/ Darren LeMontree</u>*
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CERTIFICATE OF WORD COUNT

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18. As the attorney of record, I am not a party to this action. My business address is 21550 Oxnard Street, Suite 300, Woodland Hills, CA 91367.

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