



California Workers' Compensation Institute
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December 30, 2024

Presiding Justice Mary J. Greenwood and Associate Justices
Sixth District Court of Appeal
333 W. Santa Clara Street, Suite 1060
San Jose, CA 95113

Re: *Zenith Insurance Company v. WCAB (Chan)*
Case No. H052785

Dear Presiding Justice Greenwood and Associate Justices:

On behalf of the membership of the California Workers' Compensation Institute ("CWCI"), we submit this letter to urge this Court to issue a Writ of Review or in the alternative a Writ of Mandate to address the pending writ petition on its merits. Review on the merits is necessary because the petition raises an ongoing issue regarding the tolling of the statutory time limit for the Workers' Compensation Appeals Board (Board) to rule on a reconsideration request when administrative error has occurred.

Should permission to file this letter supporting the petition be required, please treat this letter as a request for leave to file.

CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Institute members include insurers writing 76% of California's workers' compensation premium, and self-insured employers with \$92B of annual payroll (30.3% of the state's total annual self-insured payroll). CWCI further serves as a liaison for employer, labor, medical, regulatory, and legal communities within the workers' compensation system, and frequently provides written and oral testimony at legislative and regulatory hearings. Based upon its recognized expertise in workers' compensation, CWCI has been judicially permitted to join in multiple cases as *amicus curiae* before the California Supreme Court and Courts of Appeal.

Issue Posed:

When a party is aggrieved by a final decision issued by a workers' compensation judge (WCJ), their remedy is to file a petition for reconsideration with the Board (Labor Code section 5900). Labor Code section 5909 provided, between 1992 and July 1, 2024, that 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." The Fourth District Court

of Appeal created an equitable exception to the 60-day statutory deadline in *Shipley v. Workers' Comp Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1107. The Court found that although the language of then section 5909 “appears mandatory and jurisdictional,” the time after which a petition for reconsideration is deemed denied by operation of law was tolled where the Board misplaced Shipley’s file and then led him to believe the petition would eventually be considered.

The Board has since expanded its reliance on *Shipley* to issue decisions where the 60-day time limit expired due to “administrative irregularities” to cases that did not include the detrimental reliance present in *Shipley*. Two District Courts of Appeal have voiced their disagreement with the *Shipley* decision in recent published decisions:

In *Zurich American Ins. Co. v. Workers' Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213, the Second District Court of Appeal concluded “the language and purpose of section 5909 show a clear legislative intent to terminate the Board’s jurisdiction to consider a petition for reconsideration after the 60 days have passed, and thus, decisions on the petition made after that date are void as in excess of the agency’s jurisdiction.” The Court noted “the California Constitution requires the workers’ compensation system to accomplish substantial justice “expeditiously” and “inexpensively.” (Cal. Const., art. XIV, § 4.) Section 5909 furthers that purpose by imposing a limit of 60 days on the Board’s jurisdiction to grant a petition for reconsideration, thereby ensuring the expeditious adjudication of a claim.”

In *Mayor v. Workers' Comp. Appeals Bd.* (2024) 104 Cal.App.5th 1297 (*rev. granted* 12/11/24), the First District Court of Appeal agreed with *Zurich* that the deadline established by section 5909 was “mandatory” and that “granting reconsideration after the deadline exceeded [the Board’s] jurisdiction.” Dismissing the Board’s argument that their lengthy reliance on *Shipley* should be upheld to avoid depriving parties of reconsideration by the Board, the Court quoted *Earley v. Workers' Comp. Appeals Bd.*, (2023) 94 Cal. App. 5th 1, noting that “a long-standing and incorrect procedure remains incorrect.”

Notably, Labor Code Section 5909 was amended on July 2, 2024, to read “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.” The Court in *Mayor* found “this amendment at once implicitly confirms *Zurich*’s interpretation of the former statute and puts to rest the Board’s concerns about the consequences of that interpretation for the future.”

In this case, the Board's grant of reconsideration was issued more than 60 days after the petition for reconsideration was filed, and more than 60 days from the date the trial judge transmitted the case to the appeals board; the record does not reflect the type of detrimental reliance upon which the *Shipley* decision was based. As the Board's decision in this case demonstrates, the Board continues to assert expanded jurisdiction to grant reconsideration after the 60-day statutory period under section 5909 has passed.

All parties in the workers' compensation system benefit from the expeditious adjudication of claims based upon the clear language of the former and the current section 5909. This Court should grant writ review to provide clarity to the Board that section 5909 requires a determination on petitions for reconsideration within the 60-day statutory deadline. Thank you for your consideration of this request.

Respectfully submitted,

/s/ Sara Widener-Brightwell
Sara Widener-Brightwell, General Counsel
California Workers' Compensation Institute

Certificate of Service

I certify that on December 30, 2024, I electronically filed the foregoing

CALIFORNIA WORKERS' COMPENSATION INSTITUTE

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with the Clerk of the California Court of Appeal for the Sixth District by using the appellate TrueFiling system. The following case participants were served electronically through the TrueFiling system:

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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.

Respectfully submitted,

December 30, 2024

/s/ Joanne P. Swedlow

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