

# Appellate Procedure (or how to clear a room in 30 seconds)



By Louis Larres, Esq.

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## BACKGROUND

- South Coast Framing, Inc. v. Workers' Comp. Appeals Bd., (2015) 61 Cal. 4th 291; 349 P.3d 141; 188 Cal. Rptr. 3d 46; 80 Cal. Comp. Cases 489 – correct standard in death cases.
- Kroger Co. v. Workers' Comp. Appeals Bd., (2012) 210 Cal. App. 4th 952; 148 Cal. Rptr. 3d 829; 2012 Cal. App. LEXIS 1136; 77 Cal. Comp. Cases 945 – whether a DOR is necessary to perfect an appeal of the Rehab Unit.
- Coca-Cola Enterprises Inc. v. Workers' Comp. Appeals Bd., (2011) 194 Cal. App. 4th 809; 123 Cal. Rptr. 3d 712; 76 Cal. Comp. Cases 391 – applicability of Cal. Code Regs., tit. 8, § 10101.1(j).
- Star Ins. Co. v. Workers' Comp. Appeals Bd. (Tavares) (2016) 81 Cal. Comp. Cases 111 (unpublished 6<sup>th</sup> DCA decision) – guy dies in a port-a-potty and whether Cal. Sup. Ct. decision in Daubert applies to workers' comp. cases.
- Southland Spine and Rehabilitation Med. Center, Inc., v. Workers' Comp. Appeals Bd., (2015) 81 Cal. Comp. Cases 88 (writ denied) – liability for non-MPN treatment and WCJ's ability to bifurcate issues.
- Flores v. Workers' Compensation Appeals Board, (2012) 77 Cal. Comp. Cases 826 (writ denied) – going and coming and dual employment cases.
- Velasquez v. Workers' Comp. Appeals Bd. (2023) 88 Cal. Comp. Cases 1137, TSA was a sponsor of the applicant and thus, per LC 3301, was not an employer of the applicant.
- El Aguila Food Products v. Workers' Compensation Appeals Board (Cervantes), (2010) 75 Cal. Comp. Cases 904 (writ denied) – 2<sup>nd</sup> opinion spinal surgery case.
- Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman), (2010) 187 Cal. App. 4th 808, 115 Cal. Rptr. 3d 112, 2010 Cal. App. LEXIS 1454, 75 Cal. Comp. Cases 837 – AMA Guides.



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## Appellate Authority

- A party dissatisfied w/a final order of a WC Judge may seek review of that order by filing a petition for reconsideration. (LC sec. 5900)
  - A final order is one which finally disposes of substantive rights in the matter, and includes a threshold disposition.
- Decisions on reconsideration of the appeals board are appealable by petition for writ of review with the Court of Appeal or Supreme Court of the State of Ca. (LC sec. 5950)



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# Must be “aggrieved” to have standing

Labor code section 5900 provides:

- “...any person aggrieved directly or indirectly by a final order, decision or award made by the Board or WCJ, may petition the Appeals Board for reconsideration”.
- The aggrieved person must “be a party to the matter”
  - Claimant
  - Dependent
  - Employer
  - Carrier
  - Lien Claimant



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## Technical aspects of Reconsideration

### Petition for Reconsideration

- Requires final order from the WCJ.
- No longer need to file w/ DWC Office which issued final order thanks to EAMS.
- Time limit to file petition for recon:
  - 20 days from service + 5 days for mailing (even if received electronically)
  - Not sufficient to be mailed w/ statutory period, but “must be received by the Board w/ that period.”

### Formalities of Service

- Must be served upon all adverse parties
- Proof of service required



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# Grounds for Reconsideration

## Actions in Excess of Powers

- Labor Code 5903(a) states – that the first ground for granting reconsideration is *“that by the order, decision or award made and filed by the appeals board or workers compensation judge, the appeals board acted without or in excess of its powers.”*

## Fraud

- The second ground is *“that the order, decision or award was procured by fraud.”*
- Petition must make specific and detailed offer of proof



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# Grounds for Reconsideration

## Findings Not Justified by Evidence



- Third ground for reconsideration – *“that the evidence does not justify the findings of fact.”*
- Most common ground raised.
- Petition must set out specifically in detail how the evidence fails to support the findings.



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# Grounds for Reconsideration

## Newly-Discovered Evidence

- Fourth ground for reconsideration is “*petitioner has discovered new evidence material to him or her, which he or she could not, with reasonable diligence, have discovered and produced at the hearing*”
- Petition must be specific and detailed and include:
  - Witnesses
  - Testimony
  - Description of evidence
  - Effect of evidence will have on the record and prior decision
  - Explanation as to why evidence could not have been discovered or produced prior to case submission.



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# Grounds for Reconsideration

## Decision Unsupported by Findings

- Fifth and final ground is “*that the findings of fact do not support the order, decision or award*”.
- This sort of defect does not occur frequently.
- Parties often allege this ground when they feel the decision of the WCJ mistakenly relies on the adverse party’s evidence rather than their own.



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# Procedures for Reconsideration



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## Table of Times for Board Action

Event	Board Action	Time Limits
Filing of petition for Recon/removal	WCJ Modification	15 days from filing period
Filing of petition for Recon/removal	WCJ Rescission w/ further proceedings ordered	15 days from filing petition; Proceedings initiated w/ 30 days from recession
Filing of petition for Recon/removal	WCJ Report on Recon	15 days from filing petition
Filing of petition for Recon/removal	WCAB Grant of Petition or denial reconsideration	60 days from filing petition or denied by operation of law



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## WCJ May Modify or Rescind

- WCJ may “amend”, “modify” or “rescind” a decision or order.
- WCJ may rescind or modify a decision within 15 days of a filing for a removal petition.
- Upon rescinding the original order or award, rules require further proceedings to be initiated within 30 days from the rescission order.



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## WCJ May Modify or Rescind

- Simple modifications or amendments to an order, decision or award do not require any additional proceedings. Clerical v. Substantive.
- A rescinded order requires the WCJ “to issue a decision on all issues originally raised and not just those raised in the petition for reconsideration.” Clock starts anew.
- An answer for reconsideration may be filed within ten days of the filing of the original petition.
- Supplemental filings



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# The Appeals Board

- 7 members, 5 Attorneys, 6 Year Terms
- Appeals board is made up of seven (7) members, of which five (5) must be attorneys.
- All appointed by the Governor to six-year terms.
- Members carry the title of “commissioner”.
- One member is designated as “chairman”.

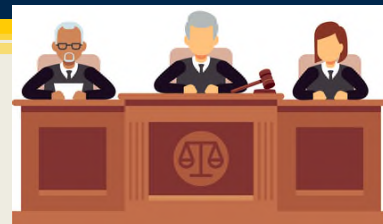


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# The Reconsideration Unit Appeals Board



- A legacy paper file is sent to the board or accessed electronically through EAMS.
- Every file logged in by the “control unit”.
- Each case pending on reconsideration assigned a panel of three (3) members of the board for “hearing, consideration and decision.”



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## En Banc Decisions

Labor Code Sec 115 provides for cases to be  
*“reassigned by the Chairman on a majority vote of the appeals board to the appeals board as a whole in order to achieve uniformity of decisions, or in cases presenting novel issues.”*

**En banc decisions are binding precedent on all WCAB panels and all WCJ’s.**



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## Board Action

- The Board may grant or deny reconsideration without scheduling any further proceedings.
- Per Labor Code sections – 5906:
  - “...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 addition evidence...**”



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## Board Action

- LC section – 5907 empowers the board thus:
  - “If at the time of granting reconsideration, it appears to the satisfaction of the appeals board that no sufficient reason exists for taking testimony the appeals board may affirm, rescind, alter, or amend the order, decision or award made 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.”



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## Reconsideration on Board Motion

The Board has the power under LC 5900 (b) to grant reconsideration of its own motion of any order, decision or award filed by the Board or any of its Workers’ Compensation Judge’s within 60 days of the filing of such disposition.



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# Time Limits for the Board

## LC Section 5909 ~

- Board must act upon a petition for reconsideration w/ **60 days** of the date of the filing of the petition or the petition is deemed denied by the operation of law. (Pre-7/2/2024)

1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

*deadline*



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## What happens if the WCAB doesn't act within 60 days of filing??

- Shipley v. WCAB – 1992 Court of Appeal case
  - although the language of former LC 5909 appeared mandatory and jurisdictional, DCA concluded that "[T]he time periods must be based on a presumption that a claimant's file will be available to the board; any other result deprives a claimant of due process and the right to a review by the board."
  - So for over 30 years if the Board failed to act due to no fault of the parties, it acted as though the recon had been filed on the date it learned of the filing.



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## Precedent what precedent?

- All of that changed in 2023 with Zurich American Ins. Co. v. WCAB.
  - The Court invalidated Shipley or at least appeared to do so.
  - Held: if the board did not act within the 60-day time period under former LC 5909, petitioners must be diligent — promptly inquiring of the board as to the status of their petitions.
  - If the board does not grant reconsideration within that period, petitioner must assume that the petition has been denied by operation of law, and must then petition the Court of Appeal within 45 days of that denial by operation of law.



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## Zurich what Zurich?

- In response, on March 27, 2024, the WCAB issued a significant panel decision.
- Scheuing v. Lawrence Livermore National Laboratory, the Board held it would continue to follow Shipley because:
  - Shipley was good law for 30 years.
  - In footnote 6 of its decision, the appeals board believed that it was not bound by Zurich, stating that "Zurich appears to reflect a split of authority on the application of Shipley."



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## Split what split??

- Mayor v. WCAB – 1st DCA agreed with Zurich
- Found that Zurich limited Shipley to its facts, which allowed equitable tolling only when the board misled a diligent petitioner into missing the deadline for judicial review.
- Also noted 2024 amendment to LC 5909 was an acknowledgement by the Legislature of the Zurich interpretation of sec. 5909. (If the Board's practice was permissible there would be no reason for the amendment).



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## Mayor what Mayor?

- Reyes v. Palm Desert Doors and Hardware – the Board will continue to apply equitable tolling because 5909 is not jurisdictional.
- B/c of this continued failure to follow Zurich and Mayor the Supreme Court granted review on 12/11/2024. Briefing still ongoing.
- Stay tuned!



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## Amended LC sec. 5909

- 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.
- When a WCJ transmits a case to the appeals board, the judge must provide notice to the parties of the case and to the appeals board. It adds that service of a report and recommendation pursuant to LC 5900(c) constitutes providing notice.
- Sunsets on 7/1/2026.



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## But what does “act” mean?

- Long-standing practice of “grant for study” decisions within 60 days.
  - No decision on the merits
  - The Board takes as long as it wants to then issue a decision on the merits.
  - Grant for study effectively satisfied the Board’s statutory obligation to act.
  - Numerous cases languished for months to years.



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## Earley v. WCAB

- The law is not without a sense of irony
- The 2<sup>nd</sup> DCA may not grant for further study because of LC sec. 5908.5 – Any decision of the Board must state the evidence relied upon and specify in detail its reason for doing so.”
- The Board still does not have to reach the merits and thus no time limit to do so.
- Pyrrhic victory – a victory not worth the price paid to achieve it.
- Petition for writ of mandate?



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## OTHER CONSIDERATIONS

- Reconsideration of the Reconsideration
  - Must be newly aggrieved.
- Petitions for Removal – know the difference!!
  - Only for non-final decisions.
  - Must demonstrate substantial prejudice/irreparable harm; or
  - Bias
  - Does not terminate or stay proceedings



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## OTHER CONSIDERATIONS (cont'd)

- Reg. 10960 – Petition for automatic reassignment of trial or expedited hearing to another WCJ.
- Reg. 10964 – supplemental petitions



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## Judicial Review



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# Writ of Review - Timeline

## Writ of Review

- **Judicial review is implemented under LC 5950**
- Requires final board order
- Filed with Court of Appeal – Appellate District where petitioner resides
- Time limits to file:
  - 45 days from issuance; no extension for mailing except where recon order never received.
- **Appellate court decisions are final 10 days after the filing of the opinion, unless writ granted.**



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## Grounds for Review

Grounds for appellate review are limited by Labor Code Section 5952 to:

- Appeals board acted without or in excess of its powers.
- The order, decision or award was procured by fraud.
- The order, decision or award was unreasonable.



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# Grounds for Review



Cont...

- The order, decision or award was not supported by substantial evidence.
- If findings of fact are made, such findings of fact support the order, decision or award under review.



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# Writ Denied Panel Decisions



Writ Denial

- *“An appellate court may, and generally does, deny petitions for writ of review without specifying any reasons.”*
- A writ denied case stands as a final Board panel opinion that the Court of Appeals did not see fit to disturb.
- The Court of Appeals has also approved that writ denied cases “are citable authority as to the holding of the Board.”



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## Granted Writs

**GRANTED**

- Counsel for both the petitioning and responding parties orally present their positions to the justices of the court and answer any questions.
- The matter is submitted and the court has 90 days to issue a decision.
- Decisions are in the form of written opinion either affirming or annulling the board order or remanding the case for further proceedings.



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## Other considerations

Potential for bad case law.



**Costs:** In the event the injured employee prevails in any petition by the employer the reviewing court finds that there is no reasonable basis for the petition, it shall remand the cause to the appeals board for the purpose of making a supplemental award awarding to the injured employee or his attorney, or the dependent of a deceased employee or his attorney a reasonable attorney's fee for services rendered in connection with the petition for writ of review.



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## Other considerations (cont'd)

Chances of success:

- Questions of law v. substantial evidence
- Question of law - Kroger Co. v. Workers' Comp. Appeals Bd., 210 Cal. App. 4th 952
- Substantial evidence - the Board's findings of fact, “are final and conclusive and not subject to appellate review if supported by substantial evidence in light of the entire record. In examining the entire record, this court ‘may not simply isolate evidence which supports or disapproves the board's conclusions and ignore other relevant facts which rebut or explain the supporting evidence ... .’”



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## Published & Unpublished Opinions

An appellate opinion issuing in a workers' compensation case may be:

- Published
- Partially published
- Unpublished



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# Published & Unpublished Opinions

## Published Opinions

- To be published, an opinion must establish a new rule of law or resolve or create an apparent conflict in the law.

## Unpublished Opinions

- “...must not be cited or relied upon by a court or a party in any other action of proceedings...”



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# Supreme Court

## Supreme Court Review

- Appellate Opinion & Disposition/writ granted
- Filed with Supreme Court
- Timeline: 30 days + 10 days to file (10 days if not)
  - “...within ten (10) days following the finality of the appellate disposition (40 days after the filing of an appellate opinion, or ten days after the filing of an order denying a writ), the “losing” party may file a petition for review in the Supreme Court.”



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# Supreme Court

- Supreme Court has 60 days to grant the petition or extend on its own motion.
- If a petition is granted, the court may start the appellate process over again with oral arguments and issue an opinion and decision affirming, reversing or modifying the decision of the court of appeal.
  - It's more common for the Supreme Court to transfer the matter back to the Court of Appeals with instructions to conduct further proceedings at their direction.



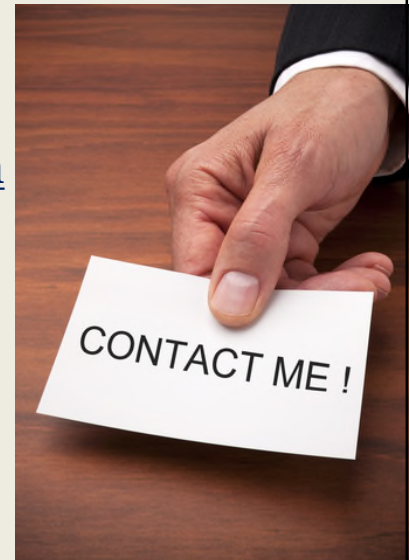
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