

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

GLORIA GUTIERREZ, *Applicant*

vs.

**ABM INDUSTRIES, INC.; Permissibly Self-Insured,
Administered by ESIS WC CLAIMS, *Defendants***

**Adjudication Number: ADJ12146064
Van Nuys District Office**

**OPINION AND ORDER
DISMISSING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the Arbitrator with respect thereto. Based on our review of the record, the petition is untimely and must be dismissed.

Preliminarily, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that “it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice” (*Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shiple*, the Appeals Board denied the applicant’s petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board’s decision holding that the time to act on applicant’s petition was tolled during the period that the file was misplaced. (*Shiple, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shiple*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shiple, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on applicant’s petition within 60 days of its filing on January 5, 2021, through no fault of applicant. Therefore, considering that the Appeals Board’s failure to act on the petition was in error, we find that our time to act was tolled.

Nevertheless, while our time to act was tolled, applicant's petition was untimely filed and therefore subject to dismissal. There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1) (eff. Jan. 1, 2020).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, former § 10508, now § 10600 (eff. Jan. 1, 2020).) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

In this case, the Arbitrator issued the decision on November 23, 2020, serving it by mail on applicant and applicant's counsel, Barkhordarian Law Firm. Based on the authority cited above, applicant had until Friday, December 18, 2020 to seek reconsideration in a timely manner. Applicant's Petition for Reconsideration is dated December 21, 2020. A proof of service shows that the Petition for Reconsideration was mailed to the Workers' Compensation Appeals Board on December 21, 2020 and it was filed in EAMS on January 5, 2021. Accordingly, applicant's Petition for Reconsideration is untimely and will be dismissed.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 6, 2021

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

**GLORIA GUTIERREZ
SCHOCHET & SOLOMON
BARKHORDARIAN LAW FIRM
ROBERT E. DRAKULICH
EMPLOYMENT DEVELOPMENT DEPT.**

PAG/ara

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