

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **SALVADOR CONTRERAS,**

Case No. ADJ1622633 (VEN 0115623)

5 *Applicant,*

6 *vs.*

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

7 **M&C FARM LABOR; CALIFORNIA
INSURANCE GUARANTEE ASSOCIATION,
Adjusted By INTERCARE PASADENA, For
PAULA INSURANCE, In Liquidation,**

9
10 *Defendants.*

11 Applicant seeks reconsideration of a Findings and Decision of November 9, 2010, wherein
12 a workers' compensation administrative law judge (WCJ) found that applicant's petition to reopen
13 was barred by the five year statute of limitations contained in Labor Code sections 5410 and 5804.
14 Previously in this matter, in a Findings and Award of June 26, 2001, it was found that, while
15 employed as a pruner on August 24, 1999, applicant sustained industrial injury to his back, neck,
16 left upper extremity, chest, and right upper extremity, causing permanent disability of 27% and the
17 need for further medical treatment. While representing himself¹, applicant filed a petition to
18 reopen on August 24, 2004, claiming that his injury had caused new and further disability. The
19 original proceedings in this case were venued in the Ventura and Oxnard WCAB district offices.
20 However, applicant filed his petition to reopen in the Los Angeles WCAB district office. The
21 WCJ found that the petition to reopen was barred by the statute of limitations since, although the
22 petition was filed within five years, it was not filed in the proper WCAB district office.

23 Applicant contends that the WCJ erred in finding his petition to reopen barred by the statute
24 of limitations. We have received an answer, and the WCJ has filed a Report and Recommendation
25 on Petition for Reconsideration (Report).

26 ¹ At the time of the June 26, 2001 decision, applicant was represented by the Finestone, Schumaker law firm. It is
27 unclear whether this law firm was ever formally substituted out as counsel prior to the applicant's in pro per filing of
his petition to reopen.

1 As discussed below, we will deny the applicant's petition for reconsideration.

2 Preliminary, we note that the Appeals Board has 60 days from the filing of a petition for
3 reconsideration to act on that petition. (Lab. Code, § 5909.) Here, however, through no fault of
4 petitioner, the timely-filed petition did not come to the attention of the Appeals Board until after
5 the expiration of the statutory time period. Consistent with fundamental principles of due process,
6 therefore, and in keeping with common sensibilities, we are persuaded, under these circumstances,
7 that the running of the 60-day statutory period for reviewing and acting upon a petition for
8 reconsideration begins no earlier than the Appeals Board's actual notice of the petition. (See
9 *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493];
10 *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felts)* (1981) 119 Cal.App.3d 193
11 [46 Cal.Comp.Cases 622].) In this case, the Appeals Board received actual notice of the petition in
12 early February 2011, making this decision timely.

13 With regard to the merits, we will deny the petition for reconsideration for the reasons
14 stated by the WCJ in his Report, which we hereby adopt and incorporate. As stated by the WCJ,
15 both WCAB Rule 10390 and WCAB Rule 10450, as they were worded at the time that applicant
16 filed his petition to reopen in the Los Angeles district office, required petitions to reopen to be filed
17 in the district office with venue. Rule 10390 stated that the papers should be filed "where the case
18 has been assigned for hearing," and Rule 10450 stated that the papers should be filed "at the
19 district office of the Workers' Compensation Appeals Board with venue."

20 Although WCAB Rule 10390 contained a clause stating that the WCAB "may excuse a
21 failure to comply with this rule resulting from mistake, inadvertence, surprise, or excusable
22 neglect," the applicant has not alleged "mistake, inadvertence, surprise, or excusable neglect"
23 either at trial or in his petition for reconsideration. Accordingly, the applicant has not submitted
24 any evidence on this issue, and has waived it.

25 In both *Phelps v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 377 (writ
26 denied) and *City of San Bernardino v. Workers' Comp. Appeals Bd. (Tull)* (1997) 62
27 Cal.Comp.Cases 798 (writ denied), we held that a petition for reconsideration of an Appeals Board


1 decision was not timely filed when it was filed in the district office rather than directly with the
2 Appeals Board as required by former Appeals Board Rule 10840. In both *Phelps* and *Tull*, failure
3 to file in the proper office was more “excusable” than in the current case, since in those cases, the
4 petitions were filed in district offices where the cases were originally venued. In this case, there is
5 no evidence that the Los Angeles WCAB office had any connection with this case at all. The WCJ
6 properly followed the applicable regulations, and correctly found that the petition to reopen was
7 time-barred. We therefore deny the applicant’s petition for reconsideration.

8 ///
9 ///
10 ///
11 ///
12 ///
13 ///
14 ///
15 ///
16 ///
17 ///
18 ///
19 ///
20 ///
21 ///
22 ///
23 ///
24 ///
25 ///
26 ///
27 ///

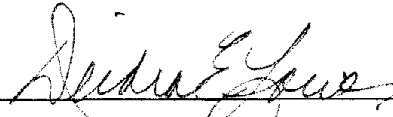
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Decision of November 9, 2010, be, and hereby is, **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

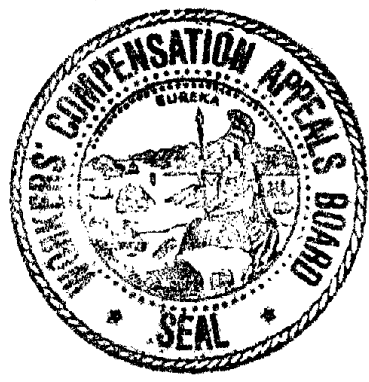

ALFONSO J. MORESI

I CONCUR,


DEIDRA E. LOWE

I DISSENT. (See attached Dissenting Opinion.)


RONNIE G. CAPLANE



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APR 04 2011

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

- SALVADOR CONTRERAS**
- ROBERT PEARMAN**
- GRANCELL, LEOVITZ, STANDER, REUBENS AND THOMAS**



DW/ bgr

CONTRERAS, SALVADOR

1 **DISSENTING OPINION OF COMMISSIONER CAPLANE**

2 I respectfully dissent. I would have excused the applicant's failure to file his petition to
3 reopen pursuant to Former WCAB Rule 10390, which was in effect at the time that the applicant
4 filed his petition to reopen.

5 Former Rule 10390, which applied when the applicant filed his petition to reopen, clearly
6 stated that "The Workers' Compensation Appeals Board may excuse a failure to comply with this
7 rule [requiring papers to be filed "where the case has been assigned for hearing"] resulting from
8 mistake, inadvertence, surprise, or excusable neglect."

9 By its plain language, Former Rule 10390 gives us the power to excuse a minor breach of
10 the rules regarding filing of papers enumerated elsewhere in Rule 10390 *sua sponte*, regardless of
11 whether the applicant raised the issue. In any case, although the applicant did not quote "mistake,
12 inadvertence, surprise, or excusable neglect" in his petition, he makes in essence the same
13 argument when he states:

14 "Contrary to Labor Code Section 3202, the judge did not liberally
15 construe the divisions and did not consider applicant's efforts at
16 timely filing the statute while he was not represented. The
17 applicant made an affirmative effort to go to the Los Angeles
18 [WCAB district office], have a document date stamped and
submitted timely, and include the medical report with which to
base the Petition to Reopen. The rule of liberal construction
applies to all aspects of workers' compensation law...."

19 The applicant has amply shown mistake and excusable neglect. He was in pro per, and he
20 had not participated in a hearing in his case for over three years. Given his layman's experience
21 and the time that had elapsed, noncompliance with filing technicalities should be excused. "[I]t is
22 the policy of the law to favor ... a hearing on the merits." (*Fox v. Workers' Comp. Appeals Bd.*
23 (*Hudson*) (1992) 4 Cal.App.4th 1196, 1205 [57 Cal.Comp.Cases 149]; *Pixpay, Inc. v. Workers'*
24 *Comp. Appeals Bd. (Anderson)* (1998) 63 Cal.Comp.Cases 334, 335 [writ denied].) In *Anderson*,
25 we applied this well-known principle to allow the filing of a petition for reconsideration which
26 was filed after the close of business on the last day it could be filed. The two cases cited by the
27 majority, *Phelps v. Workers' Comp. Appeals Bd.* (1997) 62 Cal.Comp.Cases 377 (writ denied) and

1 *City of San Bernardino v. Workers' Comp. Appeals Bd. (Tull)* (1997) 62 Cal.Comp.Cases 798
2 (writ denied), are inapposite in that they only discuss former Rule 10840, which dealt specifically
3 with petitions for reconsideration, and did not consider the "mistake, inadvertence, surprise, or
4 excusable neglect" language in Rule 10390.

5 Neither the majority nor the defendant have offered sufficient reason to ignore the
6 overriding policy in favor of a hearing on the merits in this case, despite former Rule 10390
7 plainly allowing us to forgive non-compliance with filing technicalities. I therefore would have
8 granted the applicant's petition for reconsideration, rescinded the Findings and Decision of
9 November 9, 2010, and returned this matter to the WCJ so that the petition to reopen could be
10 decided on its merits.

11
12 

13 **RONNIE G. CAPLANE, COMMISSIONER**

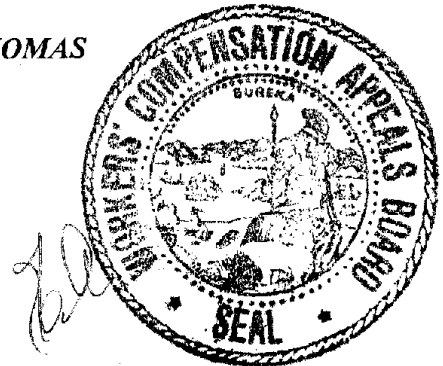
14
15
16 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

17 **APR 04 2011**

18 **SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT**
19 **THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:**

20 **SALVADOR CONTRERAS**
21 **ROBERT PEARMAN**
22 **GRANCELL, LEBOVITZ, STANDER, REUBENS AND THOMAS**

23
24 **DW/bgr**



CONTRERAS, SALVADOR