

**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**TIFFANY HILL, *Applicant***

**vs.**

**STATE OF CALIFORNIA, IN-HOME SUPPORT SERVICES;  
legally uninsured, adjusted by INTERCARE, *Defendants***

**Adjudication Number: ADJ7701836  
Oakland District Office**

**OPINION AND ORDER  
GRANTING PETITION FOR  
RECONSIDERATION**

Defendant seeks reconsideration of the December 1, 2023 Findings and Award wherein the workers' compensation administrative law judge (WCJ) found that, while employed as an in-home care giver on October 20, 2010, applicant sustained industrial injury to her bilateral upper extremities, including her left shoulder, cervical spine and psyche, causing permanent total disability.<sup>1</sup>

Defendant contends that the WCJ erred in finding applicant permanently totally disabled arguing that the WCJ considered facts not in evidence in finding sub rosa video unpersuasive and that the opinion of orthopedic panel qualified medical examiner (PQME) Ronald Wolfson, M.D., is not substantial medical evidence because it is not consistent with the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Edition) (AMA Guides).

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

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<sup>1</sup> Commissioner Sweeney, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

In the Report, the WCJ stated:

Applicant was evaluated by Dr. Zwerin on two separate occasions. The first time Dr. Zwerin evaluated the applicant he said

“What is clear is that:

1. Ms. Hills’ condition is both stable and chronic.
2. Multiple physicians spanning multiple years have reasonably concluded that Ms. Hill’s chronic pain and residuals are not going to improve significantly going forward. a. This has been based on the essentially normal imaging studies, her consistently verbalized and clinical presentation that she is “totally disabled” and here sustaining implausible and impossibly high pain levels.” (Joint Exhibit 118, page 62)

On page 16 of Joint Exhibit 118, Dr. Zwerin says that “if she has CRPS, it is end-stage and immutable. He noted the following with respect to the CRPS diagnosis:

1. There is no evidence of allodynia or hyperpathia to sensory testing.
2. The left and right hands equally cool to the touch while performing grip testing, her left hand does become colder than the right. Despite that, her hand does not blanch or become hyperemic.
3. Peripheral circulation is normal in the upper extremities.
4. Capillary filling times is normal in the nail beds as observed through her clear nail polish.
5. She has no difficulty allowing me to touch, manipulate or in any way examine her LUE other than for pain inhibition about the elbow, palm, shoulder and the left side of her neck.
6. There is no evidence of cyanosis or clubbing of the fingers.
7. Ms. Hill tells me that her left hand is swollen and the photos suggest mild fullness on the left as compared to the right. Dr. Zwerin after the first evaluation provided impairment rating applying the AMA guides. Not only did Dr. Zwerin apply the AMA guides, he stated on page 66 of his initial report (Joint Exhibit 118) that “the strict/basic interpretation of the Guides is correct”.

Unhappy with the findings of Dr. Zwerin, and confirming Dr. Warbritton’s statement that “either Ms. Hill or her attorney is intent upon maximizing the impairment and presumed financial remuneration” (Joint Exhibit 118, page 50, first paragraph) discovery continued for two more years, resulting with a re-exam with Dr. Zwerin in 2019.

In 2019 Dr. Zwerin stated that the 5th edition of the AMA guides is incorrect as it pertains to diagnosis of CRPS. Dr. Zwerin describes the guides as “ancient” by any standard and is “not up to the art in diagnosing CRPS”. (Joint Exhibit 114, page 16).

Dr. Zwerin uses the Budapest Clinical Diagnostic Criteria, since Dr. Zwerin's understanding of CRPS had developed after a conference in Budapest for the International Association for the Study of Pain). (Joint Exhibit 114, page 16).

When Dr. Zwerin analyzed the AMA guides and applied it to applicant's condition, he detailed why applicant's condition did not fit a CRPS diagnosis under the AMA guides.

Dr. Wolfson states that the standard ratings that we normally use in the workers' compensation system absolutely do not apply in this case (Joint Exhibit 125, page 80). Although Dr. Wolfson states that he is not the best person to evaluate CRPS (Joint Exhibit 124, page 2), he states that he is in agreement with Dr. Zwerin's diagnosis of CRPS (Joint Exhibit 121, page 3).

In his report of March 8, 2023, (Joint Exhibit 120) Dr. Wolfson states that there is no consistency in the objective diagnostic criteria for CRPS. He indicates that many patients have few of the diagnostic criteria and most of them have none. Dr. Wolfson points out that the list of criteria provided by the 5th edition of the AMA guide for CRPS is not accurate.

"A recent reconsideration of these [CRPS] symptoms has generated new terminology and ideas concerning the underlying physiology. It is felt that sympathetically maintained pain is not an essential component of CRPS as it may be present in a variety of painful conditions including or independent of CRPS. Contrary to previous suggestion, regional sympathetic blockade has no role in the diagnosis of CRPS. Table 16-16 on page 496 which makes no sense whatsoever because it is all about sympathetic blockade. If you look at the Sixth Edition, which [we are not supposed to] look at, it corrects a lot of these discrepancies and I would refer you to the California Orthopedic Association meeting where they discussed the faults of this book, the Fifth Edition." (Joint Exhibit 119, page 2)

The defendant correctly notes that neither Dr. Zwerin nor Dr. Wolfson applied the criteria used in the 5th edition of the AMA guides to diagnose CRPS.

Dr. Zwerin and Dr. Wolfson however in great detail explained why they did not rely on the 5th edition and why the 5th edition criteria for CRPS is inaccurate and outdated.

Medical diagnosis changes as time goes on. Despite the rapid changes that are occurring in the medical field, we continue using diagnostic criteria that was created more than 20 years ago.

Since detailed explanation was provided by both Dr. Zwerin and Dr. Wolfson as to why the 5th edition is inaccurate for a CRPS diagnosis, it is appropriate for

the physician to deviate from the guides and issue diagnosis based on their knowledge and expertise.

#### SURVEILLANCE VIDEO:

Dr. Wolfson in his report of March 2, 2022 (Joint Exhibit 124) stated that he had reviewed 32 videos of the applicant. Dr. Wolfson indicates that if the video surveillance accurately depicts the applicant, then he has been fooled by the applicant. The doctor however makes it clear that he cannot verify whether the person in the video is the applicant and therefore does not rely on the video to reach a conclusion that his diagnosis of CRPS is inaccurate or that applicant is able to return to the open labor market.

Defendant had over a year to clean up the record regarding the question of who is in the 32 videotapes. Not only did defendant do nothing at all about obtaining confirmation that the videotapes were of the applicant, for the most recent trial, defendant offered 4 videos as evidence of which videos at least two were definitely not of the applicant.

Applicant was present on the day of trial. Although she did not come into the courtroom, defendant could have called applicant as a witness and could have questioned her about the videotapes. If there is a question of identity as to who is on the videotape, for the tape to have any value what so ever, defendant/the person relying on the videotape has the burden to show the videotape is that of the individual claiming to be depicted.

I suspect some of the video reviewed by Dr. Wolfson would have been that of the applicant. Since Dr. Wolfson never specified which video made him question whether applicant was providing an honest presentation it is not possible for me to determine that Dr. Wolfson reviewed a tape of the applicant and not some other individual.

Dr. Wolfson specifically instructs the parties that the problem with who is in the video needs to be worked out between the attorneys (Joint Exhibit 124, page 3).

Upon receipt of Dr. Wolfson's report of March 2, 2022, defendant should have scheduled applicant's deposition and video by video should have confirmed applicant's identity. (Report, at pp. 6-10.)

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant applicant's Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is

deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code section 5950 et seq.

I.

We highlight the following legal principles that may be relevant to our review of this matter:

Labor Code section 4660 provides that:

This section shall only apply to injuries occurring before January 1, 2013.

(a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity.

(b)

(1) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition).

(Lab. Code, § 4660.)

In *Pearson Ford v. Workers' Comp. Appeals Bd.* (2017) 16 Cal.App.5th 889, 899-900 [82 Cal.Comp.Cases 1105], the Court of Appeal stated:

Under Labor Code section 4660, subdivision (b)(1), the determination of "the nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition)." "First published in 1971 to provide 'a standardized, objective approach to evaluating medical impairments' (Guides § 1.1, p. 1), the AMA Guides sets forth measurement criteria that certified rating physicians and chiropractors can use to ascertain and rate the medical impairment suffered by injured workers. [Citation.]" (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808, 819 [115 Cal. Rptr. 3d 112].)

As the WCAB points out the AMA Guides are not meant to be a "rigid and standardized protocol ... devoid of any clinical judgment." (*Milpitas Unified*

*School Dist. v. Workers' Comp. Appeals Bd.*, *supra*, 187 Cal.App.4th at p. 827.) Here, Dr. King examined Hernandez and the surveillance videos, and was deposed three times. He stated his conclusions and fully explained how he came to those conclusions, including a thorough explanation for what Pearson Ford contends were his departures from the AMA Guides. Given Dr. King's full explanation of his assessment and his presumed expertise as an AME, the WCJ and the WCAB could reasonably rely on his assessment of Hernandez's disability. (See *Green v. Workers' Comp. Appeals Bd.*, *supra*, 127 Cal.App.4th at p. 1444; *Power v. Workers' Comp. Appeals Bd.*, *supra*, 179 Cal.App.3d at p. 782.)

In this case, it appears that Dr. Wolfson's deviation from the AMA Guides 5th edition did not pertain to the determination of impairment but rather to diagnosis.

## II.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal.2d 360, 364.) "[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 authority limitation none will be implied.]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.]")

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd.* (1967) 67 Cal.2d 483,

491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A “final” order has been defined as one that either “determines any substantive right or liability of those involved in the case” (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers’ Comp. Appeals Bd. (Pointer)* (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers’ Comp. Appeals Bd. (Kramer)* (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a “threshold” issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers’ compensation proceedings, are not considered “final” orders. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) [“interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not ‘final’ ”]; *Rymer, supra*, at p. 1180 [“[t]he term [‘final’] does not include intermediate procedural orders or discovery orders”]; *Kramer, supra*, at p. 45 [“[t]he term [‘final’] does not include intermediate procedural orders”].)

Labor Code section 5901 states in relevant part that:

No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers’ compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. ...

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

### III.

Accordingly, we grant applicant’s Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the December 1, 2023 Findings and Award is **GRANTED**.

**IT IS FURTHER ORDERED** that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER  
PARTICIPATING NOT SIGNING



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**February 20, 2024**

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

**TIFFANY HILL  
LAW OFFICES OF ROBERT WOOD  
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK**

**PAG/abs**

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