WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PATRICIA DELPH, *Applicant*

vs.

**SCRIPPS HEALTH;
permissibly self-insured, administered by SEDGWICK RIVERSIDE; PALOMAR HEALTH, permissibly self-insured, administered by ATHENS ADMINISTRATORS ORANGE, *Defendants***

Adjudication Number: ADJ10362589; ADJ12575343; ADJ12575772; ADJ12561678
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant, Scripps Health (Scripps) seeks reconsideration of the Arbitration Decision and Findings and Order issued by the workers' compensation arbitrator (WCA) on December 3, 2024. Therein, the WCA found that "the Arbitrator would not find further cumulative trauma into 2018;" that "the [September 20, 2016 cumulative trauma (CT)] would be 40% causally responsible and that SCRIPPS and PALO MAR would each be liable pursuant applicant's respective work exposure at each place of employment, from [September 20, 2015 to September 20, 2016];" that "the specific was somewhat more significant and that applicant's condition worsened over time from some cumulative trauma exposure both from which she never fully recovered;" and that "[w]ithin this range of the evidence, … the Arbitrator apportions 60% to the specific and 40% to the 2016 cumulative trauma. No other cumulative traumas as alleged are found to be substantial." Based on these findings, the WCA ordered that Scripps' Petition for Contribution be granted.

Defendant contends that the WCA 's decision is not based on substantial medical evidence arguing he relied on a "blend" of evidence.

We received an Answer from defendant Palomar Health. The WCA issued a Report and Recommendations on Petition for Reconsideration (Report) recommending that we deny reconsideration.

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 defendant'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[1] section 5950 et seq.

I.

Preliminarily, we note that former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) 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.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on March 17, 2026 and 60 days from the date of transmission is Saturday, May 16, 2026. The next business day that is 60 days from the date of transmission is Monday, May 18, 2026. (See Cal. Code Regs., tit.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

8, § 10600(b).)[2] This decision is issued by or on May 18, 2026, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation arbitrator, the Report was served on January 7, 2025, and the case was transmitted to the Appeals Board on March 17, 2026. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Thus, we conclude that service of the Report did not provide accurate notice of transmission under section 5909(b)(2) because service of the Report did not provide actual notice to the parties as to the commencement of the 60-day period on March 17, 2026.

However, a notice of transmission was served by the district office on March 20, 2026, Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1), and consequently they had actual notice as to the commencement of the 60-day period on March 20, 2026.

II.

The WCA provided the following discussion in the Report:

INTRODUCTORY STATEMENT

> The above matter was ordered to arbitration, at the request of the parties, and was initially heard by the Arbitrator on June 17, 2022; as the parties were unable to resolve the issues, the Arbitrator's Decision was issued on November 4, 2024, and was duly filed at the Workers' Compensation Appeals Board.
>
> The Decision included findings that the Applicant sustained a significant, causative specific injury on January 13, 2015 (ADJ10362589), while employed by SCRIPPS HEALTH (hereinafter SCRIPPS) and that this injury was

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

responsible, in substantial part, for Applicant's treatment from the date of injury to the present and continuing as well as for a portion of applicant's impairment; additionally, the finding was that the specific injury was 60% responsible for applicant's injury and apportioned accordingly, with sole liability by SCRIPPS.

The Decision also found that applicant's post-specific, already-injured condition was aggravated through cumulative trauma through September 20, 2016 (ADJ125754772) which lead to further surgery on September 20, 2016; no other cumulative trauma periods, as plead by SCRIPPS, were determined to be compensable and/or legally responsible; it was determined by the Arbitrator that the September 20, 2016 cumulative trauma was 40% causally responsible and that, as such, both SCRIPPS and PALOMAR HEALTH (hereinafter PALOMAR) would each be liable pursuant to applicant's respective work exposure at each place of employment from September 20, 2015 to September 20, 2016; the exact pro rata exposure during the cumulative trauma was not determined, nor were the claimed expenditures, and the parties were to adjust the contribution claim accordingly.

The Decision did not order transfer of future claims administration from SCRIPPS to PALOMAR, as requested by SCRIPPS.

Defendant SCRIPPS timely filed its Petition for Reconsideration. It alleges in its Petition herein that the Arbitrator acted without or in excess of his powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision, or award.

Specifically, SCRIPPS disagrees with the finding of the compensability of the specific injury which is material to and shapes the entirety of the award, and the finding of only one cumulative trauma (and the denial by the Arbitrator of the two other cumulative trauma periods, July 24, 2013 to July 24, 2014 (ADJ1257543) and April 7, 2017 to April 7, 2018 (ADJ12561678), and the Arbitrator's "blending" the medical evidence that resulted in the Arbitrator's Findings and Decision. SCRIPPS argues, as they did in the Arbitration Hearing that the medical reports and opinions by Drs. Wisniewski and Tontz support only a finding of multiple distinct cumulative trauma periods, which essentially span from July 24, 2013, to April 18, 2018, nearly a five-year period. SCRIPPS maintains that Dr. Tontz, one of applicant's treating physicians, did not 'flip flop' his opinions as was characterized and found by the Arbitrator, but rather revised his opinions as information was received by him. SCRIPPS outlines how each cumulative trauma period, and its terminal date, was found and defined; again, while they point to increasing symptomatology during each period of time as support for the cumulative injury, they do not, to the Arbitrator's satisfaction, adequately explain how applicant's relatively light work duties support causation of injury; it appears to the Arbitrator that Drs. Tontz and Wisniewski have taken a leap of faith as to causation of the alleged multiple and distinct periods of the alleged injuries.

As for the specific injury, SCRIPPS maintains that only applicant's knee was injured (with no residual involved). It takes this position based on a factual and medical dispute, irrespective of the fact that Applicant's back specific injury claim was initially accepted by SCRIPPS. SCRIPPS asserts that AME Dr. Bernicker's opinions, as to dates of injury, are not substantial evidence. However, SCRIPPS appears to ignore, in its assertions, strong medical evidence showing that the specific injury dislodged her spinal cage as shown on MRI testing.

PALO MAR has filed an Answer to SCRIPPS' Peli Lion for Reconsideration and it agrees with the Arbitrator's findings, analysis and Decision (that there is a compensable specific injury and one compensable cumulative trauma period with the proportional liability of defendants allocated accordingly). PALOMAR argues that Dr. Tontz's reports do not rise to the level of substantial evidence as it does not meet the requirements of a medical-legal report. On the other hand, they assert that Dr. Bernicker's opinion as to the significance of the specific injury is objectively determined by his review of the October 8, 2015 MRI. As a result of damage to the cage, applicant went on to have surgery on Sept 20, 2016 (fusion and removal of bone graft). PALOMAR notes deficiencies in Dr. Tontz's deposition testimony as it relates to apportionment and dates of cumulative trauma; similarly, they indicate contradictions and changes made by Dr. Tontz in his October 22, 2024 report.

Specifically, PALO MAR, based upon reported case law *(Bonilla, Brenner, Moussa)* agrees with the Arbitrator's decision which was based upon and within the range of evidence. It also argues, per *Po-wers* (1986) 51 CCC 114, that the AME (Bernicker) opinion should ordinarily be followed unless there is good reason to find that the opinion is not persuasive.

…

DISCUSSION

The Arbitrator believes that his Decision and Findings and Order, as filed herein, is self-explanatory, responsive to, and dispositive of, the issues raised by SCRIPPS, except as discussed further herein. The Arbitrator incorporates, by reference, his discussion regarding the issues on pages 2 through 5 in the Decision and Findings and Order.

The Arbitrator has carefully reviewed and considered the arguments raised by SCRIPPS on Reconsideration herein as well as the arguments and points argued by PALOMAR. The Arbitrator responds further in support of his Arbitration Decision and Findings and Order, as follows.

The Arbitrator's powers are derived from Labor Code section 5272. Arbitrators shall have all of the statutory and regulatory duties and responsibilities of a

workers' compensation judge (with some exceptions not relevant here). The Arbitrator has broad latitude to evaluate evidence and render determinations related to compensation arising out of the Labor Code.

The medical reporting and opinions rendered particularly by Dr. Tontz and somewhat by Dr. Bernicker were less than stellar or reliable partly due to the extraordinary number of times these physicians were asked to reflect and report on the same subject matter, including issuing multiple reports and giving depositions, over an ex tended period of time. Additionally, it appears to the Arbitrator that by the totality of the efforts made by counsel to seek clarifying opinions with arguably new or additional evidence to review and comment upon, the record became confused, redundant and conflicting. Consequently, the Arbitrator's approach in evaluating, understanding, and weighing the evidence, in order to make a rational and substantial decision was to 'blend' the opinions within the range of evidence. However, it should be noted that, as between the primary medical reporting presented (Bernicker and Tontz), AME Dr. Bernicker's opinions were, and continue to be, the more persuasive and reliable opinion.

In the big picture of the case, and after reading all of the medical opm10ns, it is the Arbitrator's considered opinion that the Findings and Decision and Order, as it allocates responsibility to both defendants, renders a fair and just result in keeping and consistent with the facts and history of the case.

In conclusion the Arbitrator, on review, agrees with the arguments raised by PALOMAR; nothing said or argued in SCRIPPS' Petition herein causes the Arbitrator to alter his opinions, findings, or decision. For these reasons, and as fully and completely set forth in the Findings, Decision, and Order, it is recommended that SCRIPPS' Petition for Reconsideration be denied

(Report at pp. 1-5, emphasis in original.)

III.

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

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in

nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.)

Medical evidence is required if there is an issue regarding the compensability of the claim. (Lab. Code, §§ 4060(c)(d), 4061(i), 4062.3(l).) A medical opinion must be framed in terms of reasonable medical probability, it must be based on an adequate examination and history, it must not be speculative, and it must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-621 (Appeals Bd. en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Here, it is unclear from our preliminary review that there is substantial medical evidence to support the WCA's decision regarding industrial causation without additional development of the record. Where the medical evidence or opinion on an issue is incomplete, stale, and no longer germane, or is based on an inaccurate history, or speculation, it does not constitute substantial evidence. (*Place v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Based on our review, we are not persuaded that the record is properly developed. Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

IV.

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"].)

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.

V.

Accordingly, we grant defendant'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. ***While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed to*** WCABmediation@dir.ca.gov.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration 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/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 18, 2026

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

MULLEN, PLUMMER & CASTIGLIONI, APC
PHILLIP S. ALPERT, ESQ.
ENGLAND PONTICELLO

PAG/bp

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