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8 **BEFORE THE**
9 **PODIATRIC MEDICAL BOARD**
10 **DEPARTMENT OF CONSUMER AFFAIRS**
11 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 500-2019-000849

13 **JOHN WAYNE SCIVALLY, D.P.M.**
14 **130 La Casa Via, Suite 1-204**
Walnut Creek, CA 94598

ACCUSATION

15 Podiatric Medicine Certificate No. E4319

16 Respondent.

17 **PARTIES**

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- 19 1. Brian Naslund (Complainant) brings this Accusation solely in his official capacity as
20 the Executive Officer of the Podiatric Medical Board, Department of Consumer Affairs.
- 21 2. On or about January 19, 2001, the Podiatric Medical Board issued Podiatric Medicine
22 Certificate Number E4319 to John Wayne Scivally, D.P.M. (Respondent). The certificate was in
23 full force and effect at all times relevant to the charges brought herein and will expire on January
24 31, 2021, unless renewed.

25 **JURISDICTION**

- 26 3. This Accusation is brought before the Podiatric Medical Board (Board), Department
27 of Consumer Affairs, under the authority of the following laws. All section references are to the
28 Business and Professions Code (Code) unless otherwise indicated.

1 4. Section 2222 of the Code states the California Board of Podiatric Medicine shall
2 enforce and administer this article as to doctors of podiatric medicine. Any acts of unprofessional
3 conduct or other violations proscribed by this chapter are applicable to licensed doctors of
4 podiatric medicine and wherever the Medical Quality Hearing Panel established under Section
5 11371 of the Government Code is vested with the authority to enforce and carry out this chapter
6 as to licensed physicians and surgeons, the Medical Quality Hearing Panel also possesses that
7 same authority as to licensed doctors of podiatric medicine.

8 The California Board of Podiatric Medicine may order the denial of an application or issue
9 a certificate subject to conditions as set forth in Section 2221, or order the revocation, suspension,
10 or other restriction of, or the modification of that penalty, and the reinstatement of any certificate
11 of a doctor of podiatric medicine within its authority as granted by this chapter and in conjunction
12 with the administrative hearing procedures established pursuant to Sections 11371, 11372, 11373,
13 and 11529 of the Government Code. For these purposes, the California Board of Podiatric
14 Medicine shall exercise the powers granted and be governed by the procedures set forth in this
15 chapter.

16 5. Section 2497 of the Code states:

17 "(a) The board may order the denial of an application for, or the suspension of, or the
18 revocation of, or the imposition of probationary conditions upon, a certificate to practice podiatric
19 medicine for any of the causes set forth in Article 12 (commencing with Section 2220) in
20 accordance with Section 2222.

21 "(b) The board may hear all matters, including but not limited to, any contested case or may
22 assign any such matters to an administrative law judge. The proceedings shall be held in
23 accordance with Section 2230. If a contested case is heard by the board itself, the administrative
24 law judge who presided at the hearing shall be present during the board's consideration of the case
25 and shall assist and advise the board."

26 6. Section 2234 requires that the Board take action against any licensee charged with
27 unprofessional conduct, which includes, but is not limited to:
28

1 “(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or
2 omissions. An initial negligent act or omission followed by a separate and distinct departure from
3 the applicable standard of care shall constitute repeated negligent acts.

4 “(1) An initial negligent diagnosis followed by an act or omission medically
5 appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

6 “(2) When the standard of care requires a change in the diagnosis, act, or omission
7 that constitutes the negligent act described in paragraph (1), including but not limited to, a
8 reevaluation of the diagnosis or a change in treatment, and the licensee’s conduct departs from the
9 applicable standard of care, each departure constitutes a separate breach of the standard of care.”

10 7. Section 2266 of the Code provides that “failure of a physician to maintain adequate
11 and accurate medical records relating to the provision of services to their patients constitutes
12 unprofessional conduct.”

13 COST RECOVERY

14 8. Section 2497.5 of the Code states:

15 “(a) The board may request the administrative law judge, under his or her proposed
16 decision in resolution of a disciplinary proceeding before the board, to direct any licensee found
17 guilty of unprofessional conduct to pay to the board a sum not to exceed the actual and reasonable
18 costs of the investigation and prosecution of the case.

19 “(b) The costs to be assessed shall be fixed by the administrative law judge and shall not be
20 increased by the board unless the board does not adopt a proposed decision and in making its own
21 decision finds grounds for increasing the costs to be assessed, not to exceed the actual and
22 reasonable costs of the investigation and prosecution of the case.

23 “(c) When the payment directed in the board's order for payment of costs is not made by the
24 licensee, the board may enforce the order for payment by bringing an action in any appropriate
25 court. This right of enforcement shall be in addition to any other rights the board may have as to
26 any licensee directed to pay costs.

27 “(d) In any judicial action for the recovery of costs, proof of the board's decision shall be
28 conclusive proof of the validity of the order of payment and the terms for payment.

1 “(e)(1) Except as provided in paragraph (2), the board shall not renew or reinstate the
2 license of any licensee who has failed to pay all of the costs ordered under this section.

3 “(2) Notwithstanding paragraph (1), the board may, in its discretion, conditionally renew or
4 reinstate for a maximum of one year the license of any licensee who demonstrates financial
5 hardship and who enters into a formal agreement with the board to reimburse the board within
6 that one-year period for those unpaid costs.

7 “(f) All costs recovered under this section shall be deposited in the Board of Podiatric
8 Medicine Fund as a reimbursement in either the fiscal year in which the costs are actually
9 recovered or the previous fiscal year, as the board may direct.”

10 FACTUAL ALLEGATIONS

11 9. At all relevant times, Respondent was a doctor of podiatric medicine with a
12 specialization in foot and ankle surgery in Contra Costa County, California.

13 10. On September 4, 2018, Patient 1, a 19-year old male, came under Respondent’s care
14 and treatment with a chief complaint of a hypermobile or detached fat pad plantar to the
15 calcaneus. Patient 1 had a history significant for an October 10, 2015 truck versus pedestrian
16 accident, which resulted in multiple fractures of the left leg and foot as well as a degloving injury
17 to the left heel and ankle. When he presented to Respondent nearly three years post-accident, he
18 continued to complain of pain and instability to the left foot, which was unimproved despite the
19 use of orthotics. Respondent confirmed the diagnosis of severe displacement of the calcaneal fat
20 pad, which functions to protect the underlying structures (neurovascular tissues, sensitive
21 periosteum, ligaments and tendons) from undue pressure and shocks. The patient was dissatisfied
22 with orthotics that had been prescribed for the condition and, at a subsequent visit on September
23 25, 2018, Respondent offered a treatment plan which included surgical reattachment of the
24 calcaneal fat pad with Mitek soft tissue anchors and propylene mesh. Respondent’s choice of the
25 procedure and use of biocompatible materials demonstrated a lack of knowledge regarding the
26 risk of breakdown, non-healing and/or infection.

27 11. On December 17, Patient 1 was seen by Respondent for a pre-operative examination.
28 The record of this visit is virtually identical to the two previous visits, indicating that

1 Respondent's electronic record keeping utilizes templates and respondent's records are not
2 accurate records of what transpired at a specific visit.

3 12. On December 28, 2018, Respondent performed a surgical reattachment of the
4 calcaneal fat pad to the left heel with Mitek anchors and propylene mesh.

5 13. On January 4, 2019, Patient 1 returned for a post-surgical follow up examination. On
6 that occasion, Respondent was not in the office and a medical assistant removed his cast and
7 inspected the surgical site; however, the chart note does not disclose that Respondent did not
8 examine the patient on that date. At this visit, Patient 1 recalls that the medical assistant observed
9 a pressure ulcer of the dorsal foot, but it is not noted. In a subsequent interview with the Board's
10 medical consultant, Respondent stated that he did observe a small abrasion at the next visit on
11 January 10 ("That's why I put him on antibiotics later"), but again there is no record of it. In fact,
12 except for variations such as an antibiotic prescription or, later, a planned I&D (incision and
13 drainage), the records for each of five post-operative visits are similar in content and do not
14 reflect anything but normal post-operative healing. Respondent later explained the planned I&D
15 was intended to clean the dry eschar from the surgical wound to make it look better and to satisfy
16 the patient and his father because, although he assured them it was healing, "they think they know
17 better."

18 14. At the fifth post-operative visit on February 21, 2019, Respondent again described the
19 surgical wound as "well coapted (closed) with black, stable eschar (dead tissue found in a full-
20 thickness wound) around site without drainage, odor or fluctuance." A photograph taken by the
21 patient at about the same time shows a dehisced (separated) wound with devitalized margins
22 encompassing the width of the heel. Respondent did not consider and/or did not document
23 suspicions that the wound was failing to heal. Although he ordered Keflex empirically, which he
24 later explained was for the dorsal pressure ulcer, he did not perform a probe to bone test to rule
25 out infection in the surgical wound. The patient's health plan removed Respondent from its list of
26 network providers and Patient 1 did not return to care.

27 15. On February 27, 2019, Patient 1 and his father became so concerned over the non-
28 healing surgical wound and dorsal ulcer that they presented to a local ED. There the patient was

1 diagnosed with infections of the wound and bone. He was admitted to the hospital, where he
2 underwent removal of the foot surgical implants followed by six weeks of IV antibiotics for
3 osteomyelitis.

4 **CAUSE FOR DISCIPLINE**

5 (Repeated Negligent Acts, Inadequate and Inaccurate Records)

6 16. Respondent is subject to disciplinary action under Code sections 2234, 2234(c) and
7 2266 in that Respondent engaged in acts of unprofessional conduct, repeated acts of negligence
8 and failed to keep adequate and accurate records. The circumstances are as follows:

9 A. Respondent inappropriately used a template in a manner and to such an extent that it
10 cannot be determined with certainty what transpired at a specific patient encounter or what
11 Respondent's reasoning was;

12 B. Respondent formulated a treatment plan for reattachment of soft tissue to bone
13 without recognizing the elevated probability of resulting breakdown, non-healing or infection;

14 C. Respondent failed to recognize, document and respond to signs of post-operative
15 infection.

16 **DISCIPLINE CONSIDERATIONS**

17 17. To determine the degree of discipline, if any, to be imposed on Respondent,
18 Complainant alleges that on or about May 28, 2007, in a prior disciplinary action titled In the
19 Matter of the Accusation Against John Wayne Scivally, D.P.M. before the Podiatric Medical
20 Board, in Case Number 1B-2005-166794. Respondent's certificate was placed on a three-year
21 probation with terms and conditions based upon allegations of negligence and inadequate
22 documentation.

23 **PRAYER**

24 WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged,
25 and that following the hearing, the Podiatric Medical Board issue a decision:

26 1. Revoking or suspending Podiatric Medicine Certificate Number E4319, issued to
27 John Wayne Scivally, D.P.M.;

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2. Ordering John Wayne Scivally, D.P.M. to pay the Podiatric Medical Board the reasonable costs of the investigation and enforcement of this case, pursuant to Business and Professions Code section 2497.5; and,

3. Taking such other and further action as deemed necessary and proper.

DATED: OCT 30 2020



BRIAN NASLUND
Executive Officer
Podiatric Medical Board
Department of Consumer Affairs
State of California
Complainant

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