

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TERRI SCOTT, *Applicant*

vs.

**CITY OF LOS ANGELES, permissibly self-insured;
administered by TRISTAR RISK MANAGEMENT, *Defendants***

**Adjudication Number: ADJ9671636
Van Nuys District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto.¹ Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, which are both adopted and incorporated herein, and for the reasons stated below, we will deny reconsideration.

For the reasons stated in the WCJ's Report and Opinion on Decision, we agree that the opinions of Roger Bertoldi, M.D., and Martin Ross, Ph.D., are substantial medical evidence upon which the WCJ properly relied. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases

¹ Commissioner Brass, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist was appointed in his place.

1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.).)

We further note that Dr. Bertoldi's and Dr. Ross' medical opinions are corroborated by the medical records of multiple other doctors: neurologist Vernon Williams, M.D., who diagnosed post-concussion syndrome, post-traumatic headache, and visual disturbances (applicant's Exhibit 28, at p.1); Allen Huang, M.D., who diagnosed a traumatic brain injury due to motor vehicle accident, vestibular dysfunction, posttraumatic headaches and mood disorder and anxiety disorder related to traumatic brain injury (applicant's Exhibit 29, at p. 2); neuro-ophthalmology David Sami, M.D., who diagnosed applicant with traumatic brain injury/post-concussion syndrome with associated impairments to visual function, including post-concussive visual field constriction and post-traumatic retrobulbar optic neuropathy (applicant's Exhibit 21, at p. 10); Diembh Hoang, M.D., Physical Medicine & Rehabilitation specialist, who diagnosed post-concussion syndrome with impaired cognition, impaired vision, impaired balance, and depression due to head injury (applicant's Exhibit 30, at p .4); and David Patterson, M.D., from Casa Colina Hospital, who found applicant 100% disabled due to post-concussion syndrome, post-traumatic vision and cognitive disorder due to traumatic brain injury. (Applicant's Exhibit 32, at p. 2.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR



/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 12, 2022

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

**TERRI SCOTT
ASVAR LAW
LOS ANGELES CITY ATTORNEY'S OFFICE**

PAG/abs

I certify that I affixed the official seal of
the Workers' Compensation Appeals
Board to this original decision on this date.
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**REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION**

INTRODUCTION:

On November 15, 2021, the Defendant filed a timely and verified petition for reconsideration dated November 15, 2021, alleging that the undersigned WCJ erred in his Findings of Fact, Award & Order dated October 22, 2021. The Defendant contends as follows:

1. That the undersigned WCJ failed to require further discovery pursuant to Labor Code § 4061(i) by ordering a regular physician in the specialty of neuropsychology;
2. That, in finding permanent total disability pursuant to Labor Code § 4662(a)(4), the undersigned WCJ failed to comply with Dept. of Corrections & Rehabilitation vs. Workers' Comp. Appeals Bd. (Fitzpatrick) (2018) 83 Cal. Comp. Cases 1680 and failed to consider the expert opinion of Mery Kazaryan from the disability evaluation unit; and
3. That the medical reports relied upon by the undersigned WCJ to find permanent total disability consisting of Roger Bertoldi, M.D., a neurologist, and Martin Ross, M.D., a neuropsychologist, were not substantial medical evidence.

STATEMENT OF FACTS:

The Applicant, while employed on July 10, 2012, as a police officer by the City of Los Angeles, sustained an industrial injury to her right hand when, while she was using force with a suspect during an arrest, the fingers of her right hand were bent backwards and twisted. On July 10, 2014, the Applicant, while driving to an appointment with Steven Shin, M.D., for treatment to her right hand, she was involved in a motor vehicle accident and claimed to have sustained a compensable consequence injury to her brain, neurological system (in the form of post-concussion syndrome), vestibular system (in the form of a balance disorder), eyes (including her optic nerves), auditory system, cervical spine, lumbar spine, both upper and lower extremities, feet, psychiatric system and internal system (in the form of a sleep disorder).

On April 18, 2019, the Defendant wrote to the Applicant that it objected to Dr. Bertoldi's medical report dated April 10, 2019 and solicited an agreement for an agreed medical evaluator. Having failed to obtain an agreement on an agreed medical evaluator, the Applicant was evaluated by Thomas Eng, M.D., for qualified medical evaluations in neurology on August 3, 2017 and December 10, 2020 and by David A. Sami, M.D., for a qualified medical evaluation in neuro-ophthalmology on October 10, 2015.

With respect to permanent disability, Dr. Bertoldi opined in his permanent and stationary report in neurology dated November 13, 2019, on pages 13 to 14, as follows:

“Ms. Scott’s impairments from her 7/10/14 industrial work motor vehicle accident act synergistically such that the combined values chart underestimates overall disability. Ms. Scott’s medical disability is more accurately reflected by the sum of impairments, resulting in an incurable mental incapacity so severe as to preclude all work. ***Therefore, she qualifies for Labor Code (LC) 4662(a)(4), ‘An injury to the brain resulting in permanent mental incapacity’ making Ms. Scott presumed permanently totally disabled.***” (Emphasis added.)

In addition, Dr. Ross opined in his permanent and stationary report in neuropsychology dated June 24, 2020, on page 22, as follows:

“Based on my review of the medical records and having conducted two comprehensive neuropsychological examinations, ***I am in agreement with Dr. Bertoldi’s conclusion that the patient is permanently totally disabled under Labor Code § 4662(a)(4).*** Specifically, she has sustained an injury to the brain during the course of her employment that resulted in permanent mental incapacity. The injury of July 10, 2014, induced brain impairment or disorder with a combination of neurological findings (visual and vestibular systems) as well as cognitive impairment in terms of difficulty with information and processing abilities, thinking, judgment, and reasoning. On a solely cognitive basis, she is unable to perform the duties of a police officer, even in a non-emergency or desk-job-type of capacity. She manifests very significant symptoms within the physical, emotional, and cognitive realms. I agree with Dr. Bertoldi that the various symptoms and underlying disorders are synergistic in that the total impairment is more than simply adding the various symptoms together.” (Emphasis added.)

On October 22, 2021, the undersigned WCJ issued his Findings of Fact, Award & Order finding that the Applicant sustained industrial injury to her brain, neurological system (in the form of post-concussion syndrome), vestibular system (in the form of a balance disorder), eyes (including her optic nerves), right hand, both lower extremities and internal system (in the form of a sleep disorder) and psychiatric system, but not to her auditory system, cervical spine, lumbar spine, upper extremities (other than her right hand), or feet. In addition, she was found permanently total disabled pursuant to Labor Code § 4662(a)(4) and based on the medical opinions of Dr. Bertoldi and Dr. Ross.

Aggrieved by this decision, the Defendant filed its petition for reconsideration.

DISCUSSION:

LABOR CODE § 4601(i)

Pursuant to Labor Code § 4061(i):

“No issue relating to a dispute over the existence or extent of permanent impairment and limitations resulting from the injury may be the subject of a declaration of readiness to proceed unless there has first been a medical evaluation by a treating physician and by either an agreed or qualified medical evaluator.”

The purpose of § 4061(i) is to insure that there is a complete medical record available to a WCJ before a final determination is made on the issue of permanent disability. [See Villa v. Sierra Pacific Farms, Inc. (2016) 2016 Cal. Wrk. Comp. P.D. LEXIS 543, *7 (Appeals Board noteworthy panel decision)] However, the statute does not require that there be an agreed or qualified medical evaluator for each medical specialty resulting in permanent disability. [Willis v. The Kroger Company dba Food 4 Less (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 526, *18 (Appeals Board noteworthy panel decision)]

In this case, both Dr. Eng and Dr. Sami evaluated the Applicant for qualified medical evaluators in neurology and neuro-ophthalmology, respectively.

In addition, given that neuropsychology is not a qualified medical evaluator specialty that is available from the Medical Unit and that Dr. Ross, who is a neuropsychologist, provided substantive medical-legal reporting equivalent in strength to a qualified medical evaluator, the undersigned WCJ could reasonably rely on Dr. Ross’s reporting rather than appoint a regular physician since the undersigned WCJ’s authority under Labor Code § 5701 can only be triggered upon a finding that there was a deficient record. [McDuffie v. Los Angeles County Metropolitan Transit Authority (2002) 67 Cal. Comp. Cases 138, 141 (Appeals Board en banc)]

Therefore, for those reasons, the undersigned WCJ’s decision did not violate Labor Code § 4061(i).

PERMANENT TOTAL DISABILITY

Pursuant to Fitzpatrick, permanent total disability can only be made through impairment ratings by application of the AMA Guides pursuant to Labor Code § 4660, and that a finding under Labor Code § 4662(b), “in accordance with the fact,” does not provide a second independent path to permanent total disability separate from § 4660. [Fitzpatrick, *supra*, 83 Cal. Comp. Cases at p. 1692; Bermejo v. Jorge Castro Farms (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 93, *18-19 (Appeals Board noteworthy panel decision)]

However, Fitzpatrick did not abrogate conclusive presumptions of permanent total disability pursuant to Labor Code § 4662(a) declaring that certain specified disabilities “shall be conclusively presumed to be total in character.” [Fitzpatrick, *supra*, 83 Cal. Comp. Cases at p. 1685; Fraire v. California Dept. of Corrections and Rehabilitation (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 60, *9 (Appeals Board noteworthy panel decision)]

In this case, given that both Dr. Bertoldi and Dr. Ross found, in accordance with Labor Code § 4662(a)(4), that the Applicant suffered “[a]n injury to the brain resulting in permanent mental incapacity,” the undersigned WCJ was obligated to follow the conclusive presumption that the Applicant sustained permanent total disability rather than rely on the reduced permanent disability determination in accordance with the AMA Guides by Ms. Kazaryan from the disability evaluation unit.

Therefore, for those reasons, the undersigned WCJ’s decision was consistent with Fitzpatrick.

SUBSTANTIALITY OF THE MEDICAL EVIDENCE

While the WCAB may reject the findings of a WCJ and enter its own findings on the basis of its review of the record, [Labor Code § 5907] when a WCJ’s findings are supported by solid, credible evidence, they are to be accorded great weight and should be rejected only on the basis of contrary evidence of considerable substantiality. [Lamb v. Workers’ Comp. Appeals Bd. (1974) 39 Cal. Comp. Cases 310, 314] In other words, an aggrieved party’s professed dissatisfaction with the conclusions of a WCJ and the unsupported imputation of unreliability of the well-grounded evidence he or she has relied upon and a preference instead for a different conclusion based on other conflicting evidence found more desirable is not sufficient to disturb a WCJ’s decision. [Shepard v. County of Los Angeles (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 151, *7-8 (Appeals Board noteworthy panel decision); Lee v. Mitrant U.S.A. Corp. (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 610, *5 (Appeals Board noteworthy panel decision); see Place v. Workers’ Comp. Appeals Bd. (1970) 35 Cal. Comp. Cases, 525, 529 (“factual determinations of the Board must be upheld if there is substantial evidence in their support and the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence.”)]

For an expert’s medical opinion to be substantial evidence it must be framed in terms of reasonable medical probability that is based on pertinent facts, an adequate examination, an accurate history and set forth proper reasoning in support of its conclusions. [Escobedo v. Marshalls (2005) 70 Cal. Comp. Cases 604, 621 (Appeals Board en banc)] Reports and opinions are not substantial evidence if they are known to be erroneous, based on facts no longer germane, contain inadequate medical histories and examinations, or are based on incorrect legal theories, surmise, speculation, conjecture, or guess. [Hegglin v. Workmen’s Comp. Appeals Bd. (1971) 36 Cal. Comp. Cases 93, 97]

In this case, the undersigned WCJ relied on the medical opinions of Dr. Bertoldi and Dr. Ross on permanent disability, both found to be better reasoned and more persuasive than the medical opinion of Dr. Eng.

In addition, notwithstanding the Defendant’s various complaints regarding Dr. Bertoldi and Dr. Ross, neither of them speculated or guessed in providing their medical opinions on permanent disability. They both took adequate medical histories and conducted adequate examinations, relying on the Applicant’s objective findings in both concluding that the Applicant was permanently totally disabled. Since their opinions were based on germane facts and reasonable

medical probability, they were substantial medical evidence. As such, in matters that require scientific medical knowledge, a WCJ may not reject them merely because an aggrieved party is dissatisfied with them. [E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten) (1968) 71 Cal. Comp. Cases 1687, 1693]

Therefore, for those reasons, the undersigned did not err in relying on the opinions of Dr. Bertoldi and Dr. Ross to find the Applicant to be permanently totally disabled.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the Defendant's petition for reconsideration dated November 15, 2021 be denied.

Date: **November 17, 2021**

DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

ADMISSIBILITY OF APPLICANT'S EXHIBITS "21" TO "35"

The minutes of hearing did not reflect whether Applicant's Exhibits "21" to "35" were entered into evidence. Accordingly, without objection, Applicant's Exhibits "21" to "33" and "35" are admitted into evidence. With respect to Applicant's Exhibit "34", and having considered the objection of the Defendant that it did receive the exhibit but claimed that it should be stricken because it was e-mailed rather than sent by mail, the exhibit is entered into evidence over the objection of the Defendant.

PARTS OF BODY INJURED

Based on the treating physician's reports of Roger V. Bertoldi, M.D., dated November 13, 2019, on page 12, [Applicant's Exhibit "16"] and Martin V. Ross, M.D., dated June 24, 2020, on page 22, [Applicant's Exhibit "20"] as well as the qualified medical evaluation report of David A. Sami, M.D., dated October 10, 2015, [Applicant's Exhibit "21"] on pages 14 to 15, the Applicant sustained industrial injury to her brain, neurological system (in the form of post-concussion syndrome), vestibular system (in the form of a balance disorder), eyes (including her optic nerves), both lower extremities and internal system (in the form of a sleep disorder).

Based on the supplemental neuropsychological report of Dr. Ross dated June 23, 2016, on page two, [Applicant's Exhibit "19"] the Applicant sustained an industrial injury to her psychiatric system.

In the absence of any medical evidence to the contrary, the Applicant did not sustain industrial injury to her auditory system, cervical spine, lumbar spine, upper extremities (other than her right hand), or feet.

PERMANENT DISABILITY

In accordance with Labor Code § 4662(a)(4) and based on the primary treating physician's report of Dr. Bertoldi dated November 13, 2019, on pages 13 to 14, as well as the comprehensive neuropsychological reevaluation report of Dr. Ross dated June 24, 2020, on page 22, [Applicant's Exhibit "20"] the Applicant is entitled to a permanent disability award of 100% payable at the rate of \$1,103.29 per week per week (subject to reduction for an attorney's fee as set forth below) commencing **June 10, 2016** to present and continuing, less any permanent disability paid during that period.

APPORTIONMENT

Based on the treating physician's reports of Dr. Bertoldi dated March 17, 2021, on page 15, and, and Dr. Ross dated June 24, 2020, page 22, as well as the qualified medical evaluation report of Dr. Sami dated October 10, 2015, on page 13, there is no reasonable basis for apportionment to non-industrial factors.

NEED FOR FURTHER MEDICAL TREATMENT

Based on the treating physician's reports of Dr. Bertoldi dated March 17, 2021, on pages 16 to 18, and Dr. Ross dated June 24, 2020, page 22, as well as the qualified medical evaluation report of Dr. Sami dated October 10, 2015, on page 15, the Applicant is entitled to further medical treatment to her brain, neurological system (in the form of post-concussion syndrome), vestibular system (in the form of a balance disorder), eyes (including her optic nerves), both lower extremities and internal system (in the form of a sleep disorder).

Based on the supplemental neuropsychological report of Dr. Ross, dated June 23, 2016, on page two, the Applicant is entitled to further medical treatment to her psychiatric system.

ATTORNEY'S FEE

In accordance with Cal. Code Regs., tit. 8, § 10844 and the Policy and Procedure Manual § 1.140, a reasonable attorney's fee relating to the Applicant's permanent disability is found to be **\$348,308.57** and shall be commuted by way of uniformly increasing reduction method of the Applicant's permanent disability as set forth in the attorney's fee calculation by **Mery Kazaryan** dated **October 21, 2021**, attached herein. The attorney's fee shall be held in trust by the Defendant pending written agreement between the Applicant's attorneys or further order of the court.

Date: **October 22, 2021**

**DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE**