

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JESSICA CHEVERIE, *Applicant*

vs.

SCRIPPS HEALTH; SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ10325000

San Diego District Office

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the Findings, Award, Orders (F&O) issued on October 11, 2023, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed on February 8, 2016 as a nurse case manager, occupational group number 211, applicant sustained injury arising out of and the course of employment (AOE/COE) to the face (facial contusion) and jaw/TMJ, and claims to have sustained injury AOE/COE to the nose, ear, head (consisting of a neurological disorder with traumatic brain injury) and psyche; (2) applicant did not sustain an injury AOE/COE to the nose, ear, head and psyche; (3) applicant's earnings were \$1,831.60 per week, warranting a temporary disability indemnity rate of \$1,128.43 per week, and \$290.00 statutory rate for permanent disability; (4) applicant is not entitled to additional temporary disability for the period August 13, 2016 through February 2, 2018; (5) the correct occupational code is that of a nurse case manager, code number 211; (6) the injury caused permanent disability of 8 percent payable forthwith, less credit for all sums previously paid, less the attorney's fee awarded in "Finding No. 6, below"; (7) applicant needs future medical care for her jaw/TMJ; and (8) applicant's attorney is entitled to a fee of 15 percent of the permanent disability award, to be commuted from the far end of the Award, if necessary, and adjusted by the parties.

The WCJ issued an award in applicant's favor in accordance with these findings; and ordered that applicant take nothing on her (1) claim of injury to the the nose, ear, head and psyche; and (2) claim for temporary disability benefits for the period August 13, 2016 through February 2, 2018.

Applicant contends that the WCJ erroneously (1) failed to find that the reporting of PTP neurologist Dr. Schweller constitutes substantial medical evidence; (2) found that the reporting of PQME neurologist Dr. Bakst constitutes substantial medical evidence; and (3) relied upon her determination that applicant's testimony lacks credibility. Applicant further contends that the WCJ erroneously failed to find that applicant is entitled to temporary disability benefits for the period August 13, 2016 through February 2, 2018.

We did not receive an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be granted to find that applicant is entitled to additional temporary disability benefits for the period August 13, 2016 through February 2, 2018, but otherwise denied.

We have reviewed the contents of the Petition and the Report. Based upon our review of the record, and for the reasons set forth below, we will grant reconsideration, and, as our Decision After Reconsideration, we will affirm the F&O, except that we will amend to (1) correct a clerical error referencing the finding as to the attorney's fee; (2) find applicant entitled to additional temporary disability benefits for the period of August 13, 2016 through February 2, 2018, with the amount to be adjusted by the parties and jurisdiction reserved to the WCJ in the event of a dispute; and (3) omit the order that applicant take nothing on her claim for temporary disability benefits for the period August 13, 2016 through February 2, 2018; and we will return the matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

In the Report, the WCJ states:

The matter proceeded to Trial over multiple days. Issues raised were: (1) parts of the body injured (2) temporary disability for the period August 2, 2016, through February 9, 2018, (3) permanent disability, (4) apportionment, (5) occupational group number and (6) attorney fees.

The evidentiary record consisted of the testimony of the applicant, one defense witness and ***numerous*** medical reports and depositions of PQME's in a multitude of medical disciplines including a PQME in neurology (Dr. Bakst), PQME in psychiatry (Dr. Karl Jacobs), PQME in dental (Dr. David Abri), Neuropsychologist (Dr. Dan Whitehead), complex neuro-psyche (Dr. Jonathan Schleimer) and Otolaryngologist (Dr. Jeffrey Smith) as well as an AME in psychology (Dr. Zink). The applicant also submitted the report(s) of her primary treating physician neurologist (Dr. Schweller).

Based upon a review of the entire evidentiary record including the medical reports, and deposition testimony of the PQME's and AME, the WCJ did not find the reporting of primary treating physician neurologist (Dr. Schweller) substantial medical evidence upon which she could rely. Rather, the WCJ relied upon and agreed with the opinions of the multiple PQME's and agreed medical evaluator (AME) who opined that the applicant's subjective complaints were not supported by the objective medical evidence.

The undersigned found the correct occupational code variant was that of a nurse case manager, and the applicant was not entitled to additional temporary disability, the applicant suffered permanent disability of 8%, after apportionment.

...

The Petitioner asserts that there is no requirement for objective medical evidence in the AME Guides and asserts PQME in Neurology Dr. Bakst's reporting is not substantial medical evidence.

It has been well established under California workers' compensation law that an award for benefits must be supported by substantial evidence.[fn] The appeals board may not blindly accept an applicant's subjective complaints or medical opinion that lacks a solid underlying basis and must carefully judge its weight and credibility.[fn] In this case, that is exactly what has occurred. In this case, the applicant has made numerous complaints of injury to multiple body parts. However, the WCJ cannot blindly accept the applicant's subjective complaints. Rather, the WCJ must look to the medical evidence and in this case, the objective medical evidence does not support her complaints.

In this case, the parties jointly agreed to utilize the panel QME process in multiple medical specialties. Specifically, the parties agreed to PQME in neurology (Dr. Bakst), PQME in psychiatry (Dr. Karl Jacobs), PQME in dental (Dr. David Abri), Neuropsychologist (Dr. Dan Whitehead), complex neuro-psyche (Dr. Jonathan Schleimer) and Otolaryngologist (Dr. Jeffrey Smith). The parties also jointly agreed to utilize an agreed medical evaluator in psychology.

Based upon the applicant's numerous complaints of injury to her head including traumatic brain injury, the parties jointly selected Dr. Bakst as the PQME in neurology. Specifically, PQME in neurology Dr. Bakst issued five reports (Joint Exhibits 1-5) and was deposed on two occasions (Joint Exhibits 6 and 7). PQME Dr. Bakst did not find objective evidence to support the applicant's complaints. PQME Dr. Bakst opined that applicant had a relatively straightforward facial contusion. PQME Dr. Bakst testified in his deposition that the applicant had a mild head injury and that the expectation with a mild head injury that people get better within several months. *He stated the intensity of the applicant's symptoms are out of proportion to what one might have expected based upon the mechanism of injury.* (See Deposition of Dr. Bakst dated July 14, 2022, Joint Exhibit 6, page 13).

PQME Dr. Bakst further stated that although the applicant claims to have suffered a traumatic brain injury and concussion, there was no objective evidence of neurological impairment. Dr. Bakst further opined that he thought the duration of the applicant's disability was unusual. In addition, PQME Dr. Bakst stated it appeared to him that the applicant has a functional neurological disorder on a psychological or psychiatric basis which is 100% non-industrial (See Deposition of Dr. Bakst dated July 14, 2022, Joint Exhibit 6, pages 8 and 9). He opined that the psychological condition does NOT rise to the level of industrial causation and because the psych does not arise to the level of industrial level causation, the neurological functional disorder flowing from the psyche is also not industrial. (See Deposition of Dr. Bakst dated July 14, 2022, joint exhibit 6, page 10).

Dr. Bakst stated that although there was a physical injury and the impact of the ball striking the applicant may have been causative to the headaches and facial pain, the residual impact of that injury/impairment is due to a psychological condition (See Deposition of Dr. Bakst dated July 14, 2022, joint exhibit 6, pages 13 and 14).

PQME Dr. Bakst diagnosed the applicant with Somatoform functional neurological disorder. A functional disorder in neurology is a symptom complex that does not have an organic basis, and rational explanations are not present to confirm the diagnosis. (See Deposition of Dr. Bakst dated July 14, 2022, joint exhibit 6, page 15). Rather, Dr. Bakst explained that it has to do with the way information is processed in the brain.

Moreover, PQME Dr. Bakst also noted the applicant's prior concussion in 2013. He opined that it appears the applicant has some kind of emotional personality trait, or personality disorder that would lead her to magnify in her memory the events that happened. He explained that the applicant's recall of events may have caused her to magnify her symptoms in order to otherwise explain her intense emotional reaction.

PQME Dr. Bakst also notes that the applicant went back to school to obtain her master's degree, *after the date of the injury*.

PQME Dr. Bakst also reviewed the records from Kaizen Brain Institute. Although Dr. Ahmed at Kaizen diagnosed the applicant with a work related TBI, Dr. Bakst is not in agreement (See Deposition of Dr. Bakst dated July 14, 2022, joint exhibit 6, page 18). Dr. Bakst further testified that although the applicant does have a tiny microbleed, this is probably not significant and highly unlikely associated with the work injury. (See Deposition of Dr. Bakst dated, July 14, 2022, joint exhibit 6, page 19, lines 20-22). She does have post concussive headaches and he does not believe the kind of trauma she had led to her injuries.

The WCJ found the reports and deposition of PQME Dr. Bakst substantial evidence and found the opinion of PQME Dr. Bakst should be given great weight by the court.

The applicant disagrees with Dr. Bakst's opinion and argues his opinion is not substantial medical evidence. The applicant relies upon the primary treating physician reports of Dr. Schweller. However, the WCJ did not find the reporting of primary treating physician Dr. Schweller substantial medical evidence upon which she could rely. More important, PQME Dr. Bakst reviewed PTP Dr. Schweller's report dated January 11, 2021, where he diagnosed the applicant with "closed head injury with concussion." However, PQME Dr. Bakst does not agree. PQME. Dr. Bakst states post-concussion syndrome usually resolves within a short time, and he does not agree that the brain abnormalities are due to a traumatic brain injury. (Page 23). Rather, it is PQME Dr. Bakst's opinion that although the applicant may have sustained a mild TBI with post-concussive like effects, this would have been resolved by the time Dr. Schweller saw her in 2021. (Page 24).

In his May 20, 2020, P&S report, PQME Dr. Bakst does provide impairment due to headaches and facial pain. *However, PQME Dr. Bakst states that the cause of the headaches is a psychological condition rather than an organic component pain which should be determined by psychiatrist, psychologist and neuropsychologist.* (See Dr. Bakst P&S report dated May 20, 2020, Joint Exhibit 3, page 11).

Dr. Bakst notes the applicant had periods of partial and total disability as determined by Glenn Pugh NP in the initial period following the injury. Aside from these defined periods, the applicant was temporary disabled until May 8, 2016, three months post injury. Finally, Dr. Bakst is of the opinion that the applicant's ongoing symptoms are on a non-industrial basis. He assigns a WPI of 20% but states 100% of this impairment should be apportioned and is due to chronic facial pain and headache due to non-industrial functional neurological symptom disorder.

...

The Petitioner asserts the AME in psychology Dr. Zink concluded that applicant's disability should be defined by neurologists.

The applicant's petition asserts that per the AME in psychology (Dr. Zink), her disability should be defined by a neurologist. That is exactly what occurred. In this case, the applicant asserts multiple injuries, including injury to her psyche. As such, the parties *jointly agreed to utilize an Agreed Medical Examiner (AME)* in psychology. The parties utilized AME in psychology, Dr. Robert Zink, Ph.D. who evaluated the applicant and issued two reports: April 25, 2018 (Joint Exhibit 8) and September 25, 2021 (Joint Exhibit 9). Dr. Zink was also deposed one time on November 29, 2018 (Joint Exhibit 10).

Upon evaluation of the applicant and review of the numerous reports and records provided to him, AME Dr. Zink *did not see any neurological abnormalities to explain the applicant's chronic facial pain and headache.* Rather, it is AME Dr. Zink's opinion, with a reasonable degree of medical probability, that there is no objective medical evidence to support the applicant's physical symptoms. Rather, AME Dr. Zink opines that the applicant suffers from somatic symptom disorder. Further, even AME Dr. Zink notes that he disagrees with the primary treating

physician Dr. Schweller 's opinion (The WCJ notes that PQME in neurology (Dr. Bakst) also disagreed with the PTP).

AME Dr. Zink stated that the primary treating physician Dr. Schweller finds there are physical findings to justify the applicant's physical complaints and finds that the applicant's complaints are not an over-statement due to some underlying mental misperception. However, AME Dr. Zink disagrees. (See report of AME Dr. Zink dated September 25, 2021, Joint Exhibit 9, page 38).

AME Dr. Zink stated that the physical injury on February 8, 2016, was a contributing cause, but not the predominant (51%) or substantial cause 35% of the somatic symptom disorder Thus, it is deemed non-industrial. He also opined that neurological functional disorders would also be non-industrial.

AME Dr. Zink states there is a disconnect/difference between the objective physical findings and the applicant's subjective complaints and his assessment and conclusion was that the applicant appeared to be someone who had emotional distress. AME Dr. Zink explained that the applicant was excessively focusing upon the physical complaints and opines that the applicant's tendency to evaluate the February 8, 2016, *physical injury in an escalated manner is the result of a personality disorder*. AME Dr. Zink opined that the applicant did not show *intentional* malingering and indicated the applicant truly believes she has this condition. Dr. Zink diagnosed the applicant as having somatoform disorder.

AME Dr. Zink noted that the applicant had seen several physicians who also thought that there may be some psychological component. The other physicians also recommended that the applicant receive psychological treatment as part of dealing with this case.

AME Dr. Zink also stated that although the applicant's 2013 prior concussion had no long, lasting circumstance, he noted that several of the physicians think that the applicant has an underlying deviated septum that was aggravated by the injury. AME Dr. Zink stated that this may explain why the applicant has the continuing pain problem over a long period of time.

Finally, AME Dr. Zink did not find any major cognitive impairment and did not have the applicant as being unable to work. AME Zink felt the residual disability would most accurately be defined by a neurologist and dentist (See report of AME Dr. Zink dated September 5, 2021, Joint Exhibit 9, page 38) *However, the WCJ notes the PQME in neurology (Dr. Bakst) as discussed above, found no objective evidence to support the applicant's subjective complaints.*

PQME in Dental Dr. David Abri

In this case, as a result of being struck in the face with some size and some type of ball, the applicant asserts she sustained a dental injury and injury to her jaw. The parties jointly utilized Dr. David Abri, M.D. as a dental PQME.

Dr. Abri evaluated the applicant on one occasion and issued multiple reports. The first report in evidence is dated April 24, 2018 (Joint Exhibit 11), the second report is dated December 6, 2018 (Joint Exhibit 12) and the third report in evidence is dated December 11, 2020 (Joint Exhibit 13). Dr. Abri was deposed on two occasions: July 15, 2020 (Joint Exhibit 14) and March 11, 2021 (Joint Exhibit 19). The following is a summary of Dr. Abri's relevant opinions and testimony.

PQME Dr. Abri testified that his initial focus was on the applicant's complaints of jaw pain/TMJ. PQME Dr. Abri reviewed the MRI of the applicant's brain from Scripps Mercy dated March 2, 2016. Dr. Abri stated although the brain MRI reveals a right maxillary sinus retention cyst, was *otherwise normal*. Dr. Abri testified that he does not think a sinus cyst would cause TMJ issues or facial muscle issues. However, he did agree that the prior existing cyst could lead to a feeling of pressure under the eye and inner ear and could also lead to pressure causing clenching. PQME Dr. Abri testified that clenching of the jaw is one of the contributing factors to TMJ. (See Deposition dated July 15, 2020, Joint Exhibit 14, pages 19 and 20).

However, PQME Dr. Abri opined that there was a specific underlying condition that is responsible. Specifically, Dr. Abri testified that the *cause* of the applicant's clenching and grinding of the teeth *is stress*. PQME Dr. Abri testified that although the applicant has chronic facial pain, he deferred to the opinions of the psychiatrist and psychologist. (See Deposition of Dr. Abri dated July 15, 2020, joint exhibit 8, page 31. Lines 16-20).

PQME Dr. Abri opined that there was direct trauma and thus causation. However, based upon his objective clinical exam, Dr. Abri diagnosed the applicant with (1) bruxism, parafunctional habit (clenching and grinding of the teeth), *secondary to stress and TMJ*, (2) myofascial pain and (3) myalgia.

PQME Dr. Abri also noted that although the applicant felt limited in the opening of her mouth, his exam revealed a maximum opening of 37 millimeters which is a small restriction that he characterized as *"mild" bordering on less than normal opening of the mouth*. Dr. Abri noted *that was no clicking or popping in the TMJ joint upon opening and closing*. Dr. Abri noted the applicant had a "stable bite" and that there was no damage to the applicant's teeth. He diagnosed the applicant with a Class I bite, which is a *stable and an ideal bite*. (See Deposition of Dr. Abri dated, July 15, 2020, joint exhibit 14, page 26, line 9, page 27, lines 13-14).

Dr. Abri's subsequent Deposition was taken on March 11, 2021. Dr. Abri testified that it was his opinion that the applicant has a *mild sore jaw and stress aggravated or might make her clenching and pain worse*. (See Deposition March 11, 2021, Joint Exhibit 19, page 47). Dr. Abri did not believe the applicant was exaggerating or intentionally misleading him. However, he believes that stress and underlying psychiatric issues may contribute to *applicant's perception of pain*. (See Deposition of Dr. Abri dated March 11, 2021, Joint Exhibit 19, page 50).

In fact, Dr. Abri testified that the applicant self-reported to him that her stress makes her clench and the pain worse. Moreover, the records reflect the applicant has been treating with dentist Dr. Hamit Aras for TMJ since 2015, before the DOI.

Of more importance, the records reveal Dr. Abri notes that on August 13, 2013 (*three years prior to the 2016 DOI*), the applicant inadvertently walked into a door striking the right side of the face. She sustained a facial contusion and developed facial pain with headaches, head pressure and neck pain. The applicant was diagnosed with head trauma and concussion requiring occipital nerve blocks. However, the applicant initially failed to disclose this to Dr. Abri. Dr. Abri noted from a dental perspective, reviewing records of prior complaints and symptomology following the 2013 concussion would have been relevant.

In sum, it is dental PQME Dr. Abri's opinion with a reasonable degree of medical probability that there is an underlying psyche/stress related component that is causing the applicant's TMJ symptoms. With respect to the applicant's level of permanent disability,

PQME Psychiatrist Dr. Jacobs

The parties also utilized a psychiatrist PQME. On April 6, 2019, the applicant was evaluated by QME psychiatrist Dr. Jacobs. Dr. Jacobs issued a report dated April 6, 2019 (Joint Exhibit 16). Dr. Jacob's report states that although the applicant gave a history of facial trauma at her workspace, he *found no evidence getting hit by the ball caused the multitude of complaints* that she is having and opines that the applicant did *not sustain* an industrial psychiatric injury.

Neuro-psychological consultation Dr. Whitehead

On or about October 31, 2018, the applicant presented to Dr. Whitehead for a neuro-psyche evaluation. Dr. Whitehead examined the applicant and issued a report dated November 5, 2018 (Joint Exhibit 15). Dr. Whitehead stated that although the applicant relayed to him that she had significant short and long-term memory, on a cognitive basis, the applicant was average in almost all areas, and she scored in the low average range in only two areas. Dr. Whitehead diagnosed the applicant with conversion disorder (also known as functional neurological system disorder). Dr. Whitehead explained this as a condition in which a person experiences physical problems, with no underlying neurologic pathology. Finally, Dr. Whitehead opined that although the applicant complained of headaches, there was no objective finding of cognitive impairment. Rather, Dr. Whitehead indicated the Applicant *has a functional or conversion disorder arising from other stressors*.

Otolaryngology Consult Dr. Jeffrey Smith

On December 4, 2019, the applicant presented for an otolaryngology consultation with Dr. Jeffrey Smith. (See report of Dr. Smith dated December 4, 2019, Joint Exhibit 17).

Dr. Smith's report indicates that although the applicant complained of considerable pain to the touching of the jaw joint, the anterior compression test was negative for any pain in the jaw joint. Dr. Smith found that the applicant suffered from a mild sore jaw and TMJ symptoms but noted that based upon the examination, the applicant appears *to have exaggerated complaints* about the jaw's discomfort. Dr. Smith opines that it appears there is a *possible functional component to her discomfort in the jaw area*. (See report of Dr. Smith dated Joint Exhibit 17).

Complex neuro-psyche consultation Dr. Jonathan Schleimer

The applicant also presented for complex neurophysiological evaluation with Dr. Jonathan Schleimer, M.D. Dr. Schleimer evaluated the applicant one time and issued a report dated March 8, 2016. (Defendant Exhibit C). Dr. Schleimer noted right facial contusion without evidence of traumatic brain injury with subjective right facial pain and headaches. Dr. Schleimer indicated emotional sequelae with anxiety and depression, with secondary sleep disturbance. She recommended an ophthalmology due to her complaints of blurred vision in the right eye and adjustment counseling with a psychologist as he indicated a strong functional overlay.

Of note, although Dr. Schleimer 's report notes that the applicant gave a history that "she was in excellent health until the incident at work, " this is incorrect. The medical records reveal that the applicant had a prior concussion, had been complaining of severe pain and sought treatment as a result.

Primary treating physician neurologist Dr. Thomas Schweller

The applicant's entire argument relies upon the opinion of her primary treating physician (neurologist Dr. Schweller). The applicant submitted numerous PR-2 reports by Dr. Schweller. Dr. Schweller issued three narrative reports (Applicant Exhibit 1, Applicant Exhibit 2, and Applicant Exhibit 7). PTP Dr. Schweller P&S Report dated January 11, 2021 (Applicant Exhibit 2) diagnosed closed head injury with concussion. Dr. Schweller is of the opinion that there *were physical findings* to explain to applicant's symptoms and complaints, and therefore the complaints *were not an overstatement* due to the underlying mental misperception. Dr. Schweller states that although the injury and residual disability have been diagnosed as being mental, he disagrees. However, the WCJ does not find Dr. Schweller's opinion and reports to be substantial medical evidence upon which she can rely.

...

Petitioner contends that the WCJ has erred in failing to award retro temporary disability benefits.

In this case, the applicant received temporary disability for the period February 9, 2016, through August 1, 2016 (24 weeks and 6 days). However, the applicant argued she is owed additional/retro temporary disability for the period August 2, 2016, through February 9, 2018, (an additional 79 weeks, and 3 days).

The defendant disagreed that the applicant was entitled to additional periods of temporary disability. Specifically, the defendant argued the applicant was paid by EDD for a majority of the period in which she claims additional temporary disability is owed.

In her Findings and Award, the WCJ initially found that since the applicant *was paid by EDD* for the period of May 16, 2017, through March 8, 2018 (42.4 weeks), she was not entitled to additional temporary disability for this period as she had already been compensated by EDD for this period.

However, in evaluating Petitioner's petition, the WCJ *would request that the petition be allowed with regards to applicant's claim* for retro temporary disability benefits for the period August 13, 2016, through February 2, 2018. The WCJ notes that the record needs to be further developed regarding the amounts and periods EDD paid during this period and for any reimbursement to EDD that may be warranted.

As such, the WCJ would therefore recommend that Finding of Fact number 4 be amended to read "the applicant is entitled to additional temporary disability the period August 13, 2016, through February 2, 2018, with consideration to be given to any benefits already administered by EDD." The parties shall administer benefits accordingly and the Court reserves jurisdiction over any further disputes over the TD issue.

...

The WCJ is entitled to assess witness credibility.

In this case, the applicant asserts subjective complaints to multiple body parts. The applicant sought medical opinions from numerous physicians and panel qualified medical evaluators and an agreed medical evaluator. Based upon the numerous medical evaluators' opinions, the applicant's many subjective *complaints were not consistent with the objective medical evidence*. Although the Petitioner asserts the inconsistencies in her testimony are irrelevant, the WCJ disagrees. The applicant's inconsistencies and credibility *are at issue*, especially in consideration of the applicant's many subjective complaints.

In this case, the applicant testified on her own behalf. The WCJ points to the many inconsistent examples *as already described* in her Findings Award. However, one such example: although Dr. Schleimer's report notes that the applicant gave a history that "she was in excellent health until the incident at work," this is incorrect. The medical records reveal that the applicant *had a prior head injury and concussion, had been complaining of severe pain, and sought treatment as a result as was out of work for two weeks as a result of this prior head injury*. The WCJ is entitled to assess any witness credibility. In fact, that is part of the trier of fact's role when considering testimony. In this case, the WCJ found the applicant's testimony self-serving and inconsistent. The WCJ does not feel that assessment should warrant a different outcome in this regard.

Recommendation

It is therefore respectfully recommended that the Petition for Reconsideration be granted as to applicant's claim for retro temporary disability and that Finding of Fact number 4 be amended to read "The applicant is entitled to additional temporary disability for the period August 13, 2016, through February 2, 2018."

As to all other issues, the WCJ respectfully recommends that the Petition for Reconsideration be denied.

(Report, pp. 2-14.)

DISCUSSION

Preliminarily, we note that finding number 6 states that applicant's injury caused permanent disability of 8 percent payable forthwith, less credit to defendant, less the attorney fee provided for in "Finding No. 6, below." Because finding number 8 explicitly provides for the attorney's fee and appears below finding number 6, we conclude that a clerical error occurred in the reference to "Finding No. 6, below." Accordingly, we will amend finding number 6 so that it refers to the attorney fee provided in finding number 8. (See *Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [180 Cal. Rptr. 427, 47 Cal.Comp.Cases 145, 154-155] (stating that the Appeals Board may correct a clerical error at any time without the need for further hearings); *In re Candelario* (1970) 3 Cal.3d 702, 705, 91 Cal. Rptr. 497, 477 P.2d 729 (stating that the term "clerical error" includes all errors, mistakes, or omissions which are not the result of the exercise of the judicial function. In determining whether an error is clerical or substantive, it must be determined whether the mistake was made in rendering the judgment or in recording the judgment which was rendered).)

Turning to applicant's contentions that the WCJ erroneously (1) failed to find that the reporting of PTP neurologist Dr. Schweller constitutes substantial medical evidence; and (2) found that the reporting of PQME neurologist Dr. Bakst constitutes substantial medical evidence, we observe decisions of the WCAB must be supported by substantial evidence such as medical opinion. (Labor Code §§ 5903, 5952; *Garza v. Workmen's Comp. App. Bd. (Garza)* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500].) A medical opinion is not substantial evidence when based on incorrect facts, history, examination or legal theory, or surmise, speculation, conjecture or guess. (*Place v. Workers' Comp. Appeals Bd. (Place)* (1970) 3 Cal.3d 372, 378 [90 Cal. Rptr. 424, 475 P.2d 656, 35 Cal.Comp.Cases 525].) A medical opinion should be based on reasonable medical probability and logical and persuasive reasoning, which is consistent with the record. (*McAllister v. Workmen's Comp. Appeals Bd. (McAllister)* (1968) 69 Cal.2d 408, 413, 416-

417 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls (Escobedo)* (2005) 70 Cal.Comp.Cases 604, 620-621.) Generally, the parties select an AME for expertise and neutrality, and the AME's opinion is followed unless there is good reason to conclude that it is incorrect or not persuasive. (*Power v. Workers' Comp. Appeals Bd. (Power)* (1986) 179 Cal.App.3d 775, 782-784 [224 Cal. Rptr. 758, 51 Cal.Comp.Cases 114].)

Here, as stated in the Report, the WCJ relied upon the numerous opinions of “the multiple PQME's and agreed medical evaluator (AME),” which were consistent with one another—and disagreed with Dr. Schweller’s reporting. (Report, pp. 3-12.)

We concur with the WCJ’s evaluation of the medical evidence and are unable to discern good reason to conclude that the opinions of the agreed upon medical evaluators are incorrect or not persuasive.

Accordingly, we are unable to discern merit in applicant’s contentions that the WCJ erroneously (1) failed to find that the reporting of PTP neurologist Dr. Schweller constitutes substantial medical evidence; and (2) found that the reporting of PQME neurologist Dr. Bakst to constitutes substantial medical evidence.

We next address applicant’s contention that the WCJ erred by relying upon her determination that applicant’s testimony lacks credibility.

Here we observe that credibility determinations made at the trial level are entitled to great weight because the WCJ had the opportunity to observe the demeanor of the witnesses and may not be rejected without evidence of considerable substantiality. (*Garza, supra*, at pp. 318-319; *Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 254-256 [262 Cal. Rptr. 537, 54 Cal.Comp.Cases 349].)

In this case, the record supports the reasoning of the WCJ, as stated in the Report, that applicant’s testimony was “self-serving and inconsistent”—and that the record is without evidence of considerable substantiality warranting rejection of the WCJ’s determination. (Report, p. 14.) The WCJ properly included her assessment of applicant’s credibility in determining issues at trial.

Accordingly, we are unable to discern merit in applicant’s contention that the WCJ erred by relying on her determination that applicant’s testimony lacks credibility.

Next we address applicant’s contention that the WCJ erroneously failed to find that applicant is entitled to temporary disability benefits for the period August 13, 2016 through February 2, 2018.

Here, the WCJ recommends that we amend finding number 4 to state that applicant is entitled to additional temporary disability benefits for the period of August 13, 2016 through February 2, 2018, in an amount to be adjusted by the parties, and with jurisdiction reserved by the WCJ in the event of a dispute. (Report, p. 13.) In addition, the WCJ recommends that the record be further developed as to whether and what extent the EDD paid benefits to applicant during the period of August 13, 2016 through February 2, 2018, and the amount of reimbursement, if any, warranted. (*Id.*)

Accordingly, we will amend finding number 4 to state that applicant is entitled to additional temporary disability benefits for the period of August 13, 2016 through February 2, 2018, in an amount to be adjusted by the parties, and with jurisdiction reserved by the WCJ; and we will return the matter to the trial level to develop the record as to whether and what extent the EDD paid benefits from August 13, 2016 through February 2, 2018, and the amount of reimbursement, if any, warranted.

Accordingly, we will grant reconsideration and, as the Decision After Reconsideration, we will affirm the F&O, except that we will amend to (1) correct a clerical error referencing the finding as to the attorney's fee; (2) find applicant entitled to additional temporary disability benefits for the period of August 13, 2016 through February 2, 2018, with the amount to be adjusted by the parties and jurisdiction reserved to the WCJ in the event of a dispute; and (3) omit the order that applicant take nothing on her claim for temporary disability benefits for the period August 13, 2016 through February 2, 2018; and we will return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings, Award, Orders issued on October 11, 2023 is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration, that the Findings, Award, Orders issued on October 11, 2023 is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

4. The applicant is entitled to additional temporary disability benefits for the period August 13, 2016 through February 2, 2018, in an amount to be adjusted by the parties and with jurisdiction reserved to the WCJ in the event of a dispute.

* * *

6. This injury caused permanent disability of 8 percent payable forthwith, less credit to defendant for all sums previously paid on account thereof, less the attorney fee provided in finding number 8, below. (There is evidence of apportionment.)

* * *

ORDERS

A. **IT IS ORDERED** that applicant take nothing by reason of the claim asserted herein for the nose, ear, head, psyche and injury consisting of a neurological disorder with traumatic brain injury in accordance with finding number 2, above.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 29, 2023

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

**JESSICA CHEVERIE
HEWGILL, COBB & LOCKARD
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN**

SRO/cs

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