

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

**ELIZA SHAMSIAN, *Applicant***

**vs.**

**COUNTY OF LOS ANGELES, permissibly self-insured, administered by  
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Numbers: ADJ13367861, ADJ13367862  
Los Angeles District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Joint Findings and Orders of July 13, 2021, the workers' compensation administrative law judge ("WCJ") found that as a result of the stipulated industrial injuries to applicant's right wrist and hand from October 8, 2019 through June 12, 2020 (ADJ13367861) and to her left wrist and hand on October 8, 2019 (ADJ13367862), applicant, a clinical psychologist, is not entitled to temporary disability benefits "from June 9, 2020 onward." In addition, the WCJ excluded from evidence applicant's Exhibits 16, 22 and 23.

Applicant filed a timely Petition for Reconsideration of the WCJ's decision. Applicant contends that the WCJ's decision is not supported by substantial evidence, that the WCJ "did not have authorization or jurisdiction [to confer] de facto peace officer status upon applicant," and that the WCJ erred in concluding that "defendant's offer of a kiosk position was a good faith offer of modified work in lieu of payment of temporary disability [benefits]."

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate to the extent

indicated in the attachment to this opinion, we will affirm the Joint Findings and Orders of July 13, 2021.<sup>1</sup> In affirming the WCJ's decision, we have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id.*)

In addition, we note that the WCJ's decision is consistent with the general rule that an injured employee who refuses modified work without giving a good reason may be estopped from claiming temporary total disability. (See *Jamison v. Five Acres* (2022) 2022 Cal. Wrk. Comp. P.D. LEXIS 71, citing *Vittone v. Workers' Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 435 (writ den.) and *Seale v. Workers' Comp. Appeals Bd.* (1974) 39 Cal.Comp.Cases 676 (writ den.).)

In this case, the chief thrust of applicant's petition for reconsideration is that defendant's offer of the kiosk position was not a good-faith offer of modified work. Applicant alleges that the kiosk position would have placed a clinical psychologist in dangerous work that exceeded the restrictions against working with her hands. Specifically, applicant alleges that she would have been required to "assume supervision over [juvenile] detainees [who have been arrested] under serious criminal charges [such as] arson, robbery, kidnapping, attempted murder, assault with a firearm, [and] carjacking, to name a few[.]" (Petition for Reconsideration, p. 7:10-15.)

We do not find merit in this allegation because it is not supported by the trial testimony of applicant herself. Applicant's job as a clinical psychologist required frequent and extensive handwriting and keyboarding to record her work activities and interactions with juvenile detainees. The extensive handwriting and keyboarding is what caused the pain and industrial injuries to applicant's right and left hands and wrists. Dr. Sobeck, the Panel Qualified Medical Evaluator (PQME) and Dr. Hakimian, applicant's primary treating physician, both imposed restrictions against applicant using her hands in returning to work. (See Joint Exhibit 1 and Applicant's Exhibit 2, respectively.) Applicant testified that she was not able to accept the modified work offered by defendant, i.e., the "kiosk" position, because it required use of her upper extremities and because she was not able to drive to and from work. (Summary of Evidence, 10/28/20, p.

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<sup>1</sup> As noted, in the Joint Findings and Orders of July 13, 2021 the WCJ excluded from evidence applicant's Exhibits 16, 22 and 23. Applicant does not object to this ruling in her petition for reconsideration, thereby waiving the objection. (Lab. Code, § 5904.)

8:17-19; Summary of Evidence 12/14/20, pp. 3:5-9 & 6:12-17.) However, there is nothing in any of applicant's trial testimony to suggest that her personal safety or the physical demands of accompanying juvenile detainees from their "lock-ups" to interview rooms were concerns that caused applicant to refuse the kiosk position offered by defendant. Therefore, we reject applicant's reliance upon this issue to contend that the kiosk position was not a good-faith offer of modified work.

Applicant also contends that because defendant never provided her with Dragonspeak - to facilitate dictation and to avoid hand use - the kiosk position did not meet the physician-imposed restriction against applicant using her hands at work. As discussed in the WCJ's Report, however, the fact that defendant chose to accommodate applicant by placing her in a position that was congenial to her work restrictions, but without providing her the particular accommodation of Dragonspeak software that she wanted, does not entitle her to temporary disability benefits. Applicant refers to her testimony that "she could have performed the essential functions of her job using a dictation device without having to commute daily to the office as she had done on several occasions between early March 20, 2020 [and] June 9, 2020 [due to COVID-19 restrictions]." (Petition for Reconsideration, p. 9:15-20.) However, the cited testimony actually demonstrates that defendant's failure to provide applicant with Dragonspeak is not what prevented her from accepting the kiosk position. Rather, it was the commute to work that presumably would have required her to use her hands in excess of the medical restrictions described above. Applicant also was concerned that commuting to work would expose her to COVID-19. Though we are sympathetic to applicant's concerns about being exposed to COVID-19 while commuting to work, those concerns are not a legal basis to support an award of temporary disability benefits. This is because an ordinary commute is outside the employment relationship that gives rise to an employer's liability under workers' compensation law. (*Santa Rosa Junior College v. Workers' Comp. Appeals Bd. (Smyth)* (1985) 40 Cal.3d 345 [50 Cal.Comp.Cases 626].)

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings and Orders of July 13, 2021 are **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

I DISSENT. (See attached Dissenting Opinion.)

/s/ CRAIG SNELLINGS, COMMISSIONER



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

**August 8, 2023**

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

**ELIZA SHAMSIAN  
LAW OFFICES OF MARVIN L. MATHIS  
LOWER AND KESNER**

**JTL/ara**

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

## **DISSENTING OPINION OF COMMISSIONER SNELLINGS**

Defendant evidently agreed, at an early stage of this case, that applicant should have Dragonspeak to enable her to continue working without using her hands. However, defendant dragged its feet on Dragonspeak and never provided it to her. Without the provision of Dragonspeak, I am persuaded that defendant's offer of the modified kiosk position was unreasonable and renders defendant liable for temporary total disability benefits. Therefore, I dissent. I would rescind the WCJ's decision and replace it with a decision awarding applicant temporary total disability benefits.

In her Report, the WCJ states that defendant's obligation to provide applicant with Dragonspeak is not supported by medical evidence. I believe the WCJ is incorrect on this point. From very early on, defendant recognized the need to provide applicant with Dragonspeak in order to avoid further injury to her hands. This is demonstrated by the record review attached to orthopedic PQME Sobeck's report dated January 24, 2020, well before defendant offered applicant the kiosk position. The record review includes the claims examiner's letter to Dr. Sobeck dated December 20, 2019, which mentions that the claims examiner was in "the process of obtaining Dragon speech software for [applicant] as further accommodation." (Joint Exhibit 1, Sobeck report dated January 24, 2020, review of records, p. 2.) In later reports dating from June 16, 2020, Dr. Hakimian, applicant's treating physician, placed applicant on modified duty with restrictions of no driving and no repetitive motions of either hand. At the same time, Dr. Hakimian specifically noted that applicant "will benefit from a dictation device," and that absent accommodation of these restrictions by the employer, applicant is deemed temporarily totally disabled. (See Applicant's Exhibits 3, 4 & 5.) Since Dr. Hakimian recommended a dictation device while restricting applicant from the use of her hands, the doctor's reports from June 16, 2020 constitute substantial medical evidence that Dragonspeak was necessary for applicant to perform the modified kiosk position.

In light of the evidence discussed above, the WCJ's suggestion that Dragonspeak needed to be supported by a Request for Authorization – even after defendant already indicated efforts were being made to provide it - amounts to an insistence of form over substance. Further, I am persuaded that without Dragonspeak, applicant could not perform the modified "kiosk" position even if she found a safe way to commute to work. Since defendant never provided applicant with Dragonspeak, defendant is liable for temporary total disability beginning early in June 2020. (See *Guillen v. Hub Group Trucking* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 159 [equitable

considerations supported award of temporary disability where offer of modified work exceeded injured employee's physical restrictions].)

Finally, I find it necessary to comment on the WCJ's criticism of applicant's apparent reluctance to physically commute to the kiosk position, especially given the fact that applicant had been allowed to work from home at the outset of the pandemic.<sup>2</sup> I am quite troubled by the WCJ's rather strident dismissal of applicant's concerns about contracting COVID-19 while commuting. One might suppose from the WCJ's comments that she believes applicant should have risked serious illness and/or death (not to mention applicant's parents, with whom she lived) to commute to a modified job in which she also would have risked further injury to her hands. I disagree, as physical accommodation is not the only consideration in determining whether a modified offer is valid and reasonable. (See *Sandoval v. Residence Inn* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 43, citing *Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798].) As the Decision After Reconsideration, I would rescind the WCJ's decision and replace it with a decision awarding applicant temporary total disability indemnity from early June 2020 and continuing.



**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

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

**August 8, 2023**

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

**ELIZA SHAMSIAN  
LAW OFFICES OF MARVIN L. MATHIS  
LOWER AND KESNER**

**JTL/ara**

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

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<sup>2</sup> Applicant apparently was reluctant to physically commute to work at a time when effective COVID-19 vaccinations did not exist and would not become available until about a year later.

**REPORT AND RECOMMENDATION ON PETITION FOR  
RECONSIDERATION**

**I  
Introduction**

Applicant, Eliza Shamsian, by and through her attorney(s) of record, has filed a timely, verified Petition for Reconsideration, dated July 29, 2021, challenging the undersigned workers' compensation administrative law judge's (hereinafter "WCJ") Findings and Order dated July 12, 2021. Therein, it was determined that applicant was not entitled to temporary disability benefits from June 9, 2020 onward. Applicant contends that this WCJ acted in excess of her power and authority and that the Findings of Fact and Orders are unsupported by substantial evidence. The Defendant filed an Answer to the Petition, dated August 5, 2021 [...].

**II  
Facts**

Applicant is a clinical psychologist employed by the County of Los Angeles, working with juveniles at Juvenile Halls around the County. She worked at the Commerce location and on 12/6/2019, she received an ergonomic set up and was recommended to obtain Dragonspeak software due to wrist complaints. *MOH/SOE, 10/28/20, pg. 5, lines 17-18, 20-22*. She saw Dr. Hakimian in late 2019, and applicant spoke with the adjuster about the Dragonspeak. However, Dr. Hakimian, while noting the Dragonspeak software had been recommended by the ergonomic evaluator and indicated she would benefit from it, did not request authorization for the software nor indicate it as a work restriction. Applicant continued working. Then COVID came along in March 2020 with the Governor's stay-at-home Orders. Applicant was able to continue working while at home, teleworking and using the keyboard and computer at home.

By June 2020, applicant's wrists were severe enough that Dr. Hakimian indicated in her June 2020 reporting (see for example, Applicant's Exhibit 2), that applicant should be restricted from no lifting, carrying pushing, pulling more than 10 pounds, no gripping/grasping at all with the right hand, and no repetitive right-hand motions. The employer then provided her a job offer to work in what is coined as a "kiosk" position, at the Commerce physical location. Applicant did appear for work one day, on June 9, 2020. This job entailed no keyboarding or hand use at all, and involved her coordinating the other psychologists meeting with the juveniles in a computer kiosk room set up for individual therapy online. She would go to the pods where the juveniles were housed and she would escort them to the kiosk room where they would have their therapy sessions and go back to their pods. She was not required to use a keyboard or her hands, except that she had a headset on with the clinicians' phone numbers and information stored on there, and would coordinate them for their next appointments. She did not have to input phone numbers and the calls would automatically dial. The only time she would have to use her hands would be to open doors or other regular activities of daily living.

[...] No doctors indicated applicant must have Dragonspeak software to work. No doctor indicated she could not perform the kiosk position. Applicant, at trial, testified that the drive to work hurt her hands. She testified she was worried about her well-being and feared being exposed to Covid and bringing it home to her parents. *MOH/SOE, 10/28/20, pg. 8, lines 8-14.*

Applicant later testified that the kiosk/cottage position did not involve repetitive hand motions, had no gripping or grasping involved, but she did also testify that this modified job involved some typing into the computer. *MOH/SO, 10/28/20, pg. 9, lines 1-2, 5-7.* The employer witnesses later testified that this was not accurate and that the kiosk position did not involve any hand use or typing at all. She testified on day 2 of trial (*MOH/SOE, 12/14/20, pg. 2, lines 21-24*) that on the one day she returned to work on June 9th, she would call her coworkers to ask them about their daily schedules and write down their names in a schedule.

However, this testimony was rebutted later by employer witnesses that there was no writing involved because the other psychologists' information and schedules were already programmed into her phone and she had no reason to need to write anything down. *MOH/SOE, 12/14/20, pg. 7, lines 5-8, 18-21; pg. 8, lines 5-8, 15-6; pg. 11, lines 1-3.* What the witnesses confirmed is her pain complaints due to driving in to work that day, but that transportation and the commute to work is not part of her job duties and is not something the County can accommodate for her.

After reviewing the medical evidence on file and hearing the witnesses out, including the applicant, this WCJ found that applicant was not satisfied with the duties encompassing the kiosk position, that she did not want to drive to and from work (due to pain or other reasons), and when it was suggested by this WCJ that she try other transportation options such as Uber, Lyft, carpool, bus, subway, etc., she refused all avenues of getting to and from work due to the fear of Covid. I did not find this good cause to award TTD and I did not believe she could not work the kiosk position as long as she could get to the location. Her reasons for not reporting to work did not add up and therefore I did not award her TTD, and thus the issue presented here.

### III Discussion

Applicant claimed temporary total disability ("TTD") for the period beginning June 9, 2020 and ongoing. This was based upon the entire submitted record inclusive of the trial testimony, personnel and medical records, and the medical reporting of applicant's treating physician, Dr. Tina Hakimian. Defendant disputed the entitlement to TTD for the entire period claimed. Extensive arguments were made at trial and post-trial briefs were filed, as well as the current Petition for Reconsideration and Answer to Petition for Reconsideration.

While I did find all witnesses, including the applicant, to be as credible as they could be, the question here turned on whether applicant could do the "kiosk" position that she was assigned from June 9, 2020 onward. Applicant attorney argued that applicant could not use her hands and could not drive to work, but it was made abundantly clear that the kiosk position did not involve hand use.



Even if the kiosk position did involve hand use, it would have been nominal. For example, a person would need to use a hand to open a door or to go to the bathroom. The doctor's note of "no hand use" is [reasonably] interpreted as "no hand use" in the regular job duties. An incidental need to drive to and from work, or the need to wash one's hands after using the bathroom, or to swipe a piece of hair from a forehead, and so on, are necessary acts of daily living that applicant clearly could do. To say "no hand use" in the context of the job would mean exactly what she was doing and assigned to do in the kiosk modified job duties.

The applicant had a meeting on June 9, 2020 with HR and/or Mr. Santos. She complained about the driving. Applicant's telephone was programmed to directly communicate with the psychiatric professionals in anticipation of their appointments with the youth. There was no typing or keyboarding involved.

When applicant was asked at trial, and as was discussed with the parties' attorneys, her main reason for not wanting to have to appear for the "kiosk" position was because of the driving and her hand pain. This testimony later morphed into applicant claiming she did use her hands at the "kiosk" position once she was there. Yet, she only worked that position a few hours before she had the Interactive Process Meeting ("IPM").

She also testified she refused public transportation, buses, subways, Uber, carpool, etc., because of her fear of Covid and the fact she lives with her parents. The fear of Covid, fear of public transportation, or fear of being around others, were not deemed to be good cause to avoid going to work, and it did not entitle applicant to TTD during the time she would not return to work at the kiosk position. [...] [T]here was no requirement for the County to provide applicant with transportation to go to and from work. [...] Driving was not an integral part of applicant's job description and she could have found an alternative to get herself to work. Instead, she had the IPM the very first day she was assigned to the kiosk position and decided she was not going to do it.

At the time of the June 2020 meeting, I believe the defense witnesses that applicant's only complaint was the driving and not the kiosk job itself. However, at trial, she added that the kiosk job did indeed involve hand use. I did not find applicant believable in this regard. I have no doubt that at that meeting, she only mentioned the driving and not the job duties. [...]

Based on applicant's attorney's arguments within the Petition for Reconsideration and based upon the testimony at trial, I strongly suspected that applicant was unsatisfied with doing a simple, basic job of escorting juveniles back and forth to the kiosk for therapy treatment sessions and that perhaps she thought this temporary job duty was beneath her skill or educational level.

At trial, and in the Petition for Reconsideration, applicant's attorney attempts to establish the "kiosk" position was somehow unsuitable for applicant or that it was unsafe and that she was acting as a probation officer, but there was not one example of any violence or attempted violence that applicant could establish that would lead one to believe she was in danger when escorting the teenagers from their unit[s] to the kiosk for their treatment. It was also established that if and when a teen is noted as unruly or has previously shown signs of violence, there will be a probation officer

to escort them and not just the applicant alone. It was also established that these teens were about 10% or less of the residents there.

Applicant's attorney argued at trial and in his Petition that applicant was engaging in probation/peace officer work when she had to escort the teens from their pods to the kiosk, but that is simply not true. She was well within her job functions as a psychologist when working with the kids and coordinating with her coworkers. The teens that were violent were the ones that would have a probation officer there to escort them. In other words, applicant was not engaging in any peace officer duties.

Furthermore, I did not find the need or requirement for the Dragonspeak software as a work restriction provided by a treating doctor or the PQME, contrary to what applicant's attorney continuously attempted to argue. [...] The applicant's doctor did not restrict her from typing in the beginning. The doctor indicated it would be helpful to have Dragonspeak but did not include it as an actual work restriction. [...] Once the doctor said “no hand use,” then an avenue of resolution was immediately sought, which was the temporary kiosk position which was within the “no hand use” restriction. But this was apparently not good enough.

It became abundantly clear to the undersigned WCJ that applicant did not want to go to work, in person at the Commerce location, nor did she want to drive to and from work, nor did she want to find alternative transportation to get to and from work. It was this WCJ's impression that applicant wanted to stay home and work from there during Covid and that her issues were the driving to and from work and her refusal to use other modes of transportation. I found [...] her alleged “need” for Dragonspeak software was never a doctor's work restriction but simply an affirmation or recommendation of what the ergonomic evaluator recommended for her wrists and hands. [...] The Dragonspeak was never the issue. The fact was she was offered the kiosk position and tried it for half a day and then refused it without sufficient cause so as to warrant the award of temporary disability.

Therefore, I concluded the record was insufficient to establish applicant was TTD from June 9, 2020 onward, at any point in time while that kiosk position was open and available to her. Applicant's refusal or failure to return to the temporary kiosk job was unreasonable in light of the entire record submitted.

**IV**  
**CONCLUSION**

Therefore, it is respectfully recommended that Applicant's Petition for Reconsideration be denied.

Date: August 20, 2021

**Karinneh Aslanian**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE