

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

MANWELL GALL, *Applicant*

vs.

CITY OF RICHMOND FIRE DEPARTMENT; AIMS, *Defendants*

**Adjudication Numbers: ADJ15186514; ADJ15232063
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings of Fact and Award issued by a workers' compensation arbitrator (WCA) on May 3, 2023, wherein the WCA found that applicant sustained a specific injury to his psyche in the form of PTSD on September 27, 2019 as well as during the cumulative period ending on September 27, 2019, while employed by defendant. Defendant contends that the findings of the Independent Medical Evaluator (IME) Brian Jacks, M.D., upon which the WCA relied, did not constitute substantial evidence. Petitioner further asserts that the WCA should have instead relied upon the reporting of Judith Keins, M.D., and should have allowed her supplemental report of December 7, 2022 into evidence.

We received an Answer from applicant. We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCA, which recommends that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons stated in the WCA's Report, which we adopt and incorporate as stated below, as our decision after reconsideration, we will affirm the May 3, 2023 decision.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Award issued by the WCA on May 3, 2023 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 13, 2024

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

**MANWELL GALI
BOXER & GERSON
RTGR LAW
RAYMOND FROST, ARBITRATOR**

LAS/abs

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

REPORT AND RECOMMENDATION OF ARBITRATOR RE: DEFENDANT'S PETITION FOR RECONSIDERATION PER LABOR CODE SECTION 3201.7

I. INTRODUCTION

The above captioned case was heard under the jurisdiction of the City of Richmond/Richmond Firefighter's Association (IAFF Local 188) Workers' Compensation Alternative. Dispute and Resolution Program Agreement (ADR "Carve-out" Program). Applicant's original claim was filed with the WCAB on or about March 23, 2020.¹ Applicant thereafter filed a CT claim through August 3, 2021 on or about September 30, 2021. Applicant's claims as to the CT injury, as well as the original specific injury, were denied on or about December 20, 2021.

Due to significant delays in securing an arbitrator through the ADR system, the parties did not agree to this Arbitrator until October 13, 2022, Thereafter. I was duly appointed arbitrator pursuant to the stipulation of the parties and their respective counsel of record.

A pre-arbitration conference was held October 27, 2022, and the matter proceeded to arbitration on December 8, 2022. I thereafter made Findings of Fact and issued an Award on May 3, 2023. Defendant timely filed its Petition for Reconsideration, pursuant to Labor Code Section 3201.7, on or about May 30, 2023. Applicant filed his Answer to Defendant's Petition on or about June 14, 2023.

Defendant's Petition alleges that: (1) the Finding and Award is not based on substantial evidence (LC Section 5952(d)); (2) the Finding and Award is arbitrary and unreasonable (LC Section 5952(c)); (3) the evidence does not justify the findings of fact (LC Section 5903(c); and (4) the findings of fact do not support the Arbitrator's Finding and Award (LC Section 5903(e) (Petition 1:23-27).

Factually, Defendant's Petition rests on three (3) contentions: (1) The A-IME Report of Brian Jacks, MD is not substantial evidence; (2) The D-IME Report of Judith Keins, MD, dated 4/7/2022 is substantial evidence, and establishes that Applicant did not suffer an industrial injury AOE/COE; and (3) Dr. Keins Supplemental Report dated 12/7/2022 should have been admitted into evidence by the Arbitrator (Petition 3:9-15).

II. STATEMENT OF THE CASE AND MATERIAL FACTS

Applicant has worked for the Richmond Fire Department since April of 2012. He began developing difficulties in September of 2019 after responding to a shooting at DeAnza High School. During the call, Applicant attended to a 15 year-old girl who had suffered gunshot wounds to her leg and chest. The shooters were apparently still active in the area at the time.

¹ After applicant was represented by counsel, it appears that the original March 2020 specific injury claim was re-filed on or about September 20, 2021.

Applicant visited the girl the next day at the hospital; she was paralyzed. Applicant received an award for helping to save the girl's life.

The Applicant thereafter developed intrusive thoughts and images which interfered with his ability to function during later emergency calls. Nevertheless, he continued to perform his usual and customary job duties with the Richmond Fire Department.

On 10/23/2019, Applicant was seen at Kaiser in Walnut Creek for depression. He participated in an intensive outpatient program by Zoom for 1-2 months, during which he continued to perform his usual and customary job duties.² Applicant stated during his evaluation by Dr. Keins that he was unaware at the time that his symptoms were related to the shooting incident of September 2019.

After treating with a psychiatrist at Kaiser, Applicant was placed on a daily dose of 300 mg Gabapentin and 100 mg of Sertaline in the latter part of 2019. Applicant claims that he completed one-on-one counseling sessions at Kaiser and "worked through his depression." Applicant stated that he learned mindfulness techniques, and his depression resolved in the early part of 2020.

However, Applicant also reported that his symptoms of depression "slowly transitioned into anger outbursts," and that his "risk-taking" activities increased (he engages in mountain biking, snow boarding, and cliff diving). During this time period, he claims to have felt agitated and "wound-up." He stopped taking the prescribed Gabapentin and Sertaline in February 2020, as he did not feel depressed.

Applicant thereafter began self-medicating by smoking marijuana because of his anger and agitation; he claims that his anxiety was "through the roof." Applicant began smoking marijuana all day long during his days off work. His sleep routine was also interrupted; He would sleep only 4 hours a night, and then working all day in his shop. He stated that he felt "manic" and "highly productive." Applicant also increased his risk taking in extreme sports. These hypo manic symptoms lasted for about a year, until 9/13/21. During this time he continued to perform his usual and customary job duties as a Firefighter.

Applicant subsequently had a physical altercation with his wife, was arrested for domestic violence, and was released after being in jail overnight. No charges were filed. However, as a result, he was placed on a 30 day administrative leave by the Richmond Fire Department.

Applicant thereafter attended a 30 day inpatient program, where he stated that he learned various techniques to help him deal with his depression, anxiety and anger. Applicant stated to Dr. Keins that the inpatient center diagnosed him with PTSD. He was again treated with 300 mg of Gabapentin and 100 mg of Sertaline daily, which Applicant has continued to use.

² Defendants note that Applicant was seen prior to the September 2019 incident at Kaiser for severe depression (Petition 3:28).

After completing the inpatient program, Applicant returned home where his depression began anew. He stated that he used his "tools" from the program, and gradually got better. Applicant had engaged in mandated counseling (prior to the altercation with his wife) with a psychologist, which he continued on a weekly basis until 2 months before meeting with Dr. Keins, which he found helpful.

Applicant's EMS license was "called into questioned" after the incident involving his wife. An investigation was conducted by Contra Costa County, which concluded that Applicant posed no danger to the public and could return to work on a probationary basis. Applicant passed a "fit for duty" evaluation, and stated he was ready to return to work.

At the time of Dr. Keins evaluation, Applicant claimed he had no current emotional symptoms. He stated that depressive states and anxiety occur, but he claims to use his "tools" to manage them. He also has not had any further violent incidents with his wife.

Applicant describes a "normal" family life with his wife and two daughters, and remains engaged in his art design work that seems to follow a consistent regimen. He goes on camping trips with his family, helps his girls with homework, rides bikes with his wife, socializes with his neighbors and friends at the gym and gets together with his brother in Fremont. He has a somewhat strained relationship with his mother, but a good relationship with his step-father and his biological father. He is not currently drinking and is not using marijuana. Applicant has no past history of mental health issues or use of psychotropic drugs prior to 2019.

Defendant's Arguments

Defendant claims that A-IME, Brian Jacks, MD, failed to include a discussion of Applicant's Bipolar Disorder in his report, and failed to state how and why his findings support a work-related (AOE/COE) diagnosis of PTSD. Defendant alleges that Dr. Jacks also failed to account for Applicant's other preexisting psychological stressors prior to the September 2019 shooting incident, or his treatment for same. Defendant contends that Dr. Jacks did not perform a thorough evaluation or provide an accurate history of Applicant's psychological stressors (Petition 2:17-23).

Defendant charges that, although D-IME, Judith Keins, MD, did not have medical records to review, her diagnosis of non-industrial Bipolar Disorder was based on extensive testing and interview, and her review of the medical records would not have changed her diagnosis (Petition 2:24-28).

Defendant also claims that the Arbitrator's failure to admit Dr. Keins' Supplemental Report the day after the arbitration ended was in contravention of his duty to develop the record in this case (citing *Tyler v WCAB* (1997) 62 CCC 924) (Petition 2:28 - 3:5).

Defendant asserts that Dr. Jacks' report of the manifestation of Applicant's PTSD ("by experiencing extreme psychological stress situations at work, reliving the traumatic feelings once a week, startle reaction, anxiety at triggers") fails to address the fact that Applicant did return to work after the September 2019 shooting, and received psychological treatment prior to the September 2019 incident (evidencing preexisting psychological symptoms) (Petition 5:8-22).

Defendant claims that Applicant's non work-related stressors are not adequately addressed by Dr. Jacks (Petition 5:23-28). Based on this, Defendant claims that Dr. Jacks' finding of PTSD is "incorrect" and does not constitute substantial evidence (Petition 6: 1-5).

On the other hand, Defendant contends that Dr. Keins relied on the DSM-IV for her conclusion that Applicant meets the criterion for bipolar disorder, to wit: irritable mood, agitation, excessive involvement in activities with a high potential for "painful consequences" (Petition 6:6-11) Defendant notes Dr. Keins' concern that Applicant may have been "incorrectly diagnosed as having posttraumatic stress disorder, rather than Bipolar Affective Disorder ..." and that Dr. Jacks did not list several of a number and severity to warrant a diagnosis of PTSD. Defendants note that Dr. Keins found no psychological injury AOE/COE (Petition 6:12-21).

Defendants then cite to Dr. Keins' 12/7/2023 Supplemental Report (not admitted into evidence) in which she stated that "Dr Jacks ... attributed many symptoms consistent with bipolar disorder to posttraumatic stress disorder, *as there is symptom overlap with these two conditions*" (Petition 6:22-26 *[emphasis added]*).³ Defendants conclude from this that Dr. Jacks' Report cannot be relied upon in this case (Petition 6:27-28).

Defendant then charges that Dr. Keins failure to review the medical records as part of her 4/7/2022 Report was unnecessary as "Dr Keins is amply qualified to perform these diagnostics and make such assessments [of bipolar disorder] without receipt of Applicant's medical records" (Petition 7:5-17). Defendant supports this by citing to Dr. Keins 12/7/2022 Supplemental Report wherein she reached the same diagnosis after having reviewed the medical records in this case (Petition 7:19-24).

Defendant then argues that reconsideration is appropriate to allow Dr. Keins' Supplemental Report of 12/7/2022 into the record, claiming that it was not allowed for having been submitted "24 hours" after the arbitration ended. This, Defendant claims, was arbitrary and capricious (Petition 9:1-19). Defendant reiterates that the Supplemental Report was necessary to develop the record (citing again to *Tyler, supra*), and the Arbitrator had an obligation to allow it (Petition 9:20-22).

Defendant argues that the Arbitrator has the discretion to allow additional discovery outside the parameters of Labor Code Section 5502(e)(3). Defendant states that Dr. Keins requested such records in April 2022, and Defendant sent them to her (Petition 9:23-28). [Defendant fails to note, however, that the records were not sent until November, 2022].

Defendant concludes that Dr. Keins Report (inferentially her 4/7/2022 Report) constitutes substantial evidence; her medical opinion is supported by a battery of tests with her methodology "painstakingly" laid out as to how and why the diagnosis (of bipolar disorder) was reached (Petition 8:15-20). Defendant argues that a failure to review some medical

³ With such a "symptom overlap" between PTSD and Bipolar Disorder, Dr. Keins fails to clarify why, if a mis-diagnosis of PTSD could occur in place of a correct diagnosis of Bipolar Disorder, could not a Bipolar Disorder be mis-diagnosed for PTSD?

records does not render an opinion unsubstantial if it is otherwise supported by substantial evidence (citing *Brand v Mt. Diablo School District* (2019 Cal. Wrk. Comp. PD LEXIS 406) (Petition 8:21-23)).

Applicant's Answer

Applicant was evaluated by A-IME, Dr. Jacks, who issued a preliminary status report on 2/4/2022, finding industrial causation. He followed with a narrative report on 4/18/2022. This Report was based, in part, on a review of Applicant's prior psychiatric treatment records, wherein he determined that Applicant had an industrially related PTSD psychiatric injury. Dr. Jacks also found Applicant's specific injury and CT injury to be "inextricably intertwined" (Applicant's Answer 3: 1-6).

As to Dr. Keins 4/7/2022 Report, Applicant notes that she made her diagnosis of a non-industrial bipolar disorder without reviewing the medical records and, further, that she reached this conclusion in spite of the fact that Applicant was never treated for this disorder, and had no blood relation family history of bipolar disorder (Applicant's Answer 3:8-12).

As to Defendant's request for additional time to complete further discovery (to allow Dr. Keins to obtain and review medical records which had been in Defendant's possession since February of 2022), Applicant notes that Defendant did not make this request until the 10/27/2022 pre-arbitration conference. Applicant also notes that Defendant provided no explanation for the delay in providing its own IME with records during the eight (8) months Defendant had such records in its possession (Applicant's Answer 4:3-8).

Applicant states that the arbitration proceeded on 12/8/2022 with Defendant only submitting Dr. Keins 4/7/2022 IME Report. After the arbitration, Defendant requested that a forthcoming Supplemental Report of Dr. Keins be admitted into evidence, and Applicant objected based on timeliness. In the 5/3/2023 Findings & Award, the Arbitrator denied Defendant's request (Applicant's Answer 4:9-16).

Applicant notes that Defendant's Petition does not seek to overturn the Arbitrator's Findings 5 and 7, which declares that each industrial claim (for specific and CT injuries) carries a presumption of compensability. Applicant notes that the Arbitrator found the 2019 specific injury to be presumed compensable based on Defendant's failure to timely deny liability (Applicant's Answer 4:20-25).

Applicant cites authority regarding Defendant's duty to investigate claims of industrial injury under 8 CCR 10109, stating that evidence obtained after the 90-day investigatory period must have been obtained while exercising reasonable diligence during investigation of the claim (citing *State Comp. Ins. Fund v WCAB (Welcher)* 60 CCC 717; *Williams v WCA.B* (1999) 64 CCC 995) (Applicant's Answer 4:26 - 5:2). Medical evidence obtained by the employer after the 90-day investigatory period is inadmissible for the purpose of rebutting the presumption (citing *State Farm v WCAB (Fontes)* (1994) 59 CCC 802 (*writ denied*)); also *Matrix Service Co. v WCAB* (1999) 64 CCC 923 (*writ denied*)) (Applicant's Answer 5:3-8).

Applicant notes that the Arbitrator found the CT injury compensable based on the presumption of injury (PTSD) under Labor Code Section 3212.5. Applicant stated that Defendant had confused the issue of causation with "their own obligation to refute these presumptions" when attempting to "critique" the findings of Dr. Jacks (Applicant's Answer 5:9-12). Hence, Applicant holds that the issue of substantial evidence is moot since the medical report submitted by Defendant should not be considered, having been obtained after the 90-day investigatory period (Applicant's Answer 5:13-15).

Applicant discusses the evaluation process of Dr. Jacks (to wit: a thorough examination and interview of Applicant; completion of a battery of psychological tests, and review of pertinent medical/psychiatric records (including diagnoses of depression and anxiety, and treatment of same); Dr. Jacks read the physician's review of Applicant's fitness for duty dated 11/2/2021), and his diagnosis of PTSD with the evidence-based rationale for same. Applicant charges that Dr. Jacks' diagnoses were "specifically rooted in his interpretation of the psychological testing, review of pertinent treatment records, and his own examination [of the Applicant]" (Applicant's Answer 6:6-16).

Conversely, Applicant claims that Dr. Keins failed to review any medical/treatment records before making her diagnosis of bipolar disorder on 4/7/2022. Applicant again notes that this diagnosis is without explanation or justification given that there is no history of a bipolar diagnosis in his treatment history at either Kaiser or the out-patient program Applicant attended, and no family history of the disorder. Applicant also notes that he passed a fitness for duty examination prior to becoming a firefighter in which there was also no indication of a bipolar disorder (Applicant's Answer 6:17-23). Applicant restates that Dr. Keins opinion was rendered unsubstantial without a review of medical records which Dr. Keins, herself, stated was "essential" in order for her findings to be legally binding (Applicant's Answer 6:25 - 7:6).

Applicant then addresses Defendant's claim that the 12/7/2022 Supplemental Report of Dr. Keins should have been admitted into evidence: Although the Arbitrator is granted discretion in permitting further discovery when matters require further development in order to make a decision, but such discretion may not be exercised to develop the record "if doing so unfairly rewards a party who, due to their own negligence, cannot meet their burden of proof (citing *Gayton v Payless ShoeSource, Inc.* (2011 Cal. Wrk. Com. PD LEXIS 159). This includes allowing further discovery to permit a party to cure deficiencies in its own medical reports (citing *County of Sacramento v WCAB (Estrada)* (1999) 64 CCC 26)) (Applicant's Answer 7:14-21).

Applicant concludes that the Defendant's failure to provide medical records in its possession to its own IME for eight (8) months after they were requested, and only a month prior to the arbitration hearing date, together with Defendant's inability to explain such a lengthy delay, was solely due to lack of diligence on the part of the Defendant (Applicant's Answer 7:26 - 8:6).

Synopsis of Dr. Brian Jacks 4/18/2022 IME Report

A detailed outline and discussion of both IME's Reports are set forth in the 5/23/2023 Findings and Award. As the reporting of Dr. Jacks is primarily at issue (as to whether it constitutes substantial evidence), a synopsis of his 4/18/2022 IME Report is set forth below:

Facts: In addition to the September 2019 school shooting incident, other work related stressors include: (1) Applicant was called in during an investigation of a Fire Captain, who was thereafter fired for "inappropriate behavior." The result was that people stopped talking to him at work, which continues "sometimes to the present" (4/18/22 Jacks IME Report, pgs 2-3); (2) In 2014, Applicant had to attempt to extract a man who had hung himself in a storm drain; and (3) In 2015 he had to respond to a shooting at a liquor store at night (4/18/22 Jacks IME Report, pg 3).

Mental/Psychological Status: [Applicant] has nightmares three or four times a week of intensive situations (4/18/22 Jacks IME Report, pg 4-5). [Applicant] relives the traumatic feelings once a week. He startles more easily than he used to. Gunshots were traumatic events that happened to him, broken glass or [sic] are triggers which bring back all these traumatic feelings. He avoids concerts or places with lot of people (4/18/22 Jacks IME Report, pg 5).

Psychological Testing:

Beck Anxiety Inventory: Score of 3 which indicates no clinically significant anxiety (4/18/22 Jacks IME Report, Pg 10)

Beck Depression Inventory-2: Score of 16 which indicates mild depression (4/18/22 Jacks IME Report, pg 10-11)

Beck Suicide Scale: Applicant has no suicidal ideas, plans or preoccupations. (4/18/22 Jacks IME Report, pg 11)

Daily Stress Inventory: Indicates 22 out of 58 situations in everyday life would cause Applicant at least some stress (Id)

Wahler Physical Symptoms Inventory: Applicant falls in the 30th percentile - below average in worries about physical problems and health issues (Id)

Epworth Sleepiness Scale: Score of 19: indicates excessive sleepiness and drowsiness during the day (Id)

MMPI-2: ... This collectively indicates mild to moderate emotional distress. There are reports of physical symptoms that are reflective of anxiety. They usually do not report being depressed despite how they may appear to others. There may be concentration problems. This person tends to think in a very concrete manner and focus on physical ailments. They lack insight into their own symptoms and behavior, often refusing to acknowledge that the symptoms are related to emotional conflict and are used as a means of avoiding psychological problems (4/18/22 Jacks IME Report, pg 11-13).

Mental Status Examination: [Applicant's] overall mood was one of mild anxiety and depression without suicidal ideas, his emotions somewhat restricted in range of expression at times, and the content of his conversation and mood congruent (4/18/22 Jacks IME Report, pg 14).

Diagnosis:

Axis I: Posttraumatic Stress Disorder as manifested by experiencing extreme psychosocial stress situations at work, reliving the traumatic feelings once a week, startle reaction, anxiety at triggers which remind him of the trauma including gunshots, areas where the traumatic events occurred, broken glass; avoidant behaviors of concerts and crowded situations; mid-phase insomnia with nightmares, anergia (4/18/22 Jacks IME Report, pgs 14-15)

Cannabis Abuse: moderate, in remission (4/18/22 Jacks IME Report, pg 15)

Dysthymia: as manifested by intermittent anxiety and depression, social withdrawal, mid-phase insomnia, anergia; anxiety and depression on mental status examination and psychological testing (Id).

Axis II: Personality Developmental Disorders: none.

Axis III: Physical Disorders: hearing difficulty with left ear (4/18/22 Jacks IME Report, pg 15).

Axis V: Psychosocial Stressors: Work stress; Applicant concerns regarding an older brother diagnosed with cancer; Applicant's multiple injuries (bike, vehicle accidents); Applicant's concerns regarding his mother's health; Applicant's family history of depression; Applicant's stepfather with a bipolar disorder; Applicant's military experience and hearing loss (4/18/22 Jacks IME Report, pg 15-16).

GAF:

The results of this extensive psychiatric consultation reveal the following psychiatric disorders: 1) Posttraumatic stress disorder [PTSD]. 2) Cannabis abuse moderate, in remission. 3: Dysthymia.

¶ Posttraumatic stress disorder here has been in partial remission. It is diagnosed when there are characteristic symptoms, which developed following exposure to an extreme psychosocial stressors as has occurred here at his work for the City of Richmond Fire Department. [...] ¶ Finally, dysthymia or chronic intermittent depression has been diagnosed. Dysthymia is diagnosed when there are characteristic symptoms of depression, which occur intermittently for at least two years. [...] On mental status examination, there were signs of mild anxiety and depression. He had pressured speech at times, and sad worried facial expressions.[...] (4/18/22 Jacks IME Report, pg 17).

Further:

Psychological testing indicates no subjective anxiety in the high range on

the Beck Anxiety Inventory. The Beck Depression Inventory-2 indicated mild clinically significant depression.... Daily Stress Inventory indicates that 22 out of 58 situations in everyday life would cause him at least some stress. [...] Overall then, the psychological testing is fairly consistent and supports the diagnosis I have made. (4/18/22 Jacks IME Report, pg 18).

Finally:

[...] [T]he history, mental status examination, and psychological test findings provide evidence for posttraumatic stress disorder in partial remission, cannabis abuse moderate in remission, and currently dysthymia (Id).

Review of the Medical Records:

Records from Kaiser in the past have diagnosed major depressive disorder single episode severe, and anxiety disorder as of 9/15/2020, and 9/03/2021 and it was noted on 10/27/2021 by Cynthia Savage, MD that when Mr. Gali went to the Center for Excellence in Maryland for thirty days, which was intensive treatment for firefighters, he was diagnosed with PTSD. Dr. Angela Barr on 11/02/2021 diagnoses moderate cannabinoid use disorder in early remission (Id).

Various traumatic events which contributed to PTSD:

The high school shooting incident of 9/2019; investigation of a Fire Chief in which he was involved in 2014 [and was subsequently shunned by coworkers]; the emergency call in which a person hung himself in a storm drain; and the 2015 shooting at a liquor store. Applicant left work about 9/2021. The history that he [Applicant] gives is basically consistent with the records that I reviewed including the Workers Compensation claim for injury of 9/2019 indicating PTSD (4/18/22 Jacks IME Report, pg 19).

Medical Records of Depression/Anxiety:

Kaiser records indicate there was an office visit indicating a diagnosis of "major depressive disorder single episode, severe." The attending doctor mentioned that there were no major negative stressors at that time. The PHQ-9 score indicated severe depression. On 9/15/2020, a Kaiser doctor also noted he [Applicant] had been depressed for a month and felt scared all the time. Applicant's diagnosis was anxiety disorder, and was given Sertaline and Gabapentin. A Dr. Ngoc, MD, indicated anxiety disorder and, in the past, Applicant's diagnosis was mood disorder unspecified as of 10/23/2019 (Id).

On 10/27/2021, Cynthia Savage, MD, at Kaiser referenced that Applicant's diagnosis at the Center for Excellence (30 day in patient program) was PTSD even though the

diagnosis at Kaiser was mood disorder (4/18/22 Jacks IME Report, pg 20): ... [T]he records from Kaiser do indicate significant anxiety and depression in the past but give no indication whatsoever of causation" (Id).

Other Non-Industrial Stressors, including past accident injuries: Such factors were understandably ... upsetting ... [there is no record of] any psychiatric treatment as causing him more than temporary upset. They were however around the time of his stress at work so would represent some causation of a psychiatric injury" (Id).

Temporary Disability: Mr. Gali was off work he claims in 9/2021. In any case his emotional [*sic*] would be considered totally temporarily disabled since he has been off work either in 8/2021 or 9/2021 (4/18/22 Jacks IME Report, pgs 21-22).

Permanent and Stationary Status/ MMI: ... For all practical purposes and in all reasonable medical probability, his emotional condition should now be considered permanent and stationary and reached maximum medical improvement either by the date of my reporting or the date that his treating psychologist or psychiatrist so indicates whichever comes earliest (4/18/22 Jacks IME Report, pg. 22).

Rating of Permanent Emotional Disability/Impairment:

Level of Functioning: Daily Activities: Due to anxiety and depression alone, range is from no impairment (Class I) to mild impairment (Class II) (4/18/22 Jacks IME Report, pg 24).

Social Functioning: Due to anxiety and depression alone, range is from no impairment (Class I) to mild impairment (Class II) (4/18/22 Jacks IME Report, pg 25).

Concentration, Persistence, and Pace: Due to anxiety and depression alone, range is from no impairment (Class I) to mild impairment (Class II) (4/18/22 Jacks IME Report, pg 26).

Adaptation: Due to anxiety and depression alone, Range is from No impairment (Class I) to Mild Impairment (Class II) (4/18/22 Jacks IME Report, pg 27).

Severity of Symptoms: Range: mildly impaired.

GAF: [A] GAF score here of 66 representing 6% whole-person impairment, would best apply to the evidence (4/18/22 Jacks IME Report, pg 30).

Apportionment of Permanent Emotional Disability and Impairment: Family, accident, and non-industrial stressors: [These are] not causal factors of permanent emotional disability. They were temporarily upsetting only (4/18/22 Jacks IME Report, pg. 31). Further:

There are no causal factors identifiable based upon the history, examination, and available records. Specifically, there was no

history of preexisting permanent emotional disability, no prior psychiatric treatments, or psychological treatment or use of medications for anxiety and depression previously. Therefore there is no substantial medical evidence for apportionment. In all reasonable medical probability, the permanent psychiatric disability is 100% apportioned to the industrial injuries (4/18/22 Jacks IME Report, pg 31).

III. DISCUSSION

The Applicable Presumptions in This Case

The present Petition seeks to have Dr. Jacks' opinion declared unsubstantial, Dr. Keins' opinion declared substantial, and to overturn the denial of Dr. Keins' Supplemental Report. These three premises are discussed below, but are evaluated against the factual backdrop that this is, first and foremost, a presumption case.

First, Applicant is entitled to a presumption of compensability for his specific injury claim based on the extensive delay of Defendant in investigating the claim before denying it. As noted by Applicant, there was a lapse of about eighteen (18) months between the original filing of the specific injury claim (3/23/2020) and its denial (9/30/2021) (Applicant's Answer 2:23-27).

In the present petition, Defendant does not address or attempt to provide a reasonable explanation for this delay, contrary to 8 CCR 10109, *State Farm Comp. Fund v WCAB (Welcher)* and *Williams v WCAB, supra*. Further, Defendant does not challenge Finding 5 of the 5/3/2023 Findings & Award (that the specific injury is deemed compensable by virtue of this presumption), and so the specific injury claim stands as compensable by this finding alone.

Second, the CT injury is statutorily presumed to be PTSD (per Labor Code 3212.15). It is Defendant's burden to demonstrate, by substantial evidence, that Applicant's psychological condition is *not* PTSD. Applicant's only burden is to overcome any such evidence presented.

Here, as already discussed, Dr. Keins' Report of 4/7/2022 does not constitute substantial evidence, and her "curative" Supplemental Report is not part of the record in this case for the reasons set forth below. Hence, on these grounds alone, the statutory presumption that Applicant suffers from work-related PTSD, and Applicant's CT injury claim for same still stands.

Further, Finding of Fact 7 of the 5/3/2023 Findings and Award (that Applicant is entitled to the statutory presumption of LC 3212.15), was also not directly challenged in the present Petition, and Defendant's claims therein do nothing to alter either Findings 5 or 7 (regarding the applicability of the two presumptions in this case). Therefore, Defendants have failed to meet their burden of proof as to either presumption, rendering the Findings of Applicant's PTSD claim, based on these presumptions, valid and compensable, the present Petition notwithstanding.

The Inadequacy of Dr. Keins' 4/7/2022 IME Report and The Inadmissibility of Dr. Keins' 12/7/2023 Supplemental Report

Defendant is correct to assert that Labor Code Section 5952(c) provides that final disposition of a claim may be deemed arbitrary or unreasonable when based on evidence which is inadequate and incomplete, which ignores other material facts in the record, or which is derived from an unreasonable or arbitrary means (citing *Franklin v WCAB* (1971), 36 CCC 429) (Petition 5 :4-6). However, Defendant seems selective regarding to what and who this provision applies.

First, if this Arbitrator had ruled in favor of the Defendants based on Dr. Keins original 4/7/2022 IME Report, it would have been a dismissal of Applicant's claim on inadequate and incomplete evidence. ***"Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories."*** (*Hegglin v WCAB* (1971), 36 CCC 93 [*emphasis added*]).

Defendant argues that Dr. Keins reached her diagnosis (of a non-industrial bipolar disorder) based on her initial testing and interview of the Applicant, without a review of Applicant's medical records - the same diagnosis she reached after reviewing such records. However, the above standard for substantial evidence is not so conditional. It doesn't state that a medical report is not substantial evidence if based on inadequate medical histories *unless* the reporting doctor would have reached the same conclusion had he or she actually reviewed the Applicant's medical history.

Were the latter the applicable standard, virtually all reporting examiners could cure the legal deficiencies of their medical opinion simply by stating, after the fact, that their diagnosis or opinion would be the same (by virtue of the extensive testing, etc) with or without the mandated medical record review. That is *not* the standard set forth in the applicable case law, and it is not the standard employed in this decision. Even Dr. Keins expressly stated in her 4/7/2022 Report that for her medical opinion to be legally binding, it would be *essential* for her to review the Applicant's medical records and issue a supplemental report (Keins 4/7/2022 Report, pg 14).

Second, Defendant's cited standard (Labor Code 5952(c)) does state that a decision may be deemed arbitrary or unreasonable if it ignores *other material facts in the record*. It is that latter part that presents the rub.

Defendant claims that legal deficiency of Dr. Keins 4/7/2022 Report is cured by her 12/7/2023 Supplemental Report. However, the Supplemental Report was not part of the record in this case. It was not submitted at or before the hearing date of the Arbitration, and its admission into evidence was denied for the reasons set forth below. Without a timely supplemental report, there was nothing *in the record* to render Dr. Keins' initial medical opinion substantial. A ruling that Dr. Keins' 4/7/2023 Report was substantial evidence without a curative supplemental report *in the record* would have been contrary to the very authority Defendant now relies upon.

Defendant then argues that "a failure to review some medical records will not render an opinion unsubstantial if the opinion is otherwise supported by substantial evidence" (citing *Brand v. Mt.*

Diablo Unified School District, supra) (Petition 8:20-22). However, there is a quantitative difference between this case and the decision in *Brand*.

In this instance, it is not a matter that a small portion of medical records had not been reviewed; in this case *none* of the medical records were reviewed. This, on its face, presents an "incomplete medical history" sufficient to render Dr. Keins' medical opinion unsubstantial. Again, Dr. Keins herself stated *in April 2022* "No medical records were available for review ... Prior to my being able to reach binding medial/legal conclusions, it is essential that I review his mental health records to issue a supplemental report" (4/7/2022 Keins Report, pg 14).

Finally, Defendant makes the claim that, since the Supplemental Report was submitted the day after the arbitration hearing, it should be admitted into evidence, and the "fact that a supplemental report should not be allowed into the record because it was received 24 hours [after] the arbitration ended appears to be arbitrary and capricious" (Petition 17-19). For several reasons, Defendant's position is not tenable.

Again, no explanation was given to excuse or justify Defendant's delay of eight months in providing records to its own IME. Defendant had all of the Applicant's medical records in its possession when Dr. Keins made her request in April 2022. Defendant states that all such records were sent to Dr. Keins in November of 2022 - eight months later, and just one month prior to the scheduled arbitration (Petition 9: 11-13). Defendant gives no reason for this eight month delay, which prevented Dr. Keins from providing a timely supplemental report inclusive of what she described as an "essential review of [Applicant's] mental health records" (4/7/2022 Keins Report, pg 14).

Defendant is correct that the Arbitrator has discretionary authority to keep discovery open, and to accept late submissions of evidence. Such authority, however, is neither unlimited, nor can it be exercised in an arbitrary manner. As Applicant points out, although Labor Code Sections 5701 and 5906 permit additional evidence at any point in a proceeding when necessary to render a decision on undeveloped matters.

However, the exercise of such discretionary authority is not permitted if, by doing so, it "rewards" a party who, through its own lack of diligence, has failed to do that which it needed to be done to make its case or defense (citing *Gayton v Payless Shoesource, Inc.*, supra). Applicant also notes that this includes allowing further discovery for a party to "cure defects or deficiencies in their own medical reporting" (citing *County of Sacramento v WCAB*, supra) (Applicant's Answer to Petition 7:13-21).

The above documented delay by Defendant has not been explained *at all*, let alone in a way that would give this Arbitrator sufficient footing upon which to allow the late submission of Dr. Keins Supplemental Report.

Finally on this matter, another concern for a WCJ or arbitrator, confronting an issue such as this, is the impact it would have on the delaying the final resolution of the Applicant's claim. In this case, inclusion of the late supplemental report would have necessitated permitting a deposition of Dr. Keins and preparation and submission of a responsive report from Dr. Jacks.

This case has lingered since March of 2020 - a period in excess of three years. Additional delays to accommodate this late submission without reasonable justification, would have pushed a final resolution out several more months, to the prejudice of the Applicant. Substantial justice is achieved, not by granting Defendant's request, but by denying it.

Sufficiency of Dr. Jacks 4/18/2022 IME Reports

As to the sufficiency of Dr. Jacks 4/18/2022 IME Report, as summarized herein above, I find it qualifies as substantial medical evidence regarding his diagnosis of Applicant's PTSD. He noted references in the medical records after the September 23, 2019 date listing diagnoses of PTSD. He reviewed several of the work-related traumatic events experienced by Applicant as a Firefighter with the Richmond Fire Department, and found a link between the September 2019 school shooting incident, and subsequent work traumas, and the development of Applicant's PTSD symptomology.

Dr. Jacks completed and reviewed the results of the psychological testing he conducted, which he found to substantiate his diagnosis, and he noted that the industrially caused injury met the "predominant cause threshold" for a PTSD diagnosis. This collectively provides sufficient, and substantial, evidence to support Applicant's claim of industrial psyche injury, specific and CT, of Posttraumatic Stress Disorder.

Dr. Jacks also addresses non-industrial stressors in Applicant's life, demonstrating that such events/issues/stressors were of a temporary nature, having no causal impact on Applicant's work related PTSD. Dr. Jacks therefore found Applicant's PTSD to be 100% industrially caused. Which was the finding in this case.

CONCLUSION

For all the reasons set forth herein above, it is my recommendation that Defendant's Petition for Reconsideration be DENIED.

Dated: 7/ 27/23

RAYMOND FROST, Arbitrator