COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals

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| RENEE KEPHART,<br>*Petitioner* | : | Docket No. CR-23-0455 |
| | : | Date: November 15, 2024 |
| v. | : | |
| REVERE RETIREMENT BOARD<br>*Respondent* | : | |

**Appearances:**

For Petitioner: Paul Facklam Jr., *Esq.*
For Respondent: Timothy Smyth, *Esq.*

**Administrative Magistrate**:

Eric Tennen

## SUMMARY OF DECISION

The Petitioner was a Revere police officer. While responding to a call, she was in a car accident. She was not wearing her seatbelt at the time. She suffered a concussion and traumatic brain injury that resulted in lingering symptoms. She was ultimately unable to return to work because she could not perform her essential duties. She has met her burden of proving the accident proximately caused her disability.

Also, she did not commit serious and willful misconduct when she removed her seatbelt as she was approaching her destination. She did so pursuant to a Revere Police Department policy that, while mandating seatbelt use generally, permitted officers to remove it "just prior" to arriving at a scene. The Petitioner's conduct here complied with the policy as evidenced by, among other things, the Department's failure to sanction her for any misconduct.

## INTRODUCTION

Pursuant to G.L. c. 32, § 16(4), the Petitioner timely appeals the Revere Retirement Board's ("the Board") decision denying her application for accidental disability. I conducted an in-person hearing on August 22, 2024. The Petitioner was the only witness. I entered exhibits 1-22 into evidence without objection. I left the record open after the hearing and the Petitioner

submitted one more exhibit, without objection, which I now enter into evidence as exhibit 23. Both parties then submitted post-hearing briefs on October 23, 2024, at which point I closed the administrative record.

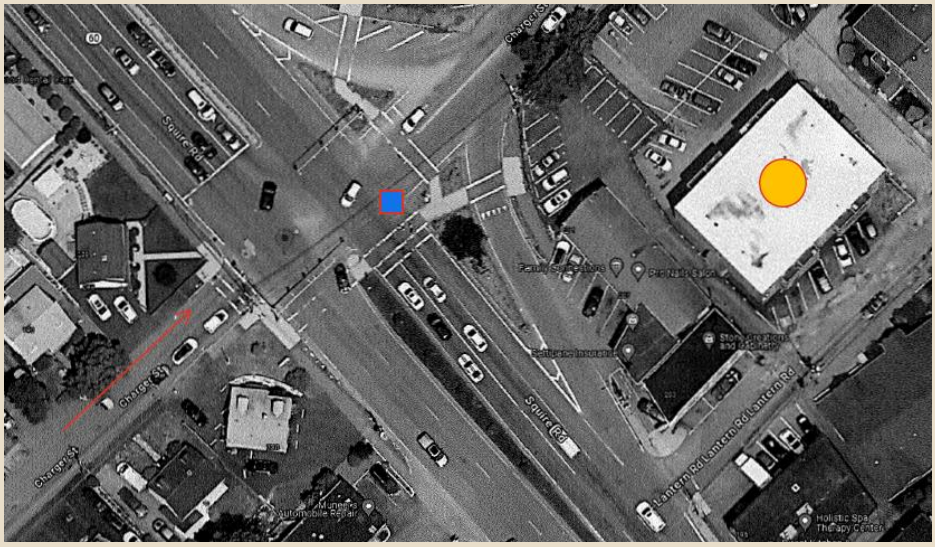
**FINDINGS OF FACT**

1. The Petitioner was a long-time police officer in Revere. (Agreed facts.)
2. On May 9, 2021, while on duty and responding to a domestic disturbance call, she was injured in a motor vehicle accident. (Agreed facts.)

The accident

3. The accident occurred in an intersection with which she was very familiar. She had traveled through it thousands of times (personally and professionally). (Testimony.)
4. The intersection was where Charger Street, a one-lane street, crosses Squire Road, a six-lane street. The location of the call was in an apartment building complex at that corner. (Testimony.)
5. She was approaching the intersection from Charger Street and needed to cross Squire Road to get to the apartment building. (Testimony.)
6. When she got to the intersection, the traffic light was red. She turned on her siren and lights, went around the cars in front of her, and carefully began to cross Squire Road (and its six lanes). She was going, at most, 10 m.p.h. (Testimony.)
7. She cleared five lanes. It was when she reached the sixth lane that a car blindsided her. It hit the front of her cruiser, taking off her ram bar. It spun her vehicle around. The impact was strong enough that her airbags deployed. (Testimony.)
8. She stayed around the scene for a short while after the accident. It did not appear the passengers of the other car were injured. (Testimony.)

9. The map below was entered into evidence. (Ex. 22.) The markings are mine based on my findings. The red arrow shows the direction the Petitioner was traveling on Charger Street; the blue square shows where the accident occurred; and the yellow circle marks the apartment complex she was heading towards.




10. The Petitioner was not wearing her seatbelt at the time of the accident. (Agreed facts.)

11. The Revere police department has a policy concerning seatbelt use. As a general matter, an officer (and anyone in the car) must always wear their seatbelt while driving. (Testimony; Ex. 17.)

12. There is one exception relevant to this case: "[w]hen arriving at an emergency call or making a traffic stop, the operator may remove the safety belt just prior to stopping for a quick exit." (Ex. 17.)

13. The department has never provided any guidance at to what "just prior" means. (Testimony.)

14. The Petitioner had removed her seatbelt many times on prior calls before arriving to a scene, for the reasons stated in the policy. In her experience, a quick exit was often

necessary, especially in these kinds of calls, i.e. dangerous, unknown situations. (Testimony.)

15. She had to be prepared for anything—from a highly volatile and dangerous scene, to fleeing suspects, to simply being able to walk up and knock on the door. (Testimony.)

16. Here, she thought to herself that if she saw something immediately, she was prepared to pull over right away after she made it through the intersection. If not, she was likely going to drive around the block to get to the front of the building. (Testimony.)

17. She thus removed her seatbelt while in this intersection because, in her judgment, she was close enough to the scene that it was appropriate. She could see the building from her car. She had also driven in this intersection thousands of times without incident, so she did not perceive it as a dangerous situation. (Testimony.)

18. She had no intent of violating the department policy. In fact, she believed she was following the policy. (Testimony.)

19. Her belief was bolstered, at least implicitly, by the department's review of the incident. The Petitioner filled out a crash report in which she stated she was not wearing her seatbelt at the time of the accident. (Ex. 9.) The department thus knew she was not wearing a seatbelt. Yet, she was never disciplined in any way. (Testimony.) And when the Chief filled out the employer's statement for her application, he noted that she had not committed any misconduct. (Ex. 2.)

Injuries

20. The Petitioner was taken away from the scene in an ambulance and straight to the emergency room. (Testimony.)

21. She was diagnosed with a concussion and traumatic brain injury. In the moment, she was dizzy, confused, unsteady, and on the verge of passing out; she also had extremely high blood pressure. (Testimony.)

22. In the weeks that followed, she had many symptoms: she was unable to drive or walk unsupported; she had consistent headaches and pain in her back and neck; she was often confused; she had memory loss; and she was uncharacteristically fatigued. (Testimony.)

23. Since the accident, she has been diagnosed with a host of ailments: post-concussion syndrome, traumatic brain injury, vertigo, delirium, anxiety, irritability and fatigue. (Agreed facts.)

24. She did not have any of these symptoms or diagnoses before the accident. (Testimony.)

25. After the accident, she regularly saw her primary care physician, Dr. Mercedes Ibanez, and a neurologist, Dr. Alexandra Stillman. (Ex. 7.)

26. Neurological testing by one of Dr. Stillman's colleagues, Dr. Scott Fish, showed the Petitioner performed "well below what was expected given her pre-morbid, estimated cognitive levels (high average), with mild-to-moderate deficits in executive functions." (Ex. 15.)[1]

27. She participated in 28 physical therapy sessions from July 2021 – October 2021. Her discharge summary indicated her prognosis was good. But when her pain did not subside, she returned to physical therapy and participated in an additional 32 sessions

[1] I found a reference to this report in the independent evaluation by Dr. Beaton referenced below in ¶ 41. None of the medical panelists referenced this report or its significance, if any, on their assessments.

from December 2022 – March 2023.[2] This time, the discharge summary indicated her prognosis "may be hindered by chronicity of [symptoms]." It also noted she was limited in her ability to fulfill her role as a police officer. (Exs. 8 & 23.)

28. Her therapy did not help with any of her long-term symptoms. After a year she showed no signs of improvement and no prospect that anything would change. (Testimony; exs. 11 & 15.)

29. Both Drs. Ibanez and Stillman believed the Petitioner was unfit to return to work. (Testimony; exs. 7 & 15.)

30. To this day, she still gets headaches. She is still unusually fatigued. She gets anxious and confused when she is overwhelmed—for example, if she is asked to perform a complicated task. (Testimony.)

31. She also still experiences memory loss, both short term and long term. She explained that at times she will find herself lost in familiar territory, such as in the aisle at the grocery store or on her way to her best friend's house. She often asks her son the same questions because she forgot she already asked him. (Testimony.)

32. I witnessed some of these effects at the hearing while she testified. When asked a compound question, she became frazzled and lost. Towards the end of her testimony, she indicated she was starting to feel anxious because of all the questions. Her memory was good at times, yet shaky at other moments.

[2] It does not appear any of the doctors who evaluated her had access to the records from December 2022 – March 2023.

Accidental Disability Application

33. She has been receiving benefits pursuant to G.L. c. 41, § 111F (injured on duty benefits), which continues through today. (Testimony; agreed facts.)

34. She also applied for accidental disability. Her application was supported by her treating physician, Dr. Ibanez. (Agreed facts.)

35. Her supervisor submitted the employer's statement attesting to the fact that the Petitioner was unable to perform the essential duties of her job, and no accommodation could be made for her. (Ex. 2.)

36. She was evaluated by a medical panel consisting of an internist, Dr. Seth Schonwald, and two neurologists, Drs. Julian Fisher and Daniel Vardeh. (Exs. 12-14.)

37. Drs. Schonwald and Fisher agreed the Petitioner was permanently incapacitated and it might have been proximately caused by the workplace incident. (Exs. 12-13.)

38. On the other hand, Dr. Vardeh did not agree the Petitioner was incapacitated, e.g. incapable of performing her job. Because of that, he offered no opinion on whether her incapacity was permanent or whether it could have been caused by the workplace incident. (Ex. 14.)

39. All three doctors agreed that the Petitioner's symptoms are largely subjective. For Dr. Vardeh, because there were no objective symptoms he could discern, he could not say the Petitioner was incapacitated: "While she still complains about subjective symptoms of mood irritability and headaches, her neurological exam today is entirely intact, and there is no objective neurological evidence in my opinion that she would not be able to return to unrestricted full-time duty." (Ex. 14.)

40. All three panel reports are rather short. It is not clear which records they had before them, but I assume they are the same medical records as those admitted in evidence.

41. The Board also obtained an opinion from an independent medical advisor, Dr. Robert Beaton. He agreed with the majority panelists that the Petitioner was permanently incapacitated, and this was related to her work. (Ex. 15.)

42. In comparison to the medical panel reports, Dr. Beaton's report was more detailed. He recounted the numerous documents he reviewed and included a lengthy, thoughtful narrative of the Petitioner's symptoms and treatment. He then summarized his findings:

> The file contains medical records and notes from Beth Israel Deaconess Medical Center from several sources. These include the hospital ER where she was brought by ambulance following the accident, and was found to have suffered a concussion, as well as subsequent MRI's, Physical Therapy notes, and other medical work-ups. The file contains medical treatment notes from her PCP, Mercedes Feije Ibanez, MD, dating back to 2017, as well as exams and follow-up visits with neurologist, Alexandra Stillman, MD, from 2019-2022. Additionally, the reviewed documents included neuropsychological testing from 8/20/21 with Scott Fish, Ph.D.
>
> Following the incident the applicant reported several physical complaints that included dizziness and vertigo, neck/head/back/shoulder pain, and sensitivity to lights and sound. She has also struggled with excessive fatigue, confusion, memory difficulties, problems with concentration, low frustration tolerance, irritability, and social withdrawal. As evident in the medical notes, and as expressed by her medical providers (PCP, neurology), the applicant has not demonstrated any significant improvement in her condition and is unable to work at her former position.

(Ex. 15.)

43. Ultimately, the Board denied her application, stating only that it "did not meet standard for an allowance pursuant to M.G.L. c. 32 s. 7." (Ex. 20.)

**DISCUSSION**

The Petitioner has the burden of proving every element of her disability claim. *Lisbon v. Contributory Ret. App. Bd*., 41 Mass. App. Ct. 246, 255 (1996); *Frakes v. State Bd. of Ret.*, CR-21-0261, 2022 WL 18398908 (DALA Dec. 23, 2022). "G.L. c. 32, § 7(1) provides for accidental disability retirement benefits if a member (1) 'is unable to perform the essential duties of [their] job' and (2) 'such inability is likely to be permanent before attaining the maximum age for [their] group,' (3) 'by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of, [their] duties,' (4) 'without serious and willful misconduct on [their] part.'" *Brady v. Weymouth Ret. Bd.*, CR-20-0201, *9 (DALA Jul. 15, 2022).

To receive accidental disability, a Petitioner must show they sustained their injuries from either a specific event or series of events. *Lisbon*, at 255. The event, or events, must be "a significant contributing cause to [the] employee's disability." *Robinson's Case*, 416 Mass. 454, 460 (1993). While a positive medical panel is "some evidence on the question of causation . . . it is not determinative." *Warren v. Boston Ret. Bd.*, CR-13-199, 2022 WL 16921473, *16-17 (DALA Sep. 30, 2022). Rather, "[t]he ultimate finding on causation is left to the retirement board to determine, considering all the evidence, both medical and non-medical." *Id*. at *17, *citing Wakefield Contributory Ret. Bd. v. CRAB*, 352 Mass. 499 (1967).

1. <u>The Petitioner did *not* commit serious and willful misconduct.</u>

The Board first argues that the Petitioner committed serious willful misconduct when she removed her seatbelt prior to arriving at the call.

A member can be disqualified from receiving accidental disability if there is "serious and willful misconduct on [their] part." G.L. c. 32, § 7(1). "Serious and willful" conduct is an exacting standard:

> "[S]erious and willful misconduct" in the retirement context has the same meaning as it has in the workers' compensation statute. . . . Serious and willful misconduct "is much more than mere negligence, or even than gross or culpable negligence. It involves conduct of a quasi-criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its probable consequences." *See Scala's Case*, 320 Mass. 432, 433-434 (1946), *quoting In re Burns*, 218 Mass. 8, 10 (1914). "In order to prove willful misconduct, [the Respondent would] have to establish facts to support the proposition that an employee acted with deliberate indifference to probable grave injury." *Tripp's Case*, 355 Mass 515, 518 (1969). "The word serious refers to the conduct itself and not to its consequences. Willful implies intent or such recklessness as is the equivalent of intent." *Dillon's Case*, 324 Mass. 102, 110 (1949).

*Baptiste v. Bristol Cty. Ret. Bd.*, CR-20-0001, 2024 WL 215931, *7 (DALA Jan. 12, 2024), *quoting Ovalle v. Everett Ret. Bd.*, CR-15-508, *25 (DALA Feb. 12, 2021).

"The violation of a rule or statute is not in and of itself serious and willful misconduct, but will bar receipt of accidental disability retirement benefits if done with the intent to cause serious injury or death to oneself or another, or with a reckless and wanton indifference to the consequences." *Ovalle*, at *25, *citing Di Gloria v. Chief of Police*, 8 Mass. App. Ct. 506, 513 (1979), *in turn citing Silver's Case*, 260 Mass. 222, 224 (1927). There are a few cases evaluating whether failure to wear a seatbelt is considered "serious and willful misconduct." The bottom line is that there is no *per se* rule. Rather, "failure to wear a seatbelt in circumstances in which seatbelt use is mandated by law can be serious misconduct, but the circumstances surrounding an employee's failure to wear a seatbelt must be examined to determine if it was willful." *Walden v. Everett Ret. Bd.,* CR-15-0476, *14 (DALA April 20, 2018), *citing Sanko v. Worcester Regional Ret. Bd.*, CR-12-659, 2017 WL 11905796 (CRAB May 25, 2017).

In *Ovalle*, the Petitioner failed to wear his seatbelt while riding as a passenger in a snowplow. He was required to wear a seatbelt by law. The snowplow hit a curb and the Petitioner was injured. There did not appear to be any exception for this rule. Although

presumably the Petitioner was not wearing a seatbelt because he had to keep getting out of the vehicle, that was not sufficient reason to excuse his conduct. *See Ovalle*, at *25-26.

On the other hand, there is *Walden* and *Sanko*. In *Walden*, the Petitioner was not wearing a seatbelt while driving a street sweeper. He was injured when his street sweeper was in an accident (caused by another truck). Yet, his failure to wear a seatbelt did not disqualify him from accidental disability

> Here, while Mr. Walden's failure to wear a seat belt was deliberate, his decision was based upon his training, and also his experience that a street sweeper could not be operated properly while wearing a belt, rather than the result of any deliberate indifference to the possibility of grave harm in a potential accident involving a heavy vehicle that traveled at no more than ten miles per hour. Furthermore, while M.G.L. c. 90, § 13A requires seatbelt use when driving a car or a truck that weighs less then 18,000 pounds, the statute says nothing about seatbelt use when operating a street sweeper.

*Walden*, at *15.

Similarly, in *Sanko*, the Petitioner was not wearing his seatbelt while riding in a front-end loader that was being towed. During a rather fluid situation, he was hurt when the tow truck began to move and crashed. While his presence inside the disabled vehicle was a questionable practice, it was also a common practice. Moreover, despite a statute generally requiring seatbelt use, there was an exception for trucks of a certain size. Thus, his failure to wear a seatbelt given these specific circumstances was not willful, wanton or reckless misconduct. *Sanko*, at *13-14 (DALA decision on remand, Apr. 27, 2018), *affirmed by Sanko v. Worcester Regional Ret. Bd.*, CR-12-659, 2023 WL 11806175 (CRAB Feb. 22, 2023).

This case is more like *Walden* and *Sanko*. While there may be statutes that generally require seatbelt use, assuming those apply to police officers, there is a police department policy that overrides those requirements. No party disputes the validity of the policy, or the department's ability to allow officers to remove their seatbelts in certain situations. The Board

simply argues the Petitioner's actions were contrary to the policy. However, I find that the Petitioner complied with the department's policy.

First, the policy instructs an officer that they can take their seatbelt off "just prior" to arriving on certain calls. "Just prior" is undefined. The ambiguity in the policy leaves space for an individual officer's reasonable interpretation. The Petitioner had taken off her seatbelt per the policy numerous times in the past. She did so when, in her experience, she might be arriving at a volatile and fast-moving situation. Her actions here were consistent with her experience: the location was in sight, she was almost through the intersection, and she was concerned this could be one of those volatile and fast-moving situations. Her actions were additionally reasonable because she had traveled this intersection thousands of times without incident and had no reason to think this time would be different. Just in case, she turned her siren and lights on, which would certainly support her belief that all cars would be stopped; indeed, they were but for the one car that caused the accident.

Second, despite knowing she removed her seatbelt, the department did not discipline her. She was not cited. She also received injured on duty benefits. And her Chief confirmed in the employer's statement that the Petitioner did not commit any misconduct. *Loura v. Taunton Ret. Bd*, CR-13-0186, 2021 WL 12297908 (CRAB Jul. 14, 2021) (one factor weighing in favor of the Petitioner is that his supervisor stated his injury was not the result of misconduct).

The Petitioner obviously chose to remove her seatbelt while her vehicle was moving. That decision, however, was not "serious misconduct." It was in conformity with a valid department policy. Based on her actions, it was reasonable for her to believe her actions would not result in serious injury, and she did not recklessly disregard the probable consequences.

2. The Petitioner's accident proximately caused her disability.

The Board also challenges whether the Petitioner's accident proximately caused her disability. A close inspection of its argument seems to suggest the Board doubts she was injured at all, or, if she was, whether she remains injured, e.g. she is not disabled today.

The Board relies heavily, if not exclusively, on *Underwood v. Boston Ret. Sys.*, CR-21-0353, 2024 WL 4582630 (DALA Jul. 26, 2024). *Underwood* explained that "the 'degree to which an applicant's report of subjective symptoms should be credited is a medical question beyond the common knowledge and experience of the retirement board.'" *Id.* at *25, *quoting Back v. Barnstable Cnty. Ret. Bd.*, CR-18-361, 2020 WL 13607017, at *11 (DALA Nov. 13, 2020).

> This is a sensible approach. After all, the panelists are armed with training and experience that includes treatment of comparable cases, knowledge of the professional literature, and familiarity with the "range of presentations commonly seen in similarly situated individuals." *Kirsten K. v. MTRS*, CR-20-675, 2023 WL 415580, at *3 (DALA Jan. 6, 2023) (citation omitted). The factfinder should thus exercise caution before rejecting a positive causation opinion merely because it rests on pain complaints by an applicant whose general credibility the factfinder deems questionable. Deference to medical experts — who not only possess the requisite training and experience, but also had the opportunity to personally examine the applicant — is prudent and appropriate.

*Id*. But *Underwood* also cautioned that "deference is not inexorable or limitless. Where, for example, 'there is conflicting expert testimony, the fact finder may completely discount the testimony of one expert and rely exclusively on the other.'" *Id*., *quoting Robinson v. Contributory Ret. Appl. Bd.*, 20 Mass. App. Ct. 634, 639 (1985).

Here, the Board disputes the seriousness of the accident because the Petitioner was traveling slowly, the passengers in the other car were not injured, and she stayed on scene to help. It highlights that she is not taking medications now and some of the medical findings, such as the results of her MRIs, did not disclose much. But nothing suggests that this accident could

not have caused these injuries, especially when the impact caused the airbags to deploy and knocked off the car's ram bar. Nor is it unusual for someone to have subjective symptoms that are difficult to measure in some objective way. The Board essentially expresses doubt and asks, like in *Underwood*, that I credit the minority opinion.

However, this case is unlike *Underwood* in a few ways. For one, there is no history of a pre-existing injury here. There are no prior medical conditions that could be causing these symptoms. There is also clear break between the Petitioner's ability to do her job pre-incident and inability to do it after. And, unlike *Underwood*, I have no doubts about the Petitioner's sincerity. I credit her testimony about her symptoms, which I do not find she is fabricating.

She did not strike me as someone trying to take advantage of a situation by creating an elaborate, years-long lie so she can collect a disability check. There is no evidence she is prone to exaggeration. Nothing indicates she was dissatisfied with her job and looking for an excuse to leave; indeed, she engaged in over 50 physical therapy sessions trying to improve her condition. Rather, she is sincerely upset with her present predicament and wishes she could go back to work instead of living with lingering medical problems. *Carreiro v. New Bedford Ret. Bd.*, CR-21-0355, 2023 WL 4846320 (DALA Jul. 21, 2023). I also find it hard to believe someone could fake these symptoms but receive years of treatment and fool countless doctors into believing her lies were true.

Dr. Vardeh provided the only opinion that backs up the Board's argument, but it was extremely curt and void of reasoning—beyond saying he cannot find objective evidence of her subjective complaints. To be sure, the majority panelists were not much more descriptive. That said, what ultimately helps carry the burden for the Petitioner is the independent report of Dr. Beaton. He went into detail about the records he read and why they supported the Petitioner's

diagnoses. He did rely on at least one objective measure: the August 2021 neurological testing which no other panelist referenced. Having credited the Petitioner's testimony—meaning that I believe her when she describes her ongoing symptoms—Dr. Beaton's report confirms that those symptoms could only be on account of the accident.

**CONCLUSION**

The Revere Retirement Board's decision denying the Petitioner's application for accidental disability benefits is hereby **reversed.**

SO ORDERED

DIVISION OF ADMINISTRATIVE LAW APPEALS

*Eric Tennen*

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Eric Tennen
Administrative Magistrate