COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Teresa Underwood,
Petitioner

v. Docket No. CR-21-0353

Boston Retirement Board,
Respondent

Appearance for Petitioner:

Nick Pollard, Esq.

Appearance for Respondent:

Michael Sacco, Esq.

Administrative Magistrate:

Timothy M. Pomarole, Esq.

SUMMARY OF DECISION

The Petitioner, an elementary school teacher, forcibly ejected an unruly third grader from her classroom. The ensuing altercation resulted in her restraining the child by laying on top of him. The Respondent properly denied her application for accidental disability retirement benefits. First, any injuries she sustained during this incident arose from her "serious and willful misconduct." Second, she has not sustained her burden of proving that her disabling injuries resulted from her altercation with the third grader rather than from the natural worsening of her longstanding lumbar and cervical spine issues.

DECISION

The petitioner appeals the decision by the Boston Retirement Board to deny her application to retire for accidental disability. Ms. Underwood, a former elementary school teacher, bases her application on injuries she claims she sustained in the course of a September 16, 2016 altercation with a third grade student (identified in this decision

under the pseudonym "Student S"). The Board contends that Ms. Underwood is not entitled to accidental disability retirement because: (1) any injuries were sustained as a result of her serious and willful misconduct; and (2) the objective medical evidence demonstrates that her disabling condition was the result of the natural worsening of a preexisting condition, rather than the September 16, 2016 incident.

I held a hearing on March 16, 2023. I admitted into evidence Exhibits 1-35 and 40-41.[1] I excluded from evidence four exhibits proposed by the Board: Proposed Exhibits 36-39. Ms. Underwood was the sole witness. A transcript was prepared. The parties submitted post-hearing briefs, whereupon the record was closed.

FINDINGS OF FACT

Based on the evidence presented by the parties, along with reasonable inferences drawn therefrom, I make the following findings of fact:

A. Preliminary Background Information

1. Ms. Underwood holds a bachelor's degree and two master's degrees. She also holds certifications in elementary education and in administration. (Testimony).
2. In 1995, Ms. Underwood was hired by Boston Public Schools ("BPS") as a substitute teacher. (Testimony).
3. In 2000, Ms. Underwood became an elementary generalist school teacher for BPS. (Testimony).

[1] Exhibit 8A consists of medical records. As originally submitted as a proposed exhibit attached to the Joint Pre-Hearing Memorandum this exhibit lacked Bates-stamped page numbers. The Board subsequently refiled this exhibit with Bates-stamped page numbers. I admit the refiled Exhibit 8A and substitute it for the originally filed version of the exhibit.

4. Ms. Underwood served as a union representative during her time with BPS and one year was elected to be the regional union representative for teachers in Roxbury, Massachusetts. She was the building representative at the David A. Ellis School. (Testimony).
5. Ms. Underwood was also elected to be the lead science teacher during her tenure at two of the schools at which she had taught. Her responsibilities in this role included ensuring that the science teachers had the equipment they needed. (Testimony).
6. Ms. Underwood had been trained on how to restrain a student, which included learning about permissible and impermissible methods of restraint. Ms. Underwood was not aware of any criteria that would permit a teacher to restrain a student by laying on top of him or her. (Testimony).
7. The Staff Handbook for the David A. Ellis School states:

> Boston School Department policy as well as Massachusetts State Law (G.L. c. 71 paragraph 37G) strictly forbids the use of corporal punishment in school. Corporal punishment includes, but is not limited to the following: 1. Slapping and hitting students, 2. Pulling students by the arms, shoulders, etc., 3. Pushing students from one location to another, 4. Forcibly causing students to sit down, and 5. Grasping students by any body part.

(Exhibit 22).

B. Medical Background Information

8. On August 9, 2011, Ms. Underwood treated with Dr. Joseph Audette of the pain management department at Atrius Health. She reported that she had been in two motor vehicle accidents that resulted in disc herniations in her lower back with left-sided lower back pain and radicular symptoms extending to her

left leg.[2] For more than ten years, her pain had been managed via opioids. (Exhibit 8A at 11-12).

9. Ms. Underwood's medical records from August 2011 through March 2016 outline a history of chronic cervical and lumbar spine pain, as well as other associated conditions. Among other things, the records note the following:

    - A history of lower back pain (Exhibit 8A at 15, 18, 34, 37-38, 43; Exhibit 33), including a September 2014 emergency room visit for back pain with radiation to the left leg. (Exhibit 8A at 21-26);
    - Shoulder and neck pain, including left shoulder and neck pain on January 28, 2013, (Exhibit 8A at 17), right neck and shoulder pain on September 14, 2013, (Exhibit 8A at 18), and on September 21, 2015 (Exhibit 8A at 30-31; Exhibit 33);
    - An April 2015 report of weakness in her upper left and lower left extremities. (Exhibit 32)
    - A March 7, 2016 report of pain in the right posterior thigh, which had "[s]everely increased for the last 2 months" and lack of feeling in her right foot. (Exhibit 8A at 39, 44); and
    - A March 7, 2016 finding of decreased range of motion and decreased core strength. (Exhibit 8A at 41).

10. MRIs of Ms. Underwood's lumbar spine had been performed in 2013 and 2015. The findings included the following impressions:

    - 2013: "Spondylotic findings as described above being most prominent at L5-S1 with development of severe right foraminal stenosis compressing the right exiting L5 nerve root."
    - 2015: "[M]ultilevel spondylosis largely unchanged compared to prior exam."

    (Exhibit 8A at 39-40).

[2] At the hearing, Ms. Underwood testified that she could not recall having been in these motor vehicle accidents. (Testimony).

11. An MRI of Ms. Underwood's cervical spine was performed in April 2015. The findings included "mild posterior disk bulging at C3-4, C4-5, C5-6, without critical spinal canal narrowing." (Exhibit 8A at 27).

12. As noted in paragraph 9, above, as of 2011, Ms. Underwood's pain had been treated with opioids for approximately ten years. In August 2011, Ms. Underwood was described as being "very motivated now to try other strategies to try to help her reduce her opioid requirement." (Exhibit 8A at 12). Nevertheless, the record indicates that from 2011 up through March of 2016, Ms. Underwood required substantial pharmacological pain management, including Percocet. (Exhibit 8A at 14-15, 18, 21-22, and 25-26; Exhibit 29, Exhibit 30).

13. On November 7, 2015, Ms. Underwood treated with Dr. Ellen Spar for severe lower back pain. Dr. Spar noted that Ms. Underwood had been taking twelve Percocets per day, in excess of her prescribed maximum of eight, and was thus running out of this medication before it was due for a refill. (Exhibit 8A at 35).

14. Ms. Underwood had been accorded various reasonable accommodations by BPS as of August 2014, namely, a classroom on the first floor, a restriction against heavy lifting, the use of chart paper in lieu of the whiteboard, and advanced notice for formal observations. (Exhibit 5).

C. Events and Circumstances Leading Up to September 16, 2016 Incident.

15. During the 2016/2017 school year, Ms. Underwood taught third grade at the David A. Ellis School. Many of her students that year had transferred to

David A. Ellis from elsewhere. (Testimony).

16. Her class that year was supposed to be an "inclusion" class --- meaning a class comprised of mostly regular education students, with a smaller number of special education students. That year, however, Ms. Underwood had many students that she surmised had special education needs. She was not certain about this because she did not have their files. (Testimony).
17. Ms. Underwood did not have a paraprofessional in the classroom with her. (Testimony).
18. The classroom had two doors. The front door led out to a hallway. The back door led out to a hallway. The back door was locked and had a window with grates. (Testimony).
19. Student S was a male third grader. I find that Student S was shorter than Ms. Underwood. (Testimony).
20. Ms. Underwood believed that Student S may have been on an IEP, but she did not have a "file" on him. (Testimony).
21. On Wednesday, September 14, 2016, Student S was being disruptive. Ms. Underwood moved Student S from one table to another. I make no specific findings as to what happened next in the classroom that day, except to note that it ultimately resulted in Student S finding himself in the principal's office. (Testimony; Exhibit 28).
22. That same day, the principal, Cynthia Jacobs-Tolbert, observed Student S sitting outside of the main office. He appeared upset. While speaking with the student, Ms. Underwood reported via intercom that Student S had just hit her

in the classroom. While escorting Student S back to Ms. Underwood's classroom, Student S volunteered to Ms. Jacobs-Tolbert that "a teacher shouldn't kick chairs from under students." Ms. Jacobs-Tolbert told Ms. Underwood she needed to complete a report regarding the incident. (Exhibit 28).

23. Ms. Underwood did not complete a report as directed. (Exhibit 28).[3]

24. Student S returned to the class the following morning. (Testimony).

D. The September 16, 2016 Incident

25. On the morning of September 16, 2016, Student S was being disruptive and punched one of his classmates. (Testimony; Exhibit 21).[4]

26. Ms. Underwood either pulled or pushed Student S out of the classroom via the back door. (Exhibit 21).

27. At some point while these events were unfolding, a student ran into Ms. Jacobs-Tolbert's office and told her that Ms. Underwood needed help. Ms. Jacobs-Tolbert followed the student to the staircase and heard a student yell "Get off me! Get off me!" As she proceeded down the stairs, she continued to hear the student yelling "Get off me!" Ms. Jacobs-Tolbert observed Ms. Underwood's body on top of the student in an unsafe restraint. The student

[3] There is no incident report in the record, and I do not credit Ms. Underwood's testimony that she submitted an incident report to Ms. Jacobs-Tolbert.

[4] Exhibit 21 is a collection of statements taken from Ms. Underwood's students during a BPS investigation. These statements will be discussed in greater detail in paragraph 36, below. In his statement, Student S stated that he and another student had a dispute over a pencil, adding: "So, maybe I punched him in the face." (Exhibit 21). Two other students report that Student S struck one of his classmates. (*Id.*).

was wiggling and kicking to try and break free from her grasp. (Exhibit 2).

28. Another teacher witnessed Ms. Underwood and Student S on the floor of the hallway. "It looked like [Ms. Underwood] had the student in a hold." (Exhibit 24).

29. Ms. Jacobs-Tolbert instructed Ms. Underwood to release the child and she did so. The student lay on the floor crying, coughing, and gagging on his mucus. (Exhibit 2).

30. Ms. Underwood told Ms. Jacobs-Tolbert that Student S had hit her and had punched another student. (Exhibit 2).[5]

31. Ms. Jacobs-Tolbert told Ms. Underwood to get the nurse. Student S began to calm down but was not ready to discuss what had happened. (Exhibit 2).

32. Student S initially reported that his back hurt. (Exhibits 2 and 25). At the nurse's office, he stated that his back felt better. (Exhibit 25).

33. As it happened, Ms. Underwood's husband arrived at the school because they were planning on having lunch together. After Ms. Underwood had lined her students up for the cafeteria, she left with her husband and went to Kenmore Urgent Care for pain "over her right wrist, left thumb, cervical spine, and right ankle." (Testimony; Exhibit 1). X-rays of Ms. Underwood's right wrist, left thumb, and right ankle revealed no acute abnormalities or signs of fracture or dislocation. An X-ray of the cervical spine showed minimal narrowing of the

[5] As noted in paragraph 25, above, I have found that Student S did punch a classmate. In view of my finding in paragraph 27 that Student S was trying to kick free from Ms. Underwood's grasp, I find it likely that Student S did, in some fashion, strike her while they were outside the classroom. I make no finding as to whether Student S struck her while they were in the classroom.

C5-C6 disc space. (Exhibit 1).

E. Post-Incident Events

34. Ms. Jacobs-Tolbert reported the incident to the Department of Children and Families. (Exhibit 20). There is no record of an investigation or any other steps DCF may have taken, if any, as a result of this report.

35. Ms. Underwood was placed on administrative leave pending a district investigation. (Exhibit 5).

36. The BPS investigation of this incident included interviews with Student S and his classmates.[6] Excerpts from the students' statements that relate to Ms. Underwood's actions are set forth below; each bullet is for a different student, the first of whom is Student S:

- "[Ms. Underwood] came and put her arms around me and pulled me out of the seat. She kept her hands on me and took me out of class. … And then I fell down on my stomach and she fell down on me and my back hurt again."
- "I saw the teacher grab the kid by the arm and take hem out of class. … and Mrs underwood put him on the floor and tried to control hem."
- "I saw [Ms. Underwood] push the student out the classroom."
- "[T]he teacher push the little boy out he clas and she hirt the little boy"
- "She put him in the floor hard then she put her leg on him."
- "She banged him on the floor when the teacher pushed him out of the class."
- "I saw that the teacher grabbed him in the neck all the way outside the classroom … and then the student punched the teacher in the face and the teacher got so mad that she through the student on the ground."

[6] It appears that an interviewer took Student S's statement by hand. The rest of the students wrote handwritten statements.

- "[…] and the teacher wus grab the student"
- "I saw the teacher pushed the student out the classroom."
- "[S]he grabed the boy that punch the student she took him out of the classroom and start a fight."

(Exhibit 21 (misspellings in original)).[7]

37. On January 12, 2017, Ms. Underwood stood up at home and her right leg buckled, leading to a fall. During her resulting hospital stay, she underwent a cervical and thoracic MRI, which reflected no "evidence of traumatic injury to the cervical or thoracic spine" and "[m]ultilevel cervical spondylosis … similar to the prior [MRI] examination of 7 April 2015" and the most severe degenerative changes at C5-6, which were "unchanged compared to prior examination." (Exhibit 8A at 60). Ms. Underwood also had a lumbar spine MRI, resulting in the following impressions: "Degenerative changes are most prominent at L5-S1 moderate to severe loss of disc height, disc herniation and facet arthropathy results in moderate to severe bilateral neural foraminal narrowing" and "No high grade spinal. No abnormal signal or enhancement

[7] Ms. Underwood objected to the admission of Exhibit 21. I overruled the objection. I can appreciate the concerns posed by anonymous hearsay statements, but taking into account these infirmities, I concluded (and still conclude) that, here, and on balance, these statements are "the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs." G. L. c. 30A, § 11 (2). Their collective consensus that Student S was forcibly removed from the classroom is suggestive of reliability, as are the inconsistencies and differences that exist --- they appear to reflect genuine impressions, rather than coaching or suggestion. The students were percipient witnesses to the events and had no discernable motive, individually or collectively, to lie. It also bears mention, vis-à-vis the anonymity of the statements, that the record discloses no efforts by Ms. Underwood to obtain from the Board or BPS the identities of these statements' authors.

of the terminal cord, conus medullaris or cauda equina." (Exhibit 8A at 60).

38. On July 27, 2017, John H. Chaglassian, M.D., examined Ms. Underwood at the request of the City of Boston, Workers' Compensation Services. Dr. Chaglassian concluded that the "injuries Ms. [Underwood] sustained on September 16, 2016, were essentially soft tissue in nature. As she had pre-existing symptoms in the same body parts, I do not believe that the work injury is a major cause of her current disability and need for treatment." (Exhibit 40).

39. On September 26, 2017 and January 2, 2018, attorney Joseph Coffey held a BPS disciplinary hearing concerning: (1) Ms. Underwood's failure to file an incident report with respect to the September 14, 2016 incident; and (2) her conduct during the September 16, 2016 incident. Ms. Underwood, Ms. Jacobs-Tolbert, and Operational Superintendent Edward Lee testified. The parties were represented by counsel. (Exhibit 28).

40. In his report dated January 9, 2018, Mr. Coffey concluded that Ms. Underwood had failed to file an incident report with respect to the September 14, 2016 incident with Student S and that Ms. Underwood had "inappropriately and unprofessionally disciplined" Student S by grabbing him and pulling him out of the class, had forcibly prevented the student from reentering the classroom, and had used an improper and unsafe use of force by pinning him to the ground. Mr. Coffey recommended termination. (Exhibit 28).

41. On November 29, 2017, George Whitelaw, M.D. examined Ms. Underwood

in connection with a worker's compensation claim. Dr. Whitelaw opined that Ms. Underwood's ongoing disabilities were not related to the September 16, 2016 incident. Dr. Whitelaw's opinion was based, among other things, on his assessment that a 2016 lumbar spine MRI taken after the incident did not show "significant interval progression compared to" a prior lumbar spine MRI taken in 2015.[8] Dr. Whitelaw's remarks concerning his physical examination noted "exaggeration of symptomatology" and observed that Ms. Underwood was not able to flex her spine when asked to do so, but at other times was able to reach down to pick up a cup of coffee "without any difficulties." (Exhibit 34).

42. On March 18, 2018, Ms. Underwood filed an application for disability retirement, claiming that because of the September 16 incident she was "mentally and physically incapable of performing the essential duties of [her] job." The treating physician's statement listed diagnoses of PTSD, lumbar spine stenosis with radiculopathy, cervical spine spondylosis, and right shoulder strain. The treating physician's statement opined that Ms. Underwood's conditions were most likely caused by her job-related injury, stating "the events at work caused psychological distress that is ongoing and worsening of her chronic spine pain that has not returned to the previous level before this event." (Exhibit 3).

43. On April 2, 2018, BPS notified Ms. Underwood that she would be dismissed effective April 6, 2018. (Exhibit 35).

[8] Dr. Whitelaw perhaps meant to refer to the April 2017 lumbar spine MRI. There does not appear to have been a lumbar spine MRI performed in 2016.

44. Ms. Underwood filed a petition for arbitration of her termination. In June 2020, Ms. Underwood and BPS entered into a Release and Settlement, which converted her termination into a resignation prior to a scheduled arbitration. (Exhibit 41).

45. In connection with her disability application, a regional medical panel comprised of Seth N. Schonwald, M.D., Richard Warnock, M.D. and Henry Drinker, M.D. ("Panel") individually examined Ms. Underwood on November 15, 2019, November 19, 2019 and November 21, 2019, respectively. Dr. Warnock provided the following diagnosis: "Aggravation of pre-existing cervical and lumbar spondylosis." (Exhibit 7). Dr. Drinker's diagnosis was "[c]ervical and lumbar degenerative spondylosis and degenerative disc disease, with possible radiculopathy and radiculitis." (*Id.*). Dr. Schonwald's diagnoses are more difficult to identify: his report, unlike those of Drs. Warnock and Drinker, does not contain a separate section or heading for "diagnosis." He recites key events from Ms. Underwood's medical records and later states that Ms. Underwood's "diagnoses include chronic lumbar radiculopathy and psychosocial matters, including depression and posttraumatic stress disorder." (*Id.*). It is not clear whether these are his own diagnoses or he is merely characterizing diagnoses reflected in Ms. Underwood's medical records.

46. All three panelists opined that Ms. Underwood was physically incapable of performing her work duties and that such disability was likely to be permanent. (Exhibit 7).

47. Drs. Schonwald and Warnock also opined that Ms. Underwood's incapacity is such as might be the natural and proximate result of the September 16, 2016 incident. Dr. Warnock further opined that her disability is "likely the result of the incident of September 16, 2016, in my opinion, by virtue of the Aggravation of a Pre-Existing Condition Standard." (Exhibit 7).

48. Dr. Drinker, however, stated that Ms. Underwood's "incapacity is not such as might be the natural and proximate result of the personal injury sustained or hazard undergone on account of which retirement is claimed." Dr. Drinker's conclusion was based, in part, on the fact that he did not have the records of her treatment at urgent care on September 16, 2016 and on "various discrepancies in the verbal history of the claimant." With respect to the latter, I take Dr. Drinker to be referring to instances outlined in his narrative in which Ms. Underwood's account of her medical history was inconsistent with the medical records. For example, Ms. Underwood reportedly denied having complained in 2015 of numbness in her left arm and leg, despite an April 10, 2015 progress note stating that she had, and denied cervical pain prior to the September 16, 2016 incident, despite prior records stating that she did have cervical pain. (Exhibit 7).[9]

49. Dr. Drinker also stated that "[t]hroughout [his] examination, there appeared to be considerable symptom magnification, and in most of the maneuvers that involved the examination of her spine and extremities, there appeared to be volitional control over the applicant's responses to individual testing."

[9] The April 10, 2015 progress note is Exhibit 32. Reports of cervical pain are found in Exhibit 8A at pages 17-18 and 30-31 and Exhibit 33.

Notwithstanding his concerns about the examination, Dr. Drinker did opine that she was permanently disabled, citing the results of her 2017 lumbar spine MRI. (Exhibit 7).

50. On January 26, 2021, the Board sought clarification from the panel. Among other issues, the Board noted that the panel did not appear to have reviewed the records of Ms. Underwood's pre-incident lumbar spine MRIs. The Board forwarded those documents to the panel (along with other records) and asked the panelists to revisit their conclusions in light of these prior MRIs. (Exhibits 8A-8C).

51. In response to the request for clarification, the panelists submitted addenda essentially stating that, having considered the additional records, the substance of their conclusions remained the same. (Exhibits 9A-9C). Dr. Drinker, whose declination to opine that causation was possible was based on the absence of the September 16, 2016 urgent care records, was provided those records and concluded in his addendum that "no evidence exists by which to establish causation between the injury of the applicant on September 16, 2016, and the permanent incapacity which exists with respect to conditions involving her cervical and lumbar spine." (Exhibit 9B).

52. Dr. Schonwald, however, did step beyond opining that causation was possible and stated that it "was my feeling during our meeting that the event at school involving an altercation with a student was the 'straw that broke the camel's back' and aggravated her lower back pain to the point where she could not return to work." (Exhibit 9).

53. On August 14, 2020, a hearing officer appointed by the Board convened a hearing on Ms. Underwood's application for accidental disability retirement. On May 10, 2021, he issued a recommended decision that Ms. Underwood's application be denied. (Exhibit 10).

54. On September 15, 2021, the Board voted to deny Ms. Underwood's application. (Exhibit 13).

55. Ms. Underwood timely appealed. (Exhibit 14).

CONCLUSION AND ORDER

The Board makes two principal arguments. First, it argues that if Ms. Underwood sustained disabling injuries on September 16, 2016, they were the result of her serious and willful misconduct. Second, it suggests that the objective medical evidence demonstrates that Ms. Underwood's disabling condition was the result of the natural worsening of a preexisting condition, rather than the September 16, 2016 incident.[10]

For the reasons stated below, I agree with the Board's first argument. Although my conclusions regarding Ms. Underwood's serious and willful misconduct are dispositive, I will nevertheless also address the Board's second argument. The resolution of the second argument involves credibility determinations. Thus, if a subsequent

[10] The Board also asserts that the opinions of Drs. Warnock and Schonwald with respect to causation are so fundamentally flawed that they cannot be relied upon to support Ms. Underwood's accidental disability retirement claim. This argument is largely duplicative of the Board's argument that the medical evidence does not support causation. To the extent it is not duplicative, it is unavailing. Although, as explained below, I conclude that the causation opinions of Dr. Warnock and Dr. Schonwald are unpersuasive when considered in light of the countervailing evidence and contrary opinions in the record, that is not the same as determining that the opinions themselves are so flawed that they should not even be considered.

tribunal concludes that my resolution of the first argument was in error, it may be useful to have the benefit of my credibility determinations vis-à-vis the second argument.

A. Serious and Willful Misconduct

G.L. c. 32, § 7(1) provides the conditions for the successful application for accidental disability retirement benefits within the Commonwealth's retirement system. Section 7(1) provides in pertinent part:

> [a]ny member in service ... who is unable to perform the essential duties of his job and ... such inability is likely to be permanent before attaining the maximum age for his group by reason of a personal injury sustained or a hazard undergone as a result of, and while in the performance of his duties at some definite place and at some definite time on or after the date of his becoming a member ... *without serious and willful misconduct on his part* ... shall be retired for accidental disability[.] (Emphasis added.).

"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).[11] Serious and willful misconduct is "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." *Scaia's Case*, 320 Mass. 432, 433-34 (1946).

When considering whether an employee has engaged in serious and willful misconduct, all of the immediately attending circumstances should be considered. *Tripp's Case*, 355 Mass. 515, 518 (1969).

[11] The Contributory Retirement Appeal Board has looked to the worker compensation law for purposes of interpreting the phrase "serious and willful misconduct." *Jones v. Weymouth Ret. Bd.*, CR-04-181, *6-7 (CRAB Sept. 30, 2005). Three of the cases cited in this decision --- *Dillon's Case*, 324 Mass. 102 (1949), *Scaia's Case*, 320 Mass. 432 (1946), and *Tripp's Case*, 355 Mass. 515 (1969) --- are worker's compensation cases frequently cited by DALA and CRAB for purposes of construing "serious and willful misconduct" under G.L. c. 32, § 7(1).

Here, the Board contends that Ms. Underwood engaged in serious and willful misconduct by forcibly removing Student S from the classroom and then placing him in an unsafe restraint.

Ms. Underwood presents a different version of events. First, she denies that she physically removed Student S from the classroom. She claims that, on the contrary, he voluntarily complied with her order to leave. (Testimony). Her testimony on this point is not plausible. She describes Student S as engaging in aggressive and non-compliant behavior, then complying with her order to leave the room, and then resuming his aggressive and non-compliant behavior once he had exited the room. Her account, which portrays Student S as cooperative when leaving the classroom, but out-of-control moments before and moments after he left is not credible.

Moreover, Ms. Underwood's own testimony calls into general question whether she is a reliable reporter with respect to the events that occurred that day. At the hearing, when she was asked if she had hit her head during the incident, she replied that "[e]verything happened so fast that day, I don't remember." (Testimony). And when she was asked about her visit to the emergency room, she explained that she had difficulty remembering it because "she [tries] to block the whole incident out." (Testimony).

The collective report of her students that she forced Student S out of the classroom, is, on balance, more credible. Although these are anonymous hearsay statements from children, and their accounts differ as to whether Student S was grabbed, pushed, or both, they were consistent on the basic point --- that Student S was forcibly removed.

Ms. Underwood also denies that she improperly restrained Student S by laying on top of him. She testified that when they were outside the classroom, Student S "went crazy" and starting punching and pushing her. She says that she was able to get a hold of his wrists. They both fell, landing side-by-side on the ground, with Ms. Underwood retaining her hold on Student S's wrists. (Testimony). This version of events is inconsistent with the account provided by the school principal (Exhibit 2) and one of Ms. Underwood's fellow teachers. (Exhibit 24). Given Ms. Underwood's acknowledged difficulties in remembering the day's events, I find the accounts of Ms. Underwood's colleagues more persuasive.

Turning to the issue of whether Ms. Underwood's forcible removal and unsafe restraint of Student S constitutes "serious and willful misconduct" within the meaning of the statute, one question that emerges is whether the requisite "likelihood of serious injury" concerns the risk of injury to the member, to a third-party, or to either of these. The Board appears to focus on the likelihood of injury to Student S. By contrast, Ms. Underwood suggests in her post-hearing briefing, albeit without development, that the inquiry turns not on the risk of harm to Student S, but rather whether her conduct posed a risk of "serious injury to *herself*." (Petitioner's Post-Hearing Memorandum, at 14 (emphasis in original)).

There is some support for Ms. Underwood's framing. In *Internicola v. Saugus Retirement Bd.*, the magistrate states that the member's "misconduct must in *some* way make the *member's* serious injury a probable consequence." CR-20-385, 2022 WL 17081140, at *4 (DALA Nov. 10, 2022) (citation and internal quotation marks omitted) (first emphasis in original, second emphasis supplied). And understandably so --- the

§7(1) decisional law focuses on the risk of injury to the member himself or herself. *See, e.g., Pacheco v. New Bedford Ret. Bd.*, CR-16-464 (DALA Dec. 6, 2019); *Sanko v. Worcester Regional Ret. Bd.*, CR-12-659, 2018 WL 2773280, at *8-9 (DALA April 27, 2018); *Poirier v. New Bedford Ret. Bd.*, CR-15-503, at *6-7 (DALA Aug, 25, 2017); *but see Burek v. Montague Ret. Bd.*, CR-08-258, at 11 (DALA Nov. 6, 2009) (considering whether member's conduct "posed an unreasonable risk of harm to others or the high probability of harm to himself").

I leave to one side the question of whether serious and willful misconduct can be based on the risk of harm to others because, in this case, Ms. Underwood's conduct posed a substantial risk that she would seriously injure herself. Forcibly removing a disruptive student who had already shown himself to be aggressive created a risk of a physical altercation. Even more seriously, once they were outside the classroom, Ms. Underwood unsafely restrained Student S by laying on top of him.

This conduct made it likely that Ms. Underwood would suffer a serious injury. Ms. Underwood already had a spine condition and associated infirmities and functional limitations. She was thus poorly equipped to physically engage with Student S and doing so posed a substantial risk of worsening her existing spinal conditions or, at the very least, temporarily exacerbating those conditions.[12]

All this said, not all conduct risking significant injury is serious and willful misconduct for purposes of the statute. In *Burek*, for example, the petitioner's decision to drive, notwithstanding his history of seizures, was "risky, but it was a calculated,

[12] In the event a subsequent tribunal determines that the likelihood of serious injury to Student S is relevant to its analysis, I conclude that Ms. Underwood's unsafe restraint of Student S created a likelihood that he would be seriously injured.

informed risk based on his knowledge of his longstanding pattern of seizures." *Burek v. supra*, at *11.

Here, however, there is insufficient evidence to conclude that Ms. Underwood's conduct was the product of "a calculated, informed risk." Because Ms. Underwood denies physically removing Student S from the room, she has not explained the thought process behind her decision to do so. Nor, lacking direct evidence, can I infer from the attendant circumstances that Ms. Underwood's action reflected a calculation of the risks involved in undertaking some other course of action (or no action) as compared to physically ejecting Student S from the classroom. Much the same analysis applies to Ms. Underwood's decision to restrain Student S and lay on top of him once they were outside the classroom.

Ms. Underwood may have faced a trying and difficult situation. She was alone in a class of students with whom she was unfamiliar, she lacked files that may have provided her with insight as to their needs, and Student S was disruptive. But she was armed with experience, training, and common sense. She decided to physically remove Student S and restrain him in disregard of the patent risks that conduct presented. Her actions constituted "serious and willful misconduct" for purposes of the statute.

B. Causation

An applicant for accidental disability benefits must prove that it was more likely that the claimed disability was caused by the injury, either directly or by aggravation of a pre-existing physical condition, than by the "natural, cumulative, deteriorative effects of her preexisting condition." *Lisbon v. CRAB*, 41 Mass. App. Ct. 246, 255 (1996).

The function of a medical panel is to "determine medical questions which are beyond the common knowledge and experience of the local board (or Appeal Board)." *Malden Ret. Bd. v. CRAB*, 1 Mass. App. Ct. 420, 423 (1973). A medical panel's affirmative certificate is a statement that the requisite causal connection is "possible" or "plausible." *Narducci v. CRAB*, 68 Mass. App. Ct. 127, 134, 144 (2007). The certificate provides "some evidence" of a causal connection's actual existence. *Blanchette v. CRAB*, 20 Mass. App. Ct. 479, 483 (1985). Where, as here, the panelists go beyond the statutory question of "possibility" and state their views on the likely cause of the applicant's condition, retirement boards and tribunals may consider such opinions so long as the opinions do not stray too far into definitive statements regarding actual causation. *Narducci*, 68 Mass. App. Ct. at 134-35. But such opinions are "not decisive of the ultimate fact of causal connection." *Malden Ret. Bd.*, 1 Mass. App. Ct. at 424. The ultimate determination of whether the member has proven causation must account for any additional relevant evidence. *Pease v. Worcester Reg. Ret. Bd*, CR-21-82, 2022 WL 19762164, at *4 (DALA Dec. 23, 2022) (citing *Narducci*, 68 Mass. App. Ct. at 134-35). That said, "while neither the retirement board nor DALA is required to reach the same medical conclusion as the medical panel, it must base any medical conclusion on evidence supported by proper expertise." *Thomson v. MTRS*, CR-20-0340, 2023 WL 183536, at *11 (DALA Jan. 6, 2023) (citations omitted).

Here, the Board contends that causation is unsupported by "objective" medical evidence and thus depends on the credibility of Ms. Underwood's own subjective pain complaints, which the Board states is highly suspect. The Board's argument is well encapsulated in the following passage:

> [T]he objective evidence in this case clearly demonstrates that (1) [Ms. Underwood] suffered from a decades-long pre-existing degenerative spine condition, as well as a herniated disc at L5-S1 that pre-dated the September 16, 2016 incident, (2) [Ms. Underwood] did not complain about back or lumbar spine pain when she treated emergently at Kenmore Urgent Care the day of the incident and (3) the lumbar MRI post-injury did not demonstrate any fundamental worsening. Thus, we are left with [Ms. Underwood's] subjective pain complaints, which hinge on her veracity, and which the Board has demonstrated is significantly lacking.

(Post-Hearing Brief, at 33).

There are some difficulties with this argument as framed. First, Ms. Underwood's disability claim is based on injuries to both her cervical and lumbar spine. Both spinal areas are cited as bases in her treating physician's statement. (Exhibit 3). Moreover, Dr. Warnock and Dr. Drinker opine that Ms. Underwood suffers from both lumbar and cervical conditions. (Exhibit 7). (Dr. Schonwald's narrative does not clearly identify his diagnoses for Ms. Underwood. (Exhibit 7)). Thus, Ms. Underwood's failure to complain of lumbar issues when she treated at urgent care on September 16 would not vitiate causation vis-à-vis cervical issues (which she did raise during that visit (Exhibit 1)). Moreover, the Board's arguments about the lumbar spine MRI have no bearing on any incapacity arising from cervical issues.

Second, as a layperson, I am disinclined --- on this record, at least --- to opine confidently that the 2017 lumbar spine MRI did not show a substantial worsening of Ms. Underwood's condition as compared to the 2015 lumbar spine MRI.[13]

[13] In his original opinion, Dr. Drinker states that a 2017 lumbar spine MRI was "essentially unchanged from a previous MRI." (Exhibit 7). Although I am not certain, the records in this case lead me to suspect that Dr. Drinker may have been attributing the findings of a 2017 cervical spine MRI to the aforementioned 2017 lumbar spine MRI. If I am incorrect, the mistake would strengthen the bottom-line conclusion of this decision with respect to causation.

All this said, neither Dr. Warnock nor Dr. Schonwald appear to have relied upon any lumbar or cervical deterioration manifested in the post-injury MRIs as compared to the pre-injury MRIs.[14] The majority's positive causation opinion appears to turn primarily on the conclusions of her treating providers, which appear to depend, in turn, on her subjective pain complaints. Drs. Warnock's and Schonwald's causation assessments are thus based on factors that could have been, to varying extents, within Ms. Underwood's volitional control.

Accordingly, the essence of the Board's argument can be reformulated as follows: Ms. Underwood is not a credible witness and the majority panel's positive causation

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[14] I note that in one passage, Dr. Schonwald states:

> I am asked to opine as to whether or not lumbar changes post-incident are due to the natural progression of her pre-existing condition or due to the underlying incident. I would suggest that these represent a natural progression of her pre-existing condition. However, I do not believe this necessarily changes my opinion in any way. She clearly had pre-existing back pain at the time of her incident, aggravated that back pain at the time of her altercation and continues to have back pain after the accident. While there certainly is evidence of new right-sided nerve impingement, she had left-sided findings on previous films.

(Exhibit 9C). This passage --- particularly in light of subsequent passages in his addendum --- appears to concern developments that occurred after the incident, rather than differences in Ms. Underwood's condition before and after the incident. It appears he is responding to the possibility that because Ms. Underwood suffered additional deterioration post-incident, not attributable to new injuries, such deterioration would tend to undermine the suggestion that her post-incident condition was caused by the altercation in the first place. None of this is particularly clear, however.

I also note that Dr. Warnock's addendum states: "She had numerous prior MRI's, which showed minor degenerative changes, but that would not change the findings relevant to the injury date of September 2016." (Exhibit 9A). Putting to one side whether the prior MRIs reflected "minor" degenerative changes, Dr. Warnock does not compare the pre-injury and post-injury MRIs.

opinion turns on subjective pain complaints (self-reports and pain behavior in the examinations), so the majority's positive causation opinion may be safely disregarded.

Matters are not quite so simple, however. Prior decisions have held 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." *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.

But the 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." *Robinson*, 20 Mass. App. Ct. at 639.[15] Thus, where there is a dispute among the panelists concerning the credibility of an

[15] There may be other circumstances in which the deference to a panel's assessment of self-reports and examination behaviors may, or even should be, relaxed or obviated. I do not construe *Back* or *Kirsten K.* (or other similar decisions) as departing from the principle that the ultimate causation determination may turn on findings outside a medical panel's opinion, only that the panel's assessment of an applicant's subjective complaints and presentation is a *medical* one and should be treated as such.

applicant's self-reports or presentation, an informed and judicious choice among them may be warranted. Here, a panelist, Dr. Drinker, and the worker's compensation IME, Dr. Whitelaw, found that Ms. Underwood exaggerated her symptoms and that she performed inconsistently during their examinations (suggesting that Ms. Underwood was exaggerating the difficulty or discomfort associated with certain maneuvers and downplaying her functional capacities).

Dr. Drinker's and Dr. Whitelaw's assessments are consonant with certain features of Ms. Underwood's testimony, which I believe was marked by palpable efforts to downplay or minimize her pre-incident pain and conditions. Some of these efforts are relatively innocuous when viewed in isolation. For example, Ms. Underwood appeared to minimize the reasonable accommodations she had been afforded prior to the September 16, 2016 incident. More concerning, however, is the fact that she denied having had chronic pain before the September 16, 2016 incident, insisting that the "only time I got the chronic pain is when I did something to exert myself too far," which she said "rarely happened." (Testimony). This characterization does not fit particularly well with the many assessments of chronic pain by Ms. Underwood's medical providers, or the fact that she required substantial pain management medication. In fact, Ms. Underwood's pain management was itself the subject of considerable minimization. Ms. Underwood testified that prior to 2016, she took pain medication "as needed, which wasn't often," adding the further remark that her use of pain medication was "not a lot"; it was "maybe once, two, three times a month." (Testimony). This testimony is flatly inconsistent with years of medical records, which include multiple references to Ms. Underwood taking the maximum prescribed amount of pain medication and at least one

occasion on which Ms. Underwood took 50% more than the prescribed amount of Percocet.

In a similar fashion, Ms. Underwood appears to have downplayed her prior Percocet use when speaking to Dr. Warnock. She told Dr. Warnock that prior to the incident "the dose of Percocet was much less." Dr. Warnock then observed that she "is *currently* taking eight Percocet tablets per day at this point prescribed by her primary care." (Exhibit 7 (emphasis supplied)). Also, as noted above, she denied prior neck pain in her examination with Dr. Drinker. She did the same when examined by Dr. Whitelaw. (Exhibit 34).

The issues outlined above do not merely reflect a generalized concern about her credibility --- a suggestion, for example, that because her testimony is unreliable on certain points, her testimony on other, unrelated subjects should also be discounted. Instead, they speak to the difficulty in relying upon Ms. Underwood for an accurate report of her medical history and symptoms. More pointedly, these are not random inaccuracies, but rather represent minimizations of her pre-incident difficulties, resulting in the *relative* magnification of Ms. Underwood's post-incident symptoms. Although I ascribe no conscious motivation to shade the truth, I am persuaded that Dr. Drinker and Dr. Whitelaw accurately discerned the obverse situation: a magnification of symptomatology so as to amplify the differences in Ms. Underwood's pre- and post-incident condition.

The opinions of Dr. Warnock and Dr. Schonwald are countervailing evidence in support of causation, but their narratives --- which turn on the questionable reliability of Ms. Underwood's own reports and examination responses, provide little basis to credit

their opinion over Dr. Drinker's, other than strength in numbers. And even that advantage evaporates when Dr. Whitelaw's and Dr. Chaglossian's opinions are considered.

First, Dr. Warnock's initial opinion that Ms. Underwood's disability is "likely the result of the incident of September 16, 2016, in my opinion, by virtue of the Aggravation of a Pre-Existing Condition Standard" is entirely conclusory. (Exhibit 7). The narrative contained in the addendum to his opinion contains a little more detail, suggesting that his causation analysis is based entirely assessments by Ms. Underwood's treating physicians. For example, he states that the "primary care does document a flare of her chronic pain and gives her a note to remain out of work. This would support an aggravation of her pre-existing condition." (Exhibit 9A). This analysis may be serviceable in the abstract, or in different circumstances, but in light of the questionable reliability of Ms. Underwood's reports and examination behaviors, reliance on a note from the primary care provider, which, in turn, appears to be based upon Ms. Underwood's subjective pain complaints, is not persuasive --- at least not without some explanation or analysis, of which there is none proffered here.

Like Dr. Warnock's, Dr. Schonwald's initial causation opinion was conclusory. In his addendum he states that it "was my feeling during our meeting that the event at school involving an altercation with a student was the 'straw that broke the camel's back' and aggravated her lower back pain to the point where she could not return to work." (Exhibit 9C). His analysis concludes as follows: "I should note that despite many years of chronic lower back pain, she apparently worked without requiring disability evaluation. It was the final straw that broke the camel's back on the date of injury that I

described in my initial report and reiterate in my report today." The phrasing is perhaps infelicitous, as it implies that the need for an evaluation proves out the condition for which an evaluation is sought. But even under a more generous reading, the general point remains that Dr. Schonwald's opinion evinces little basis for concluding that Ms. Underwood's subjective pain complaints furnish a reliable basis on which to find causation.

In sum, Ms. Underwood has not met her burden of demonstrating that her disabling condition represents an aggravation of her preexisting spinal problems resulting from the September 16, 2016 incident rather than from the natural progression of her longstanding spinal condition.

For the foregoing reasons, the decision of the Boston Retirement Board is affirmed.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS

/s/ Timothy M. Pomarole

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Timothy M. Pomarole, Esq.
Administrative Magistrate

Dated: July 26, 2024