

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

**CRISTOBAL RICO, *Applicant***

**vs.**

**RESIDENTIAL DESIGN SERVICES;  
ZURICH AMERICAN INSURANCE;  
SENTRY CASUALTY COMPANY,  
*Defendants***

**Adjudication Numbers: ADJ17444677; ADJ14797929  
Santa Rosa District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**I CONCUR,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



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

**March 8, 2024**

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

**GOLDBERG & LOREN  
LAW OFFICE OF DOUGLAS MACKAY  
STANDER, REUBENS, THOMAS & KINSEY**

**LN/pm**

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**  
**ON PETITION FOR RECONSIDERATION**

**I.**  
**INTRODUCTION**

Defendant, Sentry Casualty Company, through their attorney of record, Alex Shapiro of Thomas Kinsey LLP, filed a timely, verified Petition for Reconsideration challenging the Joint Findings and Award issued on December 20, 2023.

Applicant alleged two dates of injury at Trial. The first is an injury to the right shoulder, right wrist, right elbow, and right ribs on July 27, 2017, while working as a Tile Installer for Residential Design Services (ADJ17444677). The applicant sustained injury after a fall from a ladder while performing tile work. The applicant was 49 years old on this date of injury. The employer was insured by Zurich American Insurance Company for this date of injury.

The second injury occurred on May 14, 2019 to the same body parts as the 2017 injury (right shoulder, right elbow, right wrist and right ribs) also while working as a Tile Installer for Residential Design Services (ADJ14797929). The applicant sustained injury while reaching up to install tile during his usual and customary work. The applicant was 51 years old on this date of injury. The employer was insured by Sentry Casualty Company for this date of injury.

In a Findings and Award (F&A) dated December 20, 2023, the undersigned WCJ found permanent disability and future medical care for the two specific injuries. The WCJ found that the July 27, 2017 injury caused 9% permanent disability after apportionment, and the May 14, 2019 injury caused 2% permanent disability after apportionment. The WCJ awarded future medical treatment for the right shoulder, right elbow, right wrist and right ribs for both dates of injury based on the opinions of Qualified Medical Evaluators (QME) Dr. Joseph McCoy and Dr. David Bell.

Petitioner contends that Dr. Joseph McCoy's QME reports are not substantial medical evidence regarding apportionment. Petition, page 1, lines 24 thru 26. Petitioner further contends that Dr. David Bell's QME report is substantial medical evidence regarding causation. Petition, page 2, lines 1 thru 2.

## **II.** **FACTS**

The applicant sustained a specific injury on July 27, 2017 when he fell from a ladder while installing tile for his employer Residential Design Services. The company would perform construction work in residential home interior renovations, including tile work. (Joint Exh. D, page 2.) The applicant was taken to Kaiser Hospital and discharged that same day. (Id.) There was no evidence of fracture. (Id.) The applicant had follow-up physical therapy and progressed from modified to full duties at work. (Id.)

The applicant underwent an MRI of the right shoulder on January 11, 2018 which showed a possible full thickness tear. The applicant underwent an injection and wished to avoid shoulder surgery. (Joint Exh. G, page 3.)

On May 14, 2019, while the applicant was back in his usual and customary duties, the applicant sustained a second injury to his right shoulder while reaching up to install tile (Joint Exh. E, page 1.) This led to more resistant right shoulder difficulties, a repeat MRI on September 27, 2019, and ultimately surgical intervention for the right shoulder in February 2020 performed by Dr. Peterson. (Joint Exh. B, page 11; Joint Exh. D, page 3.)

Dr. Joseph McCoy served as the panel Qualified Medical Evaluator (QME) for the 2017 injury. Dr. David Bell served as the panel QME for the 2019 injury. The cases were consolidated via WCJ Order on August 17, 2023. (EAMS Doc. ID 77058746.)

The applicant was initially evaluated by Dr. Bell on August 26, 2022 for the 2019 injury. Dr. Bell concluded that 100% of applicant's symptoms were due to the July 27, 2017 injury. (Joint Exh. D, page 21.) He deferred disability status to the primary treating physician (PTP) for the 2019 injury, Dr. Petrofsky. (Id.) He confirmed his initial report findings in his deposition on July 14, 2023. (Joint Exh. C.)

Dr. Petrofsky issued a report dated April 12, 2021. (Joint Exh. E.) In her report, Dr. Petrofsky found the applicant permanent and stationary as of the date of her report, but thereafter issued a whole person impairment (WPI) for the left shoulder, a body part not at issue in either case herein. (Id. at page 7.) Dr. Petrofsky did not review any medical reports prior to May 24, 2019, and it appears she was unaware of the 2017 injury. (Id. at page 5.)

The applicant was initially evaluated by Dr. McCoy on May 16, 2023 for the 2017 injury (report dated May 19 2023). (Joint Exh. B.) A supplemental report issued by Dr. McCoy on August 15, 2023. (Joint Exh. A.) Dr. McCoy confirmed his original findings in his supplemental report. Dr. McCoy reported that the applicant sustained an injury on July 27, 2017 and on May 14, 2019. (Joint Exh. B, page 11.) Dr. McCoy based his finding of two injuries, in part, on the fact that the applicant returned to work after the 2017 injury but was not able to do so after the 2019 injury which resulted in necessary shoulder surgery. (Joint Exh. B, page 3.) Additionally, MRIs taken before and after the May 14, 2019 injury showed objective findings supporting a new injury had occurred. (Id.) Dr. McCoy found the applicant permanent and stationary, provided a 5% WPI for applicant's right shoulder, and apportioned 80% to the July 27, 2017 injury and 20% to the May 14, 2019 injury. (Id. at page 12.)

These cases were tried on the issues of parts of body injured (right arm), permanent disability, apportionment, need for further medical treatment, attorney's fees, and statute of limitations. The Joint F&A issued finding 9% permanent disability for applicant's 2017 right shoulder injury and 2% permanent disability for applicant's 2019 right shoulder injury. The permanent disability findings were after apportionment based upon Dr. McCoy's reporting. It is from this Joint Findings & Award that petitioner seeks reconsideration.

### **III.** **DISCUSSION**

#### **A. THERE IS EVIDENCE OF A SPECIFIC INJURY ON MAY 14, 2019**

Petitioner contends that there was no specific incident on May 14, 2019 which caused injury to the applicant. Petition, page 4, lines 6 thru 9. However, applicant's testimony and medical reports indicate otherwise.

The applicant testified to an injury on May 14, 2019. Mr. Rico testified that he injured his ribs, his entire arm, and his hips on that date. (Joint Exh. J, page 36, lines 9 thru 15.) Moreover, Dr. Petrofsky reported a specific incident on May 14, 2019 when the applicant was reaching up to install tile and he felt pain. (Joint Exh. E, page 1.)

Additionally, Dr. Bell reported that the applicant had a worsening of pain and weakness while doing his normal work duties on May 14, 2019 such that he

had to stop work. (Joint Exh. D, pages 2 and 20.) Specifically, Dr. Bell stated in his report, "The examinee reported to me that he had worsening of the right shoulder pain and weakness when he was performing his duties at work." (Joint Exh. C, page 6, lines 22-25, page 7, line 1.) This was after the applicant had been back at work for five months following the 2017 injury.

Lastly, Dr. McCoy states that the applicant reinjured himself on May 14, 2019 while doing his usual and customary work. (Joint Exh. B, page 11.) As such, medical reports from both QMEs and the primary treating physician indicate that there was an increase in pain and symptomology on May 14, 2019 while the applicant was working.

**B. THE COURT FINDS DR. MCCOY'S REPORTING MORE PERSUASIVE THAN THAT OF DR. BELL**

The crux of petitioner's argument is that the undersigned WCJ should have relied upon Dr. Bell's QME reports instead of Dr. McCoy's QME reports because Dr. Bell's reports constitute substantial medical evidence and Dr. McCoy's do not. Petition, page 1, lines 24 thru 26; page 2, lines] thru 2. However, Petitioner incorrectly states that the undersigned WCJ found Dr. Bell's reports "non substantial medical evidence with regard to causation." Petition, page 4, lines 19 thru 23. There was no such finding by the WCJ. The undersigned WCJ only found Dr. McCoy's reporting to be more persuasive than Dr. Bell's reporting, not that Dr. Bell's reporting was not substantial medical evidence.

It is well settled that the WCJ as the trier of fact has the power to choose from among conflicting medical reports, those which she deems most appropriate (Jones v. Workers' Comp. Appeals Bd. (1968) 86 Cal.2d 476 [33 Cal. Comp. Cases 221]), and the relevant and considered opinion of one doctor may constitute substantial evidence even though inconsistent with other reports in the record. (Place v. Workers' Comp. Appeals Bd. (1970) 3 Cal.3d 372, 378 [35 Cal. Comp. Cases 424]); Patterson v. Workers' Comp. Appeals Bd. (1975) 53 Cal.App.3d 916,921 [40 Cal. Comp. Cases 799].)

Petitioner asserts that Dr. McCoy's reporting is not substantial medical evidence regarding his finding of 20% apportionment to the May 14, 2019 injury. Petition, page 7, lines 7 thru 10. Petitioner further asserts that Dr. McCoy's apportionment analysis was akin to a "bare legal conclusion." Petition, page 7, lines 10 thru 21. The undersigned WCJ disagrees.

To constitute substantial evidence, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604,621 (Appeals Board en bane).)

Dr. McCoy issued two QME reports. The first evaluation report is dated May 19, 2023. (Joint Exh. B.) The second supplemental report is dated August 15, 2023. (Joint Exh. A.) Petitioner admits that Dr. McCoy undertook a thorough review of Applicant's medical history but states the apportionment analysis was conclusory. Petition, page 6, lines 24 thru 25. The undersigned WCJ, again, disagrees.

In addition to taking a thorough review of Applicant's medical history, Dr. McCoy also based his apportionment analysis on review of two MRIs of applicant's right shoulder and Dr. Peterson's treatment reports. (Joint Exh. B, page 12.) The first MRI was on January 11, 2018 and the second was on September 27, 2019. Dr. McCoy found a difference in the MRIs which supported his apportionment analysis. (Joint Exh. A, page 2.) The 2018 MRI (taken before the May 14, 2019 injury) and the 2019 MRI (taken after the May 14, 2019 injury) show objective changes in the applicant's right shoulder which supported a new and distinct injury resulting in the applicant moving forward with shoulder surgery. (Id. at pages 2 thru 3.) Dr. Peterson's review of the September 27, 2019 MRJ notes " ... this does show some progressive change in comparison to the MRJ dated January 11, 2018." (Joint Exh. F, page 3.) This reporting in conjunction with the diagnostics and Dr. McCoy's thorough review of Applicant's medical history, led him to apportion 20% of applicant's disability to the May 14, 2019 injury. (Joint Exh. B, page 12.) Based on the above, the undersigned WCJ continues to find Dr. McCoy's reporting to be substantial medical evidence regarding apportionment.

Dr. Bell's reporting is less persuasive due to contradictions in his reporting and failure to discuss the diagnostics in depth. In his August 26, 2022 report, Dr. Bell focuses his causation argument on the applicant telling him that he did not have a "specific injury" on May 14, 2019, but thereafter documents right shoulder and upper extremity symptoms while applicant was performing work on that day. (Joint Exh. D, page 20.)

And, most significantly, Dr. Bell does not fully discuss the progressive changes in MRJ findings from 2018 to 2019 in his report or his deposition

transcript. Dr. Bell apportions 100% of applicant's shoulder disability to the 2017 injury because the "May 14, 2019 symptoms reported by the applicant were persistent symptoms related to his previous specific fall at work on July 27, 2017." (Id. at page21.) His analysis appears mostly based on applicant's statements to him.

Here, Dr. McCoy's reporting is consistent, thorough and objective. Based on the record as a whole, and pursuant to the discretion ascribed to the trial judge, it is determined that the opinion of Dr. McCoy is considered to be substantial medical evidence and most persuasive.

**IV.**  
**RECOMMENDATION**

It is respectfully recommended that the Petition for Reconsideration be denied.

Date: January 23, 2024

**Heidi K. Hengel**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE