

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

**ESTHER KIM, *Applicant***

**vs.**

**COUNTY OF KERN, permissibly self-insured, self-administered, *Defendant***

**Adjudication Number: ADJ10466043**

**Bakersfield District Office**

**OPINION AND DECISION  
AFTER  
RECONSIDERATION**

We previously granted defendant's Petition for Reconsideration (Petition) 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 and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on May 26, 2023, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her cervical, thoracic, and lumbar spine, and to her shoulders, elbows, wrists, and hands; that the injury caused 74% permanent disability; and that the reports from chiropractic qualified medical examiner (QME) Joel W. Bird, D.C. are substantial medical evidence.

Defendant contends that the reports from QME Dr. Bird are not substantial evidence that applicant sustained injury AOE/COE to her thoracic and lumbar spine; that applicant's grip loss is not an appropriate factor of impairment to be included in the rating of applicant's permanent disability; and that the reports from QME Dr. Bird are not substantial evidence regarding the issue of apportionment.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We did not receive an Answer from applicant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&A.

### **BACKGROUND**

Applicant claimed injury to her neck, bilateral shoulders, bilateral elbows, bilateral hands, bilateral wrists, thoracic spine, lumbar spine, and bilateral knees while employed by defendant as a social services worker during the period from June 1, 1993, through July 28, 2017.

QME Dr. Bird evaluated applicant on March 2, 2017. The doctor examined applicant, took a history, and reviewed the record of medical treatment applicant received during the period from May 31, 2006, through July 26, 2016. (See App. Exh. 2, Joel W. Bird, D.C., March 2, 2017, pp. 2 – 48.) He stated that applicant’s injury was the result of her employment with defendant but her condition was not yet permanent and stationary. ( App. Exh. 2, pp. 74 – 75.)

Dr. Bird re-evaluated applicant on October 18, 2017. (App. Exh. 3, Joel W. Bird, D.C., October 18, 2017.) Dr. Bird again took a history, reviewed additional medical records of treatment applicant received during the period ending August 23, 2017 (See App. Exh. 3, pp. 2 – 55), and conducted an orthopedic examination. (See App. Exh. 3, pp. 63 – 73.) Regarding apportionment, Dr. Bird stated:

Even though this patient had a motor vehicle accident in 2006 or 2007 and also in 2013; I can find no indication that there were any permanent residual injuries that could be documented by examination or special studies. Therefore, I do not find any need for apportionment of the injuries ... ¶ ... Apportionment will be more specifically addressed in reference to the notices below when the patient becomes permanent and stationary. (App. Exh. 3, pp. 77 – 78.)

On January 4, 2018, Dr. Bird again re-evaluated applicant. He re-examined applicant, took an interim history and reviewed additional medical records. Dr. Bird concluded that applicant’s condition was permanent and stationary, and the diagnoses included:

1. Cervical postural dysfunction/moderate anterior head carriage. (Exam only, no MRI)
2. Facet Syndrome - cervical spine/thoracic spine.
3. Carpal tunnel syndrome bilaterally. (Exam only, no EMG/NCV)
4. Cubital tunnel syndrome left. (Exam only, no EMG/NCV)
5. De Quivering disease/stenosing tenosynovitis bilaterally.
6. Lateral epicondylitis at the elbow bilaterally.
7. Medial epicondylitis at the elbow bilaterally

8. Tendinitis/Tenosynovitis bilateral shoulders / multiple muscles. (MRI)
  9. Impingement syndrome-mild bilateral shoulders. (MRI)
  10. subacromial/sub deltoid bursitis bilaterally right > left. (MRI)
- (App. Exh. 4, Joel W. Bird, D.C., January 4, 2018, p. 90.)

Dr. Bird assigned factors of whole person impairment (App. Exh. 4, pp. 90 – 94) and regarding apportionment he stated:

Again, despite the fact that the patient was involved in a motor vehicle accident that seemed to overlap the patient's first claim for an industrial injury I do not find any evidence that the motor vehicle accident caused any of the abnormal findings that I saw during my examination with Ms. Kim on 03/02/17, 10/19/17 or 01/04/2018. ¶ With the evidence I have been provided I can find no other reason for this patient's musculoskeletal complaints or psychiatric/stress complaints to have any demonstrated cause outside of her employment with this company.  
(App. Exh. 4, p. 95.)

On August 2, 2018, Dr. Bird's deposition was taken. (App. Exh. 6, Joel W. Bird, D.C., August 2, 2018, deposition transcript.) Counsel engaged in ongoing arguments throughout the course of the deposition. Also, Dr. Bird repeatedly did not answer the questions he was asked but he repeatedly reiterated his opinion that applicant sustained one cumulative injury during the course of her employment with defendant. The deposition transcript does not constitute substantial evidence and will not be further addressed.

Dr. Bird evaluated applicant again on January 20, 2022. After examining applicant, taking an interim history, and reviewing additional medical records he concluded that the cumulative injury caused whole person impairment of applicant's cervical, thoracic, and lumbar spine, both shoulders, wrists, and in the form of bi-lateral grip loss. (App. Exh. 5, Joel W. Bird, D.C., January 20, 2022, pp. 42 – 44.) Dr. Bird reiterated his opinion that:

As noted, before please understand that the injuries that the patient currently has are not from acute trauma, they are most commonly associated to cumulative trauma that are sustained by repetitive micro-trauma that we typically see in clerical work, factory work, assembly work etc. ¶ ... Therefore, I find no need for apportionment as the patient's injuries are cumulative in nature and not specific injuries as typically seen in motor vehicle accidents. ¶ With the evidence, I have been provided I can find no other reason for this patient's musculoskeletal complaints or psychiatric/stress complaints to have any demonstrated cause outside of her employment with this company.  
(App. Exh. 5, p. 46.)

The parties proceeded to trial on September 28, 2022. The issues submitted for decision included parts of body injured, permanent disability/apportionment, and whether the reports from QME Dr. Bird constitute substantial evidence. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 28, 2022, pp. 2 – 3.)

### **DISCUSSION**

When a physician's report is well-reasoned, is not speculative, is based on an adequate history and examination, and sets forth the reasoning behind the physician's opinion, not merely his or her conclusions; the report constitutes substantial evidence. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

Here, QME Dr. Bird examined applicant four times over a period of five years. He was provided and reviewed the extensive medical record and in each report Dr. Bird explained the basis for his opinions regarding applicant's disability and the cause of her disability. Also, as quoted above, the doctor explained his reasoning for his conclusion that there was no apportionment to prior injuries or other non-industrial conditions. Having reviewed the trial record we see no evidence that is inconsistent with Dr. Bird's conclusions, and we see no support for defendant's argument that Dr. Bird's reports are not substantial evidence. Obviously, a party's arguments are not evidence and the fact that a party disagrees with a reporting doctor's opinions does not mean the doctor's reports are not substantial evidence. Further, we see no evidence of Dr. Bird's bias, speculation or inexperience, as asserted by defendant. Thus, we agree with the WCJ that the reports from QME Dr. Bird are substantial evidence and that his opinions are an appropriate basis for the WCJ's decision.

Accordingly, we affirm the F&A.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 26, 2023 Findings and Award is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**



*I DISSENT (See Dissenting Opinion),*

**JOSÉ H. RAZO, COMMISSIONER**

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

**December 5, 2023**

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

**ESTHER KIM  
KFL LAW GROUP  
KERN COUNTY COUNSEL**

**TLH/mc**

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

## **DISSENTING OPINION OF COMMISSIONER JOSE RAZO**

For the reasons discussed below I find the opinions of QME Dr. Bird to be biased, argumentative, and unprofessional. Based thereon, I would rescind the F&A, order Dr. Bird removed as the QME in this matter and recommend that the parties have applicant evaluated by an agreed medical examiner or in the alternative that the WCJ assign a regular physician pursuant to Labor Code section 5701. Therefore, I respectfully dissent.

In his reports and deposition testimony Dr. Bird repeatedly expressed his opinion that industrial medical treatment, either from an MPN provider or otherwise, cannot be relied upon. For example, in his October 18, 2017 report Dr. Bird stated:

Unfortunately, the treatment of the motor vehicle accident and the treatment of the worker's compensation claim overlapped, which seemed to confuse some of the treating physicians. ¶ In my opinion this reality made some of the industrial physicians overreact and make comments about worker's compensation fraud that were unsubstantiated, made rash diagnostic decisions as noted in my comments section after the record review and in the long run denied a patient treatment of industrial injuries that were obviously industrially related. (App. Exh. 3, Joel W. Bird D.C., October 18, 2017, p. 79.)

In the January 4, 2018 report Dr. Bird stated:

When reviewing all of the records again it appears obvious that the patient has filed legitimate workers compensation claims years ago due to cumulative trauma and it appears that the doctors at Kaiser Permanente occupational medicine would rather look for any other reason for the patient to have aches or pains as opposed to the obvious reason. That in conjunction with the naivety of one of the Kaiser physicians of how patients obtain treatment in the personal injury arena led to physician bias and incorrect assumptions. Of course, this is only my opinion, however when you see this over and over the trends tend to be accurate. (App. Exh. 4, Joel W. Bird D.C., January 4, 2018, pp. 94 – 95.)

Even though the carrier/adjuster has denied previous claims due to the reporting of the physicians at Kaiser Permanente Occupational Medicine I think that I have shown in my previous reports and this report that their opinions were biased or if not biased at a minimum the reporting was uninformed and lacking attention to detail. (App. Exh. 4, p. 104.)

Dr. Bird's August 2, 2018 deposition testimony included:

And in my -- in my experience, working with many medical doctors, their knowledge of neuromusculoskeletal disorders are quite minimal. They tend to rely on lab work and medication for a mode of treatment. ¶ And just like, I believe it was Dr. Deza, telling her that her ... carpal tunnel was related to a motor vehicle accident and not 20-some-odd years working at a desk over typing all this time. I mean, that's -- that's just, in my opinion, bias and illogical.  
(App. Exh. 6, Joel W. Bird D.C., August 2, 2018, p. 11.)

A. In my experience with industrial clinics and even knowing a few doctors that work in industrial clinics, they -- let's just say their attention to detail is boring. Okay. So if -- for example, the situation with Dr. Deza, "It can't be cumulative trauma, but we're going to treat you anyhow." It doesn't make a lot of sense to start with. And it only addresses the wrists and hands, but she's having a problem with her elbows, her shoulders. And that needs to be addressed at a later time. That could be written in a different claim form. I could see that happening, and it happens quite frequently.  
(App. Exh. 6, p. 29.)

A. Once again, in my opinion, there's a fair amount of bias in the industrial clinics. Again, you go to looking at the record review. When a doctor at an industrial clinic says you have an overuse syndrome, but it's not work-related, is it -- did she get rear-ended 17 times in 17 weeks, so it would be overuse of motor vehicle accidents? No. She got in one motor vehicle accident, she went to the doctor. The doctor -- she reported all of her aches and pains. And if I remember correctly, she didn't even report all of them at the beginning. She started to note that she was still having -- she was having wrist, elbow and arm pain, not just upper trapezius, to that doctor and he got that involved in his notes, even though it wasn't part of the motor vehicle accident.

Q Well, what was it part of?

A Cumulative trauma.

(App. Exh. 6, pp. 61 – 62.)

You know, my office is used by many, many doctors. I can't tell you how many people go in a room and out a room in fifteen minutes and a forty-page report is written. It's insane.

(App. Exh. 6, p. 132.)

Again, these are just examples of Dr. Bird's repeated comments indicating the extent of his bias and prejudice against the industrial medical treatment providers. As such, his reports and testimony are not substantial evidence, and he should be removed from his position as the QME in this matter.

For these reasons, I disagree with the majority and I dissent.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



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

**December 5, 2023**

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

**ESTHER KIM  
KFL LAW GROUP  
KERN COUNTY COUNSEL**

**TLH/mc**

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



**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

**I. INTRODUCTION:**

Petitioner, Defendant County of Kern, seeks relief from the May 16, 2023, Findings and Award (Findings) by filing a timely, verified Petition for Reconsideration (Petition).

Applicant, Esther Kim, 58 years old on the last day of injury, while employed over the period from June 1, 1993, to February 16, 2016, as a social services worker, sustained injury to the neck, both shoulders, both hands, and both wrists arising out of and in the course of employment by the County of Kern. Applicant also claimed injury to both elbows, both knees, the lumbar spine, and the thoracic spine.

The Petition's listing of statutory authority for filing is consistent with Labor Code § 5903, sections (a), (c), and (e) since it recites those provisions.

The Petition contends, generally, that the Award has an incorrect determination of permanent disability.<sup>1</sup>

Specifically, the Petition claims:

that the Award should not have found injury to the thoracic spine and lumbar spine;<sup>2</sup>

that the Award should not have included grip loss in the rating;<sup>3</sup> and that the Award should not have accepted Dr. Joel Bird's apportionment determination.<sup>4</sup>

**II. FACTS:**

Applicant suffered an admitted injury over the period from June 1, 1993 to February 16, 2016, to both shoulders, both hands, and both wrists, and claimed additional injury to both elbows, both knees, the lumbar spine, and the thoracic spine while working as a social services worker for Defendant.

The case was tried on September 28, 2022. Applicant testified. The parties were given time to file and respond to briefs. A formal rating was issued on February 15, 2023, and the matter was submitted seven days later.

A Findings and Award issued on May 16, 2023.

---

<sup>1</sup> Petition, p. 3, lines 14-17.

<sup>2</sup> Petition, p. 3, lines 18-19.

<sup>3</sup> Petition, p. 6, line 3.

<sup>4</sup> Petition, p. 7, lines 7-8.

Defendant petitioned for reconsideration of this Order on Monday, June 12, 2023<sup>5</sup>

### **III. DISCUSSION:**

#### **THORACIC AND LUMBAR SPINE**

The petition argues that the Award should not have found injury to the thoracic spine and lumbar spine.<sup>6</sup> The Petition states that this was based on the January 20,

2022, report of Dr. Joel Bird (Applicant's Exhibit 5), who made "no effort to explain what functions of the Social Services Worker position are injurious to either the thoracic spine or lumbar spine."<sup>7</sup>

In this report, Dr. Bird does note the work functions that make the thoracic pain worse in the fifth paragraph (marked as "4") on page 25. Dr. Bird notes the work functions that make the lumbar pain worse in the sixth paragraph, which extends to page 26. Dr. Bird has explained what functions of Applicant's work duties are injurious to the thoracic and lumbar spine.

#### **GRIP LOSS**

The Petition argues that the Award should not have included grip loss in the rating.<sup>8</sup> It bases this on the position that the rating "is grossly inflated and entirely inconsistent with the evidence that she was able to continue to perform those same job duties after the injury with minimal conservative medical treatment and no surgeries."<sup>9</sup>

This argument ignores the fact that workers will continue to do their job duties while in pain since they wish to keep their job. Dr. Bird found pain in both wrists and hands.<sup>10</sup> He then diagnosed de Quiverians disease<sup>11</sup> and gave impairment ratings for both grip loss readings.<sup>12</sup> Including these impairments in the rating was not an error.

---

<sup>5</sup> The twenty-fifth day after the Award was Saturday, June 10, 2023, so the filing on Monday was still timely.

<sup>6</sup> Petition, p. 3, lines 18-19.

<sup>7</sup> Petition, p. 3, lines 22-25.

<sup>8</sup> Petition, p. 6, line 3.

<sup>9</sup> Petition, p. 6, lines 24-27.

<sup>10</sup> Exhibit 5, Dr. Bird report January 20, 2022, p. 35, para. 2-7.

<sup>11</sup> Id. at p. 41, para 2.

<sup>12</sup> Id. at p. 44, para. 4 to 13.

## APPORTIONMENT

The Petition argues that that the Award should not have accepted Dr. Joel Bird's apportionment determination.<sup>13</sup> The Petition bases this on Applicant having the symptoms after stopping work.<sup>14</sup> This ignores the possibility that an injured worker will have continuing symptoms during work when an industrial injury is left untreated, as was the case with Applicant.

The Petition then states that this problem with Dr. Bird's report could be cured by appointment of a new QME in orthopedic medicine.<sup>15</sup> Defendant could have filed a Form 31.7 with the Medical Unit to get such an additional QME but did not.

### **IV. RECOMMENDATION:**

Based on the foregoing, it is recommended that the Petition for Reconsideration be denied.

DATE: JUNE 22, 2023

DONALD H. JOHNSON

Workers' Compensation  
Administrative Law Judge

---

<sup>13</sup> Petition, p. 7, lines 7-8.

<sup>14</sup> Petition, p. 7, lines 18-27.

<sup>15</sup> Petition, p. 8, lines 8-10.