

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

**FOROUGH DOURAGHI-ZADEH, *Applicant***

**vs.**

**COUNTY OF SAN DIEGO; permissibly self-insured, *Defendants***

**Adjudication Number: ADJ1805830 (SDO 0354787)  
San Diego 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 reasons stated in the WCJ's report, we agree that the opinion of agreed medical examiner (AME) Beth Bathgate, M.D., is substantial medical evidence upon which the WCJ properly relied. To be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416–17, 419 [33 Cal.Comp.Cases 660].) A physician's report must also 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. (*Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.)) Moreover, the WCJ properly relied upon the opinion of the AME, who the parties presumably chose because of the AME's expertise and neutrality. The WCJ was presented with no good reason to find the AME's opinion unpersuasive, and we also find none. (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

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/ CRAIG SNELLINGS, COMMISSIONER

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

**NOVEMBER 12, 2021**

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

**FOROUGH DOURAGHI-ZADEH  
LAW OFFICE OF MICHAEL K. WAX  
COUNTY COUNSEL**

**PAG/bea**

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

**REPORT AND RECOMMENDATION OF WORKERS'  
COMPENSATION JUDGE ON PETITION FOR  
RECONSIDERATION**

**I.  
INTRODUCTION**

- |    |                             |  |
|----|-----------------------------|--|
| 1. | Applicant's Occupation:     | Licensed Mental Health Clinician             |
|    | Applicant's Age:            | 69   |
|    | Date of Injury:             | 10/27/2003 to 10/27/2004                     |
|    | Parts of Body Injured:      | Bilateral shoulders, arms, elbows and wrists |
| 2. | Identity of Petitioner:     | Applicant                                    |
|    | Timeliness:                 | Petition was timely filed on 09/16/2021      |
|    | Verification:               | Petition was verified.                       |
| 3. | Date of Findings and Order: | August 23, 2021                              |
| 4. | Petitioner's Contentions:   |  |

The WCJ's decision is in error because that (1) By the Findings and Award, the Board acted without or in excess of its powers; (2) The Findings of Fact do not support the Award; and (3) The Findings of Fact are not supported by substantial evidence.

The Petition for Reconsideration was not signed by Petitioner's attorney. It also doesn't appear that the Petition for Reconsideration was ever served on the Defendant.

**II  
STATEMENT OF FACTS**

The facts are not in dispute. The Petitioner filed a continuous trauma claim for injuries to her bilateral shoulders, bilateral elbows, bilateral arms and bilateral wrists. The date of injury was stipulated to being October 27, 2003 to October 27, 2004. The claim was admitted to by the Defendant.

Of significance, is the fact, that the Petitioner also had another claim for a cervical injury with the same Defendant. That claim was settled in another matter. The reason that it is significant is that the medical evidence demonstrates that this other cervical injury was found to be causative of impairment in this claim. That will be discuss later.

The Petitioner had as her primary treating physician (PTP), Dr. Paul Murphy, M.D. The parties utilized Dr. Beth Bathgate, M.D. as an AME in the case.

Both the PTP and the AME authored several reports. These were admitted into evidence at the trial.

At the trial, the Petitioner had an opportunity to testify but choose not to. Instead, the parties stipulated that if Petitioner did testify she would say that the injuries negatively affected her life and standard of living.

The main issue for trial was whether the AME whose report rated to 37% was substantial medical evidence or was the PTP's reporting which rated to 45% was substantial medical evidence? The WCJ reviewed all of the reporting.

After the trial, the WCJ determined that the reporting of AME Dr. Beth Bathgate was clearly more persuasive. The Petitioner had produce no evidence that she should not be bound by her agreement to use Dr. Bathgate. Moreover, the PTP was not substantial medical evidence by his failing to addressing the effects of the injuries on the Petitioner's ADLs and with his erroneous conclusions concerning apportionment. It is from these findings that the Petitioner is aggrieved and files this Petition for Reconsideration.

### III

#### DISCUSSION

##### A. THE FINDINGS AND AWARD ARE SUPPORTED BY SUBSTANTIAL MEDICAL EVIDENCE

It appears from the Petition for Reconsideration that the Petitioner's only basis for relief is that she did not like the AME's opinion because it was lower rating than that of the PTP. The AME Dr. Beth Bathgate rated to 37% and the PTP, Dr. Murphy rated slight higher at 45%. Fundamentally, that is an 8% difference between the two ratings. Simply wanting the reporting that is higher is not a valid reason or argument on substantiality.

The Petitioner ignores several very important factors. First and foremost, the parties agreed to utilize Dr. Bathgate as an AME. The AME's opinion should be followed unless it is not substantial medical evidence. "...we begin by presuming that the agreed medical examiner has been chosen by the parties because of his expertise and neutrality. Therefore his opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive." Power v. WCAB 179 Cal. App. 3d 775.

In this case, the only reason given in support of her position by Petitioner, is that the PTP Dr. Murphy saw her more times than did the AME Dr. Bathgate. It is not a numbers game. There must be a legitimate reason why the AME should not be followed. There was no argument at all presented that attacked the substantially

of the AME's opinion. There were no reasons cited by Petitioner that AME Dr. Bathgate was not substantial medical evidence.

When the reports are actually carefully evaluated for substantiality, AME Dr. Bathgate is the only opinion that follows the AMA Guidelines. Dr. Bathgate goes through in detail, the medical history, subjective factors and objective factors in arriving at her conclusions. She cites the AMA Guides. She discusses how the injury effects the Petitioner's Activities of Daily Living. She has a well-reasoned discussion of how and why the Petitioner's other injuries involving her cervical injury impacted the findings of impairment in this case. Her conclusions concerning apportionment are well reasoned and explained.

Specifically, the Petitioner suffered from a double crush effect from the combined effect of her injuries; the cervical injury from the other case and the impairment to her wrists in this case. Dr. Bathgate reasonably points out that due to the effects of the cervical injury, and the CTS in this case, that 50% of the impairment to the wrists is caused by each respective injury to her body. This analysis justifies the AME's apportionment.

The PTP Dr. Murphy does not discuss how the Petitioner's injuries affected her Activities of Daily Living. She chose not to testify on her behalf on that issue as well. Dr. Murphy while acknowledging the effect of the cervical injury and the cervical radiculopathy and its effects on the wrist impairment, then erroneously concludes that there is no apportionment. That is not substantial medical evidence. It also explains why his report rates higher in this matter.

When the ratings are reviewed in detail, it appears that there is little or no difference between the two reporters. An 8% difference is reasonable under the circumstances. What carries the day, is that Dr. Bathgate was the AME. The Petitioner agreed to go with Dr. Bathgate. Unless Dr. Bathgate was not substantial medical evidence, there is no justification to allow her to back out of that agreement. It most certainly is not reasonable to allow that result simply based upon how many times a doctor sees someone.

**IV.**

**RECOMMENDATION**

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

DATE: September 22, 2021

**Jeffrey J. Bruflat**  
WORKERS' COMPENSATION JUDGE