WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AMADA JIMENEZ HERRERA, ***Applicant***

vs.

SWEET T'S RESTAURANT + BAR;
LP/ ILLINOIS MIDWEST INSURANCE AGENCY, LLC, on behalf of PROCENTURY INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ17939202
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.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

[1] All further statutory references are to the Labor Code unless otherwise noted.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 14, 2025, and 60 days from the date of transmission is January 13, 2026. This decision is issued by or on January 13, 2026, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 14, 2025, and the case was transmitted to the Appeals Board on November 14, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 14, 2025.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 12, 2026

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

AMADA JIMENEZ HERRERA
PACIFIC ATTORNEY GROUP
D'ANDRE LAW

JMR/*pm*

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION
and
NOTICE OF TRANSMISSION TO APPEALS BOARD

I
INTRODUCTION

Defendant, Illinois Midwest Insurance Agency, LLC on behalf of ProCentury Insurance Company, through their counsel, Aleksandr Kharshan, filed a verified, timely Petition for Reconsideration challenging the Findings and Award issued by Presiding Judge Katie F. Boriolo on October 8, 2025.

The applicant sustained an accepted industrial injury on June 7, 2022 to her right shoulder during the course of her employment as a dishwasher/kitchen helper for the employer, Sweet T's Restaurant and Bar, L.P. The applicant slipped and hit her arm on the sink. She was age 46 on the date of injury.

In a Findings and Award dated October 8, 2025, the court relied on the Qualified Medical Evaluator (QME), Daniel Solomon, M.D. to award 22% permanent disability, after apportionment with a permanent and stationary date of November 8, 2024. Applicant was found to be temporary totally disabled from April 12, 2023 through November 7, 2024 at a rate to be determined by the parties with jurisdiction reserved in the event of a dispute.

Petitioner contends:

a. Labor Code Section 4453(c) is the statutory guide for arriving at an average weekly earnings rate, and a corresponding temporary disability rate. *Petition p. 2, line 16, p- 3, line 6.*
b. The evidence in this case supports a permanent and stationary date of August 20, 2024. *Petition p. 3, line 7- p. 4, line 7.*
c. While the trier of fact is granted the power to choose amongst conflicting medical reports, depending on the substantial medical evidence threshold of those conflicting reports, the trier of fact cannot disregard the AMA Guides on which disability is based. *Petition p. 4, line 8- p. 5, line 3.*
d. Numerous misstatements in applicant's July 25, 2025 Trial Brief impermissibly gave the wrong impression of case status or otherwise implied misleadingly implied defendant's wrongdoing. *Petition p. 5, lines 4-26.*

II
FACTS

Applicant sustained an industrial injury on June 7, 2022 to her right shoulder during the course of her employment as a dishwasher/kitchen helper.

Treatment has been rendered by Dr. Christopher George, in Occupational Medicine, commencing on June 13, 2022. (App. Exh. 3.) According to Dr. George, the applicant became permanent and stationary on August 20, 2024. (App. Exh. 21/Def. Exh. A.) Dr. George provided a Whole Person Impairment of 11% based on loss of range of motion. (Id.)

The parties utilized Daniel Solomon, M.D. as the Qualified Medical Evaluator. In his initial evaluation, he reviewed the relevant medical records, including from the applicant's prior industrial injury of 2013, and recommended "a right shoulder MRI to further evaluate success or failure of her subscapularis repair". (App. Exh. 1/ Def. Exh. D.)

She was not yet at maximum medical improvement despite the surgical intervention and extensive physical therapy. (Id.)

After review of an MRI dated March 28, 2024, Dr. Solomon noted that the applicant had a recurrent tear of the subscapularis. (Def. Exh. C.) Subsequently, Dr. Solomon completed a reevaluation and issued a report therefrom on November 8, 2024. (App. Exh. 2, Def. Exh. B.) Dr. Solomon opined that "there is little chance that her subscapularis is able to repaired with any type of revision procedure" and deemed her permanent and stationary on the date of his evaluation, November 8, 2024. (Id). Based on Chapter 16 of the AMA Guides, specifically limited range of motion and a strength deficit, Dr. Solomon issued a final impairment rating of 15%, inclusive of a 2% pain add on. (Id.)

This matter proceeded to trial and was submitted on July 16, 2025 regarding body parts, earnings, temporary disability, permanent and stationary date, permanent disability, need for further medical treatment, attorney fees and a temporary disability overpayment.

In a Findings and Award dated October 8, 2025, the applicant was awarded 22% permanent disability with a permanent and stationary date of November 8, 2024. Applicant was found to be temporary totally disabled from April 12, 2023 through November 7, 2024 at a rate to be determined by the parties with jurisdiction reserved in the event of a dispute. It is from this Award that petitioner seeks reconsideration.

III
DISCUSSION

a. EARNING CAPACITY MOST ACCURATELY REFLECTS APPLICANT'S ACTUAL EARNINGS FOR PURPOSES OF TEMPORARY DISABILITY.

Labor Code section 4653 provides,

> "If the injury causes temporary total disability, the disability payment is two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market."

Labor Code section 4453(c)(4) sets forth

> "Where the employment is for less than 30 hours per week, or wherefor any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or injury, due consideration being given to his or her actual earnings from all sources and employments."

The proper method of calculating average weekly earnings is a question of fact for the Workers' Compensation Appeals Board (WCAB). (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal. App. 3d 901, 908.) If it is "unreasonable or unfair to use actual earnings at the time of injury to calculate temporary disability benefits, earning capacity should be used to calculate benefits". (*Grossmont Hospital v. Workers' Comp. Appeals Bd. (Kyllonen)*(1997) 59 Cal. App. 4th 1348.)

As the California Supreme Court explained, "Earning capacity is not locked into a straitjacket of the actual earnings of the worker at the date of injury; the term contemplates his general overall capability and productivity; the term envisages a dynamic, not a static, test and cannot be compressed into earnings at a given moment of time. The term does not cut 'capacity' to the procrustean bed of the earnings at the date of injury." (*Goytia v. WCAB* (1970) 35 CCC 27, 30.) Although due consideration must be given to an employee's actual earnings from all sources and employments, pre-injury earnings constitute one factor, but not the exclusive factor. (*Id.* at 31-32.) Temporary disability is intended to serve as a substitute for wages lost by the employer during the time she is actually incapacitated from working. (*City of Martinez v. Workers' Comp. Appeals Bd.* (2000) 85 Cal. App. 4th 601, 608.)

In this case, the applicant continued to work after her injury for nearly a year until she stopped working to undergo surgery. She credibly testified that she received an increase in hourly wages during that time period, from $18 an hour to $20 an hour. (Def. Exh. J, Deposition p. 21, lines 13-18.)

As stated in the Court's written opinion,

> "The court finds it appropriate to award indemnity based upon the applicant's actual lost wages during the period of her incapacity, as the wages earned during the year prior to her injury no longer reflect her true earning capacity. However, the current evidentiary record is insufficient to determine her exact earnings at that time. Applicant's reliance on the pay statement history at page 56 of Applicant's Exhibit 25, while noted, is not substantial as it is unclear as to what exact periods these payments covered. This sole issue is deferred upon further development of the record. The parties are encouraged to informally resolve this issue with jurisdiction reserved."
> (Opinion on Decision)

Given the post-injury wage increase, the court determined that utilizing her income for the year prior to her injury does not provide an accurate reflection of the applicant's actual earnings. The parties were directed to further develop the record and any determination regarding Average Weekly Wage was deferred with jurisdiction reserved.

b. THE REPORTING OF QME DR. SOLOMON CONSTITUTES SUBSTANTIAL MEDICAL EVIDENCE TO SUPPORT A P&S DATE OF NOVEMBER 8, 2024 AND A PERMANENT DISABILITY RATING OF 22%.

An injured worker becomes permanent and stationary when either no further medical treatment is indicated, or when the possibility of improvement of the injured worker's condition, by further medical treatment, has become remote. (*General Foundry Service v. Workers' Comp. Appeals Bd. (Jackson)* (1986) 42 Cal.3d 331, 339.)

As the Court of Appeal wrote *in E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928, "In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. Further,

a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions."

Here, the PTP Dr. George diagnosed the applicant with merely "Right Subscapularis Tendon Tear, Subseq." (App. Exh. 21/Def. Exh. A.) Regarding her permanent and stationary status, Dr. George opined, "In my opinion the patient has reached Maximal Medical Improvement (MMI) and is deemed Permanent and Stationary." (App. Exh. 21/Def. Exh. A.) It is unclear if Dr. George reviewed the applicant's most recent MRI of March 28, 2024 or if its findings were determinative in his P&S determination. Absent any explanation or rationale, his conclusion is baseless.

On the other hand, the QME Dr. Solomon stated

> "My assessment is that she has not recently been seen by her orthopedic surgeon, Dr. Sandoval, with her failed subscapularis repair and subscapularis atrophy. It is little chance that her subscapularis is able to be repaired with any type of revision procedure. Therefore, I would make her permanent and stationary."
> (App. Exh. 2/ Def. Exh. B.)

Based on the record, it was determined that Dr. George's opinion regarding permanent and stationary status is conclusory and not substantial medical evidence. Dr. George does not address applicant's development of subscapularis atrophy or why the applicant's condition was unlikely to change substantially in the next year with or without medical treatment. (Cal. Code Regs., tit. 8, §10152.)

Petitioner's claim that the Court's finding of permanent and stationary date constitutes a "denial of due process" is meritless. (Petition p. 4, line 3.) The defendant was not prevented from requesting a supplemental report and cross-examining the QME or PTP regarding their permanent and stationary opinions. They chose not to do so.

Petitioner argues that Dr. Solomon did not abide by the AMA Guides in his application of decreased strength deficit with decreased motion. (Petition p. 4, lines 19-20.)

This contention ignores that a physician may utilize any chapter, table or method in the AMA Guides that most accurately reflects the injured employee's impairment. *(Almaraz/Guzman II* (2009) 74 Cal. Comp. Cases 1084 at 1114.) A physician may employ the four corners of the AMA guides in reporting an applicant's WPI as long as they provide appropriate justification for doing so. Impairment percentages estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work. (AMA Guides, p. 4.)

In his evaluating report of November 8, 2024, Dr. Solomon administered comprehensive objective testing to support his diagnosis of:

> "Right shoulder failed arthroscopic repair with limited mobility, decreased strength and MRI confirmation from March 2024 that she has a failed subscapularis repair with subscapularis atrophy noted on my supplemental report, April 26, 2024."
> (App. Exh. 2/Def. Exh. B.)

Dr. Solomon noted the applicant's activities of daily living limitations regarding her arm, including not being able to raise her arm, using her left hand for toiletry and having a hard time showering. (Id.) Based on these results, Dr. Solomon properly relied on both the applicant's limited range of motion and deficit in strength to most accurately reflect her impairment. His reporting is considered substantial medical evidence and was relied upon.

Lastly, the petitioner asserts that there were "numerous misstatements in Applicant's July 25, 2025 Trial Brief impermissibly gave the wrong impression of case status or otherwise implied misleadingly implied defendant's wrongdoing". (Petition, p. 5, lines 4-6.)

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Labor Code §5952(d).) The parties' trial briefs are not evidence. They were neither cited nor relied upon in the Court's written opinion. Any request for judicial notice of applicant's alleged misstatements in their trial brief is improper. (Petition, p. 6, line 1.)

IV.
RECOMMENDATION

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

V.
NOTICE OF TRANSMISSION

Pursuant to Labor Code section 5909, the parties and the appeals board are hereby notified that this matter has been transmitted to the appeals board on date set out below.

Dated: November 14, 2025

Katie F. Boriolo
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE