WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOSE GAMBOA, *Applicant*

vs.

SAPUTO CHEESE USA, INC.;
SEDGWICK, *Defendants*

Adjudication Numbers: ADJ15999814, ADJ16759614
Fresno 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.

I.

Former Labor Code 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, Labor Code 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.

Under Labor Code 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 April 25, 2025, and 60 days from the date of transmission is June 24, 2025. This decision is issued by or on June 24, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 April 25, 2025, and the case was transmitted to the Appeals Board on April 25, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on April 25, 2025.

II.

In its original Petition for Reconsideration, defendant requested that it be allowed to submit an amended Petition once it had received the transcript of the proceedings. We grant defendant's request and have accepted and considered the amended Petition as a supplemental pleading under our authority in WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964).

Generally, there are two uses of subrosa video in workers' compensation. First, subrosa can be sent to a medical evaluator with a request that the evaluator review any medical conclusions reached in light of the activities seen in the video. In such cases, the subrosa video is being used as medical evidence to establish the nature and extent of disability. Because the video is only

germane to the medical expert's opinion, and unless a party objects to the expert's review, the video need not be admitted at trial because the purpose of the video is solely to affect the medical expert's conclusions. Here, the parties stipulated that AME Dr. Mandell was not provided with the subrosa videos.

A second use of subrosa occurs where defendant seeks to impeach applicant's credibility through activities seen in the video, which defendant argues are incongruent with applicant's testimony or other evidence. In such cases the video is no longer being used as medical evidence, but instead it is being used as factual evidence of credibility, which requires that the video be in evidence and that the judge review it. (Cal. Code Regs., tit. 8, § 10787(c)(6); *Hamilton v. Lockheed Corporation (Hamilton)* (2001) 66 Cal.Comp.Cases 473, 478 (Appeals Board en banc); see also *Morgan v. United States* (1936) 298 U.S. 468, 481["The one who decides must hear."].) When deciding reconsideration, the Appeals Board is required "to achieve a substantial understanding of the record[.]" (*Allied Compensation Ins. Co. v. Industrial Acc. Com.* (1961) 57 Cal.2d 115, 120.)

Here, defendant contended in its original Petition that the subrosa video was relevant to impeach applicant's testimony. However, as pointed out by the WCJ, we note that defendant's arguments with respect to the subrosa were only raised in its original Petition and not in its amended Petition after the transcript had been prepared. We agree with the WCJ's analysis that defendant did not demonstrate that the subrosa video was relevant as evidence of impeachment. In addition, we have reviewed the transcript, and it does not change our conclusion that the WCJ's decision is supported by substantial medical evidence.

Accordingly, we deny the Petition for Reconsideration.

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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 24, 2025

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

JOSE GAMBOA
LAW OFFICES OF TIMOTHY BARTELL
D'ANDRE LAW

JMR/abs

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 AND AMENDED PETITION FOR RECONSIDERATION – TRANSMITTAL DATE: 4/25/25

I

INTRODUCTION

1. Applicant's Occupation:	Production
Age at Injury:	61
Dates of Injury:	4/23/21, CT ending 9/9/21
Parts of Body Alleged Injured:	ADJ15999814 - left should & Psych; ADJ16759614– bilateral Shoulders
Manner in Which Injury Alleged Occurred:	machine, psych a compensable consequence. ADJ16759614 – CT found to bilateral shoulders by AME Peter J Mandell MD
2. Identity of Petitioner:	Defendant Stonington Ins Co, Admin by Sedgwick Claims
Timeliness:	The Petition is timely. The Amended Petition is timely.
Verification:	The Petition is verified. The Amended Petition is verified.
3. Date of Award:	3/31/25, issued 4/2/25

4. Petition contents:
   - **I. Dr. Mandell's Alternative Impairment Rating is not Substantial Medical Evidence (Listed in Both Petitions)**
     - **A. Dr. Mandell did not conduct an adequate examination to justify the use of an alternative impairment rating (Only argued in the original Petition)**
     - **B. Dr. Mandell's alternative impairment rating is speculative (Argued in both Petitions)**
     - **C. Dr. Mandell's alternative impairment rating is based on facts no longer germane (Only argued in the Amended Petition)**
   - **II. The subrosa video is relevant and was improperly excluded (Only argued in the Original Petition)**
   - **III. Dr. Mandell's opinion on apportionment is substantial (Only argued in the Original Petition)**

II

FACTS

Dr. Peter Mandell is the AME for both cases. Dr. Mandell prepared two reports: 8/19/22, EAMS Doc ID #55457193, and 3/29/24, EAMS Doc ID # 55457194. Dr. Mandell was also deposed on 11/1/24, EAMS Doc ID # 44547195.

An MSC took place in this case on 8/6/24. The MSC went off calendar to allow Defendant to cross examine the AME. Defendant obtained subrosa of Applicant during the period of 10/23/24-10/26/24. The subrosa was received by Defense Counsel on or about 10/28/24.

Defense Counsel reviewed the subrosa before the AME deposition. Defense Counsel asked AME Dr. Peter Mandell hypothetical questions about activities seen in the subrosa, as well as other topics at his deposition. The AME deposition was on 11/1/24. Defense Counsel provided the subrosa to Applicant Attorney on 11/12/24. This case was set for trial at an MSC on 12/3/24. AME Dr. Mandell has not seen the subrosa at issue.

III

DISCUSSION

I. Dr. Mandell's Alternative Impairment Rating (Listed in both Petitions)

This section of the original Petition for Reconsideration only contains legal citations defining substantial medical evidence. The Amended Petition for Reconsideration does not contain any information in this section.

A. Dr. Mandell's examination and use of an alternative impairment rating. (Original Petition only)

Defendant argues Dr. Mandell cannot make an alternative impairment rating because he was not provided with a functional capacity evaluation (hereinafter referred to as FCE), and Dr. Mandell did not review and EMG. Dr. Mandell testified Applicant's problems are in his upper extremities, and as nearly as he could tell, he was putting forth full effort. But we don't have a good way of double-checking that short of doing a formal functional capacity evaluation (Dr. Mandell Deposition Transcript, EAMS Doc ID # 44547195, pg7; 6-10). On page 12; 5-9, Dr. Mandell was asked if any objective testing was done to confirm Applicant's trouble using zippers or buttons. Dr. Mandell explained he doesn't have that ability. That's why he was talking about a functional capacity evaluation. He went on to state that would be nice to have if that's a question.

On page 12; 13-20, Dr. Mandell was asked if Applicant exhibited any difficulty with digital dexterity. Dr. Mandell responded with: "Well, that's what zippers, buttons, and that kind of thing is. So, yes. He didn't exhibit that; he told me about that." Defense Counsel responded with: "Circling back to that would be why you would request an FCE?" Dr. Mandell responded with yes.

On page 12; 23 – page 13; 2, Defense Counsel asked Dr. Mandell if there was a pegboard test? Dr. Mandell testified that sounds like something that they do in a functional capacity

evaluation, putting pegs in holes and things of that sort, but I'm not quite sure about that. Dr. Mandell explained on pages 20;16 – page 21;10 that an EMG was not necessary for Applicant's shoulder problems.

Defendant's Petition for Reconsideration incorrectly states on page 7, lines 10-11 that Dr. Mandell made it clear several times throughout the deposition that he needed an FCE to confirm his alternative opinion on impairment. *This is not true*. Even if it were true, Defendant should be estopped from challenging the AME report as not substantial medical evidence on this basis since Defendant failed to authorize the FCE before trial.

B. Dr. Mandell's alternative impairment rating (Both Petitions)

Defendant does not provide a legal basis to support the arguments made in this section of the original Petition, nor the Amended Petition. In the original Petition Defendant argues that sustaining Applicant's trial objections as speculative in 2025, equates to an implicit determination that Applicant's statements about his limitations to Dr. Mandell in the 2024 examination were speculative and unreliable.

Defendant argued at trial that the Court should review the subrosa and determine whether AME Dr. Mandell's Almaraz/Guzman analysis was correct. This court explained to Defendant the application of Almaraz/Guzman is a medical decision. The Court's responsibility as the fact finder is to determine whether the Almaraz/Guzman analysis amounts to substantial medical evidence.

he Court also provided the parties with the case citation of Kusljugic v. Community Assistance for Retarded & Handicapped Inc. (2015 Cal. Wrk. Comp. P.D. LEXIS 323). The Court explained that in the Kusljugic case, the appeals board held that while video could be received for impeachment purposes if proper foundation was established, "because the film had not been reviewed by any physicians, and discovery had closed, the video could not be received or relied on as evidence of the level of the applicant's PD."

In the Amended Petition, Defendant lists questions from the Reporters Transcript. The questions dealt with Defendant's attempt to impeach Applicant. Defendant asked Applicant if he used wax on his windows. Defendant asked Applicant if he lifted a 40 pack of 16.9 fluid ounces of water on 10/26/24. Defendant asked Applicant what weight he considered heavy on 10/26/24. The water pack and weight questions call for speculation given the approximate four month gap between 10/26/24 and the 2/12/25 trial. Never once did Defendant ask Applicant a foundational question such as: Did you tell Dr. Mandell you could not…., and then refer to the subrosa video where that activity may have been performed.

Defendant states: "It strains credulity to believe that the Court would sustain multiple relevance objections to questions that form the foundation of Dr. Mandell's alternative impairment rating and then find that Dr. Mandell's Almaraz/Guzman analysis amounts to substantial medical evidence."

Dr. Mandell made an Almaraz/Guzman impairment analysis within the four corners of the AMA Guides. This analysis is on page 6 of his 3/29/24 report. That's why this Court found that opinion to amount to substantial medical evidence. The questions referred to by Defendant were

irrelevant to permanent disability because Dr. Mandell never reviewed the video, and as phrased, the questions called for speculation. This is not a denial of due process.

Defendant never attempted to impeach Applicant by asking him what he told Dr. Mandell on 3/29/24 and refreshing Applicant's recollection with the report if necessary. Rather Defendant referred to actions or activities that occurred four months before trial. The way the questions were phrased created foundational issue that justified sustaining Applicant's objections.

Defendant's last argument in this section of the Amended Petition is that Dr. Mandell's alternative impairment opinion is speculative since it relies on Applicant's speculative statements. Applicant's statements to Dr. Mandell in March 2024 were not speculative, nor at issue because the subrosa had not been reviewed by Dr. Mandell.

C. Dr. Mandell's alterative impairment rating and germane facts (Amended Petition)

Defendant references a relevance objection that was sustained when Defendant asked Applicant if he was wearing a zip up jacket. Defendant then speculates that the objection was sustained because the facts relied upon by Dr. Mandell are no longer germane. Defendant then goes on to state since Applicant did not answer the question, Applicant failed to meet his burden of proof to rebut the scheduled rating. This Court does not understand this argument.

II. The Subrosa Video (Original Petition)

Defendant argues the subrosa video is relevant to impeachment. Applicant told Dr. Mandell in March 2024 he walked for exercise. The subrosa video shows Applicant at a gym almost seven months later from October 23rd 2024 to October 26th 2024. Applicant did not tell Dr. Mandell he would never go to a gym. Therefore, the subrosa video is not relevant to impeachment because the exercise statement to Dr. Mandell lacks foundation as to time.

The Court reviewed the subrosa video in the presence of all parties. The segments of the video were summarized by the Court in front of the parties. Both parties stipulated to the content of each of the Court summaries.

AME Dr. Mandell never reviewed the subrosa video at issue. For that reason, the only possible relevance of the video at trial, with a proper foundation, was impeachment. The Court explained to Defendant the only potentially relevant impeachment evidence for the subrosa would be if Applicant was videotaped performing activity he told Dr. Mandell he could not perform. The Court asked Defendant whether there was any such evidence on the videos. Defendant did not respond. Therefore, Applicant's relevance objection was sustained. The subrosa video was determined to be irrelevant and excluded from evidence.

III. Dr. Mandell's Apportionment Opinions (Original Petition)

AME Dr. Mandell admits on page 6 of his 3/29/24 report that apportionment in this case is difficult. Dr. Mandell explains that Applicant did have problems with his shoulders even preceding the injury of 4/23/21. The medical records show as far back as 2010 he was having problems with his shoulders. There is a suggestion of shoulder problems in 2019 as well.

Approximately 10% of the causation of his shoulder impairment is a direct result of problems that he had in 2010 and thereabouts.

In his 11/1/24 deposition, Dr. Mandell waived 10% due to 2010 problems. The reason for this is because Applicant had been working for the same employer for over 10 years. This testimony is on page 24; 13-25.

Dr. Mandell then provided the following apportionment opinions:

"Approximately 20% is a direct result of the 4/23/21 injury. Approximately 5% is a direct result of diabetes, which makes shoulder healing more difficult and impairment more probable. Approximately the remainder is a direct result of cumulative trauma on the job to both shoulders."

Dr. Mandell's apportionment opinions do not set forth reasoning to support the conclusory statements. Dr. Mandell does not provide the how and why for the 20% and 75% split for both dates of injury, nor the how and why diabetes makes shoulder healing more difficult and impairment more probable. Therefore, Dr. Mandell's apportionment opinions are not substantial medical evidence.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

William R McClelland
Workers' Compensation Judge

Date: 4/25/2025