

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

JOSE GOMEZ, *Applicant*

vs.

**DAMCO DISTRIBUTION SERVICES, INC.; NEW HAMPSHIRE INSURANCE
COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES,
*Defendants***

**Adjudication Number: ADJ11256141
Oxnard District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Applicant seeks reconsideration of the December 14, 2021 Findings and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant did not sustain an injury arising out of and in the course of his employment during a period of continuous trauma from June 12, 1992 through January 25, 2018.

Applicant contends that the WCJ failed to consider the uncontradicted opinion of applicant's treating physician Dr. Hoa Doan and failed to consider the effect of applicant's arduous job duties. Applicant argues that, pursuant to Evidence Code section 452(d), the WCAB may take judicial notice of a report by Dr. Doan that was not offered as evidence at trial because the document was filed in the electronic adjudication management system (EAMS) and is a court record.

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 below, we will deny reconsideration.

The WCJ summarized the relevant facts as follows:

JOSE GOMEZ...claims in case number ADJ11256141 to have sustained an injury arising out of and in the course of his employment during the period of continuous trauma from 12 June 1992 to 25 January 2018 to his eyes, nose, chest, neck, shoulders, back, stress and psyche.

Additionally, on 06 March 2019, applicant's attorney filed a specific injury claim, bearing case number ADJ11995044 that is alleged to have occurred on 28 February 2003 to his back. In the specific injury claim, applicant alleges that the carrier is State Compensation Insurance Fund (SCIF) but on 05 April 2019, SCIF filed a Petition for Dismissal of Party based on the allegation that SCIF was not the carrier.

This is the second time that this matter has been taken up to the Appeals Board. This case follows from a Decision and Order on Removal dated 26 June 2019 that the CT injury should be tried separately from the specific injury. On remand, after several continuances, the undersigned tried the case. The parties introduced only six exhibits between them: Applicant introduced designated portions of the Kaiser Records as Exhibit 1, designated portions of the records of US Healthworks as Exhibit 2 and a combined exhibit consisting of a Panel from the Medical Unit dated 23 January 2019 and a denial dated 25 January 2018. Defendant offered a designation of the Personnel File as Exhibit A and the parties jointly offered the deposition transcripts of Applicant and a Mr. Lance Mielke that were introduced as Exhibits X and Y, respectively. The latter two joint exhibits also had a video component as they were video depositions taken during the Covid – 19 era closures.

Applicant did not make an effective witness on his own behalf while Mr. Mielke did. The undersigned issued a Findings and Order that applicant "take nothing" due to the lack of evidence.

As correctly pointed out by Applicant's Attorney, another document appears in FileNet, the catalog of documents that are either lodged or filed with EAMS, which, as the Appeals Board is well-aware, is the computerized file and document storage system for both the Appeals Board and the Division of Workers Compensation. This document is correctly identified as a medical report of Dr. Doan who appears to have found the existence of a CT from 12 June 1992 through 25 January 2018. This document is dated 11 April 2018 and provides range of motion figures for the neck and shoulders. Applicant was terminated on 25 January 2018. (Report, pp. 1-2.)

An applicant bears the burden to put forth sufficient evidence to show that a claimed injury was industrially related based on reasonable medical probability. (See § 3600(a)(3); *Rosas v. Worker's Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1702 [58 Cal.Comp.Cases 313].) To be substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and set forth reasoning to support the expert conclusions reached. (*E.L. Yeager 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 (Appeals Board en banc).)

A party can establish that applicant's job involved repetitive mentally or physically traumatic activities using lay evidence, including testimony from the applicant. However, the question of whether repetitive traumatic activities caused injury or a need for medical treatment can only be established with substantial medical evidence. (*Peter Kiewit Sons (McLaughlin) v. Ind. Acc. Comm.* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188]; *City & County of San Francisco (Murdock) v. Industrial Acc. Com.* (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103].)

Evidence Code section 452(d) permits a Court to take judicial notice of: "Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States." The Appeals Board's record of proceedings is maintained in the adjudication file and consists of: the pleadings, minutes of hearing and summary of evidence, transcripts, if prepared and filed, proofs of service, evidence received in the course of a hearing, exhibits marked but not received in evidence, notices, petitions, briefs, findings, orders, decisions, and awards, and the arbitrator's file, if any. . . . Documents that are in the adjudication file but have not been received or offered in evidence are not part of the record of proceedings. (Cal. Code Regs., tit. 8, § 10803.)

In this case, the medical report of Dr. Doan was not offered as an exhibit at trial. Therefore, the report is not part of the record of proceedings and is not subject to judicial notice under Section 452(d). If the report were subject to judicial notice, we would not take judicial notice of it at this point in the proceedings. When a party has the opportunity to present evidence and fails to do so, the party waives its right to appeal the deficiency in the evidence. (*Telles Transport v. Workers' Compensation Appeals Bd. (Zuniga)* (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 28, 2022

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

**JOSE GOMEZ
GALE SUTOW & ASSOCIATES
TELLERIA TELLERIA & LEVY**

MWH/oo

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