

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

KEVIN ESPINOSA, *Applicant*

vs.

**ARTHREX CALIFORNIA, INC.; HARTFORD INSURANCE COMPANY
OF THE WEST, *Defendants***

**Adjudication Number: ADJ12756033
Riverside 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 and the Opinion on Decision 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 and Opinion on Decision, both of which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id.*)

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/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JANUARY 31, 2022

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

**KEVIN ESPINOSA
OCHOA & CALDERON, APC
LAW OFFICES OF MELODY Z. COX**

PAG/ara

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
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

<u>Date of Injury:</u>	October 23, 2019
<u>Age on DOI:</u>	26
<u>Occupation:</u>	Shipping clerk
<u>Parts of Body Injured:</u>	Lumbar Spine, left leg, and left hip
<u>Identity of Petitioner:</u>	Defendant
<u>Timeliness:</u>	The petition was timely filed on 11/30/21
<u>Verification:</u>	The petition was verified
<u>Date of Award and Order:</u>	11/5/2021
<u>Petitioner's Contentions:</u>	Petitioner contends the WCJ erred by: A. Finding the case compensable.

Petitioner, Defendant, by and through its attorneys of record, has filed a timely verified Petition for Reconsideration on November 30, 2021, challenging the Findings and Award dated November 5, 2021.

Applicant, the Respondent, has not filed an Answer.

In its Petition for Reconsideration, Petitioner argues that the decision was without or in excess of its powers, evidence does not justify the Findings of Fact and that the Findings of Fact do not support the decision.

It is recommended that reconsideration be denied.

II
FACTS AND PROCEDURAL HISTORY

Petitioner's summary of facts as stated in the Petition for Reconsideration is accurate. Applicant was a shipping clerk who claimed an injury from using a manual level to control the loading dock's ramp on October 23, 2019.

Trial commenced on July 8, 2021 and was submitted after further testimony on October 18, 2021. On November 5, 2021, the court issued the decision, finding the claim compensable. Petitioner filed the Petition for Reconsideration on November 30, 2021.

III **DISCUSSION**

A. Was the case compensable?

The trial judge's credibility determination should be given great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) There was also no evidence of considerable substantiality that should warrant rejecting the WCJ's credibility determination.

Petitioner appears to re-litigate the evidence in its Petition for Reconsideration; however, the court had reviewed the entire evidence, observed and listened to the witnesses and found the case was compensable. Petitioner's main argument is based on a 10-minute surveillance video. However, this video was merely a piece of the puzzle and was neither substantial nor compelling. During trial, no party inquired or identified the persons in the video. The court had assessed the video as stated in the Opinion on Decision:

On the second day of trial, defendant attempts to show the incident did not occur based on a surveillance video of an approximately 10-minute segment, around 12:19 p.m. to 12:28, on October 23, 2019 from one camera overlooking several loading garage door bays within the company. (MOH/SOE Trial day 2, pp. 2-3.) However, there was a forklift between garage doors two and three that partially obstructed the view and the camera was set relatively high and too far to observe any details or identify the persons in the video. The video does show a person wearing a dark-color uniform who walked toward garage three, the garage opened and that same person brought in a blue and white barrel on a pallet using a pallet jack through garage door three. Garage door three then closes and the same person walked out. The court was unable to observe how or who opened or closed garage door three.

There was concerns of whether the surveillance system was reliable (MOH/SOE Trial day 1, p. 6:18-21.) Applicant testified about an incident where a door was left open, but the employer was unable to confirm who left it open because they were unable to see any person in the video. (*Id.*, p. 6:21-25.) The witness was unaware of this incidence. (MOH/SOE Trial day 2, p. 4:18-20.)

The court provided the basis for making its decision, and based on the totality of the evidence presented, the court determined applicant's claim was compensable.

IV
RECOMMENDATION

It is respectfully recommended that Defendant's Petition for Reconsideration be denied.

Respectfully submitted,

DATE: December 10, 2021

Eric Yee
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

[Labor Code section 5313]

The case proceeded to trial on July 8, 2021, and continued for further testimony on October 18, 2021. The case was submitted on October 18, 2021.

STIPULATED FACTS AND ISSUES

The parties stipulated to the facts that applicant, Kevin Espinosa, age 26 at the time of the incident, while employed on October 23, 2019, as a shipping clerk, at Walnut, California, by Arthrex California, Inc., claims to have sustained injury arising out of and in the course of employment to lumbar spine, left leg and left hip.

At the time of the injury, the employer's workers' compensation carrier was Hartford Insurance Company of the Midwest.

At the time of the injury, the employee's earnings were \$678.00 per week, warranting indemnity rates of \$452.00 for temporary disability and \$290.00 for permanent disability.

The employer has furnished no medical treatment. No attorney fees have been paid and not attorney fee arrangements have been made.

The issues are:

- 1) Disputed injury AOE/COE;
- 2) EDD's Lien; and,
- 3) Attorney fees

AOE/COE

Based on the evidence and applicant's credible testimony, applicant meets his burden of proof according to Labor Code sections 3202 and 3202.5. The court finds applicant has a compensable injury to his lumbar spine, left leg and left hip.

The DWC-1 Claim Form dated October 25, 2019 (Exh. 10) confirmed applicant had reported the incident. Applicant's testimony supports the information stated in the form including the fact that the injury happened on October 23, 2019, and he reported the injury to HR Management the next day. Applicant also completed additional forms entitled "Employee's Post Incident Report" dated October 24, 2019 and October 25, 2019 (Ex. 8). These documents bolster the fact he reported the incident to Sonia Godina, his employer. The only variance is the time of the incident and whether or not the entire incident occurred. Applicant testified it happened around two o'clock (MOH/SOE Trial day 1, p. 6:1-2) which was supported by the DWC-1 Claim form dated October 25, 2021 (Exh. 10); applicant completed another, subsequent form (Exhibit 8) presumably at the employer's directive (MOH/SOE Trial day 1, p. 6:7-10) which had the time of incident at 11:00 a.m. or 12:20 p.m. Nonetheless, applicant testified he injured his back when he used the lever to lower a loading ramp onto the truck. (MOH/SOE Trial day 1, p. 5:21-25.)

Sonia Godina, the HR Manager, provided a documentation of events (Exh. 9); this document stated the employer implemented a subsequent remedial measure to safeguard against incidents from using the lever-operated ramp. Applicant requested that the company upgrade the ramp to an electric version, but they changed the lever to a larger and bigger lever. (Exh. 9, pg. 2; MOH/SOE Trial day 1, p. 6:9-10.)

Curtis Montgomery, D.C., issued several reports as the primary treating physician (“PTP”). In his initial report dated November 20, 2019, Dr. Montgomery opined with reasonable medical probability that applicant’s injury is work related. (Exh. 3, PTP report by Dr. Montgomery, 11/20/19.)

On the second day of trial, defendant attempts to show the incident did not occur based on a surveillance video of an approximately 10-minute segment, around 12:19 p.m. to 12:28, on October 23, 2019 from one camera overlooking several loading garage door bays within the company. (MOH/SOE Trial day 2, pp. 2-3.) However, there was a forklift between garage doors two and three that partially obstructed the view and the camera was set relatively high and too far to observe any details or identify the persons in the video. The video does show a person wearing a dark-color uniform who walked toward garage three, the garage opened and that same person brought in a blue and white barrel on a pallet using a pallet jack through garage door three. Garage door three then closes and the same person walked out. The court was unable to observe how or who opened or closed garage door three.

There was concerns of whether the surveillance system was reliable (MOH/SOE Trial day 1, p. 6:18-21.) Applicant testified about an incident where a door was left open, but the employer was unable to confirm who left it open because they were unable to see any person in the video. (*Id.*, p. 6:21-25.) The witness was unaware of this incidence. (MOH/SOE Trial day 2, p. 4:18-20.)

EDD LIEN

Based on the finding of compensability, EDD may be entitled to reimbursement. Parties shall attempt to resolve the lien informally, jurisdiction reserved.

ATTORNEY'S FEES

Based on the WCAB Rules of Practice and Procedure § 10844 (formerly 10775) and the guidelines for awarding an attorney's fee set forth in Policy and Procedure Manual § 1.140, a reasonable attorney's fee is found to be 15% of the retroactive benefits owed and/or permanent disability, jurisdiction reserved.

DATE: November 5, 2021

Eric Yee
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE