WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ALFREDO DELGADO, ***Applicant***

vs.

FCEC/MSG; BERKSHIRE HATHAWAY; HOMESTATE COMPANY, ***Defendants***

Adjudication Number: ADJ12410207
Fresno District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Order of February 5, 2021, the Workers' Compensation Administrative Law Judge ("WCJ") found that applicant, while working as a utility worker for FCEC/SMG, sustained injury (arising out of and occurring in the course of employment) to his left ankle and left arm, as a result of falling from a forklift on May 23, 2019. In addition, the WCJ found that "applicant asked a forklift operator co-employee to give him a ride to his car in the parking lot so he could retrieve his lunch," that "as a result of actions of a co-employee, applicant was thrown off the forklift, sustaining injury to his left ankle and left arm," that the "employer has denied the claim in its entirety," that "applicant sustained his injuries on employer's premises (i.e., the parking lot adjacent to the Convention Center), therefore he was within the curtilage of the building in which he worked, which was thus under employer's exclusive control," that "the co-employee, who was a trained and certificated forklift driver, gave the co-employee superior knowledge as to the safe operation of the forklift," that "aside from the self-serving testimony of employer's operations manager, no corroborating evidence was presented as to safety meeting discussions regarding the safe use of forklifts," that "applicant's testimony, therefore, that he received no such

[1] Commissioner Marguerite Sweeney signed the Opinion and Order Granting Petition for Reconsideration dated April 22, 2021. As Commissioner Sweeney is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

training remains unrefuted," that "the actions of the co-employee were reckless and directly resulted in applicant's injuries," and that "because the co-employer had superior knowledge regarding the safe use of the forklift, his negligence inures to the employer defeating the contention that applicant was participating in horseplay."

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends, in substance, that the evidence does not justify the WCJ's finding that applicant was injured in the course of employment, that applicant's job did not involve the use of a forklift, and that the forklift operator's knowledge of company policy prohibiting employees from riding on forklifts was not superior to that of applicant.

The Board did not receive an answer from applicant.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of defendant's petition for reconsideration, the contents of the WCJ's Report with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated below and in the WCJ's Report and Opinion on Decision, both of which are adopted and incorporated to the extent indicated in the attachment to this opinion, we will affirm in part and amend in part the Findings and Order of February 5, 2021. We do so to clarify that applicant's injury arose out of and occurred in the course of employment, and to delete the WCJ's findings pertaining to negligence, which is not germane to our analysis of whether applicant's injury occurred in the course of employment.

In essentially affirming the WCJ's conclusion that applicant's injury is compensable, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the trial 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*.)

FACTUAL BACKGROUND

In his Opinion on Decision, the WCJ describes the facts he relied upon as follows:

> Applicant testified that he had been working for the employer for the past 18 months, when he was injured on May 23, 2019. He was part of a work crew responsible for the set-up and break-down following convention center events (stages, tables, chairs) and included post-event clean-up. (Minutes of Hearing, 09/30/2020, at pg. 2:10-13.)

On the day he was injured, he arrived for work at about 2:00 p.m., and was told to park on the left side of the parking lot. That day, the crew was tasked with disassembling chairs from an event the prior day. (*Supra*, at pg. 2:14-19.)

He brought his lunch with him but, unlike before, he no longer kept his lunch in the refrigerators in the break room because people were stealing food from workers' lunch bags. As such, he kept his lunch that day in his car in the parking lot. (*Supra*, at pg. 2:20-23.) All work ceases at the same time allowing work crews to take their lunch breaks. Work crews must "clock out" for their break times. (*Supra*, at pg. 5:1-3.)

When he exited the building, it was raining heavily and there was ankle-deep standing water in the parking lot. He asked one of the forklift drivers, Wanzi Peterson, to give him a ride on the forklift to his car. He was hungry and did not want to get his feet wet. Peterson agreed. Applicant stood on the forks of the forklift, steadying himself by holding on to the cross-bar above the driver's seat. He had never done anything like this before. (Minutes of Hearing, 09/30/2020, at pgs. 2:24-3:-5.)

Peterson raised the forks and they began moving. They had only traveled about 20 feet, when the forklift ran into a parking bump under the waterline and the forklift tipped to the side. Applicant fell from the forks, landing awkwardly on his left ankle and foot. (Later, he was told he had dislocated his fibula and tibia.) (*Supra*, at pg. 3:6-9.)

Applicant received no training regarding safe operation of forklifts and was never told he could not ride on a forklift in that way. (*Supra*, at pg. 3:10-12.) However, he also testified that he should not have done it. (*Supra*, at pg. 5:14.)

Employer witness, Israel Morales, testified that he is the operations manager for FCEC/SMG. In addition, he is a certificated forklift driver. All FCEC/SMG forklift drivers are [certified] and expected to know the California OSHA regulations regarding the safe operation of forklifts. Riding on a forklift as described by Applicant is "simply not allowed." (Minutes of Hearing, 11/10/2020, at pg. 2:6-14.)

Employees are required to go "off the clock" for the lunch breaks and are allowed to leave the premises if they wish. Ordinarily, entire crews simultaneously go on break. (*Supra*, at pg. 2:21-23.)

DISCUSSION

We begin by addressing defendant's allegation that the evidence does not justify the WCJ's (implicit finding) that applicant's injury arose out of employment.

In order to support a finding that an injury arose out of employment under Labor Code section 3600, the injured employee must establish that the employment and the injury are linked in some causal fashion, i.e., the danger from which the employee's injury resulted is one to which he was exposed in his employment. (*South Coast Framing v. Workers' Comp. Appeals. Bd.* (2015) 61 Cal.4th 291, 297 [80 Cal.Comp.Cases 489].)

In this case, the evidence establishes that the danger that gave rise to applicant's injury is a danger he was exposed to in his employment. By reason of his employment, applicant was entitled to an unpaid thirty-minute lunchbreak; he was injured while hitching a ride on a forklift to retrieve his lunch from his car, parked in an area designated by the employer. Applicant intended to return to the employer-provided break room to eat his lunch. These factual circumstances are sufficient to establish that the danger from which applicant's injury resulted is one he was exposed to by reason of his employment.

However, defendant also contests the WCJ's (implicit finding) that applicant's injury occurred in the course of employment. Defendant alleges that the WCJ erred in relying upon *Smith v. Industrial Acci. Com.* (1943) 18 Cal.2d 843 [6 Cal.Comp.Cases 261] because the case is factually dissimilar from this one.

In *Smith*, the injured employee was a road worker on Treasure Island in San Francisco Bay. He was injured when he jumped off a truck on its way from his employer's administration building on the island to a ferry terminal from which the employee would disembark to ride a ferry back home to San Francisco. The truck from which the injured employee jumped was not provided by his employer, but his employer paid the injured employee's fare to ride the ferry home. In *Smith*, the Supreme Court found that the injury occurred in the course of employment.

To the extent the WCJ relied on *Smith* as factually similar to this case, we do not adopt or incorporate the WCJ's analysis. However, *Smith* is notable and relevant here for the Supreme Court's clear statement that an injured employee's alleged negligence in sustaining an injury at work is "no defense" in a workers' compensation case. (*Smith, supra,*18 Cal.2d at pp. 850-851.) In other words, workers' compensation is a no-fault system. In this case, therefore, defendant cannot prevail by raising an inapplicable negligence defense and then allege that the WCJ erred in rejecting the defense. Contrary to the implication of defendant's petition for reconsideration, applicant's supposed negligence in contributing to his own injury by riding the forklift is not a valid defense.

Pursuant to the personal comfort and convenience doctrine, however, we believe it is clear that applicant was in the course of employment when he tried to ride the forklift, in the employer-designated parking lot, to retrieve lunch for a lunchbreak authorized by the employer. Under this doctrine, activities necessary for the life, comfort and convenience of the employee at work, even if strictly personal to the employee and not in service of the employer, are incidental to that service, and injury sustained in such activities are deemed to arise out of and occur in the course of employment. (See *Price v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 559, 567-568 [49 Cal.Comp.Cases 773], string citations and quotations omitted.)

Nevertheless, defendant contends that applicant's act of riding the forklift, which was forbidden by his employer, brought him outside the course of employment. Specifically, defendant alleges that applicant substantially deviated from the course of employment by engaging in horseplay. We reject the allegation.

In *Sanchez v. Universal Lumpers* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 562 [Slip op. at pp. 13-14] ("*Sanchez*"), the Board panel explained the horseplay defense as follows:

> Now turning to defendant's contention that applicant's injury arose out of horseplay, "[i]t is the rule in California and in a great majority of other jurisdictions that injury suffered by an employee while engaged in horseplay is not compensable." (*Hodges v. Workers' Comp. Appeals Bd.* (1978) [82 Cal. App. 3d 894,899, 147 Cal. Rptr. 546, 43 Cal.Comp.Cases 870]) "The basis for holding injuries resulting to participants in horseplay non-compensable is that such injuries do not arise out of the employment…and do not occur in the course of employment." (*Id*. at 900, n. 1. [citations omitted].) Neither statute nor case law defines the term "horseplay," but examples of horseplay include hotel busboys throwing hard rolls at each other (*Pacific Emp. Ins. Co. v. Industrial Acc. Com.* (1945) 26 Cal.App.2d 286 [10 Cal.Comp.Cases 89]), ranch trainees chasing each other around a bunkhouse (*Argonaut Ins. Co. v. Workmen's Comp. Appeals Bd.* (1967) 247 Cal.App.2d 669, 672 [32 Cal.Comp.Cases 14]), a tenant of company housing diving off a balcony into a swimming pool on a bet (*Leffler v. Workers' Comp. Appeals Bd.* (1981) 124 Cal.App.3d 739, 177 Cal. Rptr. 552, 741–742 [46 Cal.Comp.Cases 1135]), and workplace sparring. (*Hodges, supra,* 82 Cal.App.3d at 898–99.) As an affirmative defense, it is defendant's burden to prove that applicant was engaged in horseplay.

In *Sanchez*, the injured employee testified that it was common practice to ride on the back of a forklift in order to complete tasks more quickly. The Board rejected the employer's horseplay defense because the WCJ found that the use of the forklift by employees facilitated and expedited their work, and that the employer derived benefit from the injured employee's activities. Further,

the employer did not provide any evidence showing that the injured employee and his coworkers were engaged in any activity that could be accurately characterized as horseplay.

The facts of this case do not closely mirror the facts of *Sanchez*, but we find *Sanchez* persuasive, nonetheless. The examples of horseplay discussed in *Sanchez* shared the element of *play* in the circumstances surrounding injury: busboys throwing hard rolls; ranch trainees chasing each other around a bunkhouse; workplace sparring; and a company housing tenant diving off a balcony into a swimming pool - on a bet. In this case, by contrast, applicant did not jump on the forklift for fun or for play or for the sake of daring-do. Rather, applicant rode the forklift for an employment-related activity – getting his lunch from his car parked in an employer-designated location to bring back for an employer-approved lunchbreak. Moreover, applicant rode the forklift to cope with an adverse condition of employment; rain had flooded the employer-designated parking lot and applicant obviously wanted to return to lunch and work with dry feet.

Defendant also relies upon *Dalsheim v. Industrial Acci. Com.* (1932) 215 Cal. 107, in which our Supreme Court denied compensation by reason of the employer's horseplay defense. In *Dalsheim*, a car mechanic sustained a burn injury while trying to remove from his workplace a bucket of supposedly non-inflammable liquid used to clean car parts; ordinarily gasoline was used to do this. On a second try, the mechanic succeeded in igniting the bucket of liquid for the "satisfaction" of himself and his laughing coworkers; this was an ill-fated attempt to prove that the liquid was indeed non-flammable, as he had claimed to them.

We reject defendant's allegation that *Dalsheim's* facts are reasonably comparable those presented here. In *Dalsheim*, as with the examples of horseplay recited in *Sanchez*, the injured employee had been *playing* around. In *Dalsheim*, the injured mechanic essentially was acting on the dare of his laughing coworkers; it appears he wanted to save himself from embarrassment. The mechanic had just purchased the cleaning liquid from a nearby shop, where the clerk sold him on the liquid's supposed non-inflammability.

The facts of the instant case are significantly different. Applicant did not ask his coworker for a ride on the forklift for fun or merely to satisfy curiosity. As the employer's breakroom was insecure, applicant kept his lunch in his car and rode the forklift in the employer's designated lot to quickly retrieve his lunch to return to the breakroom for a 30-minute lunch break – with dry feet. The fact that riding the forklift was against the employer's rules did not take applicant outside the course of employment. (*Williams v. Workers' Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937

(39 Cal.Comp.Cases 619, 621) [injury sustained by employee working in an unauthorized manner or violating employer's rules is not outside course of employment].) Further, and according to *Dalsheim*, the test is the whether the injury has its origin in a risk connected with the employment; if the act causing injury originated in horseplay, it is not compensable. (*Dalsheim, supra,* 215 Cal. 107, 114.) As noted before, here there is no evidentiary basis to conclude that applicant's act of riding on the forklift originated in horseplay.

Finally, we noted at the outset defendant's contention that the forklift operator's knowledge of company policy prohibiting employees from riding on forklifts was not superior to that of applicant. However, the issue of "who knew better" about not riding forklifts goes to comparative negligence, which is irrelevant. We do not rely upon this consideration in affirming the WCJ's conclusion that applicant's injury arose out of and occurred in the course of employment.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of February 5, 2021 is **AFFIRMED**, except that Findings 5 through 9 are **RESCINDED AND DELETED** from said decision, and Findings 1 and 3 are **AMENDED** to state as follows:

FINDINGS OF FACT

1. Applicant Alfredo Delgado, while working as a utility worker for FCEC/SMG, sustained injury arising out of and occurring in the course of employment to his left ankle and left arm, as a result of falling from a forklift on May 23, 2019.

[…]

3. Applicant was thrown off the forklift, sustaining injury to his left ankle and left arm.

[…]

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 3, 2024

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

ALFREDO DELGADO
GROSSMAN LAW OFFICES
YRULEGUI & ROBERTS

JTL/*ara*

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

OPINION ON DECISION

The limited issue presented to the Court at Trial are injury, AOE/COE, to Applicant's left ankle and left arm while Applicant was on his lunch break, [allegedly engaged] in unauthorized activity, i.e., horseplay.

BACKGROUND

Trial in this matter occurred over three (3) Court days. When the record was initially opened, on July 27, 2020, the Court read into the record the stipulated facts, issues, and evidence to be presented. On September 30, 2020, the Court heard Applicant's testimony. On November 10, 2020, the Court heard testimony from Israel Morales, Employer's operations supervisor.

Applicant testified that he had been working for the employer for the past 18 months, when he was injured on May 23, 2019. He was part of a work crew responsible for the set-up and break-down following convention center events (stages, tables, chairs) and included post-event clean-up. (Minutes of Hearing, 09/30/2020, at pg. 2:10-13.)

On the day he was injured, he arrived for work at about 2:00 p.m., and was told to park on the left side of the parking lot. That day, the crew was tasked with disassembling chairs from an event the prior day. (*Supra*, at pg. 2:14-19.)

He brought his lunch with him but, unlike before, he no longer kept his lunch in the refrigerators in the break room because people were stealing food from workers' lunch bags. As such, he kept his lunch that day in his car in the parking lot. (*Supra*, at pg. 2:20-23.) All work ceases at the same time allowing work crews to take their lunch breaks. Work crews must "clock out" for their break times. (*Supra*, at pg. 5:1-3.)

When he exited the building, it was raining heavily and there was ankle-deep standing water in the parking lot. He asked one of the forklift drivers, Wanzi Peterson, to give him a ride on the forklift to his car. He was hungry and did not want to get his feet wet. Peterson agreed. Applicant stood on the forks of the forklift, steadying himself by holding on to the cross-bar above the driver's seat. He had never done anything like this before. (Minutes of Hearing, 09/30/2020, at pgs. 2:24-3:-5.)

Peterson raised the forks and they began moving. They had only traveled about 20 feet, when the forklift ran into a parking bump under the waterline and the forklift tipped to the side. Applicant fell from the forks, landing awkwardly on his left ankle and foot. (Later, he was told he had dislocated his fibula and tibia.) (*Supra*, at pg. 3:6-9.)

Applicant received no training regarding safe operation of forklifts and was never told he could not ride on a forklift in that way. (*Supra*, at pg. 3:10-12.) However, he also testified that he should not have done it. (*Supra*, at pg. 5:14.)

Employer witness, Israel Morales, testified that he is the operations manager for FCEC/SMG. In addition, he is a certificated forklift driver. All FCEC/SMG forklift drivers are [certified] and expected to know the California OSHA regulations regarding the safe operation of forklifts. Riding

on a forklift as described by Applicant is "simply not allowed." (Minutes of Hearing, 11/10/2020, at pg. 2:6-14.)

Employees are required to go "off the clock" for the lunch breaks and are allowed to leave the premises if they wish. Ordinarily, entire crews simultaneously go on break. (*Supra*, at pg. 2:21-23.)

He was notified by the lead supervisor on the day of the accident that Applicant had been injured. The forklift driver, Wanzi Peterson was reprimanded and demoted as a result of the incident. (*Supra*, at pg. 2:25-3:9.)

DISCUSSION

The law provides that statutes and regulations affecting an injured workers' rights to Workers' Compensation benefits "shall be liberally construed by the courts with the purpose of extending their benefits for the protection of persons injured in the course of their employment. (Labor Code § 3202.)

[…]

The threshold question here is as follows: "Was Applicant…within the course…of employment when the accident took place?" If Applicant was not within his course…of employment, then Applicant will not have carried his burden of proof.

In reviewing the first question, whether Applicant was in the course…employment, the evidence is clear that he was in the middle of the work-day. The evidence shows that he was going to his car – parked in the Convention Center parking lot where he worked – to retrieve his lunch.

Evidence additionally shows that he was allowed by Employer to park in a particular parking lot at the Convention Center (or else incur costs to pay for parking on the city street.) While there is no evidence that employee parking in the Convention Center parking lot was required, from the facts as presented it can easily and logically be inferred that it was a benefit gratuitously granted to employees.

Viewing the evidence as a whole, however, it is clear that the parking lot was part-and-parcel of the Convention Center. Therefore, the parking lot remains a portion of the work site that was obviously under Employer's control. So, any contention that Applicant had "left the premises" during his lunch hour is not logical as he was still within the four-corners of the Convention Center building and parking lot. Any effort to categorize this…injury [as non-compensable] per the "going and coming" doctrine is inapplicable.

Traditionally, injuries occurred after the worker has arrived at the worksite are the responsibility of the employer. (*Price v. WCAB* (1984) 37 Cal.3d 559, 565; 49 CCC 772.) […]

[…]

[…] If Applicant's actions [rose] to the level of "horseplay" then [he may have been outside the course of employment.]

[…]

Where there is a finding of "horseplay," injuries resulting directly therefrom, or as a consequence [thereof, may be found] non-compensable. (*Clevidence v. WCAB* (2009) 74 CCC 1362.) But, where the alleged horseplay does not significantly deviate from the [course] of employment, such "minor acts of horseplay do not automatically constitute departures from employment." Larson, *1 Larson: Workmen's Compensation Law*, § 23, citing *Hodges v. WCAB* (1978) 43 CCC 8370.

[…]

DATED: February 5, 2021.

GEOFFREY H. SIMS
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

FCEC/SMG Fresno, and its insurer, Berkshire Hathaway Homestate Companies ("Petitioners"), through counsel, filed a timely and verified Petition for Reconsideration of the undersigned's Findings of Fact, Award, Order, and Opinion on Decision, issued February 5, 2021, contending that Applicant's injuries did not occur within the course…of his employment and, therefore, he is not entitled to Workers' Compensation benefits for injuries sustained on the date of the incident.

II
BACKGROUND

The facts underlying the incident that took place here are fundamentally not in dispute. […]

Applicant worked for Petitioners for an 18-month period prior to the May 23, 2019 incident. [...] He was a laborer and part of a work crew tasked with setting-up, breaking-down, and cleaning up stages, tables, and chairs, following Convention Center events.

On the date of the accident, Applicant arrived at the convention center around 2:00 p.m., and he was instructed to park on the left side of the parking lot. Because his lunch had been stolen from the worksite refrigerator previously, he opted to keep his lunch in his car and intended to retrieve it at the time of his lunch break, which would be around 6:00 p.m.

Usually, work ceases at the same time allowing work crews to take simultaneous lunch breaks. Petitioners require that work crews "clock out" for their break times. When exiting the building to get his sack lunch, Applicant found the parking lot ankle deep in standing water.

He asked one of the forklift drivers to give him a ride on the forklift to his car so he would not get his feet wet. The forklift driver agreed, and Applicant stood on the forks of the forklift. The driver raised the forks and the pair started moving. Unfortunately, within 20 feet, the forklift struck a parking bump, obscured beneath the waterline, causing the forklift to tip to one side. Applicant fell, landing awkwardly, dislocating both his left fibula and tibia.

Applicant stated there was never any training regarding the safe operation of forklifts, although he was not expected to use a forklift. He was never told he could not ride on a forklift in that manner, although he conceded that he should not have done so.

Petitioners' operations manager also testified, stating that riding a forklift in such a manner is "simply not allowed." He stated that the forklift driver was reprimanded and demoted as a result of the incident.

III
DISCUSSION

To qualify for Workers' Compensation benefits, an injured worker must show [the injured worker was] in the course…of employment at the time of injury. Triers of fact are expected to employ liberal construction of the [workers' compensation] laws to [favor the provision of] benefits. (Labor Code § 3202; § 5701.) […]

The threshold issue here surrounds whether Applicant was within the course…of employment at the time of the accident. The evidence [shows that] Applicant had just "clocked out" for his lunch break, with every intention of returning to work later in the day. Further, Applicant had just walked out of the Convention Center and was still on Petitioners' property at the time of the accident, i.e., the parking lot where he was directed to park. The parking lot was clearly under Petitioners' control and is, therefore, part of the work site as a whole. Therefore, Applicant had not "left the worksite" even though he was no longer within the structure of the Convention Center itself.

[…] [I]njuries sustained on property owned and controlled by an employer are generally deemed to have arisen out [of], and in the course of, employment.

Petitioners contend that there is "no evidence to support a finding of fact the applicant [sic] injury arose out of his employment." However, from the totality of the evidence, the accident took place on the job site, in the parking lot, owned and controlled by Petitioners, thereby [establishing prima facie showing of applicant's entitlement] to Workers' Compensation benefits.

Further, the mere proviso that workers "clock out" for breaks does not relieve an employer from liability. And that is particularly so where the worker remains on-site.

Petitioners mistakenly assert that since the act of riding the forklift was for [applicant's] "benefit alone"…it justifies barring him from benefits. Petitioners concede that there is a trend to allow "minor deviations" which could be interpreted as horseplay, however, they contend…that this [case] "does not involve a minor deviation" since Applicant violated the company policy about riding on forklifts.

[…]

In issuing the Findings of Fact here, the notion of "horseplay" was considered. […] Where the alleged horseplay does not [substantially] deviate from the [course] of employment, such "minor acts of horseplay do not automatically constitute departures from employment." (Larson, *1 Larson: Workmen's Compensation Law*, § 23, citing *Hodges v. WCAB* (1978) 43 CCC 8370.)

[…]

Petitioners appear to base their challenge to the undersigned's Findings of Fact, Award, Order, and Opinion on Decision, on the notion that Applicant's own actions contributed to this accident and, due to such contributory negligence, Applicant should be barred from Workers' Compensation

benefits. However, […] contributory negligence is not a viable defense in Workers' Compensation litigation.

IV
RECOMMENDATION

It is, therefore, recommended that the WCAB deny Petitioners' Petition for Reconsideration.

DATED: March 10, 2021.

GEOFFREY H. SIMS
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE