WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JACK RIEGER, *Applicant*

vs.

FOX SPORTS 1, LLC; DISCOVERY RE/TRAVELERS USF&G, administered by GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Number: ADJ11670075
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

On March 16, 2022, the workers' compensation administrative law judge (WCJ) filed his Findings of Fact and Award ("F&A"), wherein the WCJ found that applicant sustained work-related injury to an extensive list of body parts, and that the injury that was not barred by the exclusions for either self-inflicted injury under Labor Code section 3600(a)(5)[2] or for suicide under section 3600(a)(6). The WCJ also awarded ongoing medical care and reimbursement for already incurred medical expenses. On the same day, and evidently without knowledge that the WCJ's F&A had issued, defendant filed a Petition[3] – ostensibly labeled a Petition for Reconsideration and/or Removal – seeking to disqualify the WCJ from presiding over the case due to alleged bias.[4] Subsequently, on April 8, 2022, defendant filed a second Petition, this time

[1] Commissioner Lowe, who was on the panel that granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

[2] Further references are to the Labor Code unless otherwise specified.

[3] Strictly speaking, this Petition was the second filed in the case; a prior Petition for Removal was filed and denied via a previous order. Because that Petition was already resolved via a prior decision, for purposes of this decision we will refer to the March 16, 2022 Petition as the "first Petition," and the April 8, 2022 Petition as the "second Petition."

[4] The Petition also sought leave to file an amended petition with transcripts once they became available. Given subsequent events, we do not find it necessary to rule on this request, as the transcripts were prepared and uploaded prior to the filing of the second Petition.

seeking reconsideration of the F&A in addition to renewing defendant's request that the WCJ be removed from the case.

We received an Answer to the first Petition. We also received two Reports from the WCJ, one pertaining to each Petition, recommending that both Petitions be denied.

We have considered both Petitions, the Answer, and the contents of the Reports, and have also conducted an extensive review of the record in this matter. For the reasons described below, we will affirm the WCJ's F&A, and dismiss defendant's request to disqualify the WCJ, while making clear that we would also deny the request on the merits if it had been properly presented.

FACTS AND PROCEDURAL HISTORY

Applicant filed an Application for Adjudication, alleging injuries to a long list of body parts sustained during a fall on October 2, 2018, while employed by defendant as a Production Assistant. Defendant does not contest that applicant fell from the fifth-floor stairwell of his place of employment to the ground level, sustaining life-threatening injuries that have left him largely immobile and unable to communicate verbally, but has denied the claim on the basis that applicant's injuries are not covered by the workers' compensation system. To complicate matters, with the exception of the hospital records relating to applicant's stay in the ER immediately following the accident, the claim has proceeded to this point without medical evidence, apparently because neither party considered such evidence necessary in order to try the compensability of the claim.

The matter proceeded to an expedited hearing on November 30, 2021, with additional hearings on December 16, 2021, January 26, 2022, and March 9, 2022. At the November 30, 2021 hearing, the issues were stated as: (1) injury arising out of and in the course of employment ("AOE/COE"); (2) need for further medical treatment; (3) liability for self-procured medical treatment; (4) attorney fees; (5) applicant's due process right to a priority hearing on AOE/COE; (6) that defendant had denied the claim on the basis that applicant's injury occurred outside the course or scope of his employment; and (7) that defendant had further raised the affirmative defenses of horseplay, the Section 3600(a)(5) exclusion for intentionally self-inflicted injury, and the Section 3600(a)(6) exclusion for willfully causing one's own death. (Transcript of Proceedings, 11/30/201, at pp. 5–6.) Exhibits were either admitted or marked for admission pending a ruling on admissibility; hospital notes regarding applicant's treatment immediately following his fall were admitted without objection. (*Id.* at pp. 7–11.)

Applicant's mother and full-time caregiver, Catherine Giovenco, testified as to the circumstances surrounding her arrival at the hospital after applicant's fall and her decision to hire an attorney to file a workers' compensation claim.[5] (*Id.* at pp. 12–17.) Giovenco further testified applicant suffered from Type I diabetes, and that having reviewed the security footage of applicant on the day of his injury, she believed he was suffering from a diabetic "low" based on her long experience with how applicant acted when he was suffering from low blood sugar. (*Id.* at pp. 17–20.) She noted that in the footage immediately prior to the fall, his gait appeared to be impaired compared to the morning footage of his arrival at work, and that he was "veering over and kind of being disoriented." (*Id.* at p. 20.) The actual moment of applicant's fall is not captured on the security footage due to the placement of the cameras; the cameras show applicant entering a room on the fifth floor, and then show him slumping down the final few stairs of the stairwell on the first floor after the fall. (*Id.* at pp. 23–25.)[6]

In testimony at the continued hearing on December 16, 2021, Giovenco opined that applicant did not look like he was engaging in horseplay, had never engaged in horseplay at work to her knowledge, and had recently been promoted at work. (Transcript, 12/16/2021, at pp. 10–11.) To her knowledge, applicant had never engaged in self-harm or expressed suicidal ideation, and had not received any psychological treatment prior to the fall. (*Id.* at pp. 11–13.)

After the fall, applicant doesn't talk, he doesn't eat, he doesn't walk, and he can't turn himself; he is 100% dependent on Giovenco for his care. (*Id.* at pp. 13–15.) Post-fall, Giovenco and applicant's sister discovered that applicant had kept envelopes in his apartment marked "one month," "three months," "six months" and "one year" each with a career goal in it. (*Id.* at pp. 15–16.) Applicant's phone had a series of messages indicating that applicant had spoken with someone named Jackson the day before his fall about the possibility of a job interview. (*Id.* at pp. 17–18.)

On cross-examination, Giovenco confirmed applicant was a Type I diabetic since the age of 10. (*Id.* at pp. 20–21.) Applicant was fitted with an insulin pump to help him balance his insulin

[5] Because we conclude for the reasons described below that defendant had misconstrued applicant's burden of proof, the testimony reproduced here is focused on those topics that relate directly to defendant's contention that the claim is barred.

[6] A lengthy course of testimony related to the sufficiency of the investigation into applicant's fall, carrying over to the next hearing date, is omitted here because it does not directly relate to the issues at trial. (See Transcript, 11/30/2021 at pp. 26–36; Transcript, 12/16/2021, at pp. 31–40.)

levels. (*Id.* at pp. 21–23.) Applicant still had highs and lows after being fitted with the pump. (*Id.* at p. 26.) Applicant moved to Portland, Oregon in 2016 or 2017. (*Id.* at p. 27.) He had a girlfriend there, but they broke up, and applicant moved to Los Angeles. (*Id.* at pp. 27–28.)

Applicant was a Cubs fan. (*Id.* at p. 29.) One of applicant's job duties was to prepare the highlight reels for baseball games, including for the Cubs game that was playing at the time of applicant's fall. (*Id.* at pp. 29–30.) Giovenco agreed that shortly before the accident, the security footage showed applicant in the hallway looking at his cell phone, rather than watching the Cubs game in the space prepared for employees to watch it. (*Id.* at pp. 30–31.)

Giovenco filed a civil complaint in conjunction with the fall approximately a year and a half before the December 2021 hearing, alleging in part that applicant's insulin pump may have malfunctioned and contributed to his fall. (*Id.* at pp. 38–39.) Applicant had gone to the hospital for diabetes-related treatment after the installation of the insulin pump, but never overnight. (*Id.* at pp. 41–42.)

Applicant fell around 7:20 p.m., during the Cubs game. (*Id.* at pp. 59–60.) This was during the sixth inning, before the Cubs lost. (*Id.* at p. 60.) Giovenco did not believe applicant would have sought to harm himself because the team was losing. (*Ibid.*) As far as Giovenco was aware, applicant maintained a good relationship with his Portland ex-girlfriend after their breakup and prior to his fall. (*Id.* at pp. 68–69.)

After the fall, applicant's insulin levels were normal. (*Id.* at p. 43.) The doctors at the hospital told Giovenco that after a traumatic incident, the body can produce a surge of glucose that could have raised applicant's blood sugar levels from low to normal. (*Id.* at pp. 61–63.) The toxicology report showed no presence of alcohol or drugs. (*Id.* at p. 66.)

Alison Stauf, a coworker of applicant, testified that applicant was positive, happy, and had an infectious personality. (*Id.* at p. 74.) On the day of the fall, he seemed "very positive" and "super happy" and was in a "good mood." (*Id.* at pp. 74–75.) She was not with applicant at the time of the fall and had no idea how it occurred. (*Id.* at p. 76.)

Jackson Safon, an employee at The Ringer, a sports media website, testified that he texted with applicant the day before the fall relating to applicant's interest in submitting an application to work at The Ringer. (*Id.* at pp. 77–78.) Safon did not get any sense that applicant was suicidal. (*Id.* at pp. 79–80.) He did not get the impression that applicant was unhappy with his job at Fox,

but rather that because The Ringer was a prestigious place to work, most people in the industry would be interested in working there. (*Id.* at p. 84.)

Jacqueline Sobrino, applicant's sister, testified that she and applicant had a close relationship; they both lived in Los Angeles and applicant would sometimes come to stay with her. (*Id.* at pp. 86–87.) Based on her review of the security footage, applicant did not look well just before his fall; he looked disoriented, like he was suffering from low blood sugar. (*Id.* at pp. 88–89.) To her knowledge, applicant had never been on anti-depressants, received psychological treatment, or been suicidal. (*Id.* at pp. 89–90.) He was not the sort of person to engage in horseplay; he took his work very seriously and had worked his whole life towards being a sports writer; for example, the security footage showed he came into work after golfing with a dress shirt on a hanger because he wanted to be respected and taken seriously at work. (*Id.* at pp. 90–92.)

When applicant had low blood sugar, he would pace around in an attempt to "walk it off." (*Id.* at pp. 93–94.) That habit was consistent with what she saw in the security footage just before the fall. (*Id.* at p. 94.)

Proceedings continued on January 26, 2022. John Moore, who works for defendant as a Senior Vice President of Environmental Health and Safety and Sustainability, testified that he conducted an investigation after applicant's fall. (Transcript, 1/26/2022, at pp. 5–8.) They walked through the areas applicant had been in and reviewed security camera footage covering the entirety of applicant's movements that day. (*Id.* at pp. 8–12.) A floorplan of the fifth floor was prepared to aid the investigation, showing the locations of cameras and timestamps indicating when applicant appeared on them. (*Id.* at pp. 12–16.) There are no security cameras in the stairwell where applicant fell except on the first floor; the last time he appears on camera prior to the fall is at the exit to the stairwell on the fifth floor. (*Id.* at pp. 16–18.)

The stairwell is protected with 42-inch safety railings, which are designed to prevent falls from both conscious and unconscious people. (*Id.* at pp. 23–25.) An individual would have to be taller than six feet to be capable of falling over the railing. (*Id.* at p. 25.) Given applicant's height of five foot seven, Moore did not believe he could have accidentally fallen over the railing. (*Id.* at pp. 25–27.) Cal OSHA was notified of the fall and determined there was no fault on the party of the employer. (*Id.* at p. 27.)

Moore did not make any contact with applicant's mother or sister as part of the investigation. (*Id.* at p. 29.) Nor did Moore consider applicant's diabetic condition in conducting

the investigation. (*Id.* at pp. 30–31.) His investigation was conducted after the scene of the accident had been cleaned. (*Id.* at pp. 33–34.) In the security footage, applicant did not look "jovial" or like he was engaging in horseplay. (*Id.* at p. 38.) He looked like he had "trouble on [his] mind" and did not look like he was "normal." (*Id.* at p. 40.) Applicant's demeanor appeared much better when he arrived at work that morning. (*Id.* at p. 47.)

The purpose of his investigation was not to determine the cause of the accident but to determine whether there was fault on the part of the employer. (*Id.* at pp. 41–42.) In Moore's opinion, the only way applicant could have gotten over the railing was if he had climbed over it. (*Id.* at pp. 42–43.)

Travis Almeida, who works for defendant as the director of the Highlights Department, testified that on the day of the fall, applicant was assigned to the baseball group and tasked with helping them prepare for the day's games. (*Id.* at pp. 48–50.) None of applicant's job duties would have required him to be in the stairwell or climb the railing. (*Id.* at pp. 51–52.)

Applicant was a very good worker. (*Id.* at p. 52.) Almeida was unaware of applicant's diabetic condition, or that he was looking for another job. (*Ibid.*) Applicant never expressed any dissatisfaction with his job at Fox to Almeida. (*Id.* at pp. 52–53.) Applicant was an ambitious young man who took his job seriously; Almeida promoted him from freelance to full-time. (*Id.* at p. 55.) Almeida never wrote applicant up for any kind of bad behavior, horseplay or otherwise. (*Id.* at pp. 55–56.)

Eddie Del Campo, Director of Security Operations, testified about the security team's response after applicant's fall, including how the security camera footage was obtained and who initially responded to the scene of the accident. (*Id.* at pp. 65–70.) Del Campo prepared the incident report following the accident, but he was not present at the scene at the time of the accident. (*Id.* at pp. 70–74; Ex. B.) The police were not called after applicant's fall, just an ambulance. (*Id.* at p. 80.) Del Campo would have called the police if he had believed there was a potential suicide or homicide. (*Ibid.*)

At the final hearing on March 9, 2022, Mark Littlestone, defendant's Executive Director of Global Security Operations and a former detective with the Los Angeles Police Department ("LAPD"), testified that although he was not responsible for the investigation into applicant's fall, he was involved in the process in an oversight role. (Transcript, 3/9/2022, at pp. 12–15.) As part of that process, Littlestone met with a LAPD officer, Officer Arai, whom he discussed the incident

with to walk through possible cause of the accident. (*Id.* at pp. 15–21.) After discussing the case with Officer Arai, Littlestone concluded that applicant's fall could not have been an accident, nor were there any signs of foul play or another person involved. (*Id.* at pp. 21–22.) Based on Littlestone's history of investigating suicide attempts, he believed applicant's fall was an attempted suicide. (*Id.* at pp. 22–25.) Although Littlestone never talked with applicant and had no idea what his motive might have been, the security footage showed someone with "something on his mind." (*Id.* at pp. 24–26.) There was no liquid in the stairwell and the railing was high enough to prevent someone from accidentally falling, so suicide was the most likely explanation. (*Id.* at pp. 26–27.)

Littlestone did not see applicant jump off the railing. (*Id.* at p. 30.) He is not a medical expert and was unaware if the pacing he observed on the security footage could be explained by applicant's diabetic condition. (*Ibid.*) He was not aware that Officer Arai's report said nothing about suicide. (*Id.* at p. 31.) Littlestone was not aware of a suicide note and had not reviewed any medical reports. (*Id.* at pp. 40–41.) Defendant's report on the fall was compiled by Mariana Martinez and Amir Funes, the first to respond to the fall. (*Id.* at p. 52.) There was no external investigation. (*Ibid.*)

Mariana Martinez testified that at the time of the fall, she was working for defendant as a security supervisor. (*Id.* at pp. 59–60.) On the day of applicant's fall, Martinez was working on the first floor of the building; she heard "rumbling" sounds from her desk, and shortly afterward, she heard over the radio about a medical incident. (*Id.* at pp. 60–62.) Martinez arrived at the stairwell and saw applicant unconscious on his left side bleeding profusely from the head. (*Id.* at pp. 62–63.) Martinez immediately started first aid treatment while calling for an ambulance. (*Id.* at p. 63.) She stayed with applicant until the paramedics and firefighters arrived, arranged for cleanup of the area, and then went upstairs to try to figure out how the injury had occurred. (*Id.* at pp. 63–64.) Martinez photographed areas where it looked like applicant's body had made contact during the fall. (*Id.* at pp. 64–69.) Martinez also assessed whether applicant could have fallen over the railing accidentally. (*Id.* at pp. 69–71.) Based on her own height of five foot eight inches with heels, similar to applicant's height of five foot seven, she "could not understand" how applicant could have fallen over the railing by mistake. (*Id.* at p. 71.) Based on her law enforcement training, Martinez believed that because there was no indication that anyone else was involved, applicant was most likely to have jumped over the railing intentionally. (*Id.* at pp. 71–72.)

On cross-examination, Martinez testified that she didn't initially see the fall as "suspicious." (*Id.* at p. 75.) She didn't think to call the police because it was a medical aid situation; it didn't seem like there was any ongoing safety concern, her concern was for applicant and his injuries. (*Ibid.*) She took the photos to memorialize the scene in case it was important later. (*Id.* at pp. 78–79.)

According to Martinez, there was a witness who saw applicant fall, a man who was in the stairwell area, but she didn't know his name. (*Id.* at pp. 79–80.) This information was not put into her report but was relayed to her superiors. (*Id.* at p. 80.) Martinez also did not include her opinion that applicant had jumped over the railing in her report because she was focused on relaying the facts, not her opinions. (*Id.* at p. 81.) Martinez didn't know what happened to the cell phone footage she took of the scene after the fall. (*Id.* at pp. 81–83.)

No one told Martinez that applicant jumped over the railing. (*Id.* at p. 85.) She has not seen any medical reports indicating that applicant attempted suicide. (*Ibid.*) She was not aware of any other reports related to the fall other than the one she prepared. (*Id.* at pp. 85–86.) She did not consider whether applicant's diabetes could have played a role in his fall. (*Id.* at p. 86.) Martinez never watched the security footage of applicant's movements before the fall. (*Id.* at p. 88.)

The witness who claimed to have seen applicant's fall was located on the second floor, and saw applicant falling through the stairwell from above. (*Id.* at pp. 97–98.) The witness is depicted in the security footage, and Martinez believed his name was "Dan." (*Id.* at pp. 101–102.) His presence and name were not in the report Martinez produced because at the time she was focused on applicant, and afterwards she was not able to locate him. (*Id.* at p. 103.) Martinez thought he was an employee of defendant, but made no attempt to contact him after the fall. (*Id.* at p. 104.)

Finally, defendant attempted to present Martin Balaban, Ph.D., a biomechanics expert who intended to testify that based on his review of the circumstances surrounding the fall, applicant could not have accidentally fallen over the safety railing. (*Id.* at pp. 112–117.) After hearing this information, the WCJ indicated that because Dr. Balaban did not see the applicant, had not reviewed his medical records, and had no first-hand information on the case, his testimony would not be germane to any relevant legal issue. (*Id.* at pp. 118–119.) After confirming that Dr. Balaban could not testify as to applicant's state of mind at the time of the fall, the WCJ announced he would take no further testimony from the witness, over defendant's objection that they were being denied

their due process right to prove their case because Dr. Balaban's testimony would help establish that applicant could not have accidentally fallen over the railing, which in defendant's view established that applicant was not acting in the course of his employment at the time of the injury. (*Id.* at pp. 119–121.) Defense counsel announced he would be filing a petition for removal, but after discussion with the WCJ, appeared content to submit the case as long as the record included Dr. Balaban's testimony that applicant could not have accidentally fallen over the railing, which the WCJ confirmed would be the case. (*Id.* at pp. 121–125.) The matter was then taken under submission, with requests to file post-trial briefs denied. (*Id.* at pp. 125–126.)

On March 16, 2022, the WCJ issued his F&A, finding that applicant sustained injury to the "head, neck, brain, shoulders, back, bilateral legs, right thigh, right femur, internal system, nervous system, psyche, pulmonary, eyes, and others deferred." (F&A, at p. 1.) The WCJ further found that applicant's injuries were "not barred by any affirmative defense." (*Id.*) The WCJ awarded reimbursement for self-procured medical treatment and ongoing medical treatment, with all other issues deferred. (*Id.* at pp. 1–2.) According to the Electronic Adjudication Management System ("EAMS"), the F&A was filed at 9:22 a.m.

On the same day, defendant filed a Petition, nominally titled a Petition for Reconsideration and/or Removal, seeking to disqualify the WCJ from presiding over the case on the basis that the WCJ had exhibited bias against defendant by refusing to allow Dr. Balaban to testify, and by making statements during the course of the trial that showed hostility towards the defense. According to EAMS, this petition was filed at 1:16 p.m.

Defendant followed up this initial petition with a second Petition, filed on April 8, 2022, titled a Petition for Reconsideration, again seeking the WCJ's disqualification but further alleging that (1) the WCJ lacked authority to issue the F&A because he was deprived of jurisdiction by the filing of the March 16, 2022 petition; (2) that the WCJ erred in refusing to allow Dr. Balaban's testimony; and (3) that the WCJ erred in finding that applicant's injury was compensable in the workers' compensation system.

DISCUSSION

Here, defendant has filed two Petitions, which overlap to some degree in the relief sought. As explained in more detail below, even where the Petitions raise identical arguments, with the exception of the requests in each petition to disqualify the WCJ, these arguments must be analyzed under different legal standards because the first Petition sought review of the WCJ's decisions

prior to the F&A, while the second seeks review of the F&A itself. Accordingly, we will first consider the requests for disqualification presented in both petitions jointly, followed by consideration of the remaining arguments raised in the first Petition, and then by consideration of the remaining arguments raised in the second Petition.

REQUEST FOR DISQUALIFICATION

Both Petitions request that the WCJ be disqualified from the case for displaying bias against defendant. Requests for disqualification are governed by WCAB Rule 10960, which states:

> Proceedings to disqualify a workers' compensation judge under Labor Code section 5311 shall be initiated by the filing of a petition for disqualification supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing one or more of the grounds for disqualification specified in section 641 of the Code of Civil Procedure. The petition to disqualify a workers' compensation judge and any answer shall be verified upon oath in the manner required for verified pleadings in courts of record.
>
> If the workers' compensation judge assigned to hear the matter and the grounds for disqualification are known, the petition for disqualification shall be filed not more than 10 days after service of notice of hearing or after grounds for disqualification are known.
>
> A petition for disqualification shall be referred to and determined by a panel of three commissioners of the Appeals Board in the same manner as a petition for reconsideration.

(Cal. Code Regs., tit. 8, § 10961.)

Here, as petitions for disqualification, both Petitions are procedurally defective in multiple ways. First, neither Petition is labelled as a petition for disqualification, as required by the rule. Second, and more importantly, neither is supported by an affidavit or declaration under penalty of perjury stating in detail facts establishing grounds for disqualification. Finally, the Petitions rely at least in part on incidents that occurred more than 10 days prior to the filing of both Petitions.

Therefore, as petitions for disqualification, both Petitions are procedurally defective and subject to summary dismissal. In the interests of justice, however, we have conducted a careful, independent review of the entirety of the trial transcript in this matter, in addition to considering the specific instances of alleged bias raised in the two Petitions. Our review satisfies us that there are no grounds for disqualification here. To be sure, at times the WCJ became impatient with lines

of argument that he found legally irrelevant and viewed as a waste of time, and could admittedly have been more politic in expressing his frustrations to counsel. Full review of the record, however, makes clear that the WCJ's ire was directed as often towards the applicant's attorney as towards defense counsel, and did not stem from any antipathy towards a particular party. Similarly, although the WCJ cut short Dr. Balaban's testimony, he also made clear that he had no interest in hearing from applicant's expert witness or reviewing that expert witness' report, for the same reason that he was uninterested in hearing more from Dr. Balaban. (See Transcript, 3/9/2022, at p. 121.) We therefore are confident that whatever arguably intemperate language the WCJ may have used was not indicative of bias, and that no reasonable observer of the trial would think the WCJ was biased against defendant based upon it.

More fundamentally, it is "well settled … that the expressions of opinion uttered by a judge, in what he conceives to be a discharge of his official duties, are not evidence of bias or prejudice" (*Kreling v. Superior Court of Los Angeles County* (1944) 25 Cal.2d 305, 310–311; *Mackie v. Dyer* (1957) 154 Cal.App.2d 395, 400), and that "[e]rroneous rulings against a litigant, even when numerous and continuous, form no ground for a charge of bias or prejudice, especially when they are subject to review." (*McEwen v. Occidental Life Ins. Co.* (1916) 172 Cal. 6, 11; *Mackie, supra,* 154 Cal.App.2d at p. 400). To the extent that defendant's request to disqualify the WCJ relates to expressions of opinion and rulings made by the WCJ regarding evidence and testimony, those expressions and rulings are not evidence of bias or prejudice.

None of the incidents raised in either Petition are evidence of bias under the governing legal standards. Accordingly, even if the requests for disqualification were procedurally proper, we would deny them on the merits.

FIRST PETITION

Next, we consider the first Petition's allegation that the WCJ erred in cutting short Dr. Balaban's testimony on the grounds that it was legally irrelevant. A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]) or determines a "threshold"

issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Id.* at p. 1075 ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final'"]; *Rymer, supra*, at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].) Such interlocutory decisions include, but are not limited to, pre-trial orders regarding evidence, discovery, trial setting, venue, or similar issues.

Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 599, fn. 5 [71 Cal.Comp.Cases 155]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 280, fn. 2 [70 Cal.Comp.Cases 133].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez, supra; Kleemann, supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955(a).)

Here, the first Petition was filed before defense counsel became aware of the F&A, and sought review not of the F&A but of the decision to cut short Dr. Balaban's testimony. This order, an evidentiary decision, was neither a final order nor an order determining a threshold issue, and therefore reconsideration was not available as a remedy.

Turning to the standard for removal, the first Petition fails to show substantial prejudice or irreparable harm – although the petition characterizes the WCJ's decision as disallowing the entirety of Dr. Balaban's testimony, it is clear from the transcript that in fact the WCJ merely declined to allow further testimony beyond what had already been given, and moreover specifically made clear to defense counsel that Dr. Balaban's opinion that applicant could not have accidentally fallen over the safety railing was admitted. (See Transcript, 3/6/22, at pp. 124–126.) Even assuming for purposes of argument that the WCJ erred in disallowing further testimony from Dr. Balaban – which, as described in more detail below, we do not believe to be the case – the first Petition does not identify any further testimony that Dr. Balaban could have given that would have been legally relevant to the questions presented. Moreover, the Petition also fails to explain why

reconsideration after a final order had issued would not have been an adequate remedy, and the adequacy of reconsideration is amply demonstrated here by the fact that defense counsel did in fact promptly seek reconsideration in the second Petition.

Accordingly, the first Petition does not present any valid grounds for relief.

SECOND PETITION

I. JURISDICTION TO FILE THE F&A

Defendant's second Petition asserts that the filing of the first Petition deprived the WCJ of jurisdiction to file the F&A.

WCAB Rule 10961 states:

> Within 15 days of the timely filing of a petition for reconsideration, a workers' compensation judge shall perform one of the following actions:
>
> (a) Prepare a Report and Recommendation on Petition for Reconsideration in accordance with rule 10962;
> (b) Rescind the entire order, decision or award and initiate further proceedings within 30 days; or
> (c) Rescind the order, decision or award and issue an amended order, decision or award. The time for filing a petition for reconsideration pursuant to Labor Code section 5903 will run from the filing date of the amended order, decision or award.
> After 15 days have elapsed from the filing of a petition for reconsideration, a workers' compensation judge shall not issue any order in the case until the Appeals Board has denied or dismissed the petition for reconsideration or issued a decision after reconsideration.

(Cal. Code Regs., tit. 8, § 10961.)

Defendant speculates – apparently without evidence – that the F&A was actually issued after the filing of its first Petition, and appears to insinuate that the WCJ rushed out the F&A after receiving the first Petition in an attempt to make it appear that the F&A had issued first. (Petition for Reconsideration, p. 9.) These allegations do not appear to be backed up by the EAMS record, which indicates that the first Petition was filed at 1:16 p.m., while the F&A was filed several hours earlier at 9:22 a.m. Although defendant is correct that there is no timestamp on the F&A's proof of service, the absence of proof is not proof of wrongdoing, nor do we think that in these circumstances it is the time of service, rather than the time of filing, that is legally dispositive.

Moreover, contrary to defendant's interpretation, the text of the rule itself does not divest the WCJ of jurisdiction over the case until 15 days after the filing of a petition. Although it is true that the rule presents only three options for how a WCJ is to respond to a filed petition itself, here the first Petition was *not* filed in response to the F&A, which defendant was clearly unaware of at the time of filing. Even if defendant were right about the chronology of events, the filing of the first Petition would not have prevented the WCJ from filing the F&A in the case, as long as it was filed within 15 days of receipt of the Petition.

Finally, although not strictly relevant to the legal question presented, we feel compelled to make a few observations about defendant's line of argument. First, defendant's apparent insinuation that the WCJ manipulated the record to backdate the F&A is a serious allegation of misconduct, of the sort that should be supported by more than mere speculation. Second, although the first Petition was nominally titled a "Petition for Reconsideration and/or Removal," as a seasoned practitioner defense counsel should have known that a petition for reconsideration was not the proper vehicle for addressing the concerns raised, namely that the WCJ cut off testimony from a witness and allegedly displayed bias against defendant. Instead, those issues should have been raised via petitions for removal and disqualification – neither of which, notably, limit the WCJ's actions in the same manner as a petition for reconsideration. Although we will afford defense counsel the benefit of the doubt that he did not deliberately mislabel the first Petition in an attempt to divest the WCJ of jurisdiction, we note that such conduct would be sanctionable pursuant to WCAB Rule 10421 (Cal. Code Regs., tit. 8, § 10421), and we trust that in future more care will be taken to ensure this situation does not reoccur.

II. WCJ'S DECISION TO DISALLOW FURTHER TESTIMONY FROM DR. BALABAN

Next, the second Petition renews the argument that the WCJ erred in disallowing further testimony from Dr. Balaban. Because the second Petition properly seeks reconsideration of a final order, the F&A, we now consider this argument on the merits.

In determining whether to admit evidence, we are governed by the principles of section 5908, which states that the WCAB "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." (§ 5708.) The right to present evidence implicates the right

to due process. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 175 [36 Cal.Comp.Cases 93, 102]; *Pence v. Industrial Acci. Com.* (1965) 63 Cal.2d 48, 51 [30 Cal.Comp.Cases 207, 209].) However, a WCJ retains wide discretion to disallow cumulative or irrelevant evidence in the same manner as any other trial judge, and the proper standard of review for such a decision is abuse of discretion. (See generally *People v. Benson* (1990) 52 Cal.3d 754, 786; see also *Lopez v. State Department of Corrections* (2005) 2005 Cal. Wrk. Comp. P.D. LEXIS 33.) Additionally, the decision to disallow such evidence is consistent with the WCAB's constitutional mandate "to accomplish substantial justice in all cases, *expeditiously, inexpensively,* and without incumbrance of any character. . . ." (Cal. Const., Article XIV, § 4 (emphasis added).)

Here, as noted above, the record is clear that the WCJ allowed Dr. Balaban's opinion that based upon applicant's height and the height of the safety railing, applicant could not have fallen over the safety railing without first climbing it. (See Transcript, 3/6/22, at pp. 124–126.) Before taking the decision to disallow further testimony from Dr. Balaban, the WCJ repeatedly asked the witness and defense counsel if there was any information Dr. Balaban could provide that was relevant to the case beyond this conclusion. (*Id.* at pp. 109–111, 118–119.) No offer of proof was forthcoming, not does either Petition articulate any further testimony Dr. Balaban could have provided that would have been relevant to the legal issues raised. Moreover, the WCJ specifically confirmed that Dr. Balaban was unable to opine on applicant's state of mind at the time of the injury. (*Id.* at p. 120.)

Under the circumstances, we do not believe the WCJ abused his discretion in deciding that further testimony from Dr. Balaban would be irrelevant and/or cumulative. Dr. Balaban had expressed his opinion as to whether applicant could have fallen over the safety railing accidentally without first climbing it, and it does not appear that there is any further testimony he was prepared to provide that would have had any legal relevancy to the dispute. Accordingly, the WCJ did not err by limiting Dr. Balaban's testimony to the extent he did.

III. COMPENSABILITY OF APPLICANT'S INJURY

Defendant next argues that the WCJ erred in finding applicant's injury compensable. Initially, we note that defendant appears to have abandoned its prior argument that applicant's

injury was statutorily barred according to either section 3600(a)(5) – the exemption for intentionally self-inflicted injury – or section 3600(a)(6) – the exemption for suicide.[7]

We find this abandonment wise – it is abundantly clear based on existing caselaw that defendant failed to prove the application of either exemption. Section 3600.5(a)(5)'s exemption for intentionally self-inflicted injury requires proof not only that an injury was self-inflicted, but that the employee had the specific intent to cause themselves injury. (*Smith v. Workers' Compensation Appeals Bd.* (2000) 79 Cal.App.4th 530, 538–541 [65 Cal.Comp.Cases 277].) Here, although defendant introduced evidence tending to show that applicant could not have fallen over the safety railing accidentally without first at least partially climbing it, it presented no actual evidence to indicate that applicant intentionally threw himself off the stairwell with intent to cause himself injury.[8] Without such evidence, section 3600.5(a)(5)'s exemption cannot apply. Section 3600.5(a)(6), meanwhile, exempts claims when the employee "willfully and deliberated caused his or her own death." Here, applicant did not die from his injuries, and therefore the exemption cannot possibly apply, quite aside from defendant's failure to introduce proof showing applicant acted willfully and deliberately.

Having apparently abandoned these affirmative defenses, defendant instead emphasizes that it was applicant's burden to prove that his injury arose out of and in the course of his employment, rather than defendant's burden to prove the affirmative defenses. As a statement of the law, this is accurate: under section 3600, it is the applicant's burden to show that the injury arose out of and in the course of the employment. (§ 3600(a)(2).) Pursuant to section 3202 and extensive caselaw, this requirement is to be liberally construed in favor of awarding benefits. (§ 3202; *Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729, 733.)

Each element – whether the injury arose out of the employment, and whether it occurred in the course of the employment – requires separate analysis. (*LaTourette v. Workers' Comp. Appeals Bd.* (1998) 17 Ca1.4th 644, 651 [63 Cal.Comp.Cases 253].) As stated in *LaTourette*:

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[7] Although the Minutes of Hearing and the F&A also contain references to the exemption for horseplay, there does not appear to have been any serious attempt to argue the application of that exemption to this case.

[8] Several of defendant's witnesses who examined the scene of the accident opined that they believed applicant acted with intent to take his own life. None, however, had any knowledge of applicant as an individual or any knowledge of applicant's mental state at the time of the accident, nor had any of them reviewed any medical records or other information tending to show that applicant acted with intent to cause injury to himself. We do not consider such speculation to be evidence of any significant probative value.

> "The requirement of Labor Code section 3600 is twofold. On the one hand, the injury must occur 'in the course of the employment.' This concept 'ordinarily refers to the time, place, and circumstances under which the injury occurs.' [Citation.] Thus ' "[a]n employee is in the 'course of his employment' when he does those reasonable things which his contract with his employment expressly or impliedly permits him to do." ' [Citation.] And, ipso facto, an employee acts within the course of his employment when ' "performing a duty imposed upon him by his employer and one necessary to perform before the terms of the contract [are] mutually satisfied." ' " (*Maher v. Workers' Comp. Appeals Bd., supra,* 33 Cal. 3d at p. 733.)
>
> "On the other hand, the statute requires that an injury 'arise out of' the employment . . . . It has long been settled that for an injury to 'arise out of the employment' it must 'occur by reason of a condition or incident of [the] employment. . . .' [Citation.] CA(3) (3) (See. fn. 1.) That is, the employment and the injury must be linked in some causal fashion." (*Maher v. Workers' Comp. Appeals Bd., supra,* 33 Cal. 3d at pp. 733-734.)

(*LaTourette, supra,* 17 Cal.4th at 650–651.)

Here, defendant appears to argue that because it produced evidence showing that applicant could not have fallen down the stairwell without first at least partially climbing the safety railing, it was applicant's burden to show how at least partially climbing the safety railing arose out of and was in the course of his employment. (Second Petition, at pp. 13–14.)

Defendant's own case citations, however, illustrate the flaw in defendant's reasoning. As defendant approvingly quotes:

> Employee misconduct, whether negligent, willful, or even criminal, does not necessarily preclude recovery under workers' compensation law. **In the absence of an applicable statutory defense, such misconduct will bar recovery only when it constitutes a deviation from the scope of employment.** (See *Traub v. Board of Retirement* (1983) 34 Cal.3d 793, 799-800 [195 Cal.Rptr. 681]; *Wiseman v. Industrial Acc. Com.* (1956) 46 Ca1.2d 570, 572-573 [297 P.2d 649]; *Associated Indem. Corp. v. Ind. Acc. Com.* (1941) 18 Ca1.2d 40, 47 [112 P.2d 615]; Larson, Workmen's Compensation Law (1985) §§ 30.00, 35.00.) In determining whether particular misconduct takes an employee outside the scope of his employment, **"A distinction must be made between an unauthorized departure from the course of employment and the performance of a duty in an unauthorized manner. Injury occurring during the course of the former conduct is not**

> **compensable. The latter conduct, while it may constitute serious and willful misconduct by the employee (Lab. Code, § 4551), does not take the employee outside the course of his employment."** [Citations.]" (*Pacific Tel. & Tel. Co. v. Workers' Comp. Appeals Bd.* (1980) 112 Cal.App.3d 241, 245 [169 Cal.Rptr. 285]; *Auto Lite etc. Corp. v. Ind. Acc. Com.* (1947) 77 Cal.App.2d 629, 631-632 [176 P.2d 62]; 1A Larson, op. cit. supra, § 35.20.)

(*Westbrooks v. Workers' Comp. Appeals Bd.* (1988) 203 Cal.App.3d 249, 254 [53 Cal.Comp.Cases 157] (emphasis added).) As the emphasized portions make clear, unless defendant can show an applicable statutory defense – which defendant has abandoned, as described above – an injury will only be found to be not compensable when it is caused by an outright departure from the course of employment, as opposed to merely by performance in an unauthorized manner.

The *Westbrooks* Court illustrated this principle by reference to *Williams v. Workmen's Comp. Appeals Bd.*, wherein a messenger, on an errand for his employer, engaged in a high-speed chase with the police through heavy traffic after running a red light, and yet was still found to have sustained a compensable injury. (*Williams v. Workmen's Comp. Appeals Bd.* (1974) 41 Cal.App.3d 937, 940.) The *Westbrooks* Court noted that endorsing the opposite conclusion – that reckless, negligent or even intentional misconduct would preclude recovery under the workers' compensation statutes – "would totally undermine the no-fault foundation of workers' compensation law. Indeed, the Workers' Compensation Act contemplates that intentional ('serious and willful') misconduct may occur within the course of one's employment and that any injury resulting from such misconduct should not necessarily preclude recovery of benefits." (*Westbrooks, supra,* 203 Cal.App.3d at 254.) Instead, the Court focused on the fact that the employee was doing "the ultimate 'thing' for which he was employed -- driving -- albeit by a negligent or even a reckless and criminal 'method.'" (*Ibid.*)

Similarly, in *Smith, supra*, an employee was injured when punching the wall in frustration during an argument with a co-worker. (*Smith, supra,* 79 Cal.App.4th 530.) Although the employer attempted to assert section 3600(a)(5)'s exemption for intentionally self-inflicted injury, the Court found that the injury was compensable because the employee did not act with deliberate intent to injure himself. (*Id.* at p. 541.) It was apparently taken for granted by all parties that punching the wall did not itself represent a departure from the course of employment sufficient to prevent recovery regardless of intent.

As the above cases make clear, the operative inquiry is not whether the specific action undertaken by the employee that immediately resulted in injury was necessary to perform the employment – it is obvious that it was neither necessary to engage in a high-speed chase with the police to deliver a message, nor to punch a wall in the course of an argument with a co-worker. Therefore, it is wrong to state that applicant had the burden of proving that climbing the safety railing arose out of and was in the course of his employment; instead, applicant's burden was merely to show that he was, in the words of the *Westbrooks* Court, engaged in "the ultimate 'thing' for which he was employed" at the time of his injury. (*Westbrooks, supra,* 203 Cal.App.3d at 254.)

Here, the evidence is uncontested that applicant was injured while using the stairwell at his place of employment during work hours. There is no suggestion he was not permitted to use the stairwell where he was injured.[9] The security camera footage shows applicant clearly reporting for work on the morning of his injury, and witnesses confirmed that applicant was performing work on the day of his injury. Accordingly, there appears to be no serious dispute that applicant proved he was engaged in his general employment duties – "the ultimate 'thing' for which he was employed" – at the time of his injury.

To the extent that defendant's argument is that it proved applicant must have at least partially climbed the safety railing in order to fall over it, and that by doing so applicant was *necessarily* engaged in a fundamental departure from the course of his employment, we disagree with defendant's interpretation of the facts and of the law. Even assuming for purposes of this decision that defendant did prove the applicant could only have injured himself by first at least partially climbing the safety railing, there are any number of possible explanations why applicant may have chosen to do so, and the fact that such conduct may have been negligent or reckless does not serve as a bar to compensation.

The truth of the matter is that we will likely never know precisely why or how applicant fell, because the fall was essentially unwitnessed,[10] and applicant's injuries have rendered him unable to communicate. In circumstances such as these where the precise cause of injury is unclear

[9] Applicant's boss testified that he could not think of a reason that applicant would have needed to use the particular stairwell in question, but there is no indication that applicant was prohibited from using it. (Transcript, 1/26/22, at pp. 51–52.)

[10] Martinez's testimony that an employee named "Dan" was in the stairwell on the second floor, and saw applicant falling through the stairwell, does not suggest that the so-named employee saw how applicant fell. (Transcript, 1/26/22, at pp. 97–98.)

and the injured employee is incapable of shedding light on the matter whether through death or incapacitation, clear caselaw provides that any doubts as to compensability should be resolved in favor of the injured employee. As the Court of Appeal in *Clemmens v. Workers' Comp Appeals Bd.* explained:

> In 1 Larson, Workmen's Compensation Law, the author states (pp. 108-111): "When an employee is found dead under circumstances indicating that death took place within the time and space limits of the employment, in the absence of any evidence of what caused the death, most courts will indulge a presumption or inference that the death arose out of the employment. **The theoretical justification is similar to that for unexplained falls and other neutral harms:** The occurrence of the death within the course of employment at least indicates that the employment brought deceased within range of the harm, and the cause of harm, being unknown is neutral and not personal. The practical justification lies in the realization that, when the death itself has removed the only possible witness who could prove causal connection, fairness to the dependents [suggests] some softening of the rule requiring claimant to provide affirmative proof of each requisite element of compensability." He cites four California cases for this proposition. (*Western Metal Supply Co. v. Pillsbury*, 172 Cal. 407 [156 P. 491, Ann.Cas. 1917E 390] [night watchman found dead from gunshot wound]; *Western Grain etc. Co. v. Pillsbury*, 173 Cal. 135 [139 P. 423] [night watchman missing and evidence of violence at the scene]; *Bissinger & Co. v. Industrial Acc. Com.*, 105 Cal.App. 441 [287 P. 540]; [employee found dead enveloped in carbon monoxide gas and evidence he was repairing employer's car]; *F. W. Woolworth Co. v. Industrial Acc. Com.*, 17 Cal.2d 634 [111 P.2d 313] [employee found seriously injured at bottom of light well and with no memory].)
>
> Larson further states (pp. 112-113): "In many so-called unexplained-death cases, however, there are some employment or personal ingredients on which an inference one way or the other could be based. Thus, awards have been made for unwitnessed accidents in which employees have been found run over by trains or trucks, burned by gasoline, asphyxiated by gas, buried by cave-ins, and blown up by dynamite. In such cases, although no one may have seen the accident so as to be able to say why the dynamite exploded or the gasoline ignited, the character of the harm is so obviously work-related that it becomes practically impossible even to suggest a hypothetical personal explanation. **Similarly, when employees have died as the result of unwitnessed falls down elevator shafts, from buildings, from boats, or from trains, a noncompensable origin is virtually inconceivable.**"

> The California cases which appear to indulge a presumption or inference seem to be cases where the character of the harm is obviously work related. The problem in the present case is that the character of the harm is neither obviously work related nor obviously idiopathic, that is, personal, as it is in a case where the autopsy clearly shows that death resulted from disease. In a case where the employment appears to be the cause, the burden is placed on the employer to prove otherwise. In a case where disease appears to be the cause, the burden is placed on the applicant to prove the employment contributed.

(*Clemmens v. Workers' Comp. Appeals Bd.* (1968) 261 Cal.App.2d 1, 5–6 (emphasis added).)

Defendant attempts to distinguish this line of cases by asserting that applicant argued his injury was caused by disease, i.e. diabetes, and that the burden was therefore on applicant to prove that the employment contributed to applicant's diabetes. This appears to be a misreading both of *Clemmens* and of applicant's argument. Although some of applicant's witnesses did suggest that he may have been suffering from a diabetic shock and that this might have contributed to the circumstances leading him to fall, no one testified that disease was the *cause* of his *injury*. Applicant's injuries in this case were caused by falling down a five-story stairwell, not by diabetes. In *Clemmens,* the employee, an electrician, died at work, in circumstances where it was conceivable he could have been electrocuted; alternatively, there could have been no electrocution, and he could have died as the result of some medical condition, whether diabetes, heart disease, or a heart attack. In other words, the actual cause of death was in dispute. Here, no one has suggested that applicant's injuries were caused by anything other than his fall. The question is why applicant fell, not whether his injuries were caused by the fall.

In *F.W. Woolworth, supra,* the Supreme Court approved an award to an employee who was injured after apparently falling out of a window on the fifth floor of the employer's building, with no immediate memories of how the injury occurred. (*F.W. Woolworth Co. v. Industrial Acc. Com.*, 17 Cal.2d 634, 635 (1941).) As related by the Supreme Court:

> During the evening Sivley was engaged in transporting material between the fifth floor and the ground floor of the building by means of a freight elevator at the rear of the store. At about 10:30, while unloading supplies on the fifth floor, he stopped his work to take the elevator down to the first floor in answer to a call. He testified that after unlocking a door to permit a fellow-employee to leave the building he started back to the fifth floor to complete his task of unloading material from the elevator; that he remembered starting

> the elevator but did not remember reaching the fifth floor. During the trip he became faint and felt that he needed air; things were hazy to him and his mind went "foggy and blank". He had no recollection of what happened thereafter until he "came to" at the bottom of a light well, or shaft, between the store and an adjoining building. He was found there, seriously injured, by his fellow-workers who brought him into the store and sent for medical aid.
>
> It was established by the testimony of others that the elevator was stopped at the fifth floor with its door open and with part of its load still inside. Sivley's pencil and pliers were found beside an open window a few feet down the hallway from the elevator and there were marks on both sides of the light well below the open window indicating the course of his fall.

(*Id.* at pp. 635–636.) The defendant argued that "there was no evidence that Sivley's duties took him into the hallway where this particular window was situated; that his presence at the window might be explained by some activity in no way connected with his employment; and that there is no presumption that the injury arose out of the employment merely because it happened during working hours." (*Id.* at p. 636.) The Supreme Court affirmed the commission's finding of injury, noting that although there was no direct evidence as to how Sivley's injury occurred, it was reasonable to infer his injury was caused in the course of his employment in the absence of any other explanation. (*Id.* at pp. 636–637.)

As this line of cases makes clear, the finder of fact should not allow a myopic obsession with the precise mechanism of injury to defeat a finding of compensability if the nature of the injury itself precludes knowledge of such precise details. Here, applicant was injured in an unwitnessed fall on the employer's premises during his normal hours of employment –a situation in which an injury would clearly be compensable in the normal course of affairs, barring deliberate intention to injure oneself or some dramatic departure from the course of employment. Under the circumstances, we believe applicant carried his burden to show a work-related injury, and we do not believe his inability to explain precisely how he fell over the safety railing should preclude a finding of compensability.

To be clear, if defendant had proved that applicant acted with specific intent to cause himself harm, it would be entitled to a finding that applicant's injury was not compensable pursuant to the specific statutory exclusion of section 3600(a)(5). As described above, however, defendant did not prove such intent, instead showing at best that applicant must have at least partially climbed

the safety railing, but not, crucially, whether he then deliberately threw himself over it with intent to cause injury. In the absence of such proof, we believe the WCJ was right to conclude that applicant's injury is a compensable injury that arose out of and in the course of his employment, and we reject defendant's arguments to the contrary.

IV. SUBSTANTIAL EVIDENCE AND HEARSAY

Defendant next asserts that the WCJ's F&A is not based upon substantial evidence. Defendant appears to raise two objections here: first, that the WCJ's finding of injury was based upon a speculative finding that applicant's fall was caused by his diabetes, and second, that the WCJ impermissibly relied on hearsay evidence to reach this conclusion, which defendant asserts is a violation of Code of California Regulations, title 8, section 376.2, which provides in relevant part: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." (Cal. Code Regs., tit. 8, § 376.2.)

On the first point, defendant does not cite where in the F&A the WCJ found the fall to be caused by diabetes. The WCJ found that applicant's injuries were compensable because they arose out of and in the course of employment; he did not make any specific findings as to the impact, if any, of applicant's diabetes, nor was he required to do so at this juncture. Whether or not there was substantial evidence to prove that applicant's fall over the safety railing was caused by a diabetic shock, the WCJ neither found that to be the case, nor was required to, for the reasons outlined above.

On the second point, defendant's citation to Code of California Regulations, title 8, section 376.2 is inapposite because that regulation applies to the Occupational Safety and Health Appeals Board, not to the Workers' Compensation Appeals Board – which, at the risk of stating the obvious, are two entirely separate bodies governed by different statutory and regulatory frameworks. Hearsay is admissible in workers' compensation proceedings. (§ 5708.)

V. WCJ'S ABILITY TO DESIGNATE EXPERT WITNESSES

Defendant next asserts that the WCJ erred in refusing to designate four of its witnesses as experts. Here, we agree with defendant that expert witnesses may be designated in workers' compensation proceedings, and that the WCJ appears to have mistakenly applied the wrong criteria

for designation by focusing on sections 4060 and 4060.2, which deal with obtaining expert opinions on medical issues, not on designating expert witnesses in non-medical matters. However, to the extent the WCJ erred in not designating these witnesses as experts, we do not perceive any prejudice resulting from such an error. Contrary to defendant's assertions, designation as an expert witness does not provide any greater evidentiary weight to the testimony; the value of such testimony lies in the material upon which it is based and the strength of the expert's reasoning, not upon the expert designation itself. (See *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 [the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based].) Here, it is clear from the Report that the WCJ carefully considered the testimony of defendant's witnesses where appropriate.[11] We perceive no prejudicial error in refusing to provide these witnesses with the expert witness label.

VI. SUFFICIENCY OF MEDICAL EVIDENCE TO SUPPORT FINDINGS OF INJURY TO SPECIFIC BODY PARTS

Finally, defendant asserts that there is a lack of medical evidence to support findings of injury to specific body parts, writing that "[t]hough the applicant clearly sustained injury following his fall, the WCJ should have deferred the issue of specific injuries to a future date." (Second Petition, at p. 20.)

Although we certainly agree that it is unfortunate that the parties elected to proceed to trial on the issue of AOE/COE without a report from a Qualified Medical Examiner ("QME") or other medical-legal expert, we disagree with defendant's assertion that there is no medical evidence of causation in the record. As the WCJ makes clear in the Report, the findings of injury to specific body parts were based upon review of the treating notes of applicant's treating physicians at the hospital where he received care immediately following his injury until his discharge several weeks later, admitted at trial as Exhibits 12 through 15.

The F&A finds injury to the following body parts, with others deferred pending more thorough medical evaluation: head, neck, brain, shoulders, back, bilateral legs, right thigh, right

[11] As discussed above, the WCJ did not give weight to Dr. Balaban's opinion on the causes of applicant's fall, which was not error because Dr. Balaban was unable to testify to the critical issue, applicant's mental state at the time of the fall.

femur, internal system, nervous system, psyche, pulmonary, and eyes. (F&A, at p. 1.) In our view, the medical records admitted in this case sufficiently demonstrate applicant sustained injury to each of these body parts, and defendant does not raise any particular body part it alleges that these records do not substantiate injury to.

As we read the Petition, defendant's contention here is primarily as to causation: the treating notes do not specifically state that applicant's myriad injuries were caused by his fall, and therefore, in defendant's view, cannot support a finding that these injuries were caused by the fall. (See Second Petition, at p. 20 ["However, the medical reporting does not outline causation. The WCJ has acted as his own medical expert to determine that the various body parts were injured as part of the fall, but provides no legal basis for such a finding."].) Under the circumstances, and in the absence of any alternative explanation, we do not think that the opinion of a medical expert is required to conclude that applicant's injuries are causally related to the five-story fall he sustained immediately prior to being taken to the hospital where those injuries were documented.

To the extent that defendant questions the nature and extent of any of applicant's injuries, including the possibility of apportionment to non-industrial causes, it is of course free to address those questions to the medical-legal examiner that we hope the parties speedily obtain a report from as the next step in moving this case towards a final resolution.

VII. CONCLUSION

As described above, the WCJ properly determined that applicant sustained serious, life-threatening injuries as a result of a fall at this place of employment and that these injuries are compensable in the workers' compensation system, and we find that the WCJ is not subject to disqualification for bias. Accordingly, we will affirm the F&A, and we will dismiss defendant's requests to disqualify the judge as procedurally improper.[12]

[12] As described above, we would also have denied the requests for disqualification on the merits had they been properly presented.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Award issued on March 16, 2022 is **AFFIRMED**. To the extent that the March 16, 2022 Petition for Reconsideration and/or Removal seeks disqualification of the WCJ, it is **DISMISSED.** To the extent that the April 8, 2022 Petition for Reconsideration seeks disqualification of the WCJ, it is also **DISMISSED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 15, 2022

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

CATHERINE GIOVENCO
ODJAGHIAN LAW GROUP
LAUGHLIN, FALBO, LEVY & MORESI

AW/ara

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