WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MARISOL RESENDIZ, *Applicant*

vs.

LA CORNETA, INC.;
EMPLOYERS ASSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ12288626
San Jose District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION

On June 14, 2021, defendant filed a Petition for Reconsideration challenging a Findings and Award dated May 21, 2021 and issued on May 26, 2021 by the workers' compensation administrative law judge (WCJ). Therein, the WCJ found that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to the low back and spine while working as a food handler on May 19, 2019, that the injury did not arise out of horseplay, that the injury is not barred by Labor Code[1] section 3600(a)(5), and that defendant is barred from asserting an affirmative defense under section 5705(c). On May 28, 2021, the WCJ issued an order rescinding the Findings and Award dated May 21, 2021. The WCJ issued a second Findings and Award on June 14, 2021, making essentially the same findings as in the original decision. Pursuant to our authority, we accept applicant's and defendant's supplemental pleadings.[2] (Cal. Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).) We have reviewed defendant's Petition for Reconsideration, the WCJ's Amended Report and Recommendation on Petition for Reconsideration (Report), the parties' supplemental pleadings, and the record in this matter. Based on our review and for the reasons stated below, we will dismiss defendant's Petition for Reconsideration as moot.

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[1] All further statutory references are to the Labor Code, unless otherwise noted.
[2] Applicant filed a revised Answer on June 18, 2021 and defendant filed an objection to applicant's revised answer on June 21, 2021.

The WCJ issued the original Findings and Award on May 26, 2021. On May 28, 2021, the WCJ rescinded the original Findings and Award pursuant to his authority under section 5803 and WCAB Rule 10966, rendering that decision void. The WCJ then issued a new Findings and Award on June 14, 2021. Section 5903 provides that a Petition for Reconsideration must be filed within 20 days of the service of a final order, decision, or award. (Lab. Code, § 5903.) The same day the new decision was issued, defendant filed a Petition for Reconsideration challenging the original May 26, 2021 Findings and Award which had been rendered void by the May 28, 2021 rescission order. Consequently, defendant's Petition for Reconsideration is moot and will be dismissed. The issuance of the June 14, 2021 Findings and Award triggered a new period for filing a Petition for Reconsideration. However, defendant did not file a new Petition for Reconsideration of the June 14, 2021 decision within 20 days of the service as required by section 5903.

While we do not find the holding of *Nestle Ice Cream Co., LLC v. Workers' Comp. Appeals Bd. (Ryerson)* (2007) 146 Cal.App.4th 1104 [72 Cal.Comp.Cases 13] directly on point in this case, it is still instructive. In *Ryerson*, the Court of Appeal held that an amended decision making a substantive correction to an original decision triggered a new 20-day filing period because the substantive change involved a judicial function rather than a clerical one. In this case, the WCJ did not merely issue an amended decision. Instead, the WCJ rescinded the May 26, 2021 Findings and Award rendering it void. The act of rescinding the original decision in order to consider procedural objections raised by defendant constitutes a judicial function and not merely a clerical one. Therefore, the issuance of the June 14, 2021 Findings and Award triggered a new 20-day period for filing a Petition for Reconsideration requiring defendant to file a new Petition for Reconsideration.

While we are dismissing defendant's Petition for Reconsideration as moot for the reasons discussed above, we would have denied the petition on the merits had defendant filed it again for the reasons discussed below and for the reasons discussed in the WCJ's June 28, 2021 Amended Report and Recommendation on Petition for Reconsideration (Report), which we would have adopted and incorporated.

California has a no-fault workers' compensation system. With a few exceptions, all California employers are liable for the compensation provided by the system to employees injured or disabled in the course of and arising out of their employment, "irrespective of the fault of either party." (Cal. Const., art. XIV, § 4.) The protective goal of California's no-fault workers' compensation legislation is manifested "by defining 'employment' broadly in terms of 'service to

an employer' and by including a general presumption that any person 'in service to another' is a covered 'employee.'" (Lab. Code, §§ 3351, 5705(a); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354 [54 Cal.Comp.Cases 80])

Notwithstanding the above, section 3600 imposes liability on an employer for workers' compensation benefits only if its employee sustains an injury arising out of and in the course of employment (AOE/COE). An employer is liable for workers' compensation benefits, where, at the time of the injury, an employee is "performing service growing out of and incidental to his or her employment and is acting within the course of employment." (Lab. Code, § 3600(a)(2).) The determination of whether an injury arises out of and in the course of employment requires a two-prong analysis. (*LaTourette v. Workers' Comp. Appeals Bd*. (1998) 17 Cal.4th 644 [63 Cal.Comp.Cases 253].)

First, the injury must occur "in the course of employment," which ordinarily "refers to the time, place, and circumstances under which the injury occurs." (*LaTourette, supra*, 63 Cal.Comp.Cases at page 256.) An employee is acting within "the course of employment" when "he does those reasonable things which his contract with his employment expressly or impliedly permits him to do." (*Id*.) In other words, if the employment places an applicant in a location and he or she was doing an activity reasonably attributable to employment or incidental thereto, an applicant will be in the course of employment and the injury may be industrially related. (*Western Greyhound Lines v. Industrial. Acc. Com. (Brooks)* (1964) 225 Cal.App.2d 517 [29 Cal.Comp.Cases 43].)

Second, the injury must "arise out of" the employment, "that is, occur by reason of a condition or incident of employment." (*Employers Mutual Liability Ins. Co. of Wisconsin v. Industrial Acc. Com. (Gideon)* (1953) 41 Cal.2d 676 [18 Cal.Comp.Cases 286, 288].) "[T]he employment and the injury must be linked in some causal fashion," but such connection need not be the sole cause, it is sufficient if it is a "contributory cause." (*Maher v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 729 [48 Cal.Comp.Cases 326, 329].)

In this case, the record reflects that when applicant was injured, she was on premises, during her work day, descending stairs returning from a bathroom break. If the employment places an applicant in a location and he or she was doing an activity reasonably attributable to employment or incidental thereto, an applicant will be in the course of employment and the injury may be industrially related. (*Brooks, supra,* 225 Cal.App.2d 517.) This principle holds especially true in cases where the applicant is being paid during the time involved. (*Id.*)

We therefore conclude that applicant has demonstrated by a preponderance of the evidence that she met her initial burden of proof that she sustained injury AOE/COE in a location at which she was placed by her employment and while engaged in an activity reasonably attributable to that employment. The burden then shifted to defendant to rebut applicant's evidence or establish an affirmative defense.

In *Westbrooks v. Workers' Comp. Appeals Bd*. (1988) 203 Cal.App.3d 249 [53 Cal.Comp.Cases 157], the Court of Appeals stated:

> 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 Cal.2d 570, 572–573 [297 P.2d 649]; *Associated Indem. Corp. v. Ind. Acc. Com*. (1941) 18 Cal.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.

In other words, "[w]here an employee is in the performance of the duties of his employer, the fact that the injury was sustained while performing the duty in an unauthorized manner or in violation of instructions or rules of his employer does not make the injury one incurred outside the scope of employment." (*Williams v. Workers' Comp. Appeals Bd*. (1974) 41 Cal.App.3d 937 [39 Cal.Comp.Cases 619, 621].) Thus, if an employee's injury occurs in the performance of a duty, albeit in a manner outside the ordinary custom and practice of performing that duty, the injury has occurred within the sphere of the employment.

On the other hand, the employee's injury is not compensable if it occurred while the employee made an unauthorized departure from the course of the employment or deviated from his duties, and defendants hold the burden of proof to establish the injury was unconnected to the employment. (*Rockwell International v. Workers' Comp. Appeals Bd. (Haylock)* (1981) 120 Cal.App.3d 291 [46 Cal.Comp.Cases 664]; *City of Los Angeles v. Workers' Comp. Appeals Bd. (Rivard)* (1981) 119 Cal.App.3d 633 [46 Cal.Comp.Cases 625]; *Pacific Tel. & Tel. Co. v. Workers' Comp. Appeals Bd*. (1980) 112 Cal.App.3d 241 [45 Cal.Comp.Cases 1127].)

The following cases are instructive on the wide scope of activities that were found to be AOE/COE. In *Southwest Marine, Inc. v Workers' Comp. Appeals Bd. (Erby)* (1992) 57 Cal.Comp.Cases 216, an employee sat down on the job, an act forbidden by the employer, yet sustained an injury AOE/COE and did not abandon his employment. In *Williams, supra*, 39 Cal.Comp.Cases 619, 621, a travel agency employee in the process of delivering tickets and collecting money who was injured in a collision at the end of a high speed chase by a pursuing policeman was AOE/COE because illegal or even criminal conduct does not necessarily remove an employee from the course of his employment. In *McCarty v. Workers' Comp. Appeals Bd.* (1974) 12 Cal.3d 677 [39 Cal.Comp.Cases 712], the Court held that when an employee is injured while performing activities not specifically assigned, but which the employee consistently or customarily performs with the employer's acquiescence, the employer impliedly authorizes the conduct and any resulting injuries are compensable. Furthermore, an employee's act in exiting a hotel through an unauthorized door, although perhaps unwise, did not constitute a departure from the course of employment. In exiting the premises albeit through an unauthorized door, applicant sustained a slip-and-fall injury. As the applicant was performing her duties in an unauthorized manner, her injury was compensable. (*THG, Inc., Safeco Insurance Company v. Workers' Comp. Appeals Bd. (Anderson)* (2001) 66 Cal. Comp. Cases 1436, 1437.) In *S.O.S. Steel Company, Inc., v. Workers' Comp. Appeals Bd. (Mireles)* (2018) 83 Cal.Comp.Cases 1912 (writ den.), a steelworker sustained injury AOE/COE falling from a steel column, where rumors of applicant climbing the column to take a photograph or out of boredom did not constitute substantial evidence, where there was no evidence that applicant was ever told not to climb columns or that doing so was against employer's rules or prohibited by safety order, and where applicant's act of climbing a column while waiting for materials was not wholly unreasonable.

Participants in horseplay are generally not entitled to workers' compensation unless the employer condoned the horseplay. (*Hodges v. Workers' Comp. Appeals Bd*. (1978) 82 Cal.App.3d 894, 901 [43 Cal.Comp.Cases 870].) The rationale for denying workers' compensation benefits is that the injury sustained while engaging in horseplay does not arise out of the employment because acts of horseplay are not an element of the employment bargain. However, an applicant injured while performing an employment duty in an unauthorized manner is within the course of employment. (*Associated Indem. Corp. v. Ind. Acc. Com. (MacFie)* (1941) 18 Cal.2d 40, 47 [6 Cal.Comp.Cases 129];(*Williams, supra,* 41 Cal.App.3d at p. 940–941.)

We note that the WCJ applied section 5407.5 and WCAB Rule 10525 to find that the defendant waived the defense of serious and willful misconduct because defendant did not file a petition asserting that defense within 12 months from the date of injury. However, because we find that defendant did not meet its burden of proof to establish willful misconduct under section 5705, we need not address the question of whether the 12 month filing requirements of section 5707.5 and WCAB Rule 10525, which apply to section 4551, also apply to an asserted affirmative defense of willful misconduct pursuant to 5705. In order to prove that applicant's injury was a result of willful misconduct, defendant had the burden to establish that applicant had the intention to self-injure. (*William Smith v. Workers' Compensation Appeals Board* (2000) 79 Cal.App.4th 530 [65 Cal. Comp. Cases 277, 282] ["While applicant may have acted rashly or impulsively, or may have been negligent or even reckless in punching [a] wall, there is no evidence that he deliberately sought to injure himself, thereby breaking the chain of causation. Mere carelessness or contributory negligence of the injured does not break the causative connection …."].) Willful misconduct implies at least the intentional doing of something either with knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result. (*Mercer-Fraser Co. v. Industrial Acc. Com*., (1953), 40 Cal.2d 102, 118 [18 Cal.Comp.Cases 3].) While we do not necessarily agree with the WCJ's statement that the employer's failure to discipline applicant is dispositive to the analysis here, we agree that applicant credibly testified that she was surprised that she fell (Minutes of Hearing and Summary of Evidence (MOH/SOE) at p. 3:19-20), that that testimony negates the intention to inflict self-injury, and that no substantial evidence rebutting that testimony was provided.

For the reasons discussed by the WCJ in the Report, we agree that defendant did not meet its burden to establish that applicant's injury was intentionally self-inflicted or a result of horseplay or willful misconduct. We have given the WCJ's credibility determination significant weight because the WCJ had the opportunity to listen to the witness' testimony and judge its veracity. (See *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 determination. (*Id*.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 13, 2021

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

MARISOL RESENDIZ
LAW OFFICE OF JOHN C. DUNN
LAUGHLIN FALBO LEVY & MORESI

PAG/abs

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

AMENDED REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1. Applicant's Occupation : Food handler
   Applicant's Age : 33 (at time of injury)
   Date of Injury : 5/19/2019
   Parts of Body Injured : low back and spine
2. Identity of the Petitioner : **Defendant f**iled the petition.
   Timeliness : The petition was timely
   Verification : The Petition was properly verified.
3. Date of Issuance of Order : 06/03/2021

4. **Petitioner's contentions**: Petitioner contends that the WCJ made the decision in excess of WCAB's powers; that the evidence does not justify the findings of fact, and; that the findings of fact do not support the order and decision. Petitioner specifically contends that 1) The WCJ failed to consider defendant's timely objection to her summary of evidence and description of the applicant's actions seen on the surveillance film; 2) The WCJ failed to correctly describe the surveillance film that showed footage of the applicant's act of descending the stairs and immediately falling without landing on any step of the stairs; 3) The WCJ failed to observe the applicant when she testified during the trial by telephone instead of on a Zoom conference call and did not observe her demeanor to determine her veracity, truthfulness, and credibility; 4) The applicant's act of grabbing each handrail, lifting herself up, and swinging both of her feet forward instead of walking down each step was clearly horseplay and not known or condoned by her employer; 5) Since the applicant was on her break at the time of the incident and not performing work for her employer, her claim should be barred according to Labor Code Section 3600(a)(2); and 6) The applicant's voluntarily (sic) and careless act of horseplay and descending the stairs in such an unreasonable and reckless manner was the proximate cause of her injuries and should bar her claim according to Labor Code Section 3600(a)(2).

Applicant filed an Answer on 06/17/2021 and an Amended Answer on 06/18/2021.

Defendant filed its objection to Applicant's Revised Answer to Petition for Reconsideration on 6/21/2021.

On 7/08/2021, Applicant's counsel filed a letter, dated 07/07/2021, served on defense counsel as per the proof of service, alerting the undersigned of a clerical error in section IV which erroneously indicates the undersigned's recommendation is that the injured workers' Petition for Reconsideration be denied.

This Amended Report and Recommendation on Petition for Reconsideration is being issued to correct the clerical error in section IV below so it correctly reflects that the undersigned respectfully recommends that defendant's Petition for Reconsideration be denied.

II.
FACTS

Applicant, Marisol Resendiz, … while employed as a food handler by defendant La Corneta, Inc., claims to have sustained an industrial injury on 05/19/2019 to her low back and spine when she fell on her way back down the stairs to the restaurant after a bathroom break. Defendant denied applicant's claim on the basis that the manner in which applicant descended the stairs by grabbing both handrails and swinging both feet off the ground before she fell was horseplay and thus not compensable.

On 02/17/2021, the matter proceeded to trial on the limited issue of injury AOE/COE, with defendant asserting the affirmative defense of horseplay pursuant to Labor Code section 3600(a)(5) and Labor Code section 5705(c). The trial was held by telephone with all witnesses testifying via telephone. Neither party objected to proceeding with the trial by telephone and neither objected to applicant's and witnesses' testimony by telephone. The disposition after trial was, "Review of the surveillance video will be issued within ten days so the parties have an opportunity to read it and have an opportunity to object. If there is no objection after ten days, the matter will be submitted."

On 03/08/2021, the SUMMARY OF EVIDENCE SURVEILLANCE VIDEO (DEFENDANT'S EXHIBIT B) was issued and served by the court via U.S. Mail on all parties listed on the Official Address Record.

On 5/19/2021, defendant filed a letter of the same date inquiring as to the status of the surveillance video.

On 5/24/2021, in response to defendant's letter, the undersigned emailed the parties and attached a copy of the summary of the surveillance video and requested that the parties e-file any objection. (EAMS Doc. #74226032)

On 5/26/2021 the court served the Findings and Award and Opinion on Decision, dated 5/21/2021, on all parties listed on the Official Address Record. Based on applicant's credible testimony as well as the employer witnesses and medical reports of PQME Dr. Moshe Lewis (Joint exhibits 1 and 2), the undersigned found that applicant sustained injury arising out of and in the course of employment not a result of horseplay.

On 5/27/2021, defendant filed its Objection to Summary of Evidence of the same date and alleged it did not receive a copy of the summary until 5/24/2021.

On 5/28/2021, the court issued and served the Order Rescinding the 5/21/2021 Findings and Award to consider the issues raised in defendant's objection.

On 06/14/2021, the court served the Findings and Award and Opinion on Decision, dated 6/03/2021, addressing defendant's objection to the summary. Having considered defendant's

objection to the summary of evidence of the surveillance video, the undersigned did not change her opinion that applicant sustained injury arising out of and in the course of employment and not as a result of horseplay.

However, it appears that it is from 5/21/2021 Findings and Award and Opinion on Decision that the defendant seeks reconsideration.

III.
DISCUSSION

1. The court considered defendant's timely objection to summary of evidence of the surveillance video

Defendant asserts that the undersigned did not consider defendant's objection to the summary of evidence of the surveillance video, thus depriving it of its constitutional due process of law and rights. Defendant further asserts that the undersigned should not have submitted the matter after receiving defendant's objection.

On 5/24/2021, the court served the 5/21/2021 Findings and Award. On 5/28/2021, after receipt of defendant's 5/27/2021 objection, the court issued and served the Order Rescinding the 5/21/2021 Findings and Award to specifically consider defendant's 5/27/2021 objection to the summary of evidence of the surveillance video. The undersigned addressed defendant's objection on page 8 and 9 of the 6/03/2021 Findings and Award. As defendant's objection was considered and addressed, defendant was not deprived of its due process of law.

2. Description of the surveillance video

Defendant next asserts that the undersigned "failed to correctly describe the surveillance film" and that the undersigned's description of IMG_1033.mov (1MB) at 00.04 "contradicted what she saw in IMG_10:34 (2MB) at 00.05…" The undersigned's description of IMG_1033.mov (1MB) at 00.04 states, "At 00:04, the blurred image shows what appears to be the applicant *landing on the next steps with both feet* and arms outstretched with each hand holding each rail of the stairwell." The undersigned's description of IMG_1034.mov (2 MB) at 00:04, states, "At 00:04, shows what appears to be the applicant going down the stairs. She is wearing a black top, black pants, a black apron and black hat. She is seen with arms outstretched, with each hand holding each rail of the stairwell and *steps down with what appears to be both feet*, though the feet are not visible." (SOE surveillance video, Defendant's Exhibit B) In IMG_1034.mov (2 MB) at 00:05, the undersigned observes, "the applicant has her arms outstretched *again* with each hand holding each rail of the stairwell. At 00:06, the applicant falls." Defendant's assertion that "the applicant did not land on any sets of steps" and that "she immediately fell while trying to descend the stairs" is contrary to what the undersigned saw when reviewing the surveillance video and as described in the summary of evidence. It is also contrary to applicant's trial testimony and deposition testimony. At trial, applicant testified that she was able to go down the first part just fine and on the second part she held each of the handrails with both hands and attempted to put both feet on the steps, stepped on the edge of the stair and slipped. (SOE, p. 3: 17-19) At deposition, applicant confirmed that her feet landed on one step then swung her feet forward to the next step. (Exhibit A, p. 48, line 18 through 21)

In the 6/03/2021 Findings and Award, the undersigned acknowledged defendant's assertion that the applicant was moving both of her feet forward and not walking down each step and indicated that, while the summary of the surveillance video may not have specifically indicated that the applicant was moving both her feet forward before falling, this was clear to the court, given the totality of the testimony presented at trial and noted that the applicant had testified that she had held each of the rails with both hands and lifted and swung both feet over the step. Notwithstanding this, it did not change the undersigned's opinion that applicant's injury arose out of and in the course of employment and not out of horseplay.

3. Testimony by telephone

Defendant cites *Garza v. WCAB* (1970) 35 CCC 500, and argues that unlike *Garza*, the undersigned "failed to observe the applicant's demeanor since the claimant did not testify in a Zoom conference during which she could have seen and evaluated the veracity and credibility of the claimant." However, defendant acknowledges that "defendants agreed to allow the applicant to testify by telephone", but that having done so "did not waive the fundamental duty of the WCJ as the trier of fact to accurately determine and weigh the truthfulness of the applicant's testimony by watching her testify online and judging her demeanor."

Defendant argues that the undersigned was "unable to see the applicant's face and reactions when she testified about how there were two parts of the stairs, and how she was able to go down the first part, but not the second part." Defendant asserts yet again that the surveillance film "clearly showed her falling immediately after grabbing each handrail and swinging both of her feet forward." and that "she was never able to go down the first part of the stairs just fine." Again, this is contrary to the undersigned's observation of applicant landing with both feet the first time and then falling the second time which was consistent with applicant's trial and deposition testimony. The undersigned considered this when assessing applicant's credibility.

It must be emphasized that the option for trial proceedings on LifeSize Video Conferencing was available to the parties on the day of trial. However, the parties agreed to go forward with trial and testimony by telephone. As noted above, there was no objection by either party to proceeding with the trial by telephone nor was there any objection by either party as to applicant's and witness' testimony by telephone. Defendant was represented by able counsel who cross-examined the applicant and presented deposition testimony for impeachment purposes. The undersigned was able to hear the applicant's voice and inflection when testifying through direct and cross-examination and did not need to physically view her demeanor to assess her credibility. Therefore, defendant's assertion that the undersigned could not assess applicant's credibility by telephone is unfounded.

4. Horseplay

Defendant contends that applicant's act of grabbing each handrail, lifting herself up, and swinging both her feet forward instead of walking down each step was clearly horseplay. An injury suffered by an employee while engaged in horseplay is not compensable as not arising out of employment. (*Hodges v. Workers' Comp. Appeals Bd.* (1978) 82 Cal.App.3d 894)

As discussed in the Opinion on Decision, applicant testified that she took a break at some point during her shift and went upstairs to the second floor of the restaurant to use the bathroom.

As she was coming back down the stairs, she held each of the rails with both hands and lifted and swung both feet over the step and landed on the steps the first time, but as she held each of the rails with both hands and lifted and swung her feet the second time, she missed the step and fell, hitting her head and back. Applicant admitted that she "did it in a very foolish way" but that she had never gone down the stairs like that before and has not done so since her injury. (SOE: p. 5, 1-4) The undersigned found the applicant credible and her description of how she descended down the stairs consistent with the surveillance video. The manner in which she came down the stairs, while not condoned by her employer, was not a material deviation from her employment. Rather, it was done in an unauthorized manner.

Although not binding, the board panel decision in *De Luna* is helpful. In *De Luna*, the board affirmed the WCJ's determination that applicant was not engaged in horseplay while riding a trash cart, but was performing work in an unauthorized manner. The board held that "even if applicant was riding the trash cart when she sustained her injury, such an action would best be described as the performance of authorized work in an unauthorized manner." Here, applicant testified that she took a break at some point during her shift and went upstairs to the second floor of the restaurant to use the bathroom. Applicant admitted that the manner in which she descended the stairs was done "in a very foolish way" but that she had never gone down the stairs like that before and has not done so since her injury. (SOE: p. 5, 1-4) The employer's five witnesses all viewed the surveillance video and testified that applicant had not descended the stairs correctly (SOE, p. 6: 4-6); had not done so in a normal way (SOE, p. 7: 20-24); that the way she did it was dangerous because anyone who swings like that is bound to fall (SOE, p. 8: 16-19); that it looked dangerous because she was swinging and it did not look safe (SOE, p. 9: 20-24); and that she was playing around (SOE, p. 10: 20-22). While it was clear that the employer did not condone the manner in which applicant descended the stairs, the applicant was not disciplined and there are no plans to discipline her for how she went down the stairs. (SOE, p. 9: 9-10) As of the day of trial, the applicant was still working at La Corneta. (SOE, p. 4: 5)

In this instance, the undersigned found that, while the manner in which applicant descended the stairs may have been done in an unauthorized manner, it did not render the injury as one occurring outside the scope of applicant's employment. Where an employee is in the performance of the duties of his employer, the fact that the injury was sustained while performing the duty in an unauthorized manner or in violation of instructions or rules of his employer does not make the injury one incurred outside the scope of employment. (*Williams v. Workmen's Comp. Appeals Board* (1974) 41 Cal.App.3d 937, 940) Applicant's act of going down the stairs after using the bathroom, while done in an unconventional and unauthorized manner, was not a substantial deviation from her duties. Thus, the injury to her low back and spine arose out of and within the course and scope of her employment and not out of horseplay.

5. Labor Code Section 3600(a)(2) – bathroom break

In its Petition for Reconsideration, defendant distinguishes *De Luna* and *Williams* by arguing, for the first time on appeal, that applicant was on a restroom break and on her own time and not performing work for her employer at the time of the injury and that her claim should be barred pursuant to LC Section 3600(a)(2).

The course of employment is not considered broken by certain acts relating to the personal comfort of the employee, as such acts are helpful to the employer in that they aid in efficient

performance by the employee. On the other hand, acts which are found to be departures effecting a temporary abandonment of employment are not protected." (*State Comp. Ins. Fund v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 925, 928) In this instance, applicant was on a bathroom break. Applicant testified that "she took a break at some point and went upstairs to the second floor to use the bathroom and then came back down." (SOE, p. 3: 15 – 16) Defendant offered no evidence that applicant was on an unpaid break, or on an extended break. The record indicates that the break was solely to use the bathroom and as such, it was an act relating to her personal comfort and was not a substantial departure of her employment. Applicant's injury occurred while performing work for her employer and as such, it was in the course of her employment.

6. Applicant's injury was not self-inflicted under LC §3600(a)(5)

Defendant contends that applicant's actions of descending the stairs by grabbing the handrails and swinging both of her feet forward is evidence that she deliberately intended to injure herself. In deciding whether compensation for an injury is barred as intentionally self- inflicted, the Board, as well as the reviewing court, is enjoined by section 3202 to construe the workers' compensation provisions of the Labor Code liberally 'with the purpose of extending their benefits for the protection of persons injured in the course of their employment.' (*Smith v. Workers' Comp. Appeals Bd*. (2000) 79 Cal.App.4th 530, citing *Mathews v. Workmen's Comp. Appeals Bd*. (1972) 6 Cal. 3d 719, 726) Mere carelessness or contributory negligence of the injured does not break the causative connection unless such intervening carelessness or negligence is the sole and exclusive cause of the injury. (*Smith* (*supra*), citing *Beaty v. Workers' Comp. Appeals Bd.* (1978) 80 Cal. App. 3d 397, 403)

Here, there was no evidence presented to show that applicant deliberately intended to injure herself when she swung her legs to get to the next step. Applicant testified credibly that she was surprised when she fell as she didn't think she would ever fall. (SOE, p. 3: 19-20) Further, none of the defense witnesses mentioned of any intent by applicant to injure herself. As there was no substantial evidence of a deliberate intent on the part of applicant to injure herself, the undersigned found that Labor Code §3600(a)(5) does not bar her claim.

7. Willful misconduct

Finally, defendant alleges that applicant's conduct was serious and willful and should thus be barred pursuant to Labor Code §5705 which states, in pertinent part, "The burden of proof rests upon the party or lien claimant holding the affirmative of the issue. The following are affirmative defenses, and the burden of proof rests upon the employer to establish them: …(c) Willful misconduct of an employee causing his or her injury."

CCR §10525(a) states, in part, "[a]ny claim(s) that an injury was caused by either the serious and willful misconduct of the employee or of the employer must be separately pleaded and must set out in sufficient detail the specific basis upon which a claim is founded…" Further, §5407.5 states, "[t]he period within which may be commenced proceedings for the reduction of compensation on the ground of serious and willful misconduct of the employee, under provisions of Section 4551, is Twelve months from the date of injury." Thus, the burden rests on the employer to prove applicant's alleged willful misconduct by separate pleading and it must do so within 12 months from the date of injury. Here, defendant did not separately plead in sufficient detail the alleged serious and willful misconduct on the part of applicant and

did not do so within 12 months from the March 19, 2019 date of injury. The undersigned found defendant is barred from asserting this defense.

Defendant argues, however, that although it did not pursue the reduction of compensation on the ground of serious and willful misconduct, it did not waive its right to assert the affirmative defense at trial. Assuming that defendant may still assert this affirmative defense, defendant has not met its burden of proving that applicant's act of descending the stairs was willful misconduct. The term 'serious and [willful] misconduct' is described . . . as being something 'much more than mere negligence, or even gross or culpable negligence' and as involving 'conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences. . .' The mere failure to perform a statutory duty is not, alone, [willful] misconduct. It amounts only to simple negligence. To constitute '[willful] misconduct' there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. . . ." (*Mercer-Fraser Co. v. Industrial Acci. Com.*, 18 Cal. Comp. Cases 3, 11 (Cal. January 6, 1953) quoting apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury. . . ." (*Mercer-Fraser Co. v. Industrial Acci. Com*., 18 Cal. Comp. Cases 3, 11 (Cal. January 6, 1953) quoting *Porter v. Hofman* (1938) 12 Cal. 2d 445, 447-48) (1938) 12 Cal. 2d 445, 447-48)

Here, applicant testified that she was surprised when she fell as she did not think she would ever fall. (SOE, p. 3: 19-20) While she acknowledged that she did it in a very foolish way, she had never gone down the stairs like that before and had never fallen down the stairs prior to her injury. (SOE, p. 5: 1-4). Importantly, applicant was not disciplined and there are no plans to discipline her for how she went down the stairs. (SOE, p. 9: 9-10) As such, defendant has not met its burden that applicant's conduct constitutes serious and willful misconduct.

IV.
RECOMMENDATION

It is respectfully recommended that defendant's Petition for Reconsideration be denied for the reasons stated above.

DATE: 07/09/2021

NORMA L. ACOSTA
WORKERS' COMPENSATION JUDGE