

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **SERGIO NUFIO,**

5 *Applicant,*

6 **vs.**

7 **BRIDGE HOSPITALITY, LLC; EVEREST**
8 **NATIONAL INSURANCE COMPANY,**

9 *Defendants.*

Case No. **ADJ6808931**

**OPINION AND DECISION
AFTER RECONSIDERATION**

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11 On September 20, 2010, we granted reconsideration of the June 25, 2010 Findings of Fact.
12 Therein, the workers' compensation administrative law judge (WCJ) found that applicant, while
13 employed as a busboy on March 25, 2009, sustained injury arising out of and occurring in the course of
14 employment (AOE/COE); that applicant's entitlement to benefits is not barred by Labor Code¹ section
15 3600(a)(10) because applicant reported his injury prior to notice of termination; that applicant's injury
16 did not arise out of horseplay; and that applicant's entitlement to benefits is not barred by section
17 3600(a)(7) because applicant was not the initial physical aggressor in the altercation that resulted in
18 applicant's injury. All other issues were deferred. We granted reconsideration in order to allow us time
19 to further study the factual and legal issues in this case. We now issue our Opinion and Decision After
20 Reconsideration.

21 In its Petition for Reconsideration, defendant contends that the WCJ erred in finding injury
22 AOE/COE arguing that applicant did not meet his burden of establishing a connection between his
23 employment and the alleged injury; that applicant's injury was a result of horseplay; and, alternatively,
24 that applicant was the initial physical aggressor.

25 Applicant did not file an answer but, instead, we received an August 16, 2010 letter from
26 applicant's attorney addressed to the Appeals Board indicating that he was not served with a copy of

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¹ All further statutory references are to the Labor Code, unless otherwise noted.

1 defendant's Petition for Reconsideration and requesting an opportunity to respond to defendant's
2 contentions. The WCJ did not issue a Report and Recommendation on Petition for Reconsideration.
3 Nevertheless, we found his Opinion on Decision responsive to defendant's contentions on
4 reconsideration.

5 Based on our review of the record, and for the reasons discussed below, we will affirm the June
6 25, 2010 Findings of Fact.

7 Initially, we note that applicant's attorney claims that he was not served with defendant's Petition
8 for Reconsideration. However, the proof of service attached to defendant's Petition for Reconsideration
9 shows service on applicant's attorney at the address listed on the Official Address Record. Moreover, in
10 as much as we are affirming the WCJ's decision, applicant has suffered no prejudice. (See *Postural*
11 *Therapeutic v. Worker's Comp. Appeals Bd. (Alarcon)* (1986) 179 Cal.App.3d 551, 555 [51
12 Cal.Comp.Cases 162] disapproved on other grounds in *Camper v. Worker's Comp. Appeals Bd.* (1992) 3
13 Cal.App.4th 679, 690 [57 Cal.Comp.Cases 644].) Accordingly, we find no reason to extend the time to
14 allow applicant's attorney to respond.

15 Next, we note that in his Opinion on Decision, the WCJ noted that he found that the testimony
16 from both the applicant and from his alleged attacker, Hernandez, had some credibility and consistency
17 problems. We generally agree with the WCJ's assessment in this case and give the WCJ's
18 determinations of credibility the "great weight" to which they are entitled. (*Garza v. Workmen's Comp.*
19 *Appeals Bd.* (1970) 3 Cal.App.3d 312 (35 Cal.Comp.Cases 500).) Nevertheless, the Appeals Board is
20 empowered to resolve conflicts in the evidence, to make its own credibility determinations, and enter its
21 own findings on the basis of its review of the record. (*Garza, supra*, 3 Cal.App.3d at p. 318.) While we
22 agree with the WCJ that applicant and Hernandez made inconsistent statements regarding the events
23 leading up to the altercation that resulted in applicant's injury,² we also agree with the WCJ that there is
24

25 ² The record here contains inconsistent statements by both applicant and Hernandez regarding their conduct prior to
26 March 25, 2009 injury and regarding whom initiated the horseplay on that date. For instance, applicant denied teasing his
27 coworkers, being aggressive at any time prior to March 25, 2009, having any problems with Hernandez prior to March 25,
2009, or kissing Hernandez. (MOH, 3/16/10, at p. 6:16-22.) However, he later conceded that he testified that he teased his
co-employees (MOH, 3/16/10, at p. 6:18-19), that he called his coworkers bad names and inappropriately touched them before
March 25, 2009 (MOH, 3/16/10, at p. 7:16-20), and that he had kissed Hernandez before (MOH, 3/16/10, at p. 8:14-15).
Likewise, Hernandez testified that he had not touched applicant on March 25, 2009 prior to the altercation (MOH, 5/12/10, at

1 sufficient consistency between applicant's and Hernandez' testimony, and thus, substantial evidence,³
2 that applicant's injury was a result of an altercation of which he was not the initial physical aggressor, as
3 discussed more fully below.

4 We now turn to the substantive issues. It is the injured worker who holds the burden of proving
5 injury by a preponderance of the evidence. (Lab. Code, § 3202.5.) Section 3600(a) provides that:
6 "[I]iability for the compensation ... shall, without regard to negligence, exist against an employer for any
7 injury sustained by his or her employees arising out of and in the course of the employment...." (Lab.
8 Code, §3600(a).) In fact, employment need not be the sole cause of the injury but rather it is sufficient
9 that it is a contributing cause. (*California Comp. & Fire Co. v. Workers' Comp. Appeals Bd. (Schick)*
10 (1968) 68 Cal.App.2d 157 [33 Cal.Comp.Cases 38].) Sufficient causal connection between the injury
11 and the employment is shown where the employment was a contributory cause of the injury. Moreover,
12 where the injury occurs on the employer's premises while the employee is in the course of his
13 employment and where the connection is not so remote from the employment that it is not an incident
14 thereof, the injury arises out of the employment. (*California Comp. & Fire Co. v. Workers' Comp.*
15 *Appeals Bd.* (1968) 68 Cal.App.2d 157, 160.)

16 However, an injury suffered by an employee while engaged in horseplay is not compensable as
17 not arising out of employment. (*Hodges v. Workers' Comp. Appeals Bd.* (1978) 82 Cal.App.3d 894, 901
18 [43 Cal.Comp.Cases 870], citing *Dalsheim v Industrial Acc. Com.* (1932) 215 cal. 107, 111-114.) While
19 neither statute nor case law defines the term "horseplay" (also known as "skylarking"), it has been
20 distinguished from the term "altercation" by an absence of animosity or a willingness to inflict bodily
21 harm. (*Mathews v. Workers' Comp. Appeals Bd.* (1972) 6 Cal.App.3d 719, 726 [37 Cal.Comp.Cases

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23 p. 4:6-7). However, upon cross-examination, Hernandez testified that he had pushed applicant on March 25, 2009 because he
24 did not like what applicant was saying to him. (MOH, 5/12/10, at p. 4:24-25.) Hernandez also gave conflicting testimony as
25 to the reason he and applicant went downstairs: applicant told him they should go downstairs to fight (MOH, 5/12/10, at p.
26 3:19-20) and applicant told Hernandez they should go downstairs to engage in sexual conduct. (MOH, 5/12/10, at p. 4:4-5.)

27 ³ The term "substantial evidence" means evidence which, if true, has probative force on the issues. It is more than a mere
scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . . It
must be reasonable in nature, credible, and of solid value. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.*
(*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566].) Furthermore, the Appeals Board may not simply isolate
evidence which supports or disapproves the Appeals Board's conclusions and ignore other relevant facts that rebut or explain
the supporting evidence, but must examine the entire record. (*Braewood, supra*, 34 Cal.3d at p. 164.)

1 124].) Webster's Dictionary defines horseplay as "rowdy or unruly behavior." (Webster's II New
2 College Dict. (1995) at p. 534.) Examples of horseplay include hotel bus boys throwing hard rolls at
3 each other (*Pacific Emp. Ins. Co. v. Industrial Acc. Com.* (1945) 26 Cal.App.2d 286 [10 Cal.Comp.Cases
4 89]), ranch trainees chasing each other around a bunkhouse (*Argonaut Ins. Co. v. Workers' Comp.*
5 *Appeals Bd.* (1967) 247 Cal.App.2d 669, 672), tenant of a company housing diving off a balcony into a
6 swimming pool on a bet (*Leffler v. Workers' Comp. Appeals Bd.* (1981) 124 Cal.App.3d 739, 741-742
7 [46 Cal.Comp.Cases 1135]), and workplace sparring. (*Hodges, supra*, 82 Cal.App.3d at pp. 898-899.)
8 Thus, both the dictionary and case law suggest horseplay requires some form of *physical* activity.

9 In turn, section 3600(a)(7) bars an employee's claim for compensation where the injury arises out
10 of an altercation in which the injured employee is the initial physical aggressor. First, we note that this
11 section is to be narrowly and strictly construed in light of the statutory policy of liberal construction in
12 favor of the injured worker pursuant to section 3202. (*Mathews, supra*, 6 Cal.App.3d at p. 726.) We
13 further note that under section 5705, the burden of proof rests upon the party holding the affirmative of an
14 issue. Thus, the burden to prove applicant's claim is barred under section 3600(a)(7) rests with defendant.

15 Moreover, to "arise out of an altercation," as required by section 3600 (a)(7), an injury must result
16 from an exchange between two or more persons characterized by an atmosphere of animosity and a
17 willingness to inflict bodily harm. An altercation is distinguishable from "horseplay" or "skylarking,"
18 neither of which involves such animosity, although either may result in bodily harm. Section 3600(a)(7)
19 also imposes the necessity of selecting one overt act out of a series of hostile verbal, psychological, and
20 physical acts as the one that, for compensation purposes, caused the quarrel and elicited the ultimate
21 injury. (*Mathews, supra*, 6 Cal.3d at p. 726.) The Legislature's use of the term "physical" aggressor
22 indicates that it was primarily concerned with the increased risk of injury which arises when a quarrel
23 moves from an exchange of hostile words and nonviolent gestures to a trading of physical blows. Thus,
24 one is not an initial physical aggressor so long as he confines his antagonism to arguments, epithets,
25 obscenities or insults. Instead, an "initial physical aggressor" is one who first engages in physical conduct
26 which a reasonable man would perceive to be a real, present and apparent threat of bodily harm.
27 (*Mathews, supra*, 6 Cal.3d at p. 719.)

1 In fact, a person can be found to be the "initial physical aggressor" simply by acting in a
2 threatening and intimidating manner and not actually making first physical contact. (*Gegic v. Worker's*
3 *Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 336 (writ den.) (where the employee was found to be the
4 initial aggressor when he got down from the chair that he had been working on to face a co-employee in a
5 threatening manner).) On the other hand, an employee's claim will not be barred where he makes the
6 initial physical contact which poses no real threat of harm but the other person responds with physical
7 aggression that does. (*Budd Van Lines v. Worker's Comp. Appeals Bd. (Lepe)* 61 Cal.Comp.Cases 1288
8 (writ den.)(where applicant placed his large co-worker in a headlock after the co-worker called him names
9 and threw boxes at him causing the co-worker to then hit the applicant in the head with a hammer.)

10 Here applicant testified to the following:

11 "[Hernandez] was teasing the applicant on the date that applicant was injured. He
12 appeared nervous and 'accelerated' to the applicant on 03/25/09. [Hernandez] was
13 calling applicant a faggot and grabbing applicant's behind. He was insulting him and
14 touching him a lot. Applicant told [Hernandez] not to touch him and that he did not
like it. Despite applicant's objections, [Hernandez] continued to touch him many
times. He also called applicant a faggot many times.

15 "Applicant admits to also touching [Hernandez]'s behind. On 03/25/09 he only did so
16 after he got angry at [Hernandez] for refusing to stop. [Hernandez] was the one that
17 started the insults and touching. [Hernandez] also struck applicant with a tray on his
behind and then kicked applicant." (MOH, 3/16/10, at p. 3:19-25.)

18 * * *

19 "At some time during the evening of 03/25/09 [Hernandez] hit applicant with a tray,
20 and it hurt. When this happened applicant grabbed [Hernandez] which applicant
21 defined as pushing him. Following this incident approximately a half hour went by,
and every time applicant walked past [Hernandez], [Hernandez] would push him."
22 (MOH, 3/16/10, at p. 10:11-14.)

23 * * *

24 "On 03/25/09 the first inappropriate contact made by [Hernandez] on the applicant
25 occurred at approximately 6:30 to 7:00 p.m. He touched the applicant on the buttocks
26 at that time. [Hernandez]'s contact at that time was the same way that all the other
coworkers used to touch each other and applicant and the way applicant responded by
touching them. However, in this case [Hernandez] also called applicant a "faggot."
27

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1 "Applicant denies kissing [Hernandez] on 03/25/09. He had done so before, once on
2 the lips. [Hernandez] would throw the applicant kisses, and applicant would throw
3 [Hernandez] kisses. Applicant admits to kissing [Hernandez] on the cheek on two or
4 three occasions. He does not believe that this was inappropriate touching. Applicant
cannot recall what time it was when [Hernandez] last touched his buttocks on
03/25/09 prior to the altercation.

5 "Applicant was advised by defense counsel that at the time of his deposition on
6 8/5/09 applicant testified it was approximately 40 minutes prior to the time he was
7 pushed down the stairs by [Hernandez]. Applicant agrees that this is approximately
8 correct. Applicant denies that he and [Hernandez] were arguing during the
intervening 40 minutes between the last buttocks touch and being pushed down the
stairs. However, during this time period [Hernandez] would shove the applicant
whenever he walked past him." (MOH, 3/16/10, at p. 9:8-21.)

9 * * *

10
11 "Applicant does not consider being kicked and pushed downstairs or being hit a
12 'game.' Applicant denies that he hit [Hernandez] on 3/25/09. He did touch him prior
13 to the altercation. He did so after two hours of [Hernandez] hitting him, grabbing him
and calling him a faggot." (MOH, 3/16/10, at p. 5:6-9.)

14 * * *

15 "Applicant got angry and pushed Alfredo from behind. He pushed him in his behind
16 area so that he could feel what applicant was feeling. This push by the applicant
17 occurred upstairs at the employer's workstation. It did not occur immediately prior to
[Hernandez] kicking applicant down the stairs." (MOH, 3/16/10, at p. 5:10-12.)

18 * * *

19 "Later applicant was going downstairs at the restaurant to use a restroom. He was
20 kicked in the back which caused him to fall. [Hernandez] was the one who had kicked
21 him. [Hernandez] got on top of him and began hitting him. [Hernandez] was saying
22 bad words to the applicant while he was hitting him. He said that he was going to kill
him. He hit the applicant many times. Applicant did not hit [Hernandez] back because
he was 'dazed.' He was also bleeding." (MOH, 3/16/10, at p. 4:1-4.)

23 Hernandez testified as follows:

24 "The witness agrees that he would also use bad language with the applicant on
25 occasion. He would also push the applicant on occasion prior to the altercation on
26 3/25/09, but he would do so only when the applicant would try and touch him a lot.
He would push him away.

27 "Prior to the altercation on 3/25/09, the witness had told applicant at times that his
foul language and touching was not appreciated. Applicant was doing this same type

1 of conduct on 3/25/09. He didn't try to touch the witness's chest and nipples, but he
2 did grab his butt. The witness's shift began at 5:00 p.m. on 3/25/09. He cannot recall
3 whether the applicant started at the same time or a little bit later. On the date of the
4 altercation, the witness and the applicant had argued. The applicant had tried and did
5 in fact touch the witness's butt in excess of five times on that day. Every 20 minutes
6 or so over a four-hour period, the applicant would squeeze or grab his butt whenever
7 they ran into each other. The witness did not want that type of touching. He told the
8 applicant to stop it each time it occurred. The witness denies touching applicant's butt
9 on the date of injury. The witness did not react to applicant's language and physical
10 contacts until later in the evening. The witness got frustrated and upset. Both Jose
11 Ruiz and Enrique Perez, two coworkers, saw the applicant touching and grabbing the
12 witness on the date of injury. The employer management did not know about
13 applicant's conduct.

9 "Later in the evening, the witness was putting trays where they are stored at the work
10 station. Applicant came up behind him and tried to hit him. The witness later clarified
11 that applicant had shoved him with a clenched fist in his back. The applicant also
12 gave the witness 'the bird.' He also said insulting things to the witness. He told the
13 witness to 'go fuck your mother.' This hurt the witness's feelings because he does not
14 have a mother. Applicant told the witness that he wanted to fight and that they should
15 go downstairs. The witness could not contain himself any longer, so he followed the
16 applicant. The witness believes there are approximately eight stairs to the first landing
17 leading to the basement. After the landing there are a few more stairs after making a
18 90-degree turn. Applicant was leading the two of them down the stairs.

15 "The witness was the first one to make contact with the applicant when they were on
16 the stairs. Towards the middle or lower portion of the first flight of stairs leading to
17 the basement, the witness reached around applicant and hit him in the chest.
18 Applicant fell down. The witness denies kicking the applicant. The applicant also hit
19 the witness. The witness had marks on his body following the altercation.

19 "Applicant previously had tried to kiss the witness many times while they were at
20 work. The witness is married. It seemed to the witness that the applicant was trying to
21 get with him. The applicant had told him that they should go to the bathroom where
22 he would give him a blow job. The witness told the applicant he was not interested.

22 "Prior to hitting the applicant on the chest while they were on the stairs on 3/25/09,
23 the witness had not touched the applicant at work that entire evening." (MOH,
24 5/12/10, at pp. 3:1 -4:7.)

24 * * *

25 "The witness agrees that he sometimes used bad language at work. The witness
26 agrees that he pushed the applicant prior to 3/25/09 because he didn't like applicant
27 touching him. He pushed the applicant on 3/25/09 because he didn't like what
applicant was saying to him. This had happened many times before." (MOH,
5/12/10, at pp. 4:23-5:1.)

1 * * *

2 "The witness reiterated that he had put up with approximately four hours of touching
3 and harassment prior to the fight. The witness agrees that he should have told his
4 manager about applicant's offensive conduct. He did not talk to the manager before
5 the fight. He recalls telling the manager about a month prior to the fight that the
6 applicant had been bothering him. He maybe had mentioned this one or two times
7 previously.

8 "The witness reiterated that as he was following applicant down the stairs, he reached
9 around the applicant's front and hit him on the chest. He did so because he was very
10 upset. He said he was not afraid of the applicant physically. He was not threatened by
11 the applicant. He was upset, so he hit him." (MOH, 5/12/10, at pp. 4:23-5:1.)

12 * * *

13 "The witness was asked to show how applicant's fist in his back was done and how it
14 affected him. The witness described a slow push of the fist, shoving him forward,
15 moving his upper body a few feet forward. Following that shove, the applicant
16 suggested to the witness that they go downstairs to the bathroom. The witness hit the
17 applicant on the way down the stairs due to being pushed and everything else that had
18 happened during that evening at work." (MOH, 5/12/10, at pp. 5:22-25.)

19 * * *

20 "The witness estimates it was one to two minutes in time between his being pushed in
21 the back by the applicant until he hit the applicant while they were walking down the
22 stairs. While they were walking from the work station where he had been pushed to
23 the stairway, the applicant was insulting the witness the whole way. He insulted him
24 in the hallway. He continued to insult the witness while they were going down the
25 stairs. While they were in the stairwell going downstairs, the witness could hear
26 everything that the applicant was saying. He continued to insult him." (MOH,
27 5/12/10, at p. 6:6-10.)

28 Witness, Jose Ruiz, a coworker of applicant and Hernandez, testified essentially that he had seen
29 applicant grabbing Hernandez's buttocks prior to March 25, 2009 and on several occasions on March 25,
30 2009 (MOH, 5/12/10, at p. 7:8-16) and had seen applicant putting his hands on other employees touching
31 or pushing them in a joking manner. (MOH, 5/12/10, at p. 8:5-6.)

32 Witness, Enrique Perez, coworker of applicant and Hernandez testified essentially that applicant
33 was a bad employee and always fooling around (MOH, 5/12/10, at p. 8:18-19), that applicant pushed him
34 on one occasion causing him to fall down, that applicant was laughing and smiling when he pushed the

1 witness causing him to fall (MOH, 5/12/10, at pp. 8:18-22; 9:16-19), that he saw applicant grab
2 Hernandez' buttocks on the date of injury (MOH, 5/12/10, at p. 8:24-25), and that applicant was always
3 having fun, laughing, joking, and was not an angry person. (MOH, 5/12/10, at p. 9:10-11.)

4 Based on applicant's and Hernandez' testimony, as well as the corroborating testimony of the
5 witnesses, we are persuaded that applicant and Hernandez initially engaged in horseplay consisting
6 primarily of name calling, touching, grabbing, and pushing. These activities were common practice and
7 were engaged in by both applicant and Hernandez but were devoid of any animosity or willingness to
8 inflict bodily harm. (MOH, 5/12/10, at pp. 4:23-5:1, 5:9-10, 5:13-16, 8:5-6, 9:10-11.) Furthermore, the
9 contradictory testimony regarding the horseplay does not negate applicant's industrial injury because both
10 the testimony of applicant and Hernandez support the conclusion that it occurred, that it lead to an
11 altercation, but that applicant's injury did not take place during the horseplay.

12 Instead, the horseplay had ended and an altercation had begun by the time applicant's injury
13 occurred. Again, here, there is some contradictory testimony about how the altercation took place.

14 Applicant testified that, while upstairs at employer's workstation, Hernandez hit him with a tray
15 (MOH, 3/16/10, at p. 10:11-13). He then pushed Hernandez from behind. This did not take place
16 immediately before the fight (MOH, 3/16/10, at p. 5:11) but about 40 minutes before injury. (MOH,
17 3/16/10, at p. 9:18-19.)

18 Hernandez testified that applicant shoved him with a clenched fist in his back, gave him "the bird"
19 and insulted his mother. (MOH, 5/12/10, at p. 3:15-21.) Hernandez testified that applicant told him that
20 he wanted to fight and that they should go downstairs. Hernandez followed. (MOH, 5/12/10, at p. 3:19-
21 20.) Hernandez also testified that applicant told him they should go downstairs to engage in sexual
22 conduct. (MOH, 5/12/10, at p. 4:4-5.)

23 Applicant testified that he was descending the stairs to the bathroom when Hernandez kicked him
24 from behind. (MOH, 3/16/10, at p. 4:1-2.)

25 Hernandez testified that, "Applicant was leading the two of them down the stairs. The witness was
26 the first one to make contact with the applicant when they were on the stairs. Towards the middle or
27 lower portion of the first flight of stairs leading to the basement, the witness reached around applicant and

1 hit him in the chest. Applicant fell down.” (MOH, 5/12/10, 3:23-25.) Hernandez also testified that, “he
2 was following applicant down the stairs, he reached around the applicant’s front and hit him on the chest.
3 He did so because he was very upset. He said he was not afraid of the applicant physically. He was not
4 threatened by the applicant. He was upset, so he hit him.” (MOH, 5/12/10, 5:13-16.) Hernandez
5 estimated that it was one to two minutes between the time applicant pushed him in the back and the time
6 he hit applicant while they were walking down the stairs. (MOH, 5/12/10, 6:5-7.)

7 We are persuaded that by the time applicant and Hernandez were descending the stairs,
8 Hernandez’ conduct had shifted from horseplay to an altercation. The physical contact prior to that time
9 could not be perceived to be a real, present and apparent threat of bodily harm. (*Mathews, supra*, 6 Cal.3d
10 at p. 719.) Moreover, Hernandez testified that while they were descending the stairs “he was not afraid of
11 the applicant physically” and that “[he] was not threatened by the applicant.” (MOH, 5/12/10, 5:13-16.)
12 Hernandez testified that they went downstairs together either to fight or to engage in sexual conduct.
13 Applicant testified that he was going downstairs to the restroom. It was at this moment that Hernandez
14 hit, pushed, or kicked applicant down the stairs simply because he was upset. (MOH, 5/12/10, 5:13-16.)
15 Thus, we are persuaded that the act of initial physical aggression that resulted in the injury was Hernandez
16 hitting, pushing, or kicking applicant down the stairs. Therefore, applicant sustained injury resulting from
17 an altercation of which he was not the initial physical aggressor. The injury took place on the employer’s
18 premises while, according to applicant, he was going downstairs to the restroom. Thus, we are persuaded
19 that applicant’s injury is compensable.

20 Accordingly, based on the reasons discussed herein, we will affirm the WCJ’s decision.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Appeals Board's Decision After Reconsideration that the June 25, 2010
3 Findings of Fact be and hereby is **AFFIRMED**.

4
5 **WORKERS' COMPENSATION APPEALS BOARD**

6
7 *F. M. Brass*
8 **FRANK M. BRASS**

9 **I CONCUR,**

10
11 *Deidra E. Lowe*
12 **DEIDRA E. LOWE**

13
14 *Ronnie G. Caplane*
15 **RONNIE G. CAPLANE**



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18 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

19
20 **1 SEP 08 2011**

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

23 **SERGIO NUFIO**
24 **ROWEN, GURVEY & WIN**
25 **KEGEL, TOBIN & TRUCE**

26
27 **PAG/csl**

NUFIO, SERGIO