WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

STEVE SOPHER, *Applicant*

vs.

KEVIN CRENNAN;
STATE FARM INSURANCE COMPANY, administered by SEDGWICK, *Defendants*

Adjudication Number: ADJ17097194
Pomona District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on November 25, 2025, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his head and lumbar spine; that applicant was intoxicated at the time of injury and that his intoxication was a proximate and substantial cause of the injury; and ordered that applicant take nothing.

Applicant contends that defendant did not prove the statutory elements required to deny compensation pursuant to Labor Code section 3600(a)(4)[1], including intoxication at the time of injury and proximate causation; that under section 5705, defendant failed to meet its burden of proof by a preponderance of the evidence; that section 5313 requires the WCJ to provide reasoned findings, which are absent here; and that the blood alcohol concentration (BAC) result lacks foundational reliability and cannot support a statutory bar to compensation.

We received an Answer from defendant.

[1] All section references are to the Labor Code, unless otherwise indicated.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will grant reconsideration, rescind the F&O, and return the case to the WCJ for further proceedings consistent with this opinion.

BACKGROUND

Applicant filed an Application for Adjudication of Claim (Application) on December 22, 2022, claiming a specific injury on September 22, 2021 when he fell off a roof, while employed by defendant as a handyman, to his brain, neck, head, shoulders and multiple body parts. Applicant filed an Amended Application on March 29, 2023 (Amended Application) to add the body parts psyche and teeth.

There is no dispute that applicant was seriously injured in his fall from the roof, including sustaining a traumatic brain injury, and that the injury was industrial. (11/25/25 F&O; Defendant's Exh. D, 3/3/23 Report by Neurologist Jan H. Merman, M.D., at pp 1, 4; Defendant's Exh. G – Excerpts from Scripps Mercy Hospital.) The dispute here centers on whether defendant has proven the elements of the intoxication defense, including proving that applicant was intoxicated at the time of injury and that his intoxication was a proximate or substantial cause of the injury.

The hospital records from the date of applicant's injury indicate that applicant told hospital staff that "he had a couple of drinks" before he fell. (Defendant's Exh. G, at p. 2.) His blood alcohol level at 1:13 pm on that date was 320 mg/dL. (*Id.* at pp. 1, 18.) The injury is described as resulting from "a fall from a roof while intoxicated." (*Id.* at p. 4.) The psychosocial assessment completed on September 25, 2021 listed alcohol abuse as a diagnosis and included applicant's statements that he drinks 2 or 3 drinks a night after work and that he does not think he has a problem with alcohol. (*Id.* at pp. 9-10.) Medical records from three weeks prior to his injury also document that applicant "has been drinking a six pack of beer per day for the last couple of years" and had a diagnosis of "alcohol use disorder." (Defendant's Exh. C, at p. 16.)

Applicant was evaluated by Qualified Medical Evaluator (QME) Donald T. Lee, D.O., by Neurologist Jan H. Merman, M.D. and by Internal Medicine and Cardiovascular specialist Paul J. Grodan, M.D., who served as the AME after the death of Dr. Lee. (Defendant's Exhs. A-E; Joint Exhs. 1-3; Applicant's Exhs. 1, 2, 4, 5, 12.)

Dr. Lee, an occupational medicine specialist, served as the QME in toxicology. He evaluated applicant on June 17, 2023, and concluded that applicant sustained industrial injury when he fell off the roof and hit his head from 15-20 feet high. (Applicant's Exh. 1, Dr. Lee's 6/17/23 QME Report, at pp. 55-58.) Applicant's injuries included: closed head injury; traumatic brain injury (TBI); post traumatic vertigo; dizziness and giddiness; mild neurocognitive disorder due to TBI with behavioral disturbances; scalp laceration; left subdural hematoma; bilateral subarachnoid hemorrhages; pneumothorax and hemothorax; multiple right-sided rib fractures; L1 compression fracture and right clavicle fracture and scapular fracture. (*Ibid.*) In his record review, Dr. Lee summarized a record dated August 16, 2021, prior to applicant's injury, where applicant was diagnosed with vertigo. (*Id*. at p. 7.)

In his December 5, 2023 deposition, Dr. Lee noted that applicant's blood alcohol level on September 22, 2021 was 320. (Applicant's Exh. 2, at p. 10.) Dr. Lee discussed various standards for blood alcohol testing and concluded that they were not followed here and that the sample cannot be "considered as evidentiary because it does not meet the standards to be considered as a sample which is run through to consider as evidentiary blood alcohol test." (*Id.* at pp. 11-13.) He also indicated that "to discuss intoxication you have to have a field sobriety test…" which was not possible due to applicant's brain injury. (*Id*. at pp. 13-14.) He stated that he could not conclude with reasonable medical probability that applicant was intoxicated on the date he fell. (*Id.* at p. 33.) He noted that applicant's vertigo pre-existed the date of injury. (*Id.* at p. 34.)

Dr. Lee died on February 22, 2024. (Applicant's Exh. 5.) The parties subsequently agreed to use Dr. Grodan as the AME in toxicology, and to allow Dr. Lee's reports and depositions to be reviewed by Dr. Grodan and used at trial. (Applicant's Exh. 4.)

Dr. Merman, a neurologist, evaluated applicant via a telehealth appointment on March 3, 2023. (Defendant's Exh. D, Merman's 3/3/23 Report.) He described applicant's primary complaint as "balance problems after his accident" and noted that applicant "essentially did not have any dizzy spells prior to his industrial injury." (*Id.* at p. 4.) Dr. Merman recommended continued ENT evaluation, orthopedic evaluation and treatment, and cognitive therapy. (*Id.* at 7.) In a subsequent report, Dr. Merman recommended further evaluation by internal medicine, orthopedics, ENT experts, and cardiology, and further treatment including cognitive therapy, PT and OT. (Defendant's Exh. C, Dr. Merman's 5/7/23 Report, at p. 43.) In his January 13, 2024 Supplemental Report, Dr. Merman concluded that "the causation of the accident was due to his risky alcohol

drinking, which would not be allowed for him to drive with a level of 0.320%. (Defendant's Exh. E, Merman's 1/13/24 Supplemental Report, at p. 2.)

Dr. Paul J. Grodan evaluated applicant on August 14, 2024, and issued reports on that date and on May 5, 2025. Dr. Grodan reported that applicant stated he "slipped" and fell off the roof, landed on his back, was able to walk to the porch and knock on the door, and then lost consciousness and woke up on the hospital nine days later. (Joint Exh. 3, Dr. Grodan's 8/14/24 Report, at pp. 2, 20.) Applicant acknowledged drinking alcohol the night before the accident. (*Ibid.*) Dr. Grodan reviewed Dr. Lee's December 5, 2025 deposition transcript, noting that Dr. Lee miscalculated applicant's blood alcohol level. (*Id.* at p. 7.) Dr. Grodan summarized applicant's March 8, 2023 deposition, noting that applicant stated that in the week prior to the accident, he drank "a couple of drinks per day," the night before the accident he drank four beers while at the Padres game, and he denied having any alcohol the morning of the accident. (*Id.* at p. 20.) Applicant indicated that he spoke to the homeowner at 8 am on the day of the accident before he began work. (*Id.* at 21.) Dr. Grodan deferred to Dr. Merman regarding applicant's traumatic brain injury, and the cognitive and neurological aspects of disability. (*Id.* at pp. 21-22.) He concluded that applicant "was intoxicated when he fell off the roof. Clearly the intoxication with the level of 320 mg determined hours after he fell off the roof indicates that his blood level was substantially higher when he had the injury; this was the high probability causation, however, he fell at work. Therefore, cannot rule out apportionment." (*Id.* at 22.) Dr. Grodan noted, too, that "Considering the work experience in construction for many years by Mr. Sopher it is evident that absent alcohol intoxication the probability of falling off the roof would be low." (*Id.* at p. 24.) Dr. Grodan indicated that the only internal medical issues to address is hypertensive heart disease and noted that "his blood pressure had been controlled throughout," he had "cardiovascular impairment," and he would "not exceed 10% Whole-Person impairment." (*Id.* at 22-23.) Dr. Grodan noted that "I did not receive any medical records predating the specific date of injury when he fell off the roof. In order to determine how much of his hypertensive disease is preexisting to provide appropriate apportionment those records should be subpoenaed and reviewed." (*Id*. at p. 23.) He stated, however, that "the probability is that there is no preexisting apportionment." (*Id.* at p. 24.) He recommended ongoing treatment by an internist or cardiologist. (*Ibid.*)

In his supplemental report, dated May 5, 2025, Dr. Grodan reviewed articles provided by counsel about issues including false positives in alcohol testing and reviewed excerpts of Dr. Lee's

and Dr. Merman's reporting. (Joint Exh. 1, Dr. Grodan's 5/5/25 Report at pp. 1-7.) Dr. Grodan did not change his prior conclusions, writing that applicant:

> [I]ndicated he fell off the roof he was painting on September 22, 2021. There was no snow on the roof but he claimed it was slippery. He directly acknowledged that he was drinking alcohol the night before at the San Diego Padres baseball game. He acknowledged having balance issue - he fell twice with loss of consciousness while walking his dog. He then noted that it was after the date of injury. He noted that medications can make him dizzy and nauseous. Interestingly in the social history he specifically denied alcohol consumption stating "I don't drink at all" yet acknowledged that he was essentially intoxicated the evening of the San Diego Padres game.
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> It also must be emphasized that the testing after he fell off the roof at the hospital showed fairly high level of ethanol, noting 320 mg/dL. Considering the time gap between the trauma occurrence and the measurements, the level at the time of the occurrence would have been substantially higher. It was noted that it was early in the morning when this occurred and this is typical pattern in an alcoholic. The definition, that I am aware of, a person who on occasion would binge and gets intoxicated is not considered an alcoholic. An alcoholic by definition is a person "who requires alcohol to function normally." What that implies is that an alcoholic consumes alcohol multiple times on daily basis in order to maintain stability of function even though the equilibrium may not be 100%. A typical alcoholic will not appear intoxicated to the others who see him walking on the street.
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> I should also point out that false positive ethanol results are generally fairly low level or borderline. His result was quite high. It is safe to assume that he slept at night before he started working on the roof and the occurrence was at 9.30 a.m. That suggests that the measurement was fairly proximal to the intake.
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> As was noted by Dr. Lee in the report of June 17, 2023, Mr. Sopher denied smoking or drinking alcohol before the injury and the seriousness of that injury was documented quite well. He fell accidentally from a substantial height. There is consensus among examiners that he had alcohol intoxication at the time of injury. There is reference to multiple syncope episodes, which is obviously a sign of long-term/chronic alcoholism with chronic instability.

(*Id.* at pp. 7-8.)

Dr. Grodan also explained how the traumatic, subarachnoid hemorrhage applicant sustained was evidence of intoxication, because "an individual who slips off the roof and is fully conscious and not intoxicated will have sufficient time falling from the roof down to the ground

to brace himself and not have a contact of the ground with his head but mostly with the body and the arms. (*Id.* at p. 9.)

In Dr. Grodan's first deposition, taken February 13, 2025, he stated that disagreed with Dr. Lee's concerns about the protocols regarding the alcohol testing, because the testing "wasn't done for legal purposes; it was done for diagnostic hospital purpose. So all his [Lee's] points are not applicable in a hospital." (Joint Exh. 2, 2/13/25 Deposition of Dr. Grodan, at pp. 15-16.) He explained that applicant's blood alcohol level of 320 milligrams per deciliter at the hospital was "abnormal, it's a very high level" and no second blood test was done because "clinically it's not necessary…it was not a borderline result. If its borderline, they may repeat, but it was a definite positive, so there's no reason to repeat." (*Id.* at pp. 19-20.) When asked if that blood alcohol level can be fatal, Dr. Grodan explained, "if its you and me, could be. In him it would not because he obviously has used alcohol chronically even though he denied it." (*Id.* at p. 20.) He explained that the chain of custody and contamination concerns raised by Dr. Lee were essentially not relevant in a clinical setting. (*Id*. at pp. 23-26, 35.)

Dr. Grodan reiterated his earlier observation regarding the mechanism of injury that, "what's puzzling is that ordinarily if one would slip off the roof 15 feet up, there's a reflex mechanism to protect, so it's not likely he will dive head first….So he would try to avoid head trauma and break an arm or a leg and not his head, so that it's more an evidence towards what's -- it was a dead fall, meaning he was probably intoxicated, but again, we don't know." (*Id.* at p. 22.) He explained further, "if your brain is alert and working, if you slip and fall, you break your wrist; you don't fall on your head, because you outstretch your arm to protect the fall. If you're falling off the roof, the same thing would happen. If he's alert, he's not going to go head first…. He was falling like dead weight." (*Id.* at p. 23.) He indicated that his opinions are unchanged from those in his August 14, 2024 report. (*Id*. at p. 35.) He concluded that "the cause of injury was a fall off the roof. And the question is why did he fall of the roof. And I defer that to resolve by the Judge." (*Id*. at p. 39.)

In his second deposition, Dr. Grodan confirmed that applicant had a blood-alcohol level of .32 on the day of injury and that applicant is a "chronic alcoholic." (Applicant's Exh. 12, 6/26/25 Deposition of Dr. Grodan, at pp. 8-9.) He explained that results of the blood alcohol test were not medically improbably because "chronic alcoholics tolerate alcohol. So they tolerate a much higher amount than someone who is not an alcoholic." (*Id.* at p. 10.) He stated that applicant experienced

"balance problems" which are "not uncommon in alcoholics, cerebellar dysfunction." (*Id.* at p. 18.) Applicant "definitely complained of [balance problems] after [his injury]. And the question is, how much of it was before. And I said in my report that I wanted to see his prior medical records, which I never got." (*Ibid.*) Dr. Grodan indicated that, although there are multiple possible causes of applicant's fall, the "issue is also whether he had balance problems before…" (*Id.* at pp. 19-20.) Dr. Grodan confirmed that applicant was intoxicated on the day of injury and explained that the possibility of a "false positive" test was very unlikely for medical or specimen contamination reasons. (*Id.* at pp. 20-23.) Although an alcohol swab could lead to "a little contamination… It will not produce a level of 320…" (*Id.* at pp. 22-23.)

On the first day of trial on July 7, 2025, the WCJ ordered applicant to file a trial brief addressing exclusion of a witness due to the witness statement not being timely provided by defendant, ordered defendant to respond, and granted a continuance. (7/7/25 MOH.) The parties filed briefs addressing this issue.[2] (7/9/25 Applicant's Trial Brief; 7/29/25 Defendant's Response.)

The trial proceeded via videoconference on September 22, 2025. The parties stipulated, in relevant part, to employment; that applicant claims to have sustained injury AOE/COE to his head and lumbar spine; that the June 26, 2025 cross-examination of AME Dr. Grodan will be allowed into evidence; and that if the intoxication defense is found to be unsuccessful, defendant agrees that applicant is entitled to a QME in orthopedics. (9/22/25 Minutes of Hearing and Summary of Evidence, at p. 3.) The issues for trial were injury AOE/COE, whether defendant met its burden of proof regarding the intoxication defense and whether witness Kevin Crennan's testimony was barred due to defendant's failure to produce the witness statement. (*Ibid.*) Exhibits were admitted, including medical records and the medical reporting of Drs. Grodan, Lee, and Merman. (*Id.* at pp. 4-5.) Applicant was the only witness.

On September 22, 2025, applicant testified that he had no idea what time he fell, but it was "earlier in the morning," which he knew because the sun hadn't hit the portion of the roof and it was "all dewy and wet." (9/22/25 Minutes of Hearing and Summary of Evidence, at p. 6.) He does

[2] On August 25, 2025, the WCJ issued a Notice of Intent to Issue Sanctions, in which the WCJ indicated that defendant's July 29, 2025 Response to Applicant's Trial Brief was riddled with legal errors, and notified defendant that it would be sanctioned, absent a showing of good cause. (8/25/25 NIT.) Defendant admitted to these errors, withdrew its July 29th brief, and filed an amended brief. (9/3/25 Response to NIT; 8/20/25 Notice Withdrawing Pre-Trial Brief; 8/20/25 Defendant's Amended Trial Brief.) The WCJ's Order for sanctions in the amount of $750.00 was issued September 9, 2025.

not remember the fall but believes he may have fell because the roof was wet. (*Id.* at p. 7.) He sustained many injuries, was in the hospital for 59 days, and has not worked since the day he fell. (*Ibid.*) Applicant's September 22, 2025 testimony was cut short by audio difficulties.

Applicant resumed his testimony on October 27, 2025, testifying that he drank alcohol the night before his fall at a baseball game; that he arrived at work at 8 am on September 22, 2021; he greeted the homeowner, Ms. Crennan, before starting work; that he did not drink that morning; that he believes he fell because it was 9 am and the roof was "dewy" and he slipped; and that he spent 59 days in the hospital after the fall. (10/27/25 Minutes of Hearing and Summary of Evidence, at pp. 2-3.) He had a D.U.I. in 2013, and two D.U.I.s in Ohio; he "could have" abused alcohol in Ohio; he mostly abstained from alcohol after moving to San Diego. (*Id*. p. at 3.) He denied drinking at work or ever previously being accused of doing so. (*Ibid.*) He thinks he fell from the roof at around 9:30 am. (*Id.* at p. 4.) He does not know how many drinks he had the night before his fall. (*Ibid.*) He denied drinking a six-pack of beer daily. (*Id.* at p. 5.)

The WCJ denied defense counsel's request to call homeowner Kevin Crennan to testify, because applicant's attorney requested witness statements and Mr. Crennan's witness statement was not provided until the day of trial. (10/27/25 Minutes of Hearing and Summary of Evidence at pp. 6-7.) The parties stipulated to injury to applicant's head and lumbar spine, if the claim is not barred by the intoxication defense. (*Id.* at p. 2.)

The WCJ's F&O, issued on November 25, 2025, found that applicant was intoxicated at the time of injury, that his intoxication was a proximate and substantial cause of the injury and ordering that applicant take nothing. Applicant's Petition followed.

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)

> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on December 23, 2025 and 60 days from the date of transmission is Saturday, February 21, 2026. The next business day that is 60 days from the date of transmission is Monday, February 23, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[3] This decision is issued by or on Monday, February 23, 2026, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the WCJ's Report and Recommendation, the Report was served on December 23, 2025, and the case was transmitted to the Appeals Board on December 23, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 23, 2025.

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[3] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

II.

An applicant's right to recover workers' compensation benefits is subject to the conditions set forth in section 3600. Among these is that "the injury is not caused by the intoxication, by alcohol or the unlawful use of a controlled substance, of the injured employee." (Lab. Code, § 3600(a)(4).) Intoxication is an affirmative defense, and the burden of proof rests on the employer, as the defendant, to establish that affirmative defense. (Lab. Code, § 5705(b).) To do so, defendant must prove "Intoxication of an employee causing his or her injury." (Lab. Code, § 5705(b).) To carry its burden of proof, a defendant is required to prove each fact supporting its claim by a preponderance of the evidence. (Lab. Code, § 3202.5.) As explained in section 3202.5:

> "Preponderance of the evidence" means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth. When weighing the evidence, the test is not the relative number of witnesses, but the relative convincing force of the evidence.

The first prong of the intoxication defense requires defendant to prove intoxication at the time of injury. A positive post-injury drug test by itself is not sufficient to establish intoxication at the time of the injury. (See *Southern Insurance Co. v. Workers' Comp. Appeals Bd*. (*Hindawi*) (2020) 85 Cal.Comp.Cases 631, 633–634 (writ den.).) Blood alcohol testing is often used as evidence relevant to the issue of alcohol intoxication. (See, e.g. *Smith v. Workers' Comp. Appeals Bd.* (*Smith*) (1981) 123 Cal.App.3d 763, 774 [46 Cal.Comp.Cases 1053]; *Republic Indemnity Co. v. Workers' Comp. Appeals Bd.* (*Dickens*) (1982) 138 Cal.App.3d 42, 46 [47 Cal.Comp.Cases 1382].) Blood alcohol testing results are not *conclusive* evidence of intoxication and must be weighed with all other evidence in the record. (*Smith*, *supra*, 123 Cal.App.3d at p. 774.)

It is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) Here, the WCJ made credibility determinations regarding the medical evidence, finding Dr. Grodan's opinion to be more credible than that of Dr. Lee. (Report, at pp. 4-8.) The WCJ explained that Dr. Grodan's opinions were more credible because Dr. Lee opined that the blood alcohol test done at the hospital was neither forensically valid nor legally sufficient, as certain protocols were not followed regarding chain of custody or medical review officer oversight, but petitioner provided no legal authority that the court was bound by those protocols. (*Id*. at pp. 4-5.)

We have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) The WCJ found applicant not to be a credible witness, due to his "evasive" response when asked if he ever abused alcohol; his false testimony that he had not been drinking after he moved to San Diego, disproven by his DUI arrest; his denial that he drank before work on the day of the accident when hospital records indicate otherwise; his assertion that the fell because the roof was wet and he slipped, and his conflicting answers regarding the time of day that he fell. (Report, at pp. 6-8.) We conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations regarding applicant or regarding Dr. Grodan. (*Garza*, *supra*, 3 Cal.3d at pp. 318-319.)

The WCJ found that defendant met its burden of proof regarding the first element of the intoxication defense, that applicant was intoxicated at the time of the injury. (F&O at p. 1; Report, at pp. 5-8.) The WCJ's intoxication finding was based on the WCJ's credibility determinations discussed above, as well as the evidence at trial, which demonstrated not only that applicant had a blood alcohol level of .32 at the hospital after his injury (Applicant's Exh. 3), but also that applicant had an alcohol abuse disorder; that he had a drunk driving arrest in 2013; that he admitted to hospital personnel that he had been drinking alcohol on the date of the injury before he fell; and, that Dr. Grodan indicated that the mechanism of injury likely demonstrated that applicant was intoxicated when he fell. (Report, at pp. 5-8.)

Our review of the current record indicates that the evidence cited by the WCJ appears to demonstrate that defendant met its burden to prove, by a preponderance of the evidence, that applicant was intoxicated. (*Smith*, *supra*, 123 Cal.App.3d at 774; Lab. Code, §§ 5705(b), 3202.5.)

III.

When a defendant asserts the intoxication defense, it must prove not only that the injured employee was intoxicated at the time of the injury, but that the employee's intoxication was a proximate or substantial cause of the injury. (*Smith*, *supra*, 123 Cal.App.3d at p. 773; *Douglas Aircraft, Inc. v. Industrial Acci. Com*. (*MacDowell*) (1957) 47 Cal.2d 903, 906-907 [22 Cal.Comp.Cases 24], disapproved on another ground in *Le Vesque v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 636 [35 Cal.Comp.Cases 16].) Causation is a question of fact to be determined by the Appeals Board. (*Smith*, *supra*, 123 Cal.App.3d at p. 773; see *North Pacific S.S.*

Co. v. Industrial Acci. Com. (1917) 174 Cal. 500, 502.) Here, as discussed below, we conclude that additional discovery is required to determine if defendant has met its burden of proof regarding causation.

An employer who tolerates and encourages drinking may be estopped from raising the defense of intoxication. (*McCarty v. Workmen's Comp. Appeals Bd. (*1974) 12 Cal.3d 677, 684-685 [39 Cal.Comp.Cases 712].) The Supreme Court explained this is because,

> *'If the employer permits intoxication*, … or other dangerous practices amongst his employees, *the results thereof are industrial injuries*. It is the tacit approval and consent of the employer to be inferred from the fact of his knowledge of these practices, and his failure to terminate them, which makes the special hazard thereby involved incidental to his particular employment and, as such, a source of compensable injuries….'

(*Ibid*, quoting *Tate v. Industrial Acci. Com.* (1953) 120 Cal.App.2d 657, 665 (italics added by the Court of Appeal).)

The Supreme Court in *McCarty* further explained that reliance on an employer's express representation is not required to establish an estoppel because an "employer's tacit approval and consent amount 'to [an] implied representation that the employer will not hold it against the employee if he drinks, and will not deprive him of his job or of compensation benefits if he does so.'" (*Id.* at p. 685, quoting *Tate v. Industrial Acci. Com.*, *supra*, at p. 665.)

Parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is "one of 'the rudiments of fair play' assured to every litigant...." (*Id.* at p. 158.) As stated by the Supreme Court of California in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission... must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id.* at p. 577.) A fair hearing includes, but is not limited to, the opportunity to call and cross-examine witnesses, to introduce and inspect exhibits, and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; *Rucker*, *supra*, at pp. 157-158 citing *Kaiser Co. v. Industrial Acci. Com.* (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-394 [62 Cal.Comp.Cases 924]; *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 752 (Appeals Board en banc); *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. L.A. County Metro. Transit Auth.,* we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete. (Citations.)" (*McDuffie v. L.A. County Metro. Transit Auth.* (2002) 67 Cal.Comp.Cases 138, 141 (Appeals Bd. en banc).) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264].)

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. I.A.C.* (*Savercool*) (1923) 191 Cal. 724, 729) and of "[throwing] the entire record open for review." (*State Compensation. Ins. Fund v. I.A.C.* (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See §§ 5907, 5908, 5908.5; see also *Gonzales v. I.A.C.* (1958) 50 Cal.2d 360, 364.)

We accord the WCJ wide latitude in the determination of discovery disputes at the trial level. (Lab. Code, § 5310; Cal. Code Regs., tit. 8, § 10330; *Allison v. Workers' Comp. Appeals Bd.* (1999) 72 Cal.App.4th 654 [64 Cal.Comp.Cases 624]; *Hardesty v. McCord & Holdren, Inc.* (1976) 41 Cal.Comp.Cases 111 [1976 Cal. Wrk. Comp. LEXIS 2406].) Section 5502(d)(3) requires that exhibits and witnesses be disclosed on the pre-trial conference statement (PTCS). (Lab. Code, § 5502(d)(3).) In *Hardesty* we held that a defendant must produce non privileged witness statements before trial when an applicant formally demands them, and that the defendant's failure to do so was prejudicial to applicant meriting the imposition of the discovery sanction of excluding the

witnesses' testimony. (*Hardesty*, *supra*, 41 Cal.Comp.Cases at p. 115; see also *Nunes v. City of Santa Maria*, 2015 Cal. Wrk. Comp. P.D. LEXIS 605, *15-*22; *Ray Andrews Ford, Zenith Ins. Co. v. Workers' Compensation Appeals Bd.* (1994) 59 Cal.Comp.Cases 789, 792.)

Here, our review of the record reveals at least four evidentiary concerns that lead to our conclusion that this matter must be returned to the trial level for further development of the record on the issue of causation: the exclusion of Kevin Crennan's testimony; the lack of evidence from witnesses to applicant's fall or from the ambulance that transported applicant to the hospital; the failure to provide Dr. Grodan with applicant's complete medical records; and, the lack of testimony from applicant about whether he suffered from dizziness or vertigo prior to his injury. These concerns are discussed below.

First, the homeowner's testimony should not have been excluded. Applicant was working at a private home on the date of injury, and was employed by the homeowners, Rhonda and Kevin Crennan. (Defendant's Exh. F, at pp. 1, 3.) Mr. Crennan's name was disclosed by both defendant and applicant as a potential witness on the signed May 12, 2025 PTCS, as required by section 5502(d)(3). (5/12/25 PTCS, at pp. 5-6; Lab. Code, § 5502(d)(3).) Rhonda Crennan's name was also included on applicant's witness list, but she was not called as a witness by either party. (5/12/25 PTCS, at pp. 5-6.) On July 7, 2025, defendant called Mr. Crennan to testify and provided his witness statement to applicant. Mr. Crennan did not testify, however, due to applicant's objection to Mr. Crennan's testimony "based on defendant's failure to produce the demanded witness statement" and "unfair surprise." (7/7/25 First Amended PTCS, at p. 3.) On October 27, 2025, after considering the trial briefs filed by both parties, the WCJ ordered the exclusion of Mr. Crennan's testimony, explaining:

> … The Court has considered applicant's points and authorities as well as its own legal authority and will not allow the testimony of Kevin Crennan due to the fact that applicant's counsel requested witness statements from Mr. Crennan and they were not provided by the defendant until the time of trial. Specifically, applicant's counsel's requests for the statement are reflected in Applicant's Exhibits 7, 8, 9, and 10, and the statement was not provided until the date of the trial, July 7, 2025.

(10/27/25 Minutes of Hearing and Summary of Evidence, at pp. 5-6.)

The record is devoid of evidence about what Mr. Crennan may have witnessed. (See Applicant's Exh. 12, Dr. Grodan's deposition, at pp. 6-7.) Further, it is unknown what Mr. Crennan would have testified to: his testimony may have addressed contact with applicant before or after

the accident, and/or observations regarding applicant's demeanor or behavior. Dr. Grodan's AME report, citing QME Dr. Lee's December 5, 2023 deposition transcript, indicates that "the owner [Crennan] was aware of the alcohol but allowed him [applicant] to work on the roof." (Joint Exh. 3, at p. 8.) If this is true, Mr. Crennan's testimony may provide evidence as to whether he tolerated applicant's alcohol consumption, which would have estopped him from raising the intoxication defense. (*McCarty*, *supra*, 12 Cal.3d. at p. 684.) For these reasons, Mr. Crennan's testimony is highly relevant to the claims and defenses of both parties.

Although it is undisputed that defendant did not timely provide Mr. Crennan's witness statement to applicant's counsel, we conclude that this error was not prejudicial to applicant. Crennan's name had been timely disclosed as a potential witness, so both parties were aware, well before trial, that Crennan might be called as a witness. (5/12/25 PTCS, at pp. 5-6.) Thus, contrary to applicant's attorney's contention, there was no issue of surprise. (7/9/25 Applicant's Trial Brief, at pp. 3-5.) The witness statement may also have been protected as attorney work product, since the statement was that of the defendant. (*Hardesty, supra*, 41 Cal.Comp.Cases at pp. 116-117.) In addition, since Crennan was available to testify, his witness statement was not offered for the truth of the matter asserted, but rather, for cross-examination purposes only. Thus, although the witness statement provided by defendant on the first day of trial was untimely, this was not a situation, like that described in *Hardesty* or *Ray Andrews Ford*, where the witness statement was not provided at all. (*Hardesty*, *supra*, 41 Cal.Comp.Cases at p. 112; *Ray Andrews Ford*, *supra*, 59 Cal.Comp.Cases at p. 792.) Defendant's error here, in providing the witness statement to applicant on the day of trial could have been remedied by the WCJ granting a continuance to allow applicant's counsel time to review the witness statement prior to Crennan's testimony. In fact, since applicant's objection to Crennan's testimony was made on July 7, 2025, the matter was continued, and it was subsequently heard for trial on September 22 and October 7, 2025, there was sufficient time for applicant's counsel to review the witness statement and prepare for Crennan's testimony. The WCJ's decision to exclude Crennan's testimony denied the parties and the WCJ the opportunity to consider and respond to this potentially relevant witness testimony.

The second evidentiary problem regarding the determination of causation, closely related to the first issue above, is the lack of evidence from any witnesses who saw applicant before, during or after his fall, or from the ambulance that transported him to the hospital. Other than an email from Rhonda Crennan indicating that she placed the call to 911 after applicant's fall, the

record contains no testimony or witness statements from anyone who witnessed applicant's demeanor prior to the fall, witnessed the fall itself, or saw applicant immediately after he fell. (Defendant's Exh. F, at p. 3.) The September 22, 2021 Ambulance Report, which included statements from neighbors, was reviewed and summarized by Dr. Lee, but not entered into evidence and not provided to Dr. Grodan to review. (Applicant's Exh. 1, at pp. 8-9; Joint Exhs. 1 and 3.) Nor does the record contain witness statements from the paramedics who treated and transported applicant to the hospital. Development of the record, by inclusion of the Ambulance Report, as well as any additional statements from witnesses to the accident, if available, is necessary to allow the WCJ to determine the question of causation.

The third evidentiary problem in this matter involves the WCJ's reliance on Dr. Grodan's opinion to establish that intoxication was a proximate and substantial cause of injury, when Grodan was not provided with applicant's complete medical records. To constitute substantial evidence "… a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls, CNA Ins. Co.* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Here, the WCJ's finding regarding causation relied on Dr. Grodan's discussion of the mechanism of injury. (Report at 7-8.) The WCJ noted that Grodan discussed "the absence of the protective reflex as applicant did not break his fall and noted it was a 'dead fall, meaning he was probably intoxicated but again we don't know.'" (*Ibid*, citing Dr. Grodan's 2/13/25 deposition at p. 22.) The WCJ explained that,

> [O]nce this court found based on the reasons set forth above, the applicant was intoxicated, and the testimony of Dr. Grodan that applicant's judgment and reaction would be impaired to not produce a protective reflex while falling provides the basis for an inference that such impairment was a substantial factor in bringing about the accident. Such an inference is reasonable. The existence of numerous circumstances that would support other conflicting inferences is not a basis for overturning this court's decision.

(*Id.* at pp. 8-9.)

The WCJ concluded that there was no evidence of an "intervening force or trauma such as being pushed to cause the applicant to fall" and thus, "the defendant need not prove anything further." (*Id*. at p. 9.)

However, Dr. Grodan indicated in his first report that he was not provided with any medical records pre-dating applicant's date of injury. (Joint Exh. 3, Grodan report of 8/14/24, at p. 23.) Dr. Grodan reiterated his request for those medical records in his June 26, 2025 deposition, specifically requesting an opportunity to review the complete medical records in order to obtain additional information about applicant's balance problems prior to the date of applicant's fall. (Applicant's Exh. 12, Grodan deposition of 6/26/25, at pp. 18-20.) Dr. Lee's review of the medical records revealed that applicant was diagnosed with vertigo on August 16, 2021, a month prior to applicant's fall. (Applicants Exh. 1, Dr. Lee's QME Report, at p. 7; Applicant's Exh. 2, at p. 34.) Dr. Grodan explained that reviewing the prior medical records would be relevant to his determination of causation: "the issue is also whether he had balance problems before. So if the medical records from the past show that he was having those complaints, that would explain also what happened and the alcohol level." (Applicant's Exh. 12, at pp. 19-20.) Yet, Dr. Grodan was not provided with these additional medical records to review. (*Id*. at p. 18.) Since Dr. Grodan's conclusion regarding causation is based on a partial medical record, his reporting does not constitute substantial evidence regarding causation. (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 621.) Upon return, applicant's medical records that pre-date the accident, and the Ambulance Report from the accident date, must be provided to Dr. Grodan to allow him to assess applicant's prior balance problems (if any), determine if those problems were a proximate cause of applicant's fall, and to update his conclusion regarding causation, as appropriate. (Lab. Code, §§ 5701, 5906; *Tyler*, *supra*, 56 Cal.App.4th at p. 393; *Nunes v. State of California, Dept. of Motor Vehicles*, *supra*, 88 Cal.Comp.Cases at p. 752; *McClune*, *supra*, 62 Cal.App.4th at pp. 1121-1122; *McDuffie*, *supra*, 67 Cal.Comp.Cases at p. 141.)

The last identified evidentiary problem in this matter is that there is no testimony from applicant about his alleged vertigo prior to his injury. Despite the statement in Dr. Lee's deposition that "the vertigo pre-existed date of injury" the record indicates that applicant was not asked and thus did not testify about whether or how often he had experienced dizziness or vertigo prior to the date of the accident. (Applicant's Exh. 2, at p. 34; 9/22/25 Minutes of Hearing, at pp. 5-6; 10/27/25 Minutes of Hearing, at pp. 2-5.) Upon return, applicant's testimony on this issue may be needed, as it goes directly to the issue of causation.

In addition to the above-described areas of concern, the WCJ may consider whether other development of the record is appropriate.

Accordingly, we grant applicant's Petition, rescind the WCJ's November 25, 2025 F&O, and return the matter to the WCJ for further proceedings consistent with this opinion.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 25, 2025 Findings and Order are **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEBRUARY 23, 2026

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

STEVE SOPHER
GLAUBER BERENSON VEGO
ALBERT AND MACKENZIE

MB/*ara*

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