WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELMER TARVER, *Applicant*

vs.

ALBERTSONS, permissibly self-insured;
administered by SEDGWICK CMS, *Defendants*

Adjudication Numbers: ADJ606784 (LAO 0862910); ADJ4106251 (LAO 0881612)
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Joint Findings and Order (F&O) issued on July 19, 2021, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that defendant did not violate Labor Code[1] section 132a and ordered that applicant's section 132a petition be denied.

Applicant contends that defendant subjected him to disadvantages not visited upon other employees because they were injured by medically restricting him from obtaining a position as a spotter; that defendant failed to prove that it medically restricted him for a valid business reason; and, in the alternative, that defendant's business reason was a pretext for discriminating against him.

We received Answer from defendant.

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

We have considered the allegations in the Petition, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated below and in the Report, which we adopt and incorporate herein, we will affirm the F&O.

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[1] Unless otherwise stated, all further statutory references are to the Labor Code.

FACTUAL BACKGROUND

In the Opinion on Decision, the WCJ states:

> Evidence shows that the employer told Mr. Tarver that he was not medically cleared for the spotter position.
>
> A memo dated 8/25/08 stated the job of a spotter is "*more demanding in some ways than a regular driver and with these limitations, Elmer could not safely do his job*." (Exhibit 4)
> . . .
> There was no evidence presented that would suggest other employees in similar situations were . . . able to work at a spotter position with same or more work restrictions as Applicant.
> . . .
> This issue seemingly went off the tracks when Dr. Hunt gave an opinion in 2009 about returning to work for a job that never actually existed. Applicant has provided no credible evidence to the judge that the actual spotter job in 2009 and 2010 was as described to Dr. Hunt at the 2009 exam and at Dr. Hunt's deposition later that year.
> (Opinion on Decision, pp. 3-4.)

DISCUSSION

Under section 132a, "[i]t is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment." Section 132a protects an employee from retaliation or discrimination by an employer because of an exercise of workers' compensation rights. (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143 [63 Cal.Comp.Cases 944] (*Moorpark*); *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658 [43 Cal.Comp.Cases 1205]; *Department of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281, 1298-1299 [68 Cal.Comp.Cases 831]; *Smith v. Workers' Comp Appeals Bd.* (1984) 152 Cal.App.3d 1104, 1109 [49 Cal.Comp.Cases 212] (*Smith*); see *Usher v. American Airlines, Inc.* (1993) 20 Cal.App.4th 1520, 1526 [58 Cal.Comp.Cases 813].)

Section 132a states in pertinent part that:

> Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim…or an application for adjudication, or because the employee has received a rating, award, or settlement…testified or made known his or her intention to testify in another employee's case… may be guilty of a misdemeanor and responsible for the

> payment of increased compensation, costs, lost wages and work benefits to the injured employee.

This section has been "interpreted liberally to achieve the goal of preventing discrimination against workers injured on the job," while not compelling an employer to "ignore the realities of doing business by 'reemploying' unqualified employees or employees for whom positions are no longer available." (*Lauher*, *supra*, 30 Cal.4th at pp. 1298-1299 [citations omitted].)

In *Lauher*, the Supreme Court clarified its definition for "discrimination," noting that in its previous decisions in *Smith*, *supra* and *Barns v. Workers' Comp. Appeals Bd.* (1989) 216 Cal.App.3d 524, the Court held that an employer's action which caused detriment to the employee because of an industrial injury was sufficient to show a violation of the statute. (*Lauher, supra,* 30 Cal.4th at p. 1299 quoting [1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed., Peterson et al. edits, 2002)], § 10.11[1], p. 10-20 ["[t]he critical question is whether the employer's action caused detriment to an industrially injured employee"]; see *Barns, supra*, 216 Cal.App.3d at p. 531.)

The *Lauher* court noted with approval the Court of Appeal's finding that the formulation enunciated in *Smith v. Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3rd 1104, and adopted by *Barns* to establish a prima facie case was "analytically incomplete:"

> The court explained that, although Lauher had clearly suffered a detriment by having to use his accumulated sick leave and vacation time for his visits to see Dr. Houts, he never established he 'had a legal right to receive TDI [temporary disability indemnity] and retain his accrued sick leave and vacation time, and that [his employer] had a corresponding legal duty to pay TDI and refrain from docking the sick leave and vacation time.' Thus, said the court, '[t]o meet the burden of presenting a prima facie claim of unlawful discrimination in violation of section 132a, it is insufficient that the industrially injured worker show only that . . . he or she suffered some adverse result as a consequence of some action or inaction by the employer that was triggered by the industrial injury. *The claimant must also show that he or she had a legal right to receive or retain the deprived benefit or status, and the employer had a corresponding legal duty to provide or refrain from taking away that benefit or status.*'" (*Lauher*, *supra*, 30 Cal.4th at pp. 1299-1300, italics added.)

The Court further agreed with the Court of Appeal that "[an] employer thus does not necessarily engage in 'discrimination' prohibited by section 132a merely because it requires an employee to shoulder some of the disadvantages of his industrial injury. By prohibiting 'discrimination' in section 132a, we assume that the Legislature meant to prohibit treating injured

employees differently, making them subject to disadvantages not visited on other employees because the employee was injured or had made a claim." (*Lauher, supra* at p. 1300.)

As the *Lauher* court determined in the first part of its decision, the employee was no longer entitled to temporary disability indemnity (TDI) because his condition was permanent and stationary. (*Lauher*, *supra* at p. 1297.) Therefore, even though the employee's use of sick and vacation leave was for medical treatment and time off due to his industrial disability, because he was not entitled to TDI, the employee was treated in the same way as non-industrially disabled workers who were also required to use sick and vacation leave for medical treatment and time off due to a disability. Because the employee in *Lauher* was on the same legal footing as non-industrially injured employees with respect to this issue, he could not show a legal right to TDI, and therefore could have only established a prima facie case for discrimination if he had been "singled out for disadvantageous treatment." (*Id.* at p. 1301; *Accord*, *Gelson's Markets, Inc. v. Workers' Comp. Appeals Bd.* (2009), 74 Cal.Comp.Cases 1313, *County of San Luis Obispo v. Workers' Comp. Appeals Bd.* (2005)133 Cal.App.4th 641 *(Martinez)*; Compare with *San Diego Transit, PSI, Hazelrigg Risk Management Services, Administrator, Petitioners v. Workers' Compensation Appeals Board* (2006) 71 Cal.Comp.Cases 445 (*Calloway*) [writ den.; defendant violated section 132a by refusing to return applicant to her bus driver position after she was released to work by her PTP, another treating physician and an AME.]).)

Based on its specific application to the facts of *Lauher*, we view the Court's phrase "singled out for disadvantageous treatment" to be an *application* of the broader standard adopted by *Lauher*—that, in addition to showing that he or she suffered an industrial injury and that he or she suffered some adverse consequences as a result of some action or inaction by the employer that was triggered by the industrial injury, an applicant "must also show that he or she had a legal right to receive or retain the deprived benefit or status, and the employer had a corresponding legal duty to provide or refrain from taking away that benefit or status." (*Lauher*, *supra* at p. 1300.) Stated another way, an employee must show they were subject to "disadvantages not visited on other employees because they were injured. . . ." (*Id.*)[2] Because the employee in *Lauher* was not deprived of a legal right to TDI, and therefore could not show he was treated differently than other

[2] *Accord, St. John Knits v. Workers' Comp. Appeals Bd.,* 2019 Cal. Wrk. Comp. LEXIS 75 [writ den.; the Court of Appeals found no reasonable grounds to review a WCAB finding of section 132a discrimination based upon substantial evidence of defendant employer's subjection of industrially-injured employee to disadvantages not visited on other employees.]

employees with respect to his alleged detriment, he could not establish a prima facie case of discrimination.[3]

In the present case, applicant contends that defendant subjected him to disadvantages not visited upon other employees because they were injured by medically restricting him from obtaining the spotter position. In this regard we observe that applicant bears the initial burden of proving his prima facie section 132a claim and may meet this burden based upon evidence establishing that defendant deviated from its usual procedures for evaluating whether an injured employee can perform an available job. (See, e.g., *Calloway*, *supra*, 71 Cal. Comp. Cases 445, 446-557.)

Here, the record reveals that defendant determined that applicant was medically restricted from the spotter position prior to August 25, 2008[4]; that applicant's medical restrictions were not lifted; and that the parties received Dr. Hunt's June 5, 2009 medical opinion not on the issue of whether applicant was medically restricted from the spotter position but on whether he was medically restricted from "a job that never actually existed." (Opinion on Decision, pp. 3-4; Report, p. 6.) On this record, we are unable to discern evidence that defendant's conduct in medically restricting applicant from obtaining the spotter position before Dr. Hunt's June 5, 2009 report and declining to release him from the restrictions as a result of the report constituted a deviation from its usual procedures for evaluating whether an injured employee is medically able to perform an available position. Therefore, we are persuaded that the WCJ correctly concluded that "[t]here was no evidence presented that would suggest other employees . . . were allowed . . . to work at a spotter position with [the] same or more work restrictions." (Opinion on Decision, p. 4.)

Furthermore, we recognize that the WCJ's conclusion was based upon assessments of the witnesses' credibility, including determinations that defendant's witness Scott Dukes testified

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[3] We also note that the particular standard denoted by the phrase "singled out" does not literally apply where the detriment affects injured workers as a class, although the broader standard would apply. (*Andersen v. Workers' Comp. Appeals Bd.*, (2007) 149 Cal.App.4th 1369, 1377-1378 [72 Cal.Comp.Cases 1369].)

[4] The WCJ explained that the "[e]vidence shows that [defendant] told [applicant] that he was not medically cleared for the spotter position" and that Exhibit 4 shows that defendant determined that applicant was medically restricted from the position no later than August 25, 2008. (Opinion on Decision, p. 3.) Our review of Exhibit 4 reveals that defendant informed applicant that he was medically restricted from the spotter position no later than March 24, 2008, the date defendant memorialized having advised applicant that his "limitations . . . exclude him from being able to work as a spotter." (Exhibit 4, p. 8.)

credibly regarding the duties of the spotter position and that applicant testified without credibility regarding that issue. (Report, pp. 5-7.) We accord great weight to these determinations because the WCJ had the opportunity to observe the witnesses' demeanor at trial. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318–319 [35 Cal.Comp.Cases 500, 504–505].) In addition, the record before us lacks evidence of considerable substantiality that would warrant our rejection of these credibility determinations. (*Id.*)

Thus, we are unable to discern support for applicant's contention that defendant discriminated against him by medically restricting him from obtaining the spotter position.

Accordingly, we will affirm the F&O.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings and Order issued on July 19, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 20, 2022

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

ELMER TARVER
MOORE & ASSOCIATES
GOLDMAN, MAGDALIN & KRIKES

SRO/*pc*

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