WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GERARDO QUIROZ MARMOLEJO, *Applicant*

vs.

CITISTAFF SOLUTIONS, INC.; GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Numbers: ADJ9729654, ADJ9730146
Pomona 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.[1]

Applicant seeks reconsideration of the Findings of Fact issued on December 3, 2020, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that defendant did not discriminate against him in violation of Labor Code[2] section 132a.

Applicant contends that the WCJ erroneously failed to account for WCJ Munoz's August 5, 2016 finding that defendant did not terminate applicant until after he reported his injuries. Applicant further contends that defendant subjected him to disadvantages not visited upon other injured employees when it (1) denied his industrial injury claim on the false ground that the claim was presented after his termination; (2) failed to reinstate him after his medical restrictions were lifted; or (3) failed to follow its own procedures for resolving alleged conflicts in the reporting of medical status.

We did not receive an Answer.

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

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[1] Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.
[2] Unless otherwise stated, all further statutory references are to the Labor Code.

We have considered the allegations of the Petition and the contents of the Report. Based on our review of the record, and for the reasons stated below, as our Decision After Reconsideration, we will rescind the Findings of Fact, substitute findings that (1) applicant established his prima facie section 132a claim based upon the record showing that defendant terminated applicant on November 13, 2014 shortly after applicant made known his specific and cumulative injury claims, denied his specific injury claim on false grounds on December 5, 2014, and denied his cumulative injury claim on false grounds on May 4, 2015; and (2) defer the issues of whether defendant acted out of business necessity, and, as appropriate, whether defendant's stated business reasons were pretextual; and we will return this matter to the trial level for further proceedings consistent with this decision.

FACTUAL BACKGROUND

On November 19, 2015, the matter proceeded to trial as to the issues of whether applicant sustained injury AOE/COE on November 1, 2014 to his right foot; whether applicant sustained injury AOE/COE during the period of April 1, 2014 through November 12, 2014 to his bilateral arms, bilateral hands and wrists, right shoulder, back, right leg, and right foot; and whether his claims were barred by the section 3600(a)(10) post-termination defense. (Minutes of Hearing and Summary of Evidence, November 19, 2015, p. 3:2-25.)

The WCJ admitted applicant's November 13, 2014 claim form alleging his November 1, 2014 injury, with proof of service dated November 18, 2014, and a November 13, 2014 claim form alleging his cumulative injury, with proof of service dated November 18, 2014, into evidence. (*Id*., p. 9:5-7.)

Applicant testified that on November 13, 2014 he spoke by telephone with defendant's supervisor, Gerardo Arroyo, who told him to come to his office at 3:30 p.m. When he got there, Mr. Arroyo asked him if he had gotten into a fight and told him there was a better job for him with better pay. He responded that he couldn't work because of his injury. Mr. Arroyo then asked if he had reported his injury to [applicant's special employer's supervisor] Carlos, and he responded, yes. (*Id*., pp. 7:8-15.)

On August 5, 2016, WCJ Munoz found that (1) applicant sustained industrial injury to his right foot on November 1, 2014; (2) applicant did not sustain industrial injury during the period from April 1, 2014 through November 12, 2014; (3) defendant failed to establish that applicant was terminated from employment prior to filing his claim dated November 13, 2014; (4) if

applicant was given notice of termination on November 13, 2014, he had reported his injury prior to notice of termination; and (5) applicant's specific injury claim is not barred by the post-termination defense pursuant to Labor Code section 3600(a)(10). (Findings and Award and Order, August 5, 2016, pp.1-2.)

In the Opinion on Decision, WCJ Munoz states:

> Despite applicant's claim of injury on November 1, 2014 having been contradicted by all four defense witnesses, applicant was found more credible regarding his account of injury. Applicant was then working at the job site at Veg Fresh, and was dumping onions on the conveyor band when a pallet fell on the front of his right leg between his knee and ankle. He hurt his right foot where the pallet fell, and washed off the bleeding (Minutes of Hearing & Summary of Evidence, 11/19/2015, p. 5:18-19; 20-21; p.6: 1-2; 7-10).
>
> Defense witnesses denied any reports of injury from the applicant, except for Gerardo Arroyo, safety coordinator of applicant's employer, Citistaff Solutions. Arroyo testified that on November 13 or November 14, 2014, he informed applicant by telephone that his services were no longer needed. When he met with applicant that same day, applicant reported an injury to him. Applicant told Arroyo that that he had already reported the injury to his supervisor at Veg Fresh, Carlos Olivares (MOH/SOE, 05/03/2016, p. 3:15-17).
> . . .
> Defendant failed to meet its burden to prove that it gave applicant notice of termination prior to his claim form. In the absence of such proof, the undersigned finds that the post-termination defense is inapplicable, and applicant's claims are not barred by section Labor Code § 3600(a)(10).
>
> Applicant testified that upon his reporting injury on November 12, 2014 to Olivares, he was told to take the day off the next day, November 13, 2014. Olivares denied this account. At any event, applicant and Arroyo had a meeting on November 13, 2014.
>
> Arroyo testified that he terminated applicant's employment by telephone call on a Thursday, either November 13 or 14, 2014. Applicant testified he met with Arroyo on a Thursday, the day after November 12, 2014. . . . According to Arroyo, applicant was terminated due to complaints from Veg Fresh (MOH/SOE, 5/03/2016, p. 3:10-11). According to applicant's supervisor Olivares, he does not know if applicant was terminated, and knew of no reason to terminate applicant. He did not know of any conflicts between applicant and co-workers or any performance problems by applicant. No one complained about applicant (Id. at p. 6:4-8).

> According to applicant's lead person, Hernandez, applicant was a good worker. She no longer saw applicant at Veg Fresh and heard that he was terminated but does not know why he was terminated (MOH/SOE, 5/03/2016, p. 7: 19; p.8: 2-3 and 22).
>
> The undersigned did not find that Arroyo gave applicant notice of termination prior to filing his claims. Arroyo's testimony regarding grounds for applicant's termination was contravened by the production supervisor, Carlos Olivares.
> . . .
> It is found that applicant reported injury prior to termination on November 13, 2014, pursuant to Labor Code § 3600(a)(10). Applicant credibly testified that he reported injury on November 1, 2014 to Olivares, under whom he was working that day.
>
> With respect to the cumulative injury claim, though moot, applicant further testified he reported his complaints due to repetitive dumping at the end of the work day on November 12, 2014 to Olivares.
> (Opinion on Decision, August 5, 2016, pp. 3-6.)

The record does not reveal that defendant sought reconsideration of WCJ Munoz's April 5, 2016 decision.

On August 26, 2019, the matter proceeded to trial solely as to applicant's section 132a petition. (Minutes of Hearing, August 26, 2019, p. 2:1-2.)

Defendant requested determination of the following issues in the event that the WCJ found that it violated section 132a: (a) termination for cause; (b) nondiscriminatory personnel action; (c) legitimate business necessity; (d) failure to mitigate damages; and (e) applicant's lack of ability to work due to nonindustrial medical conditions. Also in the event that the WCJ found a violation, applicant requested that WCJ Munoz's August 5, 2016 findings regarding the grounds on which defendant terminated applicant be judicially noticed and deemed res judicata. The WCJ denied applicant's request because "grounds for termination were not actually determined" by WCJ Munoz. (*Id.*, p. 3:6-23.) Applicant's request was subsequently clarified for the record as follows: "[I]f the Court finds discrimination . . . applicant requests . . . judicial notice of [the] Findings and Opinion on Decision (specifically page 5) of Judge Munoz dated 8-5-16." (Minutes of Hearing and Summary of Evidence, October 14, 2019, p. 2:4-9.)

The WCJ admitted exhibits entitled Notices of Denial of Claim for Workers' Compensation Benefits dated December 5, 2014 and May 4, 2015, and Partial Transcript of

Proceedings, Testimony of Gerardo Arroyo, dated May 3, 2016 into evidence. (Minutes of Hearing, August 26, 2019, p. 4:3-10.)

The denial notices state respectively as follows:

> December 5, 2014
>
> . . .
>
> NOTICE OF DENIAL OF CLAIM OF WORKERS' COMPENSATION BENEFITS
>
> . . .
>
> This notice is to advise you of the status of your workers' compensation claim for your injury of 11/12/2014. Only the items completed below concern your benefits at this time.
>
> After careful consideration of all available information we are denying all liability for your claim as alleged injury was reported post termination which is barred by Labor Code 3600(a)(10). Furthermore, we have no medical evidence to substantiate an injury arising out of employment with Citistaff Solutions, Inc. . . .
>
> (Ex. 1, Notice of Denial of Claim for Workers' Compensation Benefits, December 5, 2014.)
>
> May 4, 2015
>
> . . .
>
> NOTICE OF DENIAL OF CLAIM OF WORKERS' COMPENSATION BENEFITS
>
> . . .
>
> This notice is to advise you of the status of your workers' compensation claim for your injury of 11/12/2015. Only the items completed below concern your benefits at this time.
>
> After careful consideration of all available information, we are denying your as claim of injury for CT period 04/01/14 – 11/12/14 (ADJ9730146) based on post-term filing LC3600(a)(10) as our investigation shows that injuries were filed after you were terminated for cause. Further, we have no substantial medical evidence to support such injuries arising out of employment with Citistaff Solutions.

(Ex. 1, Notice of Denial of Claim for Workers' Compensation Benefits, May 4, 2015.)

The Partial Transcript of Proceedings, Testimony of Gerardo Arroyo, dated May 3, 2016 includes:

Q Mr. Arroyo, are you employed at the current time?

A Yes.

Q Where?

A Citistaff Solutions, Inc.

Q What is your position with that company?

A Safety coordinator.

. . .

Q Now, did you have an opportunity to speak to Mr. Marmolejo on the telephone on or about November 13th, 2014?

A Yes.

. . .

Q Okay. But there was no conversation about any injuries prior to your notifying him of his being let go?

Mr. Baker: Leading.

THE WITNESS: Correct.

. . .

Q MS. BRALEY: Okay. Was there a reason for his termination from his employment?

A I received a notice from the client that there was complaints made about Mr. Marmolejo and the way he treated employees at the site. When Mr. Marmolejo arrived to my office to speak to me in person, I went over this with him. I also inquired if he was having any issues with any employees, which he stated no.

(Ex. 3, Partial Transcript of Proceedings, Testimony of Gerardo Arroyo, dated May 3, 2016, pp. 3:18-6:22.)

On October 14, 2019, defendant's safety coordinator, Gerardo Arroyo, testified that he received information that applicant made offensive statements to fellow workers at defendant's

client and applicant's special employer, Veg Fresh, that Veg Fresh no longer wanted applicant to work there, and that defendant therefore ended applicant's assignment at Veg Fresh. (Minutes of Hearing and Summary of Evidence, October 14, 2019, pp. 3:22-4:2, 5:13-18.) He further testified that applicant did not want to be reassigned because of his injury. (*Id*., p. 5:22-23.)

On January 23, 2020, applicant testified that he talked to Mr. Arroyo on November 13, 2014 and believes that he was terminated by defendant in that he received a letter from defendant's insurance company saying he was terminated. (Minutes of Hearing and Summary of Evidence, January 23, 2020, pp. 4:18-20, 5:11-14.)

Applicant testified that he has not worked for defendant since November 13, 2014; and, though he signed a statement indicating he was still employed, he does not believe he has been employed since November 2014. (*Id*., p. 8:19-22.)

In the Report, the WCJ states:

> The only issue in the case is whether applicant was discriminated against pursuant to Labor Code Section 132(a) and if so, whether attorney's fees are due.
>
> Further issues to be determined were found moot since no discrimination was found, with the exception of the court taking judicial notice of the Findings and Opinion on Decision of Judge Munoz dated 8/5/2016 in case number ADJ9729654.
>
> The issue of Res Judicata was decided from the bench and the parties notified when the issue was raised, that it did not apply.
>
> Applicant was employed by a temporary staffing service both on November 1, 2014, and during the period April 1, 2014 through November 12, 2014 as a packaging machine operator by Citistaff and was sent to work at Veg Fresh, for an assignment.
>
> . . .There is a controversy as to whether or not applicant reported a specific injury alleged to have occurred on November 1, 2014, wherein the trial judge Munoz on the regular issues of the case believed applicant had reported his injury despite four witnesses for defendants testifying to the contrary at that trial. She also found that the defendant did not meet a burden that applicant was terminated prior to his report of an injury . . .
>
> (Report, p. 2.)

DISCUSSION

We observe that 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:
> 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.*)[3] 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 employees with respect to his alleged detriment, he could not establish a prima facie case of discrimination.

Here, applicant contends that the WCJ failed to account for WCJ Munoz's findings that defendant did not terminate applicant until after applicant reported his injuries. In this regard, we note that WCJ Munoz determined that applicant reported his specific injury on November 1, 2014, his cumulative injury on November 12, 2014, was terminated by defendant on November 13, 2014, and filed both injury claims on November 18, 2014. (Opinion on Decision, August 5, 2016, pp. 5-6; Minutes of Hearing and Summary of Evidence, November 19, 2015, p. 9:5-7.)

We note that WCJ Munoz's decision was supported not only by applicant's "credibl[e]" testimony that he reported his specific injury to his special employer's supervisor, Mr. Olivares, on the date of his accident, but also by the testimony of defendant's supervisor, Gerardo Arroyo, who testified that defendant "let go" or "terminated" applicant. (Opinion on Decision, August 5, 2016, pp. 5-6; Ex. 3, Partial Transcript of Proceedings, Testimony of Gerardo Arroyo, dated May 3, 2016, pp. 3:18-6:22.)

Section 5950 provides that a party "affected by an order, decision, or award" of the WCAB may, within the prescribed time period, apply to the Court of Appeal for a writ of review "for the purpose of inquiring into and determining the lawfulness" of the order, decision, or award. "[A]ppellate review ... is limited to 'final' orders that determine a substantial right or liability of a

[3] *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.]

party." (*Duncan v. Workers' Comp. Appeals Bd*. (2008) 166 Cal.App.4th 294, 299.) An order of the WCAB is final for the purpose of seeking judicial review when it "settles, for purposes of the compensation proceeding, an issue critical to the claim for benefits, whether or not it resolves all the issues in the proceeding or represents a decision on the right to benefits." (*Maranian v. Workers' Comp. Appeals Bd*. (2000) 81 Cal.App.4th 1068, 1075-1076, 1078.) The failure of an aggrieved party to seek judicial review of a final order of the WCAB bars later challenge to the propriety of the order or decision before either the WCAB or the Court of Appeal. (*Maranian*, supra, at 1076.)

Because WCJ Munoz determined that applicant sustained his specific injury on November 1, 2014 and reported it on that same date, that applicant reported his cumulative injury on November 12, 2014, and that applicant was terminated by defendant on November 13, 2014; and because defendant did not seek reconsideration of WCJ Munoz's decision, WCJ Munoz's determinations regarding when applicant reported his injuries and when he was terminated became final, and, as such, the law of the case. (§§ 5900, 5950; see also 9 Witkin Cal. Proc. Appeal § 480 (stating that the law of the case doctrine generally provides that where a court states a rule of law necessary to its decision, that statement of the law is conclusive and determinative of the rights of the same parties in subsequent proceedings in the same case).) Consequently, our evaluation of the record concerning the issue of whether applicant established his prima facie section 132a claim begins with the question of whether defendant terminated applicant after he "made known his . . . intention to file a claim." (*Lauher*, *supra* at p. 1300; § 132a.)

Here, as explained above, the record shows that applicant reported his specific injury on November 1, 2014, his cumulative injury on November 12, 2014, and defendant's safety coordinator, Mr. Arroyo, advised him of his termination on November 13, 2014. It is thus clear that a close temporal proximity exists between the dates on which applicant reported his specific and cumulative injuries and the adverse action taken by defendant. It follows that the record evidence establishes applicant's prima facie section claim that defendant discriminated against him in violation of section 132a because he made known his intent to file a specific injury claim and because he made known his intent to file a cumulative injury claim. (Opinion on Decision, August 5, 2016, pp. 3-6; see *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353 (finding that temporal proximity between a worker's filing of a workers' compensation claim and an employer's adverse action against the worker may establish a prima facie section 132a claim).)

In addition, the record shows that applicant filed his specific and cumulative injury claims on November 18, 2014, that defendant denied the specific injury claim on December 5, 2014 on the false grounds that he had not reported the injury before termination, and that defendant denied the cumulative injury claim on May 4, 2015 on the false grounds that he had not reported the injury before termination. (Minutes of Hearing and Summary of Evidence, November 19, 2015, p. 9:6-7; Ex. 1, Notice of Denial of Claim for Workers' Compensation Benefits, December 5, 2014.) In this regard, we are persuaded that the evidence demonstrates that defendant singled applicant out for disadvantageous treatment by denying these claims on the false grounds that he had been terminated before asserting them.

Having concluded that the record shows that applicant has established his prima facie section 132a claim, we turn to applicant's contention that the record establishes his prima facie section claim by showing that defendant failed to reinstate him after his medical restrictions were lifted and failed to follow its own procedures for resolving alleged conflicts in the reporting of medical status.

Here, as stated above, the record is that defendant terminated applicant on November 13, 2014; and, as such, the evidence and argument of the parties relating to defendant's alleged failure to reinstate him (with or without work modifications) after the removal of his medical restrictions and to follow its own procedures to resolve conflicts in the medical reporting are moot.

Accordingly, we will rescind the Findings of Fact and substitute findings that applicant established his prima facie section 132a claim based upon the record showing that defendant terminated applicant on November 13, 2014 shortly after applicant made known his specific injury and cumulative injury claims, denied his specific injury claim on false grounds on December 5, 2014, and denied his cumulative injury claim on false grounds on May 4, 2015.

When an employee establishes a prima facie case, the defendant still retains the right to present evidence to rebut applicant's prima facie case. (See § 5705; *Judson, supra*, 22 Cal.3d at p. 667.) In rebuttal, the employer must show that its actions were "…necessitated by 'the realities of doing business.'" (*Judson, supra*, 22 Cal.3d at p. 667; *Smith, supra*, 152 Cal.App.3d at p. 110.) The employer's stated business reasons must be reasonable under the facts of the case. (*Barns, supra,* 216 Cal.App.3d at p. 534-535.) Thus, evidence produced by an employee in the prima facie case, and the related inferences raised by such evidence, may support a finding of retaliation or discrimination if the reason offered by the employer is unreasonable or not credible under the

totality of the circumstances of an individual case. (See *Westendorf v. W. Coast Contrs. of Nev., Inc.* (9th Cir. 2013) 712 F.3d 417, 423. (Citation omitted.).) We note also that while an employer's motivation might be discriminatory in its effect, section 132a does not require proof of *discriminatory intent*. (*Lauher*, *supra,* at p. 1301, fn. 8, italics added.)

Here, given that the WCJ determined that defendant did not violate section 132a and its defenses were therefore moot, the record has not been developed as to the issues of whether defendant may establish its business necessity defense as to applicant's prima facie case; namely, that applicant was subjected to disadvantages not visited upon other injured employees in the form of his November 13, 2014 termination following his reported his specific injury on November 1, 2014 and cumulative injury on November 12, 2014, the December 5, 2014 denial of his specific injury claim on false grounds, and the May 4, 2015 denial of his cumulative injury claim on the false grounds. (Report, p. 2.)

Furthermore, the record lacks development of the issue that must be determined following any finding that an employer has discriminated against a worker for a valid business reason: whether the reason was a pretext for imposing disadvantageous treatment upon the injured worker. In this regard, we observe that if defendant meets its burden of proving that it terminated applicant and denied the specific and cumulative injury claims for legitimate business reasons, the burden shifts back to applicant to show that the reasons offered for these actions were excuses or pretexts: "[T]he plaintiff must have an opportunity to show by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." (*Frank v. County of Los Angeles* (2007) 149 Cal.App.4th 805, 822–824; accord *Arteaga, supra,* at p. 353.)

Because the record here is incomplete, we will substitute findings that defer the issues of whether defendant acted out of business necessity, and, as appropriate, whether defendant's stated business reasons were pretextual, and return the matter to the trial level. (See §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].)

Accordingly, we will substitute findings that (1) applicant established his prima facie section 132a claim based upon the record showing that defendant terminated applicant on November 13, 2014 shortly after applicant made known his specific injury and cumulative injury claims, denied his specific injury claim on false grounds on December 5, 2014, and denied his cumulative injury claim on false grounds on May 4, 2015; and (2) defer the issues of whether

defendant acted out of business necessity, and, as appropriate, whether defendant's stated business reasons were pretextual; and we will return this matter to the trial level for further proceedings consistent with this decision

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact issued on December 3, 2020 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Applicant established his prima facie section 132a claim based upon the record showing that defendant terminated applicant on November 13, 2014 shortly after applicant made known his specific injury and cumulative injury claims, denied his specific injury claim on false grounds on December 5, 2014, and denied his cumulative injury claim on false grounds on May 4, 2015.

2. The issue of whether defendant acted out of business necessity, and, as appropriate, the issue of whether defendant's stated business reasons were pretextual are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 22, 2022

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

GERARDO QUIROZ MARMOLEJO
ESPINOZA LAW GROUP
SLATER & ASSOCIATES

SRO/*ara*/*cs*

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