COMMISSION ON HEALTH AND SAFETY AND WORKERS' COMPENSATION

MEMORANDUM

Date: July 14, 2003

To: Christine Baker, Executive Officer

From: Joel Gomberg, Workers' Compensation Administrative Law Judge

Re: Update on Labor Code Section 132a and Employer Termination of Health Insurance Coverage: California Supreme Court Decision in *State of California Dept. of Rehabilitation v. WCAB (Lauher).*

On June 26, 2003, in a unanimous opinion, the California Supreme Court determined that, in order to make out a prima facie case of a violation of Labor Code section 132a, an employee must establish not only that the employer engaged in detrimental conduct, but that he or she was subjected to differential treatment as a result of his or her industrial injury. (State of California Department of Rehabilitation v. Workers' Comp.App.Bd (Lauher) 2003 ___ Cal.4th ____.) The requirement of proof of differential treatment will shield most employer decisions to terminate health insurance coverage to injured workers on disability status from liability under section 132a, because employers generally apply the same policies to industrially injured employees as they do to any other employees who are on leave status.

BACKGROUND

Commissioner Wilson initially raised the subject of the interaction between section 132a and the termination of health insurance benefits in the context of school district employees on long-term disability status. Larry Swezey wrote a background memo on this issue on January 8, 2002. I provided a supplemental memo on July 8, 2002.

As Mr. Swezey explained in his memo, the Supreme Court gave an expansive reading to section 132a in *Judson Steel v. Workers' Comp.App.Bd (Maese)* (1978) 22 Cal.3rd 658, 43 Cal.Comp.Cas 1205. The Court specifically held that an employer may not avoid liability under section 132a by relying on the provisions of a collective bargaining agreement as a business necessity for taking an adverse

action against an injured worker. In *Smith v. Workers' Comp.App.Bd* (1984) 152 Cal.App.3rd 1104, 49 Cal.Comp.Cas 212, the Court of Appeal ruled that any detrimental action taken by an employer triggered by the employee's industrial injury is discriminatory unless the employer can prove that the action was necessitated by the realities of doing business. The prevailing test was succinctly summarized in *Barns v. Workers' Comp.App.Bd.* (1989) 216 Cal. App. 3d 524, 531[54 Cal.Comp.Cas. 433]: "a worker proves a violation of section 132a by showing that as the result of an industrial injury, the employer engaged in conduct detrimental to the worker."

In several cases, including *Abratte v. Workers' Comp.App.Bd* (2000) 65 Cal.Comp.Cas 790 [28 CWCR 201], the WCAB and the Court of Appeal applied the "detriment" test to the termination of health insurance benefits, and found that the injured worker had established a prima facie violation of section 132a. In none of the reported cases was the employer able to establish that the termination of benefits was required by business necessity.

The impact of these decisions was narrowed to some extent by the WCAB's en banc opinion in *Navarro v. A&A Farming (2002)* (67 Cal.Comp.Cas 145), holding that where an employer provides health insurance coverage through a group plan subject to the provisions of the Employee Retirement Income Security Act of 1974 [ERISA] any claim of discrimination under section 132a "relates to" ERISA and is therefore subject to ERISA's extremely broad preemption provisions. The effect of *Navarro* is to immunize employers participating in ERISA group health benefit plans from liability under section 132a when they terminate coverage pursuant to the terms of the plan.

At its July 2002, meeting, the Commission decided to defer consideration of this issue, including whether a roundtable should be convened, until the Supreme Court had issued its decision in the Lauer case.

THE LAUER CASE

The applicant continued to required frequent medical treatment for his industrial injury after he returned to work and his condition was found to be permanent and stationary. His employer refused to pay Lauer temporary disability indemnity when he missed work to receive medical treatment, instead requiring him to use accrued sick leave. Lauer contended that the employer's refusal to compensate him for lost time constituted unlawful discrimination within the meaning of section 132a.

The Supreme Court granted review to decide two questions: (1) whether an injured worker is entitled to temporary disability, after being declared permanent and stationary, for time lost from work to receive medical treatment for an industrial injury; and (2) whether an employer violates section 132a when it requires an employee to use sick leave or other credits in such circumstances. The Court answered both questions in the negative.

Justice Werdegar, writing for a unanimous court, emphasized that workers' compensation benefits were never intended to provide a "make-whole" remedy to injured workers, and that an employer does not necessarily engage in discrimination when it "requires an employee to shoulder some of the disadvantages of his industrial injury."

With respect to the question of entitlement to TD benefits to compensate for lost time to receive medical treatment after P&S status, the Court emphasized that TD benefits are intended to provide partial compensation for wage loss, and that such benefits are not necessary once the injured worker returns to work. Further, as a general rule, injured workers may not receive temporary disability and permanent disability benefits at the same time.

Turning to the second question, the Court noted that "[t]o decide the merits of Lauher's claim, we must decide what section 132a means when it refers to 'discrimination.'" After reviewing the history of the "detriment" test, Justice Werdegar agreed with the Court of Appeal that the "Smith formulation" was "analytically incomplete." The Court held that evidence of a detrimental action was insufficient to establish a violation of section 132a: "We agree that for Lauher merely to show he suffered an industrial injury and that he suffered some detrimental consequences as a result is insufficient to establish a prima facie case of discrimination within the meaning of section 132a…. By prohibiting "discrimination" in section 132a, we assume the Legislature meant to prohibit treating injured employees differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim." The Court therefore determined that, in order to establish a prima facie violation of section 132a, an injured worker must also show that the employer engaged in differential treatment: "Lauher's argument fails to appreciate that, although his injury was industrial, nothing suggests his employer singled him out for disadvantageous treatment because of the industrial nature of his injury….Because Lauher does not allege that other employees are permitted to be away from their workplace for medical care yet need not use their sick leave if they wish to be paid their full salaries, we

conclude Lauher fails to demonstrate he was the victim of discrimination within the meaning of section 132a. To hold otherwise would elevate those who had suffered industrial injuries to a point where they enjoyed rights superior to those of their coworkers. Nothing in the history or meaning of section 132a's antidiscrimination rule supports such an interpretation."

The Court has redefined the word "discrimination" in the Labor Code section 132a context to mean "differential treatment" because of an industrial injury claim, in addition to "detrimental treatment" flowing from the claim. As a result, employers who apply uniform policies to industrially injured and non-industrially injured employees will not be found to have violated section 132a. If an employer uniformly terminates health insurance benefits to all workers on disability status, there will be no differential treatment, and therefore, no unlawful discrimination.

CONCLUSION

The Lauher decision has profoundly changed the legal landscape in Labor Code section 132a cases. It has not, however, altered the reality that injured workers -- and their families -- often suffer economic losses that go far beyond wage loss, and that society offsets some of these losses through other social insurance programs, such as Medi-Cal, unemployment insurance, welfare, and state disability insurance. The Commission may still wish to consider a study of the social costs of loss of health insurance by injured workers. Gathering the necessary data would provide a foundation for a public policy debate and recommendations for legislative solutions. The issue of loss of health insurance is only one part of the broader issue of cost-shifting after industrial injuries. For example, whenever an injured worker with a need for further medical treatment enters into a compromise and release agreement, the cost of his or her future treatment will be shifted to private insurance, county governments, Medi-Cal, or Medicare (if the worker is eligible for Social Security Disability benefits). When injured workers with child support obligations suffer a loss of income, the costs may be shifted to county welfare agencies. Wage loss alone does not tell the whole story.