

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **ALONSO NAVARRO,**

5 *Applicant,*

6
7 **vs.**

8 **A&A FARMING; and WESTERN GROWERS**
9 **INSURANCE CO.**

10 *Defendants.*

Case Nos. **GOL 0087934**
GOL 0087935
GOL 0087936

OPINION AND DECISION
AFTER RECONSIDERATION
(EN BANC)

11
12 On November 13, 2001, the Board granted reconsideration of the Findings and Order
13 issued by the workers' compensation administrative law judge ("WCJ") on August 27, 2001. In
14 that decision, the WCJ found that defendant, A&A Farming ("A&A"), did not violate Labor Code
15 section 132a ("section 132a") when it terminated its contributions to an ERISA group health
16 benefits plan after applicant, Alonso Navarro, had been off work for over three months due to his
17 industrial injuries.¹ In essence, the WCJ concluded there was no "discrimination," within the
18 meaning of section 132a, because the ERISA plan's provision that employer contributions would
19 be discontinued after a disabled employee had been off work for 90 days applied whether or not
20 the disability was work-related.

21 On reconsideration, applicant contended in substance: (1) that it is a violation of section
22 132a for an employer to terminate an industrially-injured employee's group medical coverage
23 while the employee is temporarily disabled; and (2) that ERISA does not preempt his section 132a
24 claim. A&A filed an answer asserting in substance that ERISA does preempt applicant's section
25 132a claim.

26
27 ¹ All references to "ERISA" are to the Employee Retirement Income Security Act of 1974, 29
28 U.S.C. §1001 et seq..

1 Because of the important legal issue presented, and in order to secure uniformity of
2 decision in the future, the Chairman of the Board, upon a majority vote of its members, has
3 reassigned this case to the Board as a whole for an *en banc* decision. (Lab. Code, §115.)² Based
4 on our review of the relevant statutory and case law, we conclude that where an injured
5 employee's section 132a claim is premised upon the employer's termination of (or refusal to
6 provide) group health plan benefits to the employee pursuant to the terms of an ERISA plan, the
7 employee's section 132a claim "relates to" the ERISA plan and, therefore, is preempted by
8 ERISA. (29 U.S.C. §1144(a).)³ Accordingly, we will not reach the question of whether the
9 employer's act of discontinuing its contributions to the ERISA plan on applicant's behalf
10 constituted "discrimination" under section 132a.

11 **I. BACKGROUND**

12 The essential facts are not in dispute.

13 A&A is a farming corporation that, at all times relevant here, was a participating member
14 employer of the Western Growers Assurance Trust ("the Trust"), a multi-employer trust that
15 provides medical, dental, vision, and other benefits to the employees of participating employers.
16 The Trust, which is funded in part by employer contributions, is an "employee welfare benefit
17 plan" within the meaning of ERISA (29 U.S.C. §1002(1)(A)).⁴

18 Under the Participation Agreement between A&A and the Trust, the only A&A employees

19 ² The Board's *en banc* decisions are binding precedent on all Board panels and WCJs.
20 (WCAB/DWC Policy & Procedure Manual, Index No. 6.16.1.)

21 ³ Our rationale, however, could apply equally to other non-workers' compensation benefits
22 provided by an employer pursuant to an ERISA plan.

23 ⁴ The issue of whether a group health benefit plan (or any other plan) is an "employee welfare
24 benefit plan" within the meaning of ERISA is a question of fact on which the defendant has the burden of
25 proof. (*Stuart v. UNUM Life Ins. Co. of America* (9th Cir. 2000) 217 F.3d 1145, 1148-1153; *Zavora v.*
26 *Paul Revere Life Ins. Co.* (9th Cir. 1998) 145 F.3d 1118, 1120-1121; *Qualls v. Blue Cross of California,*
27 *Inc.* (9th Cir. 1994) 22 F.3d 839, 842-844; *Kanne v. Connecticut General Life Ins. Co.* (9th Cir. 1989) 867
28 F.2d 489, 491-493, cert. denied, 492 U.S. 906 [109 S.Ct. 3216, 106 L.Ed.2d 566] (1989).) Here, the
WCJ's Opinion on Decision stated "[t]he facts show that [the Western Growers Assurance Trust] ... was
... an ERISA Trust." Without discussing this question in detail, we concur with the WCJ that A&A
carried its burden of establishing the Trust was an "employee welfare benefit plan" under ERISA. (See
particularly, Trial Transcript, 6/19/01, at 16:15-21:15; Defendant's Exhs. A, D & E.) Among other things,
participating employers, including A&A, make contributions to the Trust, as noted above.

1 eligible for health coverage were those who actively worked at least 20 hours per week. The Trust
2 terms also provided, however, that upon approval by the Trust at the time the employer became a
3 participating member, a participating employer could establish a general policy to continue
4 making contributions to the Trust on behalf of a disabled employee for up to 180 days after the
5 employee became disabled and ceased active work. In accordance with the Trust terms, A&A
6 adopted a general policy providing that it would continue to make Trust contributions for its
7 disabled employees for a period of 90 days, whether or not the disability was work-related.

8 Applicant was employed as a working foreman/irrigator by A&A for nine years. On
9 August 6, 1996, on November 18, 1999, and during a period from August 6, 1996 to April 5,
10 2000, he sustained industrial injuries to his back. As result of his injuries, he stopped working on
11 April 5, 2000 and he had back surgery two days later. While off work following his surgery, he
12 received temporary disability indemnity. With the exception of one partial-day attempt to return
13 to work, he never worked for A&A after April 5, 2000, although he would have done so had he
14 been physically able.

15 While applicant was actively working, A&A made contributions to the Trust on his behalf.
16 In addition, he contributed \$20 per month (which was deducted from his paycheck).

17 After applicant stopped working in April 2000 due to his industrial injuries, A&A made
18 contributions to the Trust on his behalf for the months of May, June, and July 2000, in accordance
19 with its continuation policy. Applicant also sent checks to A&A covering his \$20 contributions
20 for each of these months, plus the month of August 2000.

21 By a letter dated August 15, 2000, however, A&A stated it was returning applicant's \$20
22 contribution for the month of August because it would only provide medical coverage for
23 disabled employees for a period of 90 days after they commenced leave due to their disability. It
24 also notified him that, after this 90-day period, continuation of his health coverage was available
25 under COBRA.⁵

26 By a letter dated August 25, 2000, applicant's counsel wrote to A&A stating that any

27 ⁵ All references to "COBRA" are to the Consolidated Omnibus Budget Reconciliation Act of 1985,
28 29 U.S.C. §1161 et seq.

1 termination of applicant's health coverage while he was temporarily disabled due to his industrial
2 injuries would constitute discrimination under section 132a. The letter also enclosed a \$40 check
3 from applicant for his September and October 2000 health plan contributions. The letter stated
4 that, because A&A is "obligated to continue applicant's health care," then A&A should "process
5 applicant's co-pay premium checks without delay." A&A, however, did not comply with
6 applicant's request.

7 On September 21, 2000, applicant filed a "Petition for Benefits-Discrimination [Labor
8 Code Sec. 132a]," alleging in substance that A&A's failure to continue contributing to the Trust
9 on his behalf while he was temporarily disabled on an industrial basis constituted unlawful
10 discrimination against an industrially-injured worker in violation of section 132a.

11 On June 19, 2001, the issue of applicant's section 132a petition was tried.

12 On August 27, 2001, the WCJ issued the decision now before us. To reiterate, the WCJ
13 concluded in substance that applicant had failed to establish a violation of section 132a because
14 A&A's policy of continuing health coverage for a limited period of 90 days applied to all of its
15 employees, not just applicant, whether the disability was industrial or not. Thus, the WCJ found,
16 there was no section 132a discrimination against applicant.

17 II. DISCUSSION

18 Section 132a states that "[i]t is the declared policy of this state that there should not be
19 discrimination against workers who are injured in the course and scope of their employment" and
20 it provides that, where unlawful discrimination is found, the employer is liable to the injured
21 employee for various penalties, including a 50% increase in workers' compensation benefits (up
22 to \$10,000) and reimbursement of lost wages and/or benefits. (Lab. Code, §132a.) Although
23 section 132a provides that certain specific employer acts constitute unlawful discrimination,⁶
24 violations of section 132a are not limited to its express discriminatory acts. Rather, whenever an
25 employee's industrial injury causes an employer to take an adverse action against the injured

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27 ⁶ For example, an employer may violate section 132a if it "discharges, or threatens to discharge, or
28 in any manner discriminates against any employee because he or she has filed or made known his or her
intention to file a [workers' compensation] claim." (Lab. Code, §132a.)

1 employee, the employer may have engaged in unlawful discrimination within the meaning of
2 section 132a, unless the employer establishes that the adverse action was “necessitated by the
3 ‘realities of doing business.’ ” (*Judson Steel Corp. v. Workers’ Comp. Appeals Bd. (Maese)*
4 (1978) 22 Cal.3d 658, 666-667 [43 Cal. Comp. Cases 1205, 1210].) Discrimination in violation
5 of section 132a “is just as obnoxious to the interests of the State and contrary to public policy and
6 sound morality as sexual or racial discrimination.” (*City of Moorpark v. Superior Court* (1998) 18
7 Cal.4th 1143, 1153 [63 Cal. Comp. Cases 944, 952].)⁷

8 Nevertheless, under the Supremacy Clause, Congress may preempt any state law either by
9 express provision or by implication. (*New York State Conference of Blue Cross & Blue Shield*
10 *Plans v. Travelers Ins. Co. (“Travelers”)* (1995) 514 U.S. 645, 654 [115 S.Ct. 1671, 131 L.Ed.2d
11 695].)⁸ ERISA contains a preemption clause which expressly provides that ERISA “shall
12 supersede any and all State laws insofar as they ... relate to any employee benefit plan” (29
13 U.S.C. §1144(a).)

14 This ERISA preemption provision “ [is] not a model of legislative drafting’ ” (*Pilot Life*
15 *Ins. Co. v. Dedeaux (“Pilot Life”)* (1987) 481 U.S. 41, 47 [107 S.Ct. 1549, 95 L.Ed.2d 39]
16 (quoting *Metropolitan Life Ins. Co. v. Massachusetts (“Met Life”)* (1985) 471 U.S. 724, 739 [105
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18 ⁷ Although we are resolving applicant’s section 132a claim on ERISA preemption grounds, we note
19 the issue of what constitutes “discrimination” under section 132a is pending again before the California
20 Supreme Court. That is, in *State of Cal. Dept. of Rehabilitation v. Workers’ Comp. Appeals Bd. (Lauher)*
(August 14, 2001, D035665) 66 Cal. Comp. Cases 993, 2001 WL 1335828, 2001 Cal. Wrk. Comp. LEXIS
20 3838 [nonpub. opn.], the Court of Appeal held:

21 “To meet the burden of presenting a prima facie claim of unlawful
22 discrimination in violation of section 132a, it is insufficient that the
23 industrially injured worker show only that he or she suffered some
24 adverse result as a consequence of some action or inaction by the
25 employer that was triggered by the industrial injury. The claimant must
26 also show that he or she had a legal right to receive or retain the
27 deprived benefit or status, and the employer had a corresponding legal
28 duty to provide or refrain from taking away that benefit or status.” (66
Cal. Comp. Cases at 1018.)

On October 24, 2001, the California Supreme Court granted review in *Lauher*. (S100557.)

27 ⁸ The Supremacy Clause states, in relevant part: “This Constitution, and the Laws of the United
28 States ... shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to
the Contrary notwithstanding.” (U.S. Const., art. VI, cl. 2.)

1 S.Ct. 2380, 85 L.Ed.2d 728]) and the Courts have had some difficulty in delineating the exact
2 range of its rather enigmatic and nebulous phrase “relate to.”⁹

3 Recently, however, the Supreme Court has emphasized that we “simply must go beyond
4 the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the
5 objectives of ... ERISA ... as a guide to the scope of the state law that Congress understood
6 would survive.” (*Travelers, supra*, 514 U.S. at 656; see, also, *Egelhoff, supra*, 532 U.S. at ___ [121
7 S.Ct. at 1327]; *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.*
8 (“*Dillingham*”) (1997) 519 U.S. 316, 324 [117 S.Ct. 832, 136 L.Ed.2d 791].)

9 In enacting ERISA, the essential objective of Congress was “to establish the regulation of
10 employee welfare benefit plans ‘as exclusively a federal concern.’ ” (*Travelers, supra*, 514 U.S. at
11 656 [quoting from *Alessi v. Raybestos-Manhattan, Inc.* (“*Alessi*”) (1981) 451 U.S. 504, 523 [101
12 S.Ct. 1895, 68 L.Ed.2d 402].) More specifically, Congress intended “ ‘to ensure that plans and
13 plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the
14 administrative and financial burden of complying with conflicting directives among States or
15 between States and the Federal Government ..., [and to prevent] the potential for conflict in
16 substantive law ... requiring the tailoring of plans and employer conduct to the peculiarities of the
17

18 ⁹ As stated in *Travelers, supra*, “one might be excused for wondering, at first blush, whether the
19 words of limitation (‘insofar as they ... relate’) do much limiting. If ‘relate to’ were taken to extend to the
20 furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its
21 course, for ‘[r]eally, universally, relations stop nowhere.’ ” (514 U.S. at 655; see also, *DeBuono v. NYSA-*
ILA Medical and Clinical Services Fund (1997) 520 U.S. 806, 813, fn. 7 [117 S.Ct. 1747, 138 L.Ed.2d 21]
22 (“[A]pplying the ‘relate to’ provision according to its terms was a project doomed to failure, since, as
23 many a curbstome philosopher has observed, everything is related to everything else”).)

24 It is clear that “[p]re-emption does not occur ... if the state law has only a tenuous, remote, or
25 peripheral connection” to an ERISA plan. (*Travelers, supra*, 514 U.S. at 661; *District of Columbia v.*
Greater Washington Bd. of Trade (“*Greater Washington Bd. of Trade*”) (1992) 506 U.S. 125, 130, fn.1
26 [113 S.Ct. 580, 121 L.Ed.2d 513].) Beyond that, however, the parameters of ERISA preemption, as set by
27 the limiting phrase “relate to,” have been somewhat muddy and indefinite. At one point, the Supreme
28 Court announced a standard that “[a state] law ‘relates to’ an employee benefit plan ... if it has a
connection with or reference to such a plan.” (*Shaw v. Delta Air Lines, Inc.* (“*Shaw*”) (1983) 463 U.S. 85,
97 [103 S.Ct. 2890, 77 L.Ed.2d 490].) Ultimately, though, the Supreme Court essentially concluded that
this standard did not solve the “relate to” problem. (See, *Egelhoff v. Egelhoff* (“*Egelhoff*”) (2001) 532 U.S.
141, ___, [121 S.Ct. 1322, 1327, 149 L.Ed.2d 264] (stating that “[the phrase] ‘connection with’ is scarcely
more restrictive than ‘relate to’ ”); *Travelers, supra*, 514 U.S. at 656 (stating that “[f]or the same reasons
that infinite relations cannot be the measure of pre-emption, neither can infinite connections”).)

1 law of each jurisdiction.’ ” (*Travelers, supra*, 514 U.S. at 656-657 [quoting from *Ingersoll-Rand*
2 *Co. v. McClendon* (“*Ingersoll-Rand*”) (1990) 498 U.S. 133, 142 [111 S.Ct. 478, 112 L.Ed.2d
3 474].) Thus, “[t]he basic thrust of the [ERISA] pre-emption clause ... was to avoid a multiplicity
4 of regulation in order to permit the nationally uniform administration of employee benefit plans.”
5 (*Travelers, supra*, 514 U.S. at 657.)

6 In light of these Congressional objectives in creating ERISA, it appears that at least three
7 kinds of state laws “relate to” ERISA for preemption purposes: (1) those that “mandate[]
8 employee benefit structures or their administration;” (2) those that “bind employers or plan
9 administrators to [a] particular choice” or “preclude uniform administrative practice,” thereby
10 functioning as a regulation of an ERISA plan itself; and (3) those that “provid[e] alternative
11 enforcement mechanisms.” (*Travelers, supra*, 514 U.S. at 657-658, 659-660.)

12 Regardless of which preemption test is employed, however, we are guided by the repeated
13 observations of the United States Supreme Court that ERISA’s preemption provision is “clearly
14 expansive” (*Egelhoff, supra*, 532 U.S. at ___ [121 S.Ct. at 1327]; *Travelers, supra*, 514 U.S. at
15 655), it is “deliberately expansive” (*Greater Washington Bd. of Trade, supra*, 506 U.S. at 129;
16 *Morales v. Trans World Airlines, Inc.* (“*Morales*”) (1992) 504 U.S. 374, 384 [112 S.Ct. 2031, 119
17 L.Ed.2d 157]; it is “broadly worded” (*Egelhoff, supra*, 532 U.S. at ___ [121 S.Ct. at 1327];
18 *Ingersoll-Rand, supra*, 498 U.S. at 138), it has a “broad scope” (*Dillingham, supra*, 519 U.S. at
19 324; *Met Life, supra*, 471 U.S. at 739), it has an “expansive sweep” (*Dillingham, supra*, 519 U.S.
20 at 324; *Pilot Life, supra*, 481 U.S. at 47), and it is “conspicuous for its breadth.” (*Morales, supra*,
21 504 U.S. at 384; *FMC Corp. v. Holliday* (1990) 498 U.S. 52, 58 [111 S.Ct. 403, 112 L.Ed.2d
22 356].)

23 In assessing whether applicant’s section 132a claim here is preempted by ERISA, we
24 begin by reviewing several Supreme Court cases which, when read together, establish that ERISA
25 preempts any state law discrimination claim where the existence of, the implementation of, or the
26 specific terms of an employer’s ERISA plan are central to (indeed, critical to) that claim.

27 In *Shaw, supra*, 463 U.S. 85, the Supreme Court considered the interplay between the
28 ERISA preemption statute (29 U.S.C. §1144(a)) and New York’s Human Rights Law

1 (N.Y.Exec.Law §290 et seq.). The Human Rights Law included a comprehensive state
2 anti-discrimination provision prohibiting, among other practices, discrimination in the
3 compensation, terms, conditions or privileges of employment on the basis of sex. (*Id.*, §296.1(a).)
4 The New York Court of Appeals had held that, if a private employer’s employee benefit plan
5 treated pregnancy differently from other nonoccupational disabilities, this constituted sex
6 discrimination within the meaning of the Human Rights Law. (*Brooklyn Union Gas Co. v. New*
7 *York State Human Rights Appeal Board* (1976) 41 N.Y.2d 84, 390 [N.Y.S.2d 884, 359 N.E.2d
8 393].) Several employers, however, had established ERISA medical and disability plans that did
9 *not* provide benefits to employees disabled by pregnancy, which would have been a violation of
10 New York’s Human Rights Law. Yet, the Supreme Court held that the Human Rights Law was
11 preempted by ERISA to the extent it prohibited employment practices that are lawful under
12 federal law, i.e., Title VII of the Civil Rights Act of 1964. (42 U.S.C. §2000e et seq.)¹⁰

13 In so holding, the Supreme Court noted, “ERISA does not mandate that employers provide
14 any particular benefits, and does not itself proscribe discrimination in the provision of employee
15 benefits.” (*Shaw, supra*, 463 U.S. at 91.)¹¹ The Court further stated it had “no difficulty” in
16 concluding that New York’s Human Rights Law “relates to” employee benefit plans because the
17 law “prohibits employers from structuring their employee benefit plans in a manner that

18 ¹⁰ Of course, ERISA does not preempt discrimination claims based on *federal* law. (See 29 U.S.C.
19 §1144(d).) The ERISA plans in *Shaw*, however, were created prior to the federal Pregnancy
20 Discrimination Act of 1978, which made discrimination based on pregnancy unlawful under Title VII of
21 the Civil Rights Act of 1964.

22 Similarly, ERISA does not preempt state discrimination laws that prohibit the same discriminatory
23 acts that federal law prohibits. (*Shaw, supra*, 463 U.S. at 100-104, 108-109; accord *Humana, Inc. v.*
24 *Forsyth* (“*Humana*”)(1999) 525 U.S. 299, 310 [119 S.Ct. 710, 142 L.Ed.2d 753] (“We held in *Shaw* that
25 the [state discrimination] law was preempted only to the extent it prohibited practices lawful under
26 [federal law]. ... To the extent the [state] law prohibited practices also prohibited under federal law, we
27 explained, the [state] law was not preempted ... ”).) Presently, however, there is no federal law
28 precluding discrimination on the basis of an industrial injury per se.

24 ¹¹ See also, *Bronk v. Mountain States Telephone & Telegraph, Inc.* (10th Cir. 1998) 140 F.3d 1335,
1338 (“It is well established that ERISA does not prohibit an employer from distinguishing between
25 groups or categories of employees, providing benefits for some but not for others”); *McGann v. H&H*
26 *Music Co.* (3d Cir. 1991) 946 F.2d 401, 407-408, cert. denied 506 U.S. 981, 113 S.Ct. 482, 121 L.Ed.2d
27 387 (1992) (noting that it was “Congress’s intent that employers remain free to create, modify and
28 terminate the terms and conditions of employee benefits plans without [state or local] governmental
interference” and that, therefore, “ERISA does not broadly prevent an employer from ‘discriminating’ in
the creation, alteration or termination of employee benefit plans.”)

1 discriminates on the basis of pregnancy.” (*Id.*, at 96-97.) Finally, the Court concluded the Human
2 Rights Law was preempted because, if the employers’ ERISA plans were subject to New York’s
3 anti-discrimination law, this would be inconsistent with “the reservation to Federal authority the
4 sole power to regulate employee benefit plans” and inconsistent with Congress’s intention to
5 “eliminate[] the threat of conflicting state and local regulation.” (*Id.*, at 99-100.)

6 In *Metropolitan Life Ins. Co. v. Taylor* (“*Taylor*”) (1987) 481 U.S. 58 [107 S.Ct. 1542, 95
7 L.Ed.2d 55], an employee sustained an industrial back injury in 1961 for which he received
8 workers’ compensation benefits. Eventually, he returned to work. Nearly 20 years later, the
9 employee filed a supplemental disability claim under the employer’s ERISA benefits plan,
10 alleging that his industrial back injury disabled him from continuing his work. The plan sent him
11 to an orthopedist to be examined, but the physician found no orthopedic problems and the
12 employee’s supplemental disability claim was denied. Six months later, the employee filed state
13 law tort and contract claims for wrongful denial of ERISA plan benefits. The Supreme Court
14 concluded, however, that the state law claims were preempted by ERISA because they “ ‘relate[]
15 to [an] employee benefit plan.’ ” (481 U.S. at 60-62, 62-63.)¹²

16 In *Greater Washington Board of Trade, supra*, 506 U.S. 125, an employer sponsoring an
17 ERISA health benefits plan sued to enjoin enforcement of a provision of the District of Columbia
18 Workers’ Compensation Equity Amendment Act of 1990. The provision in dispute stated:

19 “Any employer who provides health insurance coverage for an
20 employee shall provide health insurance coverage equivalent to the
21 existing health insurance coverage of the employee while the
22 employee receives or is eligible to receive workers’ compensation
benefits under this chapter.” (D.C. Code, §36- 307(a-1)(1).)

23 The Supreme Court held that this provision was preempted by ERISA.

24 In so concluding, the Court pointed out that the District of Columbia law “specifically
25 refers” to health benefit plans covered by ERISA and “on that basis alone is pre-empted” because

26 _____
27 ¹² See also, *Pilot Life, supra*, 481 U.S. 41 (ERISA preempts employee’s state law claim for wrongful
28 denial of ERISA plan benefits); *Ingersoll Rand, supra*, 498 U.S. 133 (ERISA preempts employee’s state
law claim of wrongful discharge in order to avoid paying pension benefits).

1 “any state law imposing requirements [on ERISA regulated health insurance] programs must yield
2 to ERISA.” (*Greater Washington Board of Trade, supra*, 506 U.S. at 130-131.) The Court
3 observed, however, that ERISA will preempt *any* state law that “relates to” a covered plan “ ‘even
4 if the [state] law is not specifically designed to affect such plans, or the effect is only indirect.’ ”
5 (*Greater Washington Board of Trade, supra*, 506 U.S. at 129-130 (quoting from *Ingersoll-Rand,*
6 *supra*, 498 U.S. at 139).)

7 Similarly, in *Alessi, supra*, 451 U.S. 504, the Supreme Court considered an action brought
8 by retirees who had received workers’ compensation awards subsequent to their retirements. The
9 retirees challenged provisions in their employers’ ERISA pension plans which required that a
10 retiree’s pension benefits be offset (reduced) by an amount equal to any workers’ compensation
11 award for which the retiree is eligible. The retirees asserted that such offset provisions in their
12 employers’ ERISA pension plans violated a New Jersey workers’ compensation law prohibiting
13 such offset. (N.J. Stat., §34:15-29.) The Supreme Court held that the New Jersey workers’
14 compensation law was preempted by ERISA.

15 In so concluding, the Supreme Court noted:

16 “[F]or the pre-emption provision to apply here, the New Jersey
17 law must be characterized as a state law ‘that relate[s] to any
18 employee benefit plan.’ 29 U.S.C. §1144(a). [Footnote omitted.]
19 That phrase gives rise to some confusion where, as here, it is
20 asserted to apply to a state law ostensibly regulating a matter quite
21 different from pension plans. The New Jersey law governs the
22 State’s workers’ compensation awards, which obviously are
23 subject to the State’s police power.” (451 U.S. at 523-524.)

24 Nevertheless, the Court went on to state:

25 “Whatever the purpose or purposes of the New Jersey statute, we
26 conclude that it ‘relate[s] to pension plans’ governed by ERISA
27 because it eliminates one method for calculating pension benefits –
28 integration -- that is permitted by federal law. ... New Jersey’s
effort to ban pension benefit offsets based on workers’
compensation applies directly to this calculation technique. We
need not determine the outer bounds of ERISA’s pre-emptive
language to find this New Jersey provision an impermissible
intrusion on the federal regulatory scheme.” (451 U.S. at 524-525.)

1 The clear import of the foregoing Supreme Court cases leaves little doubt that applicant's
2 section 132a claim here is preempted by ERISA.

3 As demonstrated by *Shaw*, ERISA does not itself proscribe discrimination in the provision
4 of employee benefits and, like the state anti-discrimination statute in *Shaw*, section 132a cannot
5 make unlawful a failure or refusal to provide ERISA-regulated benefits where such failure or
6 refusal is not prohibited by federal law. Moreover, to conclude that section 132a was not
7 preempted would be inconsistent with "the reservation to Federal authority the sole power to
8 regulate employee benefit plans" and inconsistent with Congress's intention to "eliminate[] the
9 threat of conflicting state and local regulation." (*Shaw, supra*, 463 U.S. at 99-100.)

10 Similarly, as demonstrated by *Met Life* and *Pilot Life*, a state law action based on an
11 employer's allegedly wrongful denial of ERISA benefits is preempted. Therefore, applicant's
12 section 132a action (which, essentially, is premised on an allegation that his ERISA benefits were
13 wrongfully terminated following his industrial injuries) is also preempted.

14 Further, as demonstrated by *Greater Washington Board of Trade*, a state statute cannot
15 require an employer to provide an industrially injured worker with the same health benefits he or
16 she would have received absent the industrial injury. We recognize that *Greater Washington*
17 *Board of Trade* involved a state statute that directly attempted to regulate employee health
18 benefits, while section 132a's effect on health benefits would be solely indirect. That difference,
19 however, is immaterial because a state law may "relate to" an ERISA benefit plan, and thereby be
20 pre-empted, " 'even if the [state] law is not specifically designed to affect such plans, or the effect
21 is only indirect.' " (*Greater Washington Board of Trade, supra*, 506 U.S. at 129-130 (quoting
22 from *Ingersoll-Rand, supra*, 498 U.S. at 139; see also, 29 U.S.C. §1144(c) (ERISA preempts any
23 state action that "purports to regulate, *directly or indirectly*, the terms and conditions of employee
24 benefit plans" (emphasis added).)

25 Finally, like *Alessi*, to the extent that section 132a would require employers to provide
26 industrially injured employees with ERISA benefits to which they otherwise would not be entitled
27 under their ERISA plans, section 132a would impermissibly intrude on the federal scheme.

28 Of course, these Supreme Court cases only establish by analogy that applicant's section

1 132a claim is preempted; none of them specifically address any section 132a claim. There are,
2 however, non-Supreme Court cases that specifically address ERISA preemption in the context of
3 section 132a. And, like the Supreme Court cases, these cases also establish that a section 132a
4 claim is preempted by ERISA where the claim is premised upon and dependent upon the existence
5 of an ERISA plan and the benefits provided (or not provided) thereunder.

6 In *Pacific Bell v. Workers' Comp. Appeals Bd. (Grigsby)* (1987) 186 Cal.App.3d 1603 [51
7 Cal. Comp. Cases 529], the applicant sustained an industrial injury that resulted in a period of
8 disability from July 10, 1977 through September 30, 1981. During this period, she received a
9 disability pension that was at least equal to her temporary disability indemnity (TDI) and
10 vocational rehabilitation temporary disability indemnity (VRTD) rates. After she returned to
11 work, her employer sent her a notice stating that, because she had received a disability pension
12 through September 30, 1981, that period was being "deducted" from her total number of years of
13 continuous service and that she would not receive credit toward her service pension for any
14 portion of that period. As a result of this revision, her total net credited time of service toward her
15 pension was reduced from about 18-1/2 years to about 16-1/2 years. When the applicant
16 challenged this reduction of service credit, the employer responded that no service credits are
17 given to anyone on a disability pension because that person is not considered an employee under
18 the employer's ERISA plan and that the employer takes "an inflexible position in this regard, due
19 to the corporation's interpretation of its duties pursuant to ERISA." Thereafter, applicant filed a
20 petition with the WCAB seeking additional service credits and increased compensation pursuant
21 to section 132a. She contended that, in violation of section 132a, the employer had discriminated
22 against her based on her industrial injury by refusing to grant her service credit during her
23 disability period.

24 The California Court of Appeal concluded, however, that ERISA preempted applicant's
25 claim that her employer discriminated against her, in violation of section 132a, when it denied her
26 service credits toward her pension for the period she did not work due to industrial disability.
27 (*Grigsby, supra*, 186 Cal.App.3d at 1612-1615 [51 Cal. Comp. Cases at 535-539].) In so
28 concluding, the Court noted "the broad scope of preemption by ERISA ... as explained in *Shaw*

1 ... , *supra*, 463 U.S. 85, ... and *Alessi* ... , *supra*, 451 U.S. 504” (*Grigsby*, *supra*, 186
2 Cal.App.3d at 1615 [51 Cal. Comp. Cases at 538]) and it observed that “ERISA expressly
3 preempts state action regulating ERISA-controlled employee benefit plans ... including [state
4 action] that “purport[s] to regulate, directly or indirectly, the terms and conditions of [ERISA-
5 regulated] employee benefit plans....’ (29 U.S.C. §1144(c).)” (*Grigsby*, *supra*, 186 Cal.App.3d at
6 1612 [51 Cal. Comp. Cases at 536].) The Court further pointed out that ERISA and its related
7 regulations (29 U.S.C. §1054(b)(3); 29 C.F.R. §§2530.200b-2(a), 2530.200b-3) specifically
8 “allow an employer to deny service credits for the time during which an absent employee receives
9 or is entitled to receive disability indemnity pursuant to a self-insured employer’s workers’
10 compensation plan ... and also allow an employer to deny service credits for a year during which
11 the employee performs less than 1,000 hours of service.” (*Grigsby*, *supra*, 186 Cal.App.3d at
12 1612-1614 [51 Cal. Comp. Cases at 539].)

13 Here, as in *Grigsby*, we conclude that ERISA preempts applicant’s claim that his employer
14 discriminated against him, in violation of section 132a, when it terminated its contributions to the
15 ERISA health benefits plan after he had been disabled for over 90 days due to his industrial
16 injuries. As observed by *Grigsby*, ERISA has fashioned a “broad scope of preemption” (*Grigsby*,
17 *supra*, 186 Cal.App.3d at 1615 [51 Cal. Comp. Cases at 538]) and “ERISA expressly preempts
18 state action regulating ERISA-controlled employee benefit plans ... including [state action] that
19 “purport[s] to regulate, directly or indirectly, the terms and conditions of [ERISA-regulated]
20 employee benefit plans....’ (29 U.S.C. §1144(c).)” (*Grigsby*, *supra*, 186 Cal.App.3d at 1612 [51
21 Cal. Comp. Cases at 536].) Thus, even though the effect of section 132a on A&A’s ERISA plan
22 would be indirect, there is still preemption. Moreover, although we do not believe that the
23 existence of a federal statute or regulation specifically allowing an employer to take a particular
24 action was critical to *Grigsby*’s preemption analysis (see *Grigsby*, *supra*, 186 Cal.App.3d at 1612-
25 1614 [51 Cal. Comp. Cases at 539]),¹³ we nevertheless observe that federal law does allow an
26 employer to discontinue its contributions to an ERISA health benefits plan after an employee has

27 ¹³ If, however, federal law specifically *prohibited* the employer’s action, the result might be
28 different. (See *Shaw*, 463 U.S. at 100-104, 108-109.)

1 been disabled for twelve weeks (i.e., 84 days) or more.¹⁴

2 Even more directly on point is *Scotti v. Los Robles Regional Center* (“*Scotti*”) (C.D.Cal.
3 2000) 117 F.Supp.2d 982.

4 In *Scotti*, the applicant was covered by an ERISA group health benefits plan funded by
5 employer contributions. The ERISA plan provided that the employer could discontinue funding
6 an employee’s coverage if the employee was on a leave of absence greater than six months,
7 whether or not the leave was related to an industrial injury. When employer-funded coverage was
8 discontinued, however, the employee was given the option of continuing coverage under COBRA.

9 After applicant’s industrially-related disability had extended beyond six months, the
10 employer notified her that it was terminating her group medical benefits in accordance with the
11 terms of its ERISA plan. Applicant then filed a petition with the WCAB alleging that her
12 employer’s termination of her group medical benefits after a six-month industrially-caused leave
13 of absence constituted discrimination under section 132a. Following removal of the section 132a
14 claim to federal district court, however, the court dismissed applicant’s section 132a claim on the
15 basis that it was preempted by ERISA.

16 In finding that the applicant’s section 132a claim was preempted by ERISA, the Court
17 began with the general observations that “[t]he phrase ‘relates to’ has been read expansively in

18 ¹⁴ ERISA provides that “[n]othing in this subchapter shall be construed to alter, amend, modify,
19 invalidate, impair, or supersede any law of the United States ... ” (29 U.S.C. §1144(d).) Thus, ERISA does
20 not supersede the provisions of the federal Family and Medical Leave Act (“FMLA”) which, among other
21 things, provides that “[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise
22 of or the attempt to exercise, any right provided under this subchapter.” (29 U.S.C. §2615(a)(1).)

23 The FMLA, however, requires an employer to continue a disabled employee’s group health
24 benefits only during the first twelve weeks of the disabled employee’s leave. That is, the FMLA provides:
25 (1) that “an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month
26 period ... [b]ecause of a serious health condition that makes the employee unable to perform the functions
27 of the position of such employee” (29 U.S.C. §2612(a)(1)(D)) and (2) that “during any period that an
28 eligible employee takes leave under section 2612 ... , the employer shall maintain coverage under any
‘group health plan’ ... for the duration of such leave at the level and under the conditions coverage would
have been provided if the employee had continued in employment continuously for the duration of such
leave.” (29 U.S.C. §2614(c)(1).)

Because the FMLA only provides for the continuation of group health benefits during the first
twelve weeks (i.e., 84 days) of a disabled employee’s leave, an employer is permitted by the FMLA (and,
therefore, by ERISA) to terminate its contributions to a group health plan after an employee has been
disabled for 84 days.

1 order to achieve uniformity in employee benefit laws,” that “[e]ven indirect state action affecting
2 private [ERISA plans] may impermissibly encroach on an exclusively federal area,” and that “[a]
3 direct relationship to a plan need not be established because an indirect relation to a plan is
4 sufficient to establish preemption.” (*Scotti, supra*, 117 F.Supp.2d at 986.) Turning to section 132a
5 itself, the Court stated:

6 “[T]he Court ... holds that the enforcement of §132a would relate
7 to the employee benefit Plan [and] reach the terms and conditions
8 of that Plan

9 “First, §132a does not directly mention employee benefit plans
10 covered under ERISA. However, the Plan would be essential to
11 analyzing whether Defendants violated §132a. Such analysis
12 would connect the state law to the ERISA-controlled Plan. The
13 Plan allows the employer to discontinue employer-funded medical
14 coverage when employees are on leave of absence for longer than
15 six months, regardless of their reason for the leave. To determine
16 whether Defendants discriminated against [applicant] under §132a,
17 the reviewing body would have to consider the Plan’s terms for
18 allowing discontinuation of benefits upon leave of absence. The
19 Plan could potentially serve as the justification for the Defendants’
20 conduct and disprove the allegation of discrimination. A violation
21 of §132a could not be shown without reference to the Plan, nor can
22 the state law’s enforcement stay clear of affecting the Plan’s
23 administration. Thus, the state law relates to the Plan in this case.

24 “Second, §132[a] reaches the Plan’s terms and conditions by
25 punishing conduct set forth in the Plan for the purpose of its
26 administration. [Applicant] is claiming rights to group medical
27 benefits. ‘Any attempt to establish a right to benefits’ has been
28 held to ‘involve a determination [or clarification] of the terms of
the plan.’ [Citations omitted.]

“While §132[a] is an anti-discrimination law, preemption depends
on ‘the conduct to which such law applie[s], not on the form or
label of the law.’ [Citation omitted.] The determination of whether
Defendants’ conduct was discriminatory under §132a would
necessitate an analysis of the terms of the Plan. The Plan’s terms
set forth the events that justify termination of benefits, the exact
conduct challenged in this case and to which §132a would apply.
Section 132[a] mandates that work benefits be reinstated if the
employer is found to have discriminated. The state law further
orders the employer to increase the employee’s compensation.
Hence, [applicant’s] claim under §132a would potentially require

1 benefits to be reinstated, provide the amount of such medical
2 benefits, and provide a remedy for misconduct arising from the
3 administration of the plan. Such state laws are clearly preempted
4 by ERISA.” (*Scotti, supra*, 117 F.Supp.2d at 988.)

5 The analysis set forth in *Scotti* applies with full and equal force here. There is no material
6 difference of fact or law between the section 132a claim in *Scotti* and the section 132a claim
7 presently before us. As with *Scotti*, applicant’s section 132a claim could not prevail without
8 making reference to the terms of the ERISA plan and without determining that there was
9 misconduct (discrimination) in the administration of the plan. Moreover, in this context, the
10 remedies afforded by section 132a could not be effectuated without requiring the employer to
11 violate or amend the provisions of the ERISA plan.¹⁵

12 In his petition for reconsideration, applicant contends ERISA does not preempt his section
13 132a claim because, under the terms of the Trust, A&A could have elected to extend its group
14 health plan contributions on his behalf for a period of 180 days (as opposed to 90 days).
15 Applicant further argues that A&A’s refusal to provide 180 days of continuation coverage, where
16 such coverage was available under the terms of the Trust, is a clear violation of section 132a.

17 It is true that, under the terms of the Trust, a member employer could elect to establish a
18 policy to continue its health plan contributions on behalf of its disabled employees for a maximum
19 of 180 days after the commencement of the employees’ disability. This policy, however, had to
20 be established by the participating employer at the time it became a member of the Trust and the

21 ¹⁵ We recognize that, in his petition for reconsideration, applicant relies upon *Maraviiov v. Tenet*
22 *Health Systems Hospital, Inc.* (1997) RDG 75444, 25 Cal. Workers’ Comp. Rptr. 341. In *Maraviiov*, a
23 Board panel found: (1) that an employer violated section 132a when, pursuant to the medical leave of
24 absence provisions of its ERISA health benefits plan, it terminated its contributions on the employee’s
25 behalf to the plan after the employee had been off work 12 weeks due to industrial disability; and (2) that
26 the employee’s section 132a claim was not preempted by ERISA.

27 The decisions of Board panels, however, have no stare decisis effect (*cf., e.g., Tenet/Centinela*
28 *Hosp. Med. Center v. Workers’ Comp. Appeals Bd. (Rushing)* (2000) 80 Cal.App.4th 1041, 1047, fn. 4 [65
Cal.Comp.Cases 477, 481, fn. 4]; *Bowen v. Workers’ Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 21,
fn. 10 [64 Cal.Comp.Cases 745, 750, fn. 10]) and, unlike *en banc* decisions of the Board, they are in no
way binding on the Board or its WCJs. (*Ford v. Lawrence Berkeley Lab.* (1997) 62 Cal.Comp.Cases 153,
159 (Board en banc); WCAB/DWC Policy & Procedure Manual, Index No. 6.16.1.) For all the reasons
set forth in our present opinion, we expressly disapprove of the *Maraviiov* holding that ERISA does not
preempt section 132a claims in circumstances like those present here.

1 employer's policy had to be approved by the Trust. Moreover, once the employer's policy was
2 established, the Trust could not accept employer health plan contributions beyond the period
3 established by the employer's policy. Accordingly, once A&A established its policy (prior to
4 applicant's disability) that it would continue to pay health plan contributions for its disabled
5 employees for 90 days, it appears that A&A (and the Trust) had no discretion to extend the
6 continuation period to 180 days without amending the Participation Agreement between A&A and
7 the Trust. And, of course, it would contravene ERISA to require an employer to amend or alter
8 the terms of its participation in an ERISA plan in order to comply with a state discrimination law.
9 That is, such a requirement would mandate a particular employee benefit structure and
10 administration, it would govern the payment of plan benefits, and it would affect the very terms of
11 the ERISA plan.

12 In any event, the terms of the Trust did not *require* a participating employer to provide 180
13 days of continuation coverage to its disabled employees and, as discussed above, federal law only
14 requires continuation coverage for twelve weeks (84 days). (See pp. 13-14 & fn. 14.) Moreover, a
15 state discrimination law is saved from ERISA preemption only where the state law targets conduct
16 that is also prohibited by federal law, i.e., ERISA preempts state discrimination laws that target
17 conduct that federal law permits. (*Shaw, supra*, 463 U.S. at 100-104, 108-109; *Humana, supra*,
18 525 U.S. at 310.) Again, there is no federal law prohibiting discrimination on the basis of an
19 industrial injury per se.

20 In his petition for reconsideration, applicant also contends that there is no preemption
21 because ERISA does not permit an employer to avoid its liability under a state's workers'
22 compensation laws, citing *Employee Staffing Services, Inc. v. Aubry* (9th Cir. 1994) 20 F.3d 1038
23 and other cases.

24 It is true that, based on uniform federal interpretation of 29 U.S.C. §1003(b)(3),¹⁶ an
25 employer may not escape a state's workers' compensation laws by establishing a multibenefit

26 _____
27 ¹⁶ 29 U.S.C. §1003 provides: "(b) [t]he provisions of this subchapter shall not apply to any employee
28 benefit plan if ... (3) such plan is maintained solely for the purpose of complying with applicable
workmen's compensation laws or unemployment compensation or disability insurance laws"

1 ERISA plan which, among other things, would provide disability benefits and medical treatment
2 for industrial injuries in accordance with the terms of the ERISA plan, rather than in accordance
3 with state law. (*Employers Resource Management Co., Inc. v. James* (4th Cir. 1995) 62 F.3d 627,
4 632; *Contract Services Network, Inc. v. Aubry* (9th Cir. 1995) 62 F.3d 294, 297; *Contract Services*
5 *Employee Trust v. Davis* (10th Cir. 1995) 55 F.3d 533, 535-536; *Combined Management, Inc. v.*
6 *Superintendent of the Bureau of Insurance of the State of Maine*, 22 F.3d 1, 7 (1st Cir. 1994), *cert.*
7 *denied*, 513 U.S. 943, 115 S.Ct. 350, 130 L.Ed.2d 306 (1994); *Employee Staffing Services, Inc. v.*
8 *Aubry* (9th Cir. 1995) 20 F.3d 1038, 1040–1041.) As stated by one Court, an employer cannot
9 “don the mantle of ERISA preemption simply by including workers’ compensation benefits in its
10 welfare benefit plan and thereby escape the requirements of [state] law.” (*Combined Management,*
11 *Inc.*, 22 F.3d at 5.)

12 This does not mean, however, that ERISA cannot preempt a state workers’ compensation
13 law that “relates to” an ERISA plan which provides, for example, group medical, dental and
14 vision benefits outside of any workers’ compensation scheme. To the contrary, in *Greater*
15 *Washington Board of Trade*, the Supreme Court held that ERISA preempted a District of
16 Columbia law requiring employers to provide disabled employees on workers’ compensation with
17 health insurance coverage equivalent to that which they would have received had they been
18 working. (D.C. Code, §36-307(a-1)(1).) The Court specifically concluded that 29 U.S.C.
19 §1003(b)(3) did *not* alter the result:

20 “It makes no difference that [the District of Columbia law’s]
21 requirements are part of the District’s regulation of, and therefore
22 also ‘relate to,’ ERISA-exempt workers’ compensation plans. The
23 exemptions from ERISA coverage set out in ... 29 U.S.C.
24 §1003(b) ... do not limit the pre-emptive sweep of [29 U.S.C.
25 §1144(a)] once it is determined that the law in question relates to
[an ERISA] covered plan.” (*Greater Washington Board of Trade,*
supra, 506 U.S. at 131.)

26 ///

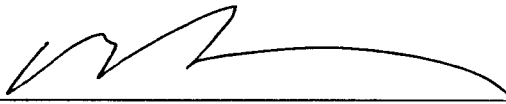
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ORDER

IT IS ORDERED that applicant take nothing by reason of his Labor Code section 132a claim herein.

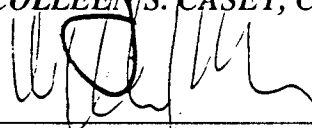
WORKERS' COMPENSATION APPEALS BOARD (EN BANC)



MERLE C. RABINE, Chairman



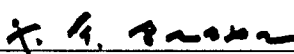
COLLEEN S. CASEY, Commissioner



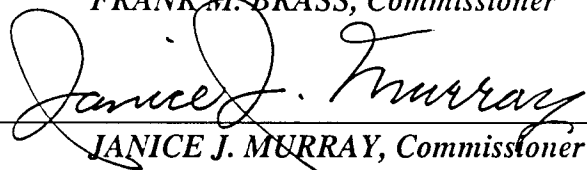
WILLIAM K. O'BRIEN, Commissioner



JAMES C. CUNEO, Commissioner



FRANK M. BRASS, Commissioner



JANICE J. MURRAY, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 13 2002

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