WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALONSO NAVARRO, *Applicant,* vs. A&A FARMING; and WESTERN GROWERS INSURANCE CO. *Defendants.*	Case Nos. GOL 0087934 GOL 0087935 GOL 0087936 OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION (EN BANC)

Applicant, Alonso Navarro, seeks reconsideration of the Opinion and Decision After Reconsideration (En Banc) issued by the Board on February 13, 2002. In that decision, the Board concluded that applicant's Labor Code section 132a petition, which had alleged that his employer had unlawfully discriminated against him when it terminated its contributions to its group health benefits plan after he had been off work for over three months due to his industrial injuries, was preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1144(a) ("ERISA"). Therefore, the Board ordered that applicant take nothing by reason of his Labor Code section 132a claim. In his petition for reconsideration, applicant contends in substance: (1) that ERISA does not preempt state workers' compensation laws; and (2) that the Board failed to liberally construe Labor Code section 132a, as required by Labor Code section 3202.[1]

For the reasons that follow, we will dismiss applicant's petition for reconsideration as an impermissible successive petition to the Board. Even if applicant had been newly aggrieved by our February 13, 2002 decision, however, we would have denied the petition on the merits.

[1] Hereafter, Labor Code section 132a and Labor Code section 3202 may be referred to "section 132a" and "section 3202," respectively.

I. BACKGROUND

The general facts underlying this case are detailed in our February 13, 2002 decision. With respect to our current decision, however, the salient facts are as follows.

On September 21, 2000, applicant filed a "Petition for Benefits-Discrimination [Labor Code Sec. 132a]." Applicant alleged that his employer, A&A Farming ("A&A"), unlawfully discriminated against an industrially-injured worker, in violation of section 132a, when it failed to continue making contributions on his behalf to its ERISA group health plan while he was temporarily disabled.

On October 13, 2000, A&A filed an answer to the section 132a petition raising, among other things, the defense of ERISA preemption.

On March 13, 2001, applicant filed a declaration of readiness to proceed to trial on his section 132a petition.

On March 21, 2001, A&A filed a letter with the Board, again raising the issue of ERISA preemption. A&A's letter appended a copy of the federal district court's decision in *Scotti v. Los Robles Regional Center* (C.D.Cal. 2000) 117 F.Supp.2d 982, which held that ERISA preempted an injured employee's section 132a claim based on her employer's termination of her group medical benefits after a six-month leave of absence due to industrial disability.

On March 27, 2001, the Board issued notice that applicant's section 132a claim was being set for a mandatory settlement conference ("MSC").

On May 1, 2001, the MSC took place. At the MSC, A&A specifically raised the issue of: "Is the application of Labor Code §132a pre-empted by ERISA from enforcement against A&A Farming."

On June 19, 2001, applicant's section 132a claim was tried before a workers' compensation administrative law judge (WCJ). At trial, testimony and documentary evidence was presented on the issue of whether A&A's group health benefits plan was an ERISA plan. Following trial, the WCJ gave the parties time to submit points and authorities.

On July 18, 2001, A&A filed a post-hearing brief addressing the issue of whether applicant's section 132a claim was preempted by ERISA.

On July 30, 2001, applicant filed an answer to A&A's post-trial brief, arguing that A&A's ERISA preemption defense was invalid.

On August 27, 2001, the WCJ issued a Findings of Fact. The WCJ determined that "[a]pplicant's Petition for Benefits pursuant to Labor Code Section 132(a) [sic] is denied." In the Opinion on Decision accompanying the Findings of Fact, the WCJ stated there was no "discrimination," within the meaning of section 132a, because the ERISA plan's provision that employer contributions would be discontinued after a disabled employee had been off work for 90 days applied whether or not the disability was work-related. Therefore, the WCJ's Opinion on Decision did not address the issue of ERISA preemption.

On September 14, 2001, applicant filed a petition for reconsideration. In his petition, applicant argued that A&A discriminated against him, in violation of section 132a, by terminating his group health benefits while he was temporarily totally disabled. Applicant's petition also specifically contended that ERISA did not preempt his section 132a claim.

On September 27, 2001, A&A filed an answer to applicant's petition for reconsideration. In its answer, A&A again argued the ERISA preemption issue.

On November 13, 2001, a Board panel granted reconsideration in order to allow it a sufficient opportunity to study the factual and legal issues presented. Thereafter, the Chairman of the Board, upon a majority vote of its members, reassigned the matter to the Board as a whole for an en banc decision. (Lab. Code, §115.) During the pendency of applicant's petition for reconsideration, the Board did not receive or consider any new evidence.

On February 13, 2002, the Board issued the en banc decision from which applicant now seeks reconsideration. In substance, the Board found that applicant's section 132a discrimination claim was preempted by ERISA and, on that basis, the Board ordered that applicant take nothing by reason of his section 132a claim. Accordingly, the Board expressly did not reach the question of whether A&A's act of discontinuing its contributions to its ERISA plan on applicant's behalf constituted "discrimination" under section 132a.

On March 8, 2002, applicant filed his present petition for reconsideration. To reiterate, applicant argues (as he did in his first petition for reconsideration) that ERISA does not preempt

state workers' compensation laws. He also argues that the Board failed to liberally construe section 132a.

II. DISCUSSION

The general rule is that, where a party has filed a petition for reconsideration with the Board, but the party does not prevail on that petition for reconsideration, the petitioning party cannot attack the Board's action by filing a second petition for reconsideration; rather, the petitioning party must either be bound by the Board's action or challenge it by filing a timely petition for writ of review.

As stated in *Goodrich v. Industrial Acc. Com.* (1943) 22 Cal.2d 604, 611 [8 Cal.Comp.Cases 177, 181]:

> "Generally, if a party does not prevail on the original hearing and his petition for [reconsideration] is denied, he may not again petition for [reconsideration]. He must seek relief in the courts. (Citations omitted.) However, if one party prevails in the original hearing and on [reconsideration] the other party prevails, the first party may petition for [reconsideration] of the order made on [reconsideration] because he has for the first time become the aggrieved party."

Similarly, in *Ramsey v. Workmen's Comp. Appeals Bd.* (1971) 18 Cal.App.3d 155, 159 [36 Cal.Comp.Cases 382, 384], the Court said:

> "[O]rdinarily a person may not petition for reconsideration of an order denying reconsideration. If one party prevails in the original hearing and on [reconsideration] the other party prevails, the first party may petition for [reconsideration] of the order made on [reconsideration] because he has for the first time become the aggrieved party."

In *Pacific Employers Ins. Co. v. Industrial Acc. Com.* (*Mazzanti*) (1956) 139 Cal.App.2d 22, 25-26 [21 Cal.Comp.Cases 46, 48-49], the Court declared:

> "[T]here would be no end to the proceedings before the [Board] if successive [petitions for reconsideration] could be entertained. ... If [a] losing party ... petitions for ... reconsideration ... in a case where no new evidence is presented, and it is denied, he cannot

> again petition for [reconsideration], because the [Board] in such a case is not requested to reconsider new and different evidence."

Finally, in *Crowe Glass Co. v. Industrial Acc. Com.* (*Graham*) (1927) 84 Cal.App. 287, 293 [14 IAC 221, 223-224], the Court stated:

> "It seems plain to us that the provisions in question contemplate but one [petition for reconsideration], and that thereafter, if a party feels aggrieved, he must apply to the appellate courts. If it could be held that [a party] is entitled to more than one [petition for reconsideration] ... [then,] [u]nder such a practice there would be no end to the litigation, as no time, however great, would operate to bar successive applications provided only that they were applied for in seasonable time. Such a construction ... would defeat the very purposes of the [workers' compensation] act itself, which contemplates a speedy determination of controversies involved thereunder. ..."

We discern no compelling reason why, based on the circumstances present here, we should depart from the general rule precluding successive petitions for reconsideration.

We recognize that, in the present case, we "granted" reconsideration and did not merely "deny" applicant's petition. However, in the proceedings before the WCJ at trial and in the proceedings before us on reconsideration, the evidentiary record was the same, i.e., the Board did not admit or consider any new evidence.[2] More importantly, in the proceedings before the WCJ at trial and in the proceedings before us on reconsideration, the result was the same, i.e., applicant did not prevail on his section 132a petition.

We also recognize that, on reconsideration, we rejected applicant's section 132a petition based on a different rationale than the one relied upon by the WCJ. However, much like in a case where no new evidence is considered on reconsideration (see fn. 2, *supra*), we did not consider

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[2] There is an exception to the rule that, where a party does not prevail on its petition for reconsideration, it may not seek reconsideration a second time. That is, where the Board admits additional evidence subsequent to the filing of the original petition for reconsideration and prior to the Board's action on it, the petitioning party is entitled to seek reconsideration again, even though it was the party that originally sought reconsideration. (*Goodrich v. Industrial Acc. Com.*, *supra*, 22 Cal.2d at p. 611 [8 Cal.Comp.Cases at p. 181]; *Callahan v. Workers' Comp. Appeals Bd.* (1978) 85 Cal.App.3d 621, 627, fn. 2 [43 Cal.Comp.Cases 1097, 1099, fn. 2]; *Zozaya v. Workmen's Comp. Appeals Bd.* (1972) 27 Cal.App.3d 464, 470 [37 Cal.Comp.Cases 575, 580.) Here, however, the Board did not admit or consider any new evidence on reconsideration.

and decide any new legal theories on reconsideration, i.e., theories never presented to the WCJ at trial and never addressed by the parties on reconsideration. To the contrary, the question of ERISA preemption has been present at every stage of the proceedings in this matter: the preemption issue was raised prior to the MSC, the preemption issue was raised at the MSC, testimony and documentary evidence was offered on the preemption issue at trial, the preemption issue was argued in both parties' post-trial briefs, and the preemption issue was argued in both parties' pleadings on reconsideration.

Thus, the circumstances present here are in sharp contrast to those in *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584, 592] (due process violated where, on reconsideration, the WCAB rejected the WCJ's rationale and introduced an entirely new rationale for its decision, which had not previously been raised and which parties had not previously had an opportunity to argue) and in *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805, 809-810] (due process violated where the WCJ's amended decision was based on a completely different theory than any presented by the parties and where the parties were not first afforded an opportunity for rebuttal). Instead, under the present circumstances, the Board's power to affirm, rescind, alter or amend the WCJ's decision (see Lab. Code, §§5906, 5907, 5908(a), 5908.5) is analogous to the power of an appellate court to affirm the decision of a lower court on any theory of the law applicable to the case, even if the lower court relied upon different (and even legally incorrect) grounds. (See 9 Witkin, Cal. Procedure (4th ed. 1997), Appeal, §340, pp. 382-383; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 ("No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion."); *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 568 ("There is perhaps no rule of review more firmly established than the principle that a ruling or decision correct in law will not be disturbed on appeal merely because it was given for the wrong reason. If correct upon any

theory of law applicable to the case, the judgment will be sustained regardless of the considerations that moved the lower court to its conclusion."); *Bauer v. Workers' Comp. Appeals Bd.* (1979) 94 Cal.App.3d 250, 258 [44 Cal.Comp.Cases 597, 603] ("[W]e hold that the Board's award was correct, as a matter of law, even though it was for the wrong reason."); *Sweeney v. Industrial Acc. Com.* (1951) 107 Cal.App.2d 155, 158 [16 Cal.Comp.Cases 264, 266] ("In a review of a proceeding before the [Board] the rule is that if its decision can be supported on any ground it becomes immaterial that other grounds are improper.").)

Accordingly, we conclude that applicant cannot again seek reconsideration and that his current petition must be dismissed. Therefore, he must either accept the Board's decision or seek review by the appellate courts.

In any event, were we not dismissing applicant's petition as a successive one, we would have denied it on the merits.

In his second petition for reconsideration, applicant raises two basic arguments: first, that ERISA does not preempt state workers' compensation laws (an argument which applicant also raised in his first petition for reconsideration) and, second, that the Board failed to liberally construe section 132a, as required by section 3202. We find neither argument persuasive.

As discussed in our February 13, 2002 decision, it is true that, under uniform federal interpretation of 29 U.S.C. §1003(b)(3),[3] ERISA does not preempt state workers' compensation laws. What this means is that an employer cannot use a multi-benefit ERISA plan to elude the requirements of and oversight by the state workers' compensation system, i.e., ERISA does not permit an employer to provide industrially-related disability benefits and medical treatment in accordance with the terms of its ERISA plan, rather than in accordance with state law. (*Fuller v. Norton* (10th Cir. 1996) 86 F.3d 1016, 1021; *Fuller v. Skornicka* (7th Cir. 1996) 79 F.3d 685, 686–687; *Employers Resource Management Co., Inc. v. James* (4th Cir. 1995) 62 F.3d 627, 632; *Contract Services Network, Inc. v. Aubry* (9th Cir. 1995) 62 F.3d 294, 297; *Contract Services*

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[3] 29 U.S.C. §1003 provides: "(b) [t]he provisions of this subchapter shall not apply to any employee 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 ... ."

Employee Trust v. Davis (10th Cir. 1995) 55 F.3d 533, 535-536; *Combined Management, Inc. v. Superintendent of the Bureau of Insurance of the State of Maine,* 22 F.3d 1, 7 (1st Cir. 1994), *cert. denied,* 513 U.S. 943, 115 S.Ct. 350, 130 L.Ed.2d 306 (1994); *Employee Staffing Services, Inc. v. Aubry* (9th Cir. 1995) 20 F.3d 1038, 1040–1041.)[4]

This does not mean, however, that ERISA cannot preempt a state workers' compensation law that "relates to" an ERISA plan that provides, as here, for group medical benefits outside of any workers' compensation scheme. As discussed in our February 13, 2002 opinion, in *District of Columbia v. Greater Washington Bd. of Trade* ("*Greater Washington Bd. of Trade*") (1992) 506 U.S. 125 [113 S.Ct. 580, 121 L.Ed.2d 513]), the Supreme Court held that ERISA preempted a District of Columbia law requiring employers to provide disabled employees on workers' compensation with group health insurance coverage equivalent to that which they would have received had they been working. (D.C. Code, §36-307(a-1)(1).) In so holding, the Supreme Court specifically concluded that, although the District of Columbia's law applied to ERISA plans maintained for the purpose of complying with applicable workers' compensation laws (29 U.S.C.

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[4] Similarly, in *Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85 [103 S.Ct. 2890, 77 L.Ed.2d 490], the Supreme Court stated:

> "This is not to say, however, that [employers] are completely free to circumvent [a state's] Disability Benefits Law by adopting plans that combine disability benefits inferior to those required by that law with other types of benefits. Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible. A State may require an employer to maintain a disability plan complying with state law as a separate administrative unit. Such a plan would be exempt under [29 U.S.C. §1003(b)(3)]. The fact that state law permits employers to meet their state-law obligations by including disability insurance benefits in a multi-benefit ERISA plan, ... does not make the state [disability] law wholly unenforceable as to employers who choose that option. ... In other words, while the State may not require an employer to alter its ERISA plan, it may force the employer to choose between providing disability benefits in a separately administered plan and including the state-mandated benefits in its ERISA plan." (*Shaw*, *supra*, 463 U.S. at p. 108.)

Although *Shaw* was specifically addressing regulation of disability benefits, the rationale of *Shaw* applies with equal force to workers' compensation benefits. (29 U.S.C. §1003(b)(3); see, *Fuller v. Norton*, *supra*, 86 F.3d at p. 1021; *Employee Staffing Services v. Aubry, supra*, 20 F.3d at p.1041 ("We see no reason to distinguish workers' compensation plans from disability plans, since both are controlled by identical language in the same subsection of the ERISA statute, and the same reasons apply to both.").)

§1003(b)(3)), this fact did *not* cause the District of Columbia's law to be outside the scope of ERISA's preemption provision (29 U.S.C. §1144(a)):

> "It makes no difference that [the District of Columbia law's] requirements are part of the District's regulation of, and therefore also 'relate to,' ERISA-exempt workers' compensation plans. The exemptions from ERISA coverage set out in ... 29 U.S.C. §1003(b) ... do not limit the pre-emptive sweep of [29 U.S.C. §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.)

Thus, even if we assume section 132a is a "workmen's compensation law" within the meaning of 29 U.S.C. §1003(b),[5] its application here would still "relate to" an ERISA plan and, therefore, applicant's section 132a claim would still be preempted by ERISA. (29 U.S.C. §1144(a).)

As to applicant's assertion that we failed to liberally construe section 132a, we are cognizant of section 3202's mandate that the California Labor Code "shall be liberally construed ... with the purpose of extending their benefits for the protection of persons injured in the course of their employment." (Lab. Code, §3202.)[6] Section 3202, however, does not apply to the construction of *federal* laws, such as ERISA. Moreover, even if section 3202's liberal construction mandate could be applied, it would not alter our analysis of the issue of ERISA preemption.

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[5] In this regard, we note that 28 U.S.C. §1445(c) provides that "[a] civil action in any State court arising under *the workmen's compensation laws* of such State may not be removed to any district court of the United States." (Emphasis added.) In interpreting §1445(c), the federal courts have consistently held that a claim arises under a state's "workmen's compensation laws" if the claim is brought under a state statute prohibiting discrimination or retaliation against industrially-injured employees or employees filing workers' compensation claims. (E.g., *Reed v. Heil Co.* (11th Cir. 2000) 206 F.3d 1055, 1058-1061; *Trevino v. Ramos* (5th Cir. 1999) 197 F.3d 777, 781-782; *Sherrod v. American Airlines, Inc.* (5th Cir. 1998) 132 F.3d 1112, 1118-1119; *Suder v. Blue Circle, Inc.* (10th Cir.1997) 116 F.3d 1351, 1352; *Humphrey v. Sequeritia, Inc.* (8th Cir. 1995) 58 F.3d 1238, 1244-1247; *Jones v. Roadway Express, Inc.* (5th Cir. 1991) 931 F.2d 1086, 1091-1092.)

[6] Although, by its terms, the liberal construction mandate of section 3202 applies only to Divisions 4 and 5 of the Labor Code (Lab. Code, §3202), the liberal construction mandate has been extended to other Labor Code provisions, including section 132a. (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (*Maese*) (1978) 22 Cal.3d 658, 668 [43 Cal.Comp.Cases 1205, 1211].)

For the foregoing reasons,

IT IS ORDERED that the petition for reconsideration filed by applicant on March 8, 2002 be, and it is hereby, **DISMISSED.**

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

MAR 2 8 2002

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