WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CARLOS LOERA, *Applicant*

vs.

NORTHROP GRUMMAN;
permissibly self-insured, *Defendants*

Adjudication Numbers: ADJ7303582; ADJ1042223
Van Nuys 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.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons stated below, we will affirm the July 13, 2021 Joint Findings of Fact.

Under Labor Code[1] 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

[1] All further statutory references are to the Labor Code, unless otherwise noted

[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 ... is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($10,000), together with costs and expenses not in excess of two hundred fifty dollars ($250).

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 of "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*.) 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, we agree with the opinion of the WCJ, as expressed in the Report, that applicant did not meet his burden of demonstrating a prima facie violation of section 132a. Moreover, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 13, 2021 Joint Findings of Fact is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 14, 2021

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

CARLOS LOERA (2)
LARSON, LARSON & DAUER
KEGEL, TOBIN & TRUCE

PAG/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

The Workers' Compensation Administrative Law Judge ("WCJ") issued a Joint Opinion on Decision and Joint Findings of Fact, on July 13, 2021. Applicant, hereinafter, "Petitioner," has filed a timely and verified Petition for Reconsideration on the following grounds pursuant to Labor Code § 5903 I Rule 10843:

1. The evidence does not justify the Findings of Fact and Order;
2. That the findings of fact do not suppo1i the order, decision, or award.

I. CONTENTIONS

That the applicant's unexcused absences did not justify termination because it violates defendant's policy, that the grievance decision contradicts the court's finding, that applicant's absences were excused and became falsely classified as "unexcused" to suppo1i termination; that defense witness Mr. Richard Frisby is not credible; and that case law supports finding defendant violated L.C. § 132a.

II. FACTS

The matter herein proceeded to trial on the issue of two alleged violations of L.C. § 132a, filed by the applicant. The applicant was employed as an aircraft painter for defendant Northrop Grumman, and filed two admitted dates of injury; a cumulative trauma from September 26, 2002 through May 19, 2009, to the applicant's respiratory, sleep, internal and psyche body parts, (ADJ7303582, designated the Main File MF), and a cumulative trauma from August 23, 2000 through September 25, 2002, to the applicant's pulmonary system (ADJ1042223). The matters were consolidated, and proceeded to trial on the applicant's "Petition for 132a" and attorney fees. Minutes of Hearing August 28, 2019 and Minutes of Hearing (Further) and Summary of Evidence, March 2, 2021.

In the "Petition for 132a," filed on May 11, 2010, the applicant alleges that his employer discriminated against him when he was terminated on or about May 14, 2009 "because the applicant was injured on the job, reported to the employer his injuries, filed an employee claim form, and was under a doctor's care for his injuries." Petition for 132a, May 11, 2010, page 3, lines 4-7 (filed in ADJ1042223). The applicant also alleged a second violation, when the employer refused to make "reasonable accommodations for Applicant. .. ". Id. at page 3, lines 8-9.

Both cases were resolved via Compromise and Release. The first CT, ending on September 25, 2002, ADJ1042223, pursuant to the "Events" section in EAMS, was resolved via Compromise and Release on August 16, 2006. However, the actual document is not in filenet. The parties then settled the cumulative trauma ending on May 19, 2009, via Compromise and Release, approved on October 10, 2013. In addition, the applicant had an injury in 2001, ADJ2104484, which was resolved via Stipulation with Request for Award on August 17, 2006, pursuant to the "EVENTS" page in EAMS. However, this case was not consolidated, or submitted for decision at the time of trial.

At trial, the applicant testified about having had a specific injury on or about March 12, 2008, however, it appears this was never filed as a separate specific injury, and is part of the applicant's CT claim ending May 19, 2009 (MF).

There were various delays at the start of trial, initially due to the parties organizing and submitting extensive exhibits; Joint Exhibits A-U, Applicant's Exhibits 1-54, and Defense Exhibits A-J, and then due to COVID. Day one of trial began before COVID on August 28, 2019, with day 2 on November 20, 2019, and following several joint continuances related to COVID, trial resumed on the Lifesize application on September 16, 2020, November 3, 2020, March 2, 2021, and was submitted on April 22, 2021.

During the six days of trial, the applicant provided testimony on his behalf, and defendant presented two defense witnesses; Ms. Diana Tallie, an HR representative, and Mr. Richard Frisby, a retired employee, and the applicant's supervisor.

The undersigned issued a Joint Findings of Fact and Joint Opinion on Decision on July 13, 2021, finding that the applicant did not establish a prima facie case for discrimination on both counts, and thus there was no violation of L.C. § 132a by the employer.

Applicant then filed a timely and verified "Petition for Reconsideration," dated August 2, 2021, and was date stamped received on August 6, 2021 by the WCAB. Petitioner argues that the evidence supports that defendant violated L.C. § 132a.

Defendant filed an Answer on August 10, 2021.

III. DISCUSSION

1. ADJ2104484 WAS NOT SUBMITTED AT TRIAL AND WAS IMPROPERLY LISTED IN PETITION FOR RECONSIDERATION:

The matter proceeded to trial on two claims only, which were consolidated on March 2, 2021. However, petitioner listed a third case, ADJ2l04484 in the Petition for Reconsideration, which should not be considered as part of the record. The case was not submitted at the time of trial, and petitioner did not specifically address why it should be part of the record. Accordingly, it should be considered off calendar due to an apparent clerical error.

2. FINDINGS ON ADJ1042223 SHOULD BE UPHELD, AS THEY WERE NOT SPECIFICALLY ADDRESSED OR APPEALED BY PETITIONER:

Petitioner did not specifically address how there was a violation of L.C. § 132a on the CT injury pled from August 23, 2000 through September 25, 2002, ADJ1042223, either at trial, or in the Petition for Reconsideration. Accordingly, the findings in said case should be upheld.

3. DEFENDANT DID NOT VIOLATE 132a.

A. BACKGROUND OF CLAIM AND TERMINATION:

The applicant was hired on June 2, 1997, by defendant Northrop Grumman, and initially worked as a "Low observable applicator" until January or February of 2005, and then as a Painter and Sealer, until his last day worked on May 14, 2009. Minutes of Hearing (Further) and Summary of Evidence, November 20, 2019, page 2, lines 21-25.

The applicant testified that he had an injury on March 12, 2008, "in the form of breathing and psychiatric issues." Id. at page 6, line 19. The applicant reported his injury to his supervisors, Ms. Mary Wiggins and Mr. Dane Barriault, and was sent to an on-site clinic. Id. at page 6, lines 20-21. The applicant was also sent to U.S. Healthworks, where he was taken off work beginning March 12, 2008. Id. at pages 6-7, lines 23-25, 1.

On that same day, March 12, 2008, the applicant's supervisor, Mr. Richard Frisby had met with the applicant. The meeting appears to have taken place before the applicant reported his injury to Ms. Wiggins and Mr. Barriault.

Mr. Frisby was called as a defense witness, and testified that in 2007 the applicant had received second and final warnings. Minutes of Hearing (Further) and Summary of Evidence, April 22, 2021, page 7, lines 14-15. Ms. Diana Tallie, the second defense witness, a current employee, who works as an "HR Business Partner," testified that the warnings in 2007 were due to excessive absenteeism, and that a final warning had issued indicating that the applicant's requests to have the absences reconsidered had been rejected or not reflected. Minutes of Hearing (Further) and Summary of Evidence, April 22, 2021, page 2, lines 13-19.

Under cross-examination, the applicant confirmed having received a "final warning in November 2007 (Joint Exhibit D, Final Warning [Notice] 11/6/07) regarding absenteeism ... [but] He did not file a grievance." Minutes of Hearing (Further) and Summary of Evidence, March 2, 2021, page 3, lines 20-23. The applicant "confirmed he was aware that if he had additional unexcused absences he could be fired." Id. at page 3, lines 24-25. Following the final warning, the applicant indicated he did have absences, and "confirmed missing November 13, November 15, and November 16 in 2007." Minutes of Hearing (Further) and Summary of Evidence, March 2, 2021, pages 3-4, lines 25 and 1. These absences occurred before he reported an injury on March 12, 2008.

Prior to meeting with the applicant on March 12, 2008, Mr. Frisby confirmed with HR that the applicant had unexcused absences, and that the applicant had not advised they were excused. Minutes of Hearing (Further) and Summary of Evidence, April 22, 2021, page 19, lines 3-5. Mr. Frisby testified that the meeting was brief, and it was to see if the applicant "wanted to let me know anything, and nothing came out of it." Id. at page 19, lines 12-14. As of March 12, 2008, Mr. Frisby believed he had enough documentation and confirmation from HR for a sufficient basis to terminate the applicant due to absenteeism. Id. at page 19, lines 15-16. However, Mr. Frisby testified that the termination did not take place because he could not terminate someone who was on medical leave. Minutes of Hearing (Further) and Summary of Evidence, April 22, 2021,

page 10, lines 1-4. Specifically, the applicant was on medical leave following his injury of March 12, 2008.

Prior to his medical leave, the applicant was initially given work restrictions of "no painting," and was not taken back to work. Minutes of Hearing (Further) and Summary of Evidence, November 20, 2019, pages 12-13, lines 18-22. Mr. Frisby was asked under cross-examination about the work restrictions, and he confirmed that the work restrictions could not be accommodated. Minutes of Hearing (Further) and Summary of Evidence, April 22, 2021, page 11, lines 4-10.

The applicant was then off work from March 13, 2008 through May 10, 2009, and applied and received short term disability benefits through "UNUM Life Insurance Company," a third party carrier used by the employer to review and approve medical leave. Minutes of Hearing (Further) and Summary of Evidence, March 2, 2021, page 9, lines 17-18. During his leave, the applicant testified that "he treated with doctors who kept him off work due to his illness." Minutes of Hearing (Fu11her) and Summary of Evidence, November 20, 2019, pages 6-7, lines 23-25, 1.

The applicant then returned to work on May 11, 2009, as "he had been released by Dr. Zlotolow and Dr. Brautbar. He was accepted back ... He was at regular full-time work for three days." Id. at page 7, lines 2-4. After the three days back, the applicant was te1minated by "a supervisor, Richard Frisby." Minutes of Hearing (Further) and Summary of Evidence, November 20, 2019, page 7, lines 5-6.

The applicant confirmed receiving two notices for his termination. Id. at page 7, lines 11-12. The first notice, Joint Exhibit C, is titled "Termination of Employment form, and dated May 14, 2009. The second notice, Joint Exhibit B, was a "revised" notice, dated October 30, 2009.

Both termination notices included several absence dates, including his 1 year medical leave of absence following his March 12, 2008 injury. The revised termination notice removed the word "unexcused" for the March 13, 2008 through May 10, 2009 medical leave. The applicant read the absences listed from the revised termination notice, Joint Exhibit B, into the record as follows:

> "11-13-07, 8 hours (unexcused).
> 11-15-07 and 11-16-07 16 hours (unexcused).
> Medical leave 19 November 2007 through 18 December 2007.
> 2-18-08 8 hours (unexcused).
> 02-25-08 to 03-06-08 72 hours (unexcused).
> Medical leave 13 March 2008 through 10 May 2009."

The applicant testified that he "understood that he was being terminated for these absences." Minutes of Hearing (Further) and Summary of Evidence, November 20, 2019, page 7, lines 21-22. The notice includes a total of 4 unexcused absences of various dates and lengths as follows:

1. 11-13-2007, 8 hours, or 1 day
2. 11-15-2007 and 11-16-2002, 16 hours, or 2 days

3. 2-18-2008, 8 hours, or 1 day
4. 2-25-2008 through March 6, 2008-72 hours or 3 days

The applicant was then asked about the employer's attendance policy via a memorandum dated April 19, 2007, Joint Exhibit Q. The applicant confirmed that the memorandum was issued before his first unexcused absence of November 13, 2007, and that it included a section titled "Reporting an Absence." Id. at page 8, lines 2-5. Specifically, the section indicated that employees (referred to as "teammates) "were to advise a supervisor for missing a day," including leaving a voicemail to a supervisor, and if one could not be left, to contact Ms. Cheryl Carter, the department's secretary. Id. at page8, lines 5-8.

The parties then stipulated on the record that the applicant would testify to having called Ms. Cheryl Carter, Mr. Dane Barriault, and other employer representatives at their phone numbers, on various dates for the absences, from November 11, 2007 through March 5, 2008. Id. at pages 9-10, lines 19- 25, and 1-5.

The applicant acknowledged that "reporting an absence does not mean it is excused," and he understood that "three unexcused absences within 60 days, or a combination of three unexcused tardies in 30 days, would result in disciplinary action." Id. at page 8, lines 10-13.

The applicant's supervisor Mr. Dane Barriault did not appear at trial, however parties submitted as Joint exhibit R, excerpts from his sworn telephonic statement. At trial, the applicant's attorney referred to Mr. Barriault's statement regarding giving employees "orange slips" following unexcused absences. The applicant testified that this procedure was "company-wide policy," and that the orange slip was retained in employee's personnel files. Id. at page 8, lines 24-25.

The applicant testified that he did not receive "orange slips" following his November 15 and November 16 absences, and that "nobody at work told him that the absences were unexcused." Id. at page 10, lines 8-10. The applicant testified similarly for his February 18, 2008, and February 25, 2008 through March 6, 2008 absences. Id. at page 10-11, lines 23-25, lines 1-2. However, there was no testimony or evidence submitted that the dates in question had been excused by a supervisor. The applicant not having received an orange slip does not mean that he had in fact been approved for his absences by a supervisor.

Ms. Tallie was asked about the "orange slips" and employees needing to call in when they will be absent. Specifically, Ms. Tallie indicated that the orange slips are not handed to an employee who has missed work, but rather that the employee is to request them, and fill them out if they want an absence to be reviewed or excused. Id. at page 9, lines 3-7. Further, that if there are no orange slips in an employee's file "it could mean that it wasn't requested or that the responsible manager did not file it." Id. at page 9, lines 8-9. In addition, Ms. Tallie explained that the absence of orange slips in the applicant's file "wouldn't impact the fact that he had a warning. The final warning notice would indicate that attendance irregularities had been reviewed and were deemed unexcused." Id. at page 2, lines 19-22.

The applicant did not have orange slips in his personnel file.

In regards to calling out for an absence, Ms. Tallie indicated that by calling, it does not necessarily excuse the absence. Minutes of Hearing (Further) and Summary of Evidence, April 22, 2021, page 9, lines 12-14.

Under cross-examination Ms. Tallie was asked if an employee receiving UNUM benefits means they are on a validly excused leave of absence, and she responded that "the benefits don't bear on unexcused or excused but, typically, it's considered approved leave of absence." Id. at page 10, lines 3-7.

The applicant filed a grievance following his termination, and a hearing was held. The applicant testified that at the hearing he told the employer that his termination was unfair, because his time had been approved by his supervisor, and that when he was asked for doctor's notes, he didn't have them for the unexcused February 2008 dates. Id. at page 5, lines 11-15.

Under cross-examination the applicant was asked about the employer asking for medical notes for the unexcused absences on February 8, 18, and March 10, 2008, and the applicant testified that "he didn't give them documents because he was not out on those days due to medical reasons and he wasn't going to lie; he does not do that." Minutes of Hearing (Further) and Summary of Evidence, March 2, 2021, page 4, lines 15-16. No other evidence was presented or submitted as to why the applicant was out on those days, or that they had been excused by a supervisor.

A Grievance Determination was issued on November 3 2009, Joint Exhibit A, upholding the termination. The determination did not indicate that the applicant's supervisor had approved any of the applicant's unexcused absences, and indicated that the termination was upheld due to "testimony and facts heard," and the leave of absence from March 13, 2008 through May 10, 2009 was corrected to reflect as being "excused." Joint Exhibit A.

B. JOINT OPINION AND FINDINGS OF FACT:

Following submission of the trial, the undersigned issued a Joint Findings of Fact and Opinion, finding that the defendant had not violated L.C. § 132a. In the Opinion, the case of *California Supreme Court case of Department of Rehabilitation v. Workers' Comp. Appeals Ed., 68 Cal. Comp. Cases 831, 2003 Cal. Wk. Comp. LEXIS 3 77, 30 Cal. 4th 1281, 70 P. 3d 1076, 135 Cal. Rptr. 2d 665 (Cal. June 26, 2003). (Dept. of Rehab.)* was noted and applied to the established facts, testimony and exhibits submitted at trial.

Specifically, the California Supreme Court in the *Dept. of Rehab* case indicated that in order to address the merits of the 132a claim, it needed to determine what constituted "discrimination." In this regard it noted the analysis provided by the Court of Appeals in the case, which had found that in order "[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." *Dept. of Rehab*. 68 Cal.Comp.Cases 844.

The California Supreme Court further analyzed that "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. Id. at 844.

Accordingly, in line with the *Dept. of Rehab* case, the question is whether the applicant met his burden of proof, and established that he had a legal right to retain his employment, and to being accommodated with his work restrictions. Further, whether the applicant was terminated and his work restrictions not accommodated as a result of his claimed work injury.

Based on the testimony provided by all three witnesses, and extensive exhibits submitted, it was found that the applicant was not entitled to retain his employment following extensive absenteeism, and that the termination itself was not done as a result of the applicant having filed for an injury. Further, it was not established that the employer did not accommodate the applicant's work restrictions due to discrimination.

Of great significance and relevance is the fact that well before the applicant's claimed injury of March 12, 2008, and his termination in 2009, the applicant had already received second and final warnings in 2007 regarding unexcused absenteeism.

Specifically, Joint Exhibit E, a "Second Warning Notice," dated April 24, 2007 from the employer to the applicant, indicates that the applicant has a "First Warning Notice," and that due to various absences, a "Second Warning Notice" was warranted. The absences listed were March 9, 19, 26-April 20, 2007. The letter also indicated that the applicant had been "continually going out on long unexcused leaves of absences. Adding to your Irregular Attendance practices, the following are dates and duration: 09/01/06-12/05/06, 07 /17 /06-07 /28/06, 05/31/06-06/16/06.

The letter advises that the applicant will be placed on a "Corrective Action Plan," and that the Second Warning Notice will remain active for one year with no fu1ther written warnings." The applicant was advised of the grievance process, and the letter was signed by Mr. Dane Barriault and Mr. [Richard] Frisby. On the line for the "employee name," it appears someone wrote "employee refuses to sign."

Accordingly, the Second Warning Notice was in effect for one year, until April 24, 2008, which encompassed the applicant's subsequent claimed injury of March 12, 2008. Thus, the applicant had already been reprimanded close to 1 year before he filed his claim. Within that one year, approximately 6 months after the Second Warning Notice issued, the applicant then received a "Final Warning Notice, Joint Exhibit D, on November 6, 2007. The letter indicated that the applicant had missed the period between October 8, 2007 through November 1, 2007, for a total of 152 hours.

The applicant was advised that he is allowed a maximum of 3 "occurrences of unexcused attendance unless otherwise arranged with your (sic) management." Joint Exhibit D. Further, that anything over ten consecutive days "must have appropriate documentation to justify a formal leave of absence." Joint Exhibit D.

The letter concludes advising the applicant that the employer hopes he "will be able to improve your attendance as specific above so this situation does not lead to termination of your

employment." Joint Exhibit D. The letter was signed, like the Second Warning Notice, by Mr. Dane Barriault and Mr. Richard Frisby. In addition, like the Second Warning Notice, it was indicated that the applicant had refused to sign.

Therefore, 4 months before his claimed injury, the applicant had been put on notice to improve his attendance, and was advised it could lead to termination.

Under cross-examination, the applicant confirmed having received the final warning in November of 2007, and that he did not file a grievance." Minutes of Hearing (Further) and Summary of Evidence, March 2, 2021, page 3, lines 20-23. Further, the applicant "confirmed he was aware that if he had additional unexcused absences he could be fired." Id. at page 3, lines 24-25. The undersigned found this testimony relevant because the applicant was aware of his unexcused absences and the potential of termination, well before his March 12, 2008 date of injury.

Despite being aware that he could be fired, the applicant had had four additional unexcused absences following the Final Warning notice of November 2007; November 13, 2007, November 15 and [November] 16, 2007, February 18, 2008, and three days between February 25 through March 6, 2008.

Mr. Frisby testified that the applicant was terminated on those four unexcused absences, and that he consulted with HR and reviewed the company records which confirmed same. Minutes of Hearing (Further) and Summary of Evidence, April 22, 2021, Id. at page 9, lines 12-14. Further, and of great relevance against petitioner arguing that the defendant terminated the applicant for his work related leave of absence is that Mr. Frisby met with the applicant on March 12, 2008, before the applicant reported his injury, to see if the applicant would provide him with any information regarding the absences in question. However, Mr. Frisby testified that "nothing came of it." Minutes of Hearing (Further) and Summary of Evidence, page 19, lines 12-14.

Petitioner argues that Mr. Frisby is not credible and contradicted his testimony, however, Mr. Frisby was found to be credible, and it is relevant that he met with the applicant, before he reported his injury of March 12, 2008, regarding his unexcused absences. Further, Mr. Frisby testified that before the applicant went off work for 8 months, that he had already determined "that he would take additional action, specifically to terminate, pursuant to the documents that they had, and that the next step was termination, and then the applicant went on medical leave." Id. at page 9, lines 11-14.

Thus, the termination process was underway for the applicant, but was put on hold due to the applicant's leave of absence. Mr. Frisby testified that without the leave of absence the applicant would have been terminated, but he would not terminate someone who was on medical leave. Id. at page 10, lines 1-4.

The applicant testified about having been asked about providing medical notes at his grievance, and testified that "he didn't give them documents because he was not out on those days due to medical reasons and he wasn't going to lie; he does not do that." Minutes of Hearing (Further) and Summary of Evidence, March 2, 2021, page 4, lines 15-16. However, it appears the applicant did not give any type of evidence that the absences were excused as he argues in his Petition for Reconsideration.

Thus, the evidence does not establish that the employer discriminated against the applicant because of his work injury, but rather that the applicant had a history of extensive absenteeism, which was well documented by the employer, and resulted in disciplinary notices, all well before his claimed injury. In addition, the applicant was aware he could face termination. Further, the evidence does not support that the applicant was treated differently as a result of his claimed injury.

The extensive testimony regarding the applicant having made calls for the days he missed, whether he was to have been provided with "orange slips," that he received vacation pay on some of the dates in question, and that there had been some miscommunication regarding if he had been approved for medical leave through UNUM, did not establish discriminatory behavior by the employer. The employer had corrected the applicant's industrial medical leave of absence in the termination, however, even with that correction, the applicant had additional unexcused absences.

C. THE APPLICANT'S ABSENCES WERE NOT EXCUSED WITH THE EXCEPTION OF HIS LEAVE OF ABSENCE

Petitioner argues that "every one of the five incidents of unexcused absences contained in the termination letters were in fact excused and approved before hand by Mr. Loera's supervisor, Dane Barriault." Petition for Reconsideration, page 7, lines 18-21. The five incidents are listed by petitioner as follows:

> "1) 11/13/07, 2) 11/15/07-11/16/07, 3) 2/18/08, 4) 2/25/08-3/06/08, and 5)3/13/08-5/10/09."

Id. at page 7, lines 22-23.

The 5th incident listed by petitioner is for the applicant's leave of absence, which defendant corrected to not be labeled as "unexcused," pursuant to Joint Exhibit B.

In regards to the other four absence dates, the parties stipulated that the applicant had called in to Ms. Cheryl Carter for all of the dates in question. However, as the applicant himself testified, "reporting an absence does not mean it is excused." Minutes of Hearing (further) and Summary of Evidence, November 20, 2019, page 8, lines 10-13.

Petitioner nonetheless argues as follows:

> "The evidence proves that Mr. Loera both notified his employer of his absences on the relevant dates per official company protocols, and that he was never provided any orange slips following his return to work. This supports Mr. Loera's claim that his supervisor Dane Barriault approved each one of the first four absences itemized in the Termination Letters, and that he was first notified that they were being deemed "unexcused" only after he retun1ed from an industrial course of treatment. (MOH/SOE, 11/20/19, p. 9: 13 - 14; p. 10: 9-10; p.10:24; p. 11: 11-13.)"

Petition for Reconsideration, page 9, lines 10-14.

The applicant and witnesses testified regarding "orange slips." Specifically, the applicant testified in regards to Mr. Dane Barriault's statement regarding giving employees "orange slips" following unexcused absences, and the applicant confirmed same, calling it "company-wide policy. Minutes of Hearing (Further) and Summary of Evidence, November 20, 2019, page 8, lines 24-25.

Petitioner acknowledged that "simply contacting the employer to inform them of the absence, does not in itself excuse the absence. But the evidence does not stop there. For each of the first four incidents, Mr. Loera's supervisor, Dane Barriault, approved the absence." Petition for Reconsideration, page 8, line 14-17. Petitioner is referring to the absence dates of 11/13/07, 11/15/07-11/16/07, 2/18/08, and 2/25/08-3/06/08, and argues that these dates in question were " in fact excused and approved before hand by Mr. Loera's supervisor." Id. at page 7, lines 19-20.

However, no evidence was submitted showing that Mr. Barriault specifically approved and excused the dates in question beforehand.

The parties submitted excerpts of Mr. Barriault's sworn telephonic statement, Joint Exhibit R, taken on September 5, 2017. It is unclear why Mr. Baniault was unable to appear in court, or provide his testimony directly to the court at the time the matter proceeded to trial via Lifesize. Thus, the undersigned could not take into account Mr. Barriault's demeanor or credibility.

However, even if the excerpts are accepted as credible, the focus of the excerpts was about "orange slips," and not whether in fact Mr. Barriault excused the applicant's absences.

Specifically, applicant's attorney asked Mr. Barriault the following regarding employees calling in about absences and orange slips:

> "Q If the absence was not excused, even though they called in, what would be your standard protocol to notify the employee of that?
>
> "A Well, he would get an orange slip the next time I seen him, and I would physically say, "Hey, why didn't you call in?" You know, I got, ... "I forgot." I've gotten, "I don't care." I've gotten every excuse in the book saying, you know -- so - "

Joint Exhibit R, page 26, 27, lines 25, 1-7.

Applicant's attorney continued asking Mr. Barriault about orange slips, and disciplinary guidelines regarding absences. However, none of the testimony submitted of Mr. Barriault demonstrates that he specifically "approved and excused" the applicant's absences in question beforehand.

The testimony provided by Mr. Barriault was about orange slips only. While the theory argued by petitioner is that if the applicant was never provided with an orange slip, then his absences were excused, Mr. Baniault's testimony does not support same. Specifically, in the above quoted exchange, he was asked what his procedure was for employees that had an unexcused absence and had called in, and his response includes that when he gave the slips he told ·the employee "Hey, why didn't you call in?" Which raises the question whether orange slips were given to those employees who had simply not called in at all about their absence. That would explain the lack of

orange slips in the applicant's personnel file since the applicant had called in, however, it does not support that his absences were in fact excused.

No evidence was submitted demonstrating that Mr. Barriault had approved all of the applicant's absences in question beforehand. It appears he was not asked that question specifically at the time of his telephonic statement. Fu1ther, there was no evidence or testimony submitted by the applicant that Mr. Barriault had stated at his grievance hearing that he had excused his absences.

At trial, the applicant did not state why his absences were excused, except only that he did not have medical notes for February 8, 18 and March 10, 2008, all before his claim of injury on March 12, 2008. Nonetheless, petitioner argues that "a quick review of the evidence presented in this case shows that none of the alleged 'unexcused' absences identified in the Termination Letters and Grievance Decision where actually unexcused, and only later became unexcused when Mr. Loera returned to work following an approved medical leave of absence for industrially-related treatment." Petition for Reconsideration, page 8, lines 8-13. However, there was no evidence provided by petitioner to support said allegation that the employer somehow changed the applicant's absences from "excused" to "unexcused."

Petitioner actually states that defendant "falsely classified" the applicant's absences as "unexcused." Id. at page 8, lines 15-18. Despite making such a strong allegation, there was no evidence submitted supporting same.

Accordingly, with the exception of the applicant's leave of absence related to his work injury, the other absences were not excused pursuant to the evidence submitted, and the applicant's resulting termination by defendant was not a violation of L.C. § 132a.

D. CASE LAW DOES NOT SUPPORT FINDING A 132a VIOLATION IN THE CASE HEREIN:

Petitioner argues that three cases support finding a violation of L.C. § 132a in his case.

First, petitioner notes the case of *Los Angeles County Metropolitan Transportation Authority, Self-Insured, Petitioner v. Workers Compensation Appeals Board, Connie Soto, Respondents, (Soto)* (1998) 63 CCC 869, as suppo11 for finding against defendant.

In *Soto*, the applicant was terminated for a total of 5 unexcused absences, which included her date of injury. *Soto*, 63 CCC 869, 3. The WCJ found that because one of the unexcused absences included the injury, that "the event in question could not be utilized as an absence which would warrant her discharge." Id at 4-5.

The facts are different in the case herein. Specifically, unlike the applicant in Soto, the applicant herein had received a final warning notice, before he had additional absences that led to his termination. Defendant herein, unlike the employer in Soto, was in the process of terminating the applicant before his leave of absence took place.

Further, his leave of absence was corrected to be reflected as "excused" and was not the basis for his termination. In fact, on the day the applicant reported his injury on March 12, 2008, Mr. Frisby believed he had enough documentation and confirmation from HR for a sufficient basis to

terminate the applicant due to absenteeism. Minutes of Hearing (Further) and Summary of Evidence, page 19, lines 15-16.

The applicant's claim is comparable to the case of *Dale Ponder, Petitioner v. Workers Compensation Appeals Board, Kern Rock Company, Respondents*. 62 Cal. Comp. Cases 95.

In *Ponder*, the applicant sustained an injury and was off work for approximately a month, and then returned to work for several months, when he was terminated. *Ponder*, 62 Cal. Comp. Cases 95, 2. The applicant in *Ponder*, like the applicant herein, filed a grievance, and the matter proceeded to arbitration, where the arbitrator found that there had been good cause to terminate the applicant. Id. at 2. At trial, the manager testified that the applicant's "termination was based upon a long history of violating company policy, excessive absenteeism, and insubordination." Id. at 4. The WCJ found that defendant had violated L.C. 132, however the WCAB granted defendant's Petition for Reconsideration, and rescinded said findings, and found that defendant had not violated L.C. 132a. Id. at 5.

Specifically, the WCAB noted that the applicant had been terminated for several reasons, and that before his termination, the "Applicant had been reprimanded numerous times for unexcused, unnoticed, or undocumented absences, and had been given a safety warning for a serious violation." Id. at 5. Further, the WCAB indicated the following:

> "Applicant's conduct demonstrated a chronic unwillingness to abide by company policy by repeatedly failing to show up for work or keep the company posted as to his availability for work. Defendant employer gave applicant repeated notice and warnings about his violation of company policy on absenteeism. The warnings, however, were not about the absences themselves. Furthermore, although applicant had been told repeatedly that the company needed to know on a timely basis the nature of his medical condition and how it was affecting his availability for work, in order to schedule relief help and create work schedules for the plant, applicant continued his conduct of failing to notify the company. Applicant continued to refuse to comply even after he had verbally agreed to do so.

Id. at 7.

While the defendant in *Porter* had additional reasons for terminating the applicant, their actions are similar to defendant herein, in that they gave the applicant various warnings, and notifications, well before his work injury. Further, both the applicant in *Porter* and the applicant herein, demonstrated a "chronic unwillingness to abide by company policy."

The WCAB "concluded that the record amply demonstrated Applicant's misconduct went back as far as 1991, predating his industrial injuries, and that his refusal to comply with reasonable notice requirements in light of the company's production schedules established that his termination was non-retaliatory. Accordingly, the WCAB found Applicant failed to establish his termination was in violation of L.C. § 132a. [Deering's]." Id. at 8.

The case herein is comparable to what the WCAB found in *Porter*; that the misconduct predated the applicant's injury of March 2008, the applicant continued missing days without an excuse, and thus, the termination was non-retaliatory.

Petitioner also argues that the case of *Pacific Bell v. WCAB* (*Escatel*) (1996) 61 CCC 72 (writ denied) supports there was a 132a violation, because it involved a termination based on excessive absenteeism, and that "some of the absences were due to the industrial injury and the employer failed to correct its records to reflect that prior to termination." Petition for Reconsideration, page 16, lines 9-13. However, as supported by Joint Exhibit B, defendant herein did correct the record to reflect the applicant's medical leave of absence as "excused," and the applicant was terminated do to unexcused absences unrelated to his injury. Thus, the case does not support petitioner's arguments.

Finally, petitioner referred to the case of T*rans World Airlines v. WCAB (Leef)* (1988) 53 CCC 143, in which it was found that "a termination for unexcused absences that included absences related to an industrial injury was deemed discriminatory." Petition for Reconsideration, page 16, lines 13-15.

In the *Leef* case, the employer testified that "no distinction was made between industrial and non-industrial absences." *Leef*, 53 CCC 143, 143. The WCJ found that "the supervisor's testimony was essentially that if the number of hours missed due to the back injury, conjunctivitis, and food poisoning were to be deducted from the total, *Leef*'s absences would not have resulted in termination." Id at 144. Thus, the facts in the *Leef* case are different than the case herein.

Specifically, the defendant in *Leef* admitted to making no distinction between absences related to the applicant's injury and those unrelated, and would not have terminated the applicant if they had removed the industrially related absences.

In the case herein, however, the applicant had extensive unexcused absences before he was off work due to his injury, for which management met with him before he reported an injury, and were in the process of terminating him. Further, the defendant herein corrected their mistake of having labeled the medical leave of absence as "unexcused." Nonetheless, the applicant was terminated for his unexcused absences. Accordingly, the *Leef* case does not support finding a violation of 132a in the case herein.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied in its entirety.

DATE: August 31, 2021

Sandra Rosenfeld
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE