INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS AND CLIENTS

FROM: W. JOSEPH TRUCE

DATE: October 17, 2005

RE: **VICTORY FOR OUR SIDE: BOARD UPHOLDS NEW STANDARD OF PROOF IN LABOR CODE §132(a) CASES**

Ever since the landmark decision by the California Supreme Court in ***Judson Steel v. WCAB*** (1978) 43 Cal. Comp. Cases 665, employers have been fighting an uphill battle with respect to defending charges of discriminatory conduct pursuant to Labor Code §132(a).

For years the applicant had a ridiculously easy burden of proof as follows:

1. The applicant simply had to show that he and/or she sustained an industrial injury;

2. Next, the applicant need only show that he and/or she was a victim of some type of job action which was felt to be the result of the industrial injury.

3. If the applicant was able to satisfy requirements 1 and 2, the burden of proof then **shifted** to the employer and the employer had the rather onerous burden of showing that the job action against the employee (such as termination or other types of discipline) was solely due to the realities of doing business.

After finding that the employer, Judson Steel, violated Labor Code §132(a), the Court of Appeal in a **tag line** hastened to mention that, of course, their decision did not mandate that the employer ignore the "**realities of doing business.**"

In successive Court of Appeal decisions enforcing Labor Code §132(a) pursuant to the mandate as set down by the Supreme Court in ***Judson Steel***, the courts routinely (in my opinion) penalized employers for job actions contemplated by the "**realities of doing business**" and the "**realities of doing business**" doctrine became the "**business necessity**" doctrine.

Therefore, following ***Judson Steel***, if an employer took any type of job action, discipline, counseling, or other disparate treatment against an employee who had sustained an industrial injury, such employer would find itself before the Board defending its actions and the only defense was that said job action was due solely to "**business necessity.**" This was a burden that, at times, was almost impossible to prove.

Fortunately for employers, the California Supreme Court weakened the ***Judson Steel*** case by issuing a decision in the year 2003 by the name of ***Department of Rehabilitation/State of California v. WCAB (Lauher)*** (2003) 68 Cal. Comp. Cases 831.

In the ***Lauher*** case, the Supreme Court held that even though the applicant/employee suffers "some adverse consequence as a result of some action or inaction taken by the employer," this is now "**insufficient**" to establish a violation of Labor Code §132(a).

Therefore, the Supreme Court in ***Lauher*** again made Labor Code §132(a) a "**discrimination statute**" as opposed to a strict liability statute as it became immediately subsequent to the decision in ***Judson Steel***.

Scott Corngold of our Long Beach office has obtained a decision from Judge Greenberg of the Appeals Board District Office in Anaheim in the case of ***Oscar Mancilla v. Coca Cola Bottling Company*** (**AHM 097154**) validating and upholding the ***Lauher*** doctrine.

In ruling in favor of our client that the applicant failed to establish a violation of Labor Code §132(a), Judge Greenberg quoted from ***Lauher*** extensively and observed as follows:

> **"The applicant must also show that he had a legal right to retain the benefit that was deprived or the status that was taken away and that the employer had a corresponding legal duty to provide the benefit or to refrain from taking that benefit or status away . . . "**

Judge Greenberg went on to comment as follows:

> **"The intent behind the statute as discussed by the Supreme Court in *Lauher*, is not to manufacture a make-whole remedy for injured workers. It was intended to prohibit discrimination . . . "**

In ***Mancilla*** the applicant was terminated pursuant to a provision of the union contract that called for the termination of any employee absent for more than 24 months. Prior to ***Lauher*** this would have been a slam dunk Labor Code §132(a) violation unless the employer could prove a business necessity for said termination. However, in light of ***Lauher***, Judge Greenberg pointed out that the applicant's burden establishing that the employer violated Labor Code §132(a) was to show that he was singled out as a candidate for the employer for firing simply because of the industrial injury.

Judge Greenberg went on to state:

> **"From the testimony of the defense witnesses, it can be concluded that the employer did nothing to him that it did not do to any other employee who was absent from the workplace for 24 months . . . "**

Since applicant failed to prove that defendant's actions were discriminatory, the applicant failed to show that his termination and defendant's failure to re-instate him were in violation of Labor Code §132(a). Therefore, applicant was ordered to take nothing and his Labor Code §132(a) petition was ordered dismissed.

Remember that we want to analyze all Labor Code §132(a) defenses now in light of the Supreme Court decision in ***Lauher***.

Congratulations, Scott. Good job.

WJT:lb/ib

SFC

BEFORE THE WORKERS' COMPENSATION APPEALS BOARD OF THE STATE OF CALIFORNIA

OSCAR MANCILLA Applicant, vs. COCA COLA BOTTLING CO/TRAVELERS PROPERTY & CASUALTY COMPANY. Defendant.	Case No.: AHM 097154 **FINDINGS AND AWARD AND/OR ORDER WITH OPINION ON DECISION** Hon. JULES L. GREENBERG

ATTORNEY FOR APPLICANT
GOLDSCHMIDT, SILVER & SPINDEL
BY
LAWRENCE SILVER

ATTORNEY FOR DEFENDANT
THE LAW OFFICES OF KEGEL, TOBIN & TRUCE
BY
SCOTT CORNGOLD

FINDINGS OF FACT

1. The initial burden to show that the defendant had engaged in a discriminatory act against the applicant in violation of section 132(a)was not met.

2. The corresponding duty to rehire or reinstate the applicant only applies to injured workers who have been

deemed to have been discriminated against in violation of Labor Code 132(a).

Date: October 6, 2005

Jules L. Greenberg
Workers' Compensation
Administrative Law Judge

ORDER

Applicant be and here by is ordered to take nothing and the petition for enhanced benefits filed pursuant to Labor Code 132(a) is dismissed.

Date: October 6, 2005

Jules L. Greenberg
Workers' Compensation
Administrative Law Judge

A Petition for Reconsideration from this Decision
Must be filed at the Anaheim Office of the WCAB

Served on the Parties as shown on
The official address record of the WCAB

On 10/7/05

By
nbg

OPINION ON DECISION

FACTUAL/LEGAL DISPUTE

Applicant a 61 year old forklift driver, on various dates in 2001 and 2002, sustained injury to his right upper extremity(shoulder) and abdomen with hernia. He settled his claim by stipulations with request for award for 15% permanent disability with a need for further medical treatment in the future. He also filed a claim for discrimination pursuant to Labor Code 132(a).[1] His petition filed on or about April 15, 2004, alleged that on or about April 6, 2004 Coca Cola engaged in an intentional act of discrimination. The applicant alleged that he was from March 29, 2001 through March 25, 2002 temporarily and totally disabled and unable to return to work.

On April 6, 2004, he was released to return to work by his primary treating physician (PTP) with no work restrictions and was able to return to his usual and customary job duties effective on that date. Coca-Cola did not allow him to return to work and its action was based solely on the fact that Mancilla sustained an industrial injury, had demanded workers' compensation benefits and was disabled for the period of time stated above.

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[1] All numbered references are to the Labor Code unless otherwise stated.

The applicant then pleaded for lost wages, employment benefits and a 50% increase in compensation. At a mandatory settlement conference on February 28, 2005, the defendant employer denied all charges of discrimination. At the trial on June 13, 2005, the parties were provided with additional time, in which to file post trial briefs. Thereafter the matter stood submitted.

The testimony of the applicant and defense witnesses is briefly described below starting with the applicant:

APPLICANT'S TESTIMONY

He left on industrial leave on March 25, 2001 and obtained a release from his doctor on April 5, 2001. He took this release back to work and gave it to "a lady supervisor". She was new and did not know her name. She then advised him that he had been terminated and could not return to work.

That very same month he started looking for other employment and found it on July 12, 2004 at Heather Screw Products. He started there at $8.50 an hour for 50 hours a week and then in December of that year his pay was raised to $9.00. When he worked at Coca Cola, his pay he believed was about $18.00 an hour. He is a member of a Union, local 896 and was not aware before he was told that he could be let go if he was out with an injury for over two years.

He denied getting a letter to that effect from Coca Cola until one was shown to him on cross examination. Since the letter reached him on March 31, 2004, he already knew when he returned to work that he had been terminated. This testimony on cross examination is in line with his deposition testimony that he already knew he was fired but went back to the employer, hoping they would take him back. He denied he ever got a copy of his union contract. The shop steward who was his son's wife was responsible to give him one, but she never did and wanted him out of that job. She and her son have divorced.

JOEL ROSENFELD

Rosenfeld was the regional safety manager at the plant in Ontario. He has only held this position for one and half years but has been with Coca Cola for seven years. He was not familiar with the applicant but did have familiarity with Section 5.03 of the Union Contract. He had a great deal of familiarity with the contract over the years.

He also was the manager of the workers' compensation claims. He was aware that applicant had taken an industrial medical leave in March of 2002. On or about March 30, 2004 the company sent Mancilla a letter terminating him.

MARK FRIEDLEIN

He is the union manager of the Ontario plant since 1999. He was involved in the negotiations of the union contracts of

1999, 2002 and 2005. Section 5.03 was in the contract and applicant was terminated because his leave went beyond the two years allowed. He could have been rehired. But this apparently is not done by the company as it would set a precedent with the union that might lead to demands for rehiring of all terminated workers who had been fired under similar circumstances. Section 5.5 of the contract which had been bargained for, does not give the company discretion to rehire. If Mancilla had been out for a non-industrial leave the same thing would have happened to him. He was fired because the contract called for it and not because he was out on industrial leave.

Article 5.3 of the contract on page 4 states as follows:

"A regular employee who is not employed under this Agreement For any consecutive period of (2)two years shall thereupon lose His status as a regular employee. A regular employee who quits the Company or who has been discharged by the Company in the exercise of its management function shall thereby lose his status and all seniority. His name shall then be removed from the seniority list."

DISCUSSION

I'll address the issue of discrimination in this case, by employing the old adage, "First things first". In the instant case the first thing to analyze is whether the applicant, met his burden of presenting a prima facie case of an unlawful

discrimination. He presented two separate and distinct acts that he believed met that burden. The first was his termination after 24 months and the second was the failure of the employer to reinstate him approximately one week after that termination took place. In the Barnes case (supra) the court stated that the worker need only show that the employer engaged in "conduct detrimental to the worker". This was also echoed by the court in Smith v. W.C.A.B. (1984) 49 Cal. Comp. Cases 212, where the concept of detrimental conduct found in Barnes was accepted as the standard, i.e. any action by the employer which works a "detriment" to the worker because of an industrial injury is seen as a violation of 132(a).

It goes without saying that the applicant suffered a detriment both by his being fired and by the refusal to rehire him. Just his testimony alone regarding his salary being cut in half indisputably creates such a detriment, even in the absence of any other evidence.

However for the applicant to merely show that he suffered an industrial injury and as a consequence suffered a detriment will not suffice to establish a prima facie case of discrimination. (See Department of Rehabilitation/State of California v. W.C.A.B. (Lauher) (2003) 68 Cal. Comp. Cases 831.)

The Supreme Court in Lauher pointed out that the fact that applicant suffered some adverse consequence as a result of some

action or inaction taken by the employer is in insufficient to establish a violation of 132(a).

The applicant must also show that he had a legal right to retain the benefit that was deprived or the status that was taken away and that the employer had a corresponding legal duty to provide the benefit or to refrain from taking that benefit or status away. (See Lauer supra)

The intent behind the statute as discussed by the Supreme Court in Lauher, is not to manufacture a make-whole remedy for injured workers. It was intended to prohibit discrimination.

"By prohibiting "discrimination" in section 132 (a), we assume the Legislature meant to prohibit treating injured workers differently, making them suffer disadvantages not visited on other employees because the employee was injured or had made a claim."

It must be noted that Mancilla's argument like Lauher's that alleged discrimination does not in any way suggest that he was singled out as a candidate by Coca-Cola for firing. From the testimony of the defense witnesses, it can be concluded that the employer did nothing to him that it did not do to any other employee who was absent from the workplace for 24 months. Mancilla, did not offer evidence that he alone was singled out for punishment or that other workers with industrial or for that matter non-industrial medical leaves over 24 months were retained.

Thus in the most vital area, the first one of showing the act was discriminatory, Mancilla failed to demonstrate the detriment violated the statute.

Defendant cited Jordan v. W.C.A.B. (1985) 50 Cal. Comp. Cases 688 where a similar 18 month rule was upheld. The defendant would like to the board to consider that there is no distinction between this case and Jordan. The Court of Appeal held in Jordan, that the 18 months provided for appeared a reasonable time over and above all use of sick and vacation time to cover what essentially was a temporary physical illness and disability. Since Coca-Cola's time period is even more generous it too should be viewed as reasonable. Defendant argues it is not reasonable to have employers keep positions open for an indefinite period of time on the hopes that someday the employee may fully recover from the effects of the industrial injury.

It is obvious that I would agree with the defendant since there is no factual distinction between the instant case and Jordan. Verna Jordon, who worked for General Telephone exhausted her sick leave and vacation credits while she was out on industrial medical leave. She then requested and was granted a leave of six months. When this time period expired, she requested and was granted another six month period of time. She then requested a third leave which was granted.

It was only when she requested her fourth leave of absence that she was informed that under the collective bargaining agreement she was not entitled to further leave and if she did not return to work she would be terminated since she was out over the 18 months allowed. Also as a terminated employee, she had no right to rehire. In Jordan's case however, she was unable to show that she could be rehired as someone who could step back into the position from which she came. Since she could not demonstrate that she had suffered a detriment in being let go, nor could she show that she had the physical ability to perform in her old position, the employer had no duty to re-employ her.

Further, defendant argued there is a distinction between the instant case and Judson Steel v. W.C.A.B.(1978) 43 Cal. Comp. Cases 665. In Judson defendant argued, the W.C.A.B. invalidated a 12 month leave of absence rule that was not uniformly being applied. Rather the rule was subject to extention and exception routinely in cases of industrial leaves for medical reasons. Since the applicant in Judson was terminated after 12 months without the extension being granted the WCAB ruled the termination discriminatory. I also agree with the defendant's comparison of the facts in Judson with those in the instant case.

The applicant contended that Judson Steel does in fact uphold the position of the applicant that Coca-Cola discriminated against him secondary to his industrial injury. The union cannot bargain away his individual rights pursuant to a collective bargaining agreement. The applicant was almost ready to return to work, in fact was just days away from it, when the two year period of time ran and the company sent out its letter terminating him.

Were Judson the only standard by which to judge this case, the applicant might be correct. However, the Supreme Court in Lauher has extended the standard by announcing clearly the applicant's burden of individual proof to show discrimination and this he has not done.

That does not do away with applicant's second argument which deals with the actions of Coca-Cola not to re-employ him. Clearly, contended the applicant, he should have been allowed to return to his job. In the case of Barns v. W.C.A.B. (1989) 52 Cal. Comp. Cases 444 there were several interrelated principals the applicant argued that should be looked at concerning the right to discharge and the duty to reinstate injured workers.

A refusal to reinstate an injured worker who has been terminated

may be justified if at the time the reinstatement is sought, the employer believes the worker is unable to perform the duties of the position without undue risk of reinjury.

Or business realities may compel the employer to replace the worker and in such cases the employer does not violate 132 (a) if the unavailability of the position precludes reinstatement (see also McClintic v. W.C.A.B. (1987) 52 Cal. Comp. Cases 444).

[McClintic's doctor concluded that he could return only to a modified light work position and by the time his doctor released him to his regular work he was already replaced. The employer's collective bargaining agreement with the union prevented ousting the replacement worker. The board found that the employer had at the time they replaced McClintic harbored a good faith belief that he could not do his regular job and did not discriminate by failing to reinstate him, to a position that was no longer available to him.]

Applicant argued that no argument was ever made in the instant case by the defendant that Coca-Cola had such a business necessity. This was made clear by testimony of the defense witness, Friedlein, who testified that the employer never lets anyone who was terminated like the applicant to return to his or her job. Thus there is no business necessity defense. Rather it is the strict application of the policy that holds sway and that policy the applicant argues in violation of 132(a).

In Judson, a collective bargaining agreement for 12 months, with an additional 12 month add on period was not considered to be a business necessity when an employee who was out for 18 months had his seniority stripped. Under the doctrine announced

in Judson Steel, a union cannot bargain away its members' statutory rights to be free from the discrimination under 132(a) any more than it could bargain away its members' statutory rights to be free from racial or sexual discrimination.

The defendant did not address the applicant's argument about the rehiring, perhaps relying on its defense concerning the firing, that if there was initially no act of discrimination, there was later no corresponding duty to rehire the applicant following termination. It is instructive to turn to the words of the statute itself. Section 132(a) provides that:

> *"It 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. (1) Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has made known his or her intention to file a claim for compensation with his or her employer 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 way event shall be more than ten thousand dollars ($10,000), together with costs and expenses not in excess Of two hundred fifty dollars ($250).* ***Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer."***

As it turns out the language contained in the above section does not afford protection regarding rehiring, except to an injured worker who has been discriminated against under the

statute. Then and only then does the applicant have a *right* to reinstatement and then and only then does the employer have a corresponding duty(within certain restraints as enunciated in Barnes)to re-hire and reinstate.

There was no provision that was in the collective bargaining agreement that applicant must be reinstated following his termination under Section 5.3. Had there been applicant would have availed himself of his private remedy up to and including the filing of a union grievance.

JLG