WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RICHARD GUERRA, ***Applicant,*** **vs.** **MR. ROOTER PLUMBING; STATE COMPENSATION INSURANCE FUND,** ***Defendant(s).***	**Case No. ADJ2254122 (VNO 0535926)** **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award served on December 15, 2009, wherein the workers' compensation administrative law judge (WCJ) found that applicant was terminated on October 3, 2007, in violation of Labor Code section 132a, and awarded a 50% increase in compensation, not to exceed $10,000.00. The WCJ found applicant entitled to reinstatement to his job as a plumber and to reimbursement for lost wages and benefits. He awarded an attorney's fee of 15% of the increase in compensation and the lost wages and benefits. Applicant's underlying claim that he sustained industrial injury to his lumbar spine, left knee, neck, right elbow, right knee, and right ankle, while employed as a plumber on October 15, 2006, was resolved by the April 8, 2008 Opinion and Order Approving Compromise and Release.

Defendant contends the WCJ erred in finding a violation of section 132a, arguing that applicant was terminated due to the nondiscriminatory business necessity of downsizing in the failing economy, that the evidence does not show he was singled out for disadvantageous treatment, and that defendant could not accommodate applicant's restrictions. Defendant also contends it was error for the WCJ to order reinstatement and retroactive wages, because applicant's treating physician, Dr. David Heskiaoff, found applicant to be a qualified injured worker.

We have considered the Petition for Reconsideration and applicant's Answer, and we have reviewed the record in this matter. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) and a Supplemental Report, recommending that the petition be denied.

For the reasons expressed in the WCJ's Report and Supplemental Report, which we adopt and incorporate, and for the reasons discussed below, we will grant the petition for reconsideration, amend the Findings and Award to defer the issues of reinstatement and retroactive wages and benefits, and otherwise affirm.

Labor Code section 132a provides, in pertinent part:

> "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 filed or 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 event 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."

In *Judson Steel Corporation* v. *Workers' Comp. Appeals Bd. (Maese)* (1978) 22 Cal. 3d 658 [43 Cal.Comp.Cases 1205, 1210], the Court approved the Appeals Board's interpretation that section 132a applies to "those situations in which an employee is penalized solely because he was injured on the job or had to lose time from work solely because of a work injury."

The burden of proving section 132a discrimination was articulated in *Smith v. Workers' Compensation Appeals Board* (1984) 152 Cal.App.3d 1104 [49 Cal.Comp.Cases 212, 216]:

> "Thus, section 132a proscribes certain actions triggered by the industrial injury which work to the detriment of the claimant,

> unless they were necessitated by 'the realities of doing business.' As can be inferred from *Judson Steel* ..., the only reasonable procedure for implementing such a rule is to make it the claimant's burden to show the detriment, the action, and its cause, and the employer's burden to prove an affirmative defense of business realities."

Holding that the applicant had "presented a prima facie case under section 132a," the court, in *Barns v. Workers' Compensation Appeals Board* (1989) 216 Cal.App.3d 524 [54 Cal.Comp.Cases 433, 437], paraphrased the holding in *Smith*: "We held that a worker proves a violation of section 132a by showing that as a result of an industrial injury, the employer engaged in conduct detrimental to the worker."

Based on *Judson Steel, Smith,* and *Barns*, therefore, it is applicant's responsibility to show: (1) the action or conduct, (2) the detriment, and (3) the cause. A fourth element of applicant's prima facie case, disparate treatment, was added in *Department of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281 [68 Cal.Comp.Cases 831]:

> "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 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." (68 Cal.Comp.Cases at p. 844.)

"*Lauher* requires an employee not only to show detriment but also show that he was singled out for disadvantageous treatment because of his injury." (*County of San Luis Obispo v. Workers' Comp. Appeals Bd. (Martinez)* (2005) 133 Cal.App.4th 641 [70 Cal. Comp. Cases 1247, 1252; see also *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369 [72 Cal.Comp.Cases 389]; *Gelson's Supermarkets v. Workers' Comp. Appeals Bd. (Fowler)* (2009) 179 Cal.App.4th 201 [74 Cal.Comp.Cases 1313].)

Our first inquiry, then, is whether applicant satisfied his prima facie case. The first two elements, defendant's action and the detriment, are satisfied by the showing that applicant was terminated. The cause of the termination, element three, is in dispute.

Defendant has put forward three reasons for applicant's termination. First, a downturn in business due to the failing economy caused defendant to downsize. Second, a plumber's work is arduous, and defendant could not keep an employee with work restrictions like applicant's. The third reason was raised in the testimony of defendant's owner, John Akhoian, but is not discussed in the petition for reconsideration. It is that there was no vehicle for applicant to drive because he crashed the last company vehicle.

Initially we note that none of these reasons were stated to applicant when he was terminated. He was told by his supervisor and defendant's operations manager, Mr. Askari Cannon, that he could not return to work as an employee because Mr. Cannon "did not want the applicant to work under any kind of workers' compensation." (June 4, 2009 Minutes of Hearing and Summary of Evidence, p. 5:7-8.) Defendant argues in its petition that section 132a does not require that an employer inform an employee of its reason for termination, nor is the employer required to provide such proof at trial. Technically, defendant may be right. Proving the reason for the employer's detrimental act is part of applicant's prima facie case. However, even if the employer is not *required* to give a terminated employee a reason, in this case, defendant did give applicant the reason. Recorded voicemail messages from Mr. Cannon support applicant's testimony about the reason. The WCJ stated that he found applicant's testimony credible. While the burden to prove the reason is applicant's, defendant fails to understand that a reason stated by the employer at the time of termination is more convincing than reasons expressed in testimony or argument two years after the fact.

Although the employer in this case may have reduced its workforce due to economic reasons, no evidence was presented showing that applicant would have been one of the employees laid off, if he had not been injured. In fact, Mr. Akhoian testified regarding the procedure for laying off workers, including given them a layoff notice called a "Change Order Form." The procedure described by Mr. Akhoian was not followed in applicant's case. Applicant testified that he did not receive a layoff notice.

As to defendant's inability to accommodate applicant's restrictions, we see that Dr. Heskiaoff released applicant to work full duties on September 13, 2007. He was under no restrictions when he was terminated. Furthermore, the fact that defendant offered to keep applicant as an independent contractor, doing the same work but without exposing defendant to liability for potential workers' compensation claims, is further persuasive evidence of the true reason for defendant's refusal to keep applicant as an employee. The offer of independent contractor status belies any genuine concern by defendant about applicant's ability to do the work.

As for the unavailability of a vehicle, that does not appear to have been a concern when applicant returned to work previously in 2007, and defendant does not mention this reason in its petition for reconsideration. We regard this reason as another post hoc rationalization for a termination that was accurately and honestly explained at the time. These multiple unsupported reasons do not add up to a solid rebuttal of the reason stated at the time of termination.

Applicant has thus satisfied the third element of his prima facie case, and we now turn to element four, whether he was singled out for disadvantageous treatment. We agree with the WCJ that the evidence shows that applicant was singled out because of defendant's workers' compensation concerns. When applicant was released to return to work and advised Mr. Cannon that he was anxious to return, Mr. Cannon told applicant he would "have to talk to workers' comp and would get back to the applicant." (June 4, 2009 Minutes of Hearing and Summary of Evidence, p. 5:3-4.) In September 2007, applicant "was feeling really good" (*Id.*, at p. 7:11.), and he had a doctor's release. He was not aware of any economic problems with the company. (*Id.*, at p. 7:20.) Because of defendant's concerns regarding workers' compensation liability, applicant was singled out for the offer of a different and less advantageous working status. When he refused, applicant was terminated. Defendant's standard layoff procedure was not used to terminate applicant.

Applicant satisfied his prima facie case, so the burden shifted to defendant to prove the termination was motivated by business necessity. The WCJ determined that defendant failed to meet its burden. As the discussion above demonstrates, the explanations defendant provided in

support of the business necessity defense were generated only after the fact. The contemporaneous explanation of defendant's motivation fully supports applicant's claim. We do not doubt that defendant suffered a downturn in business and needed to reduce its workforce. We simply see no credible evidence that this factor motivated its conduct toward applicant in September and October of 2007. We agree with the WCJ that defendant failed to meet its burden. We, therefore, affirm his finding of a section 132a violation.

Defendant's contention regarding reinstatement and the related issue of lost wages and work benefits may have merit, however. The decision in *Judson Steel Corporation* v. *Workers' Comp. Appeals Bd. (Maese), supra,* (43 Cal.Comp.Cases 1205, 1210) explained, "Section 132a does not compel an employer to ignore the realities of doing business by 'reemploying' unqualified employees...." On October 15, 2007, shortly after applicant's termination, Dr. Heskiaoff imposed work restrictions on applicant. Dr. Heskiaoff said that, if modified work was not available, applicant would be a qualified injured worker. Mr. Akhoian testified that modified work was not available, and applicant testified as well that Mr. Rooter did not have a job that fit his work restrictions. Applicant testified, however, that he was aware that the restrictions were temporary. (June 4, 2009 Minutes of Hearing and Summary of Evidence, p. 7:25.) Applicant also testified that he has worked briefly as a plumber since his termination, with no restrictions and no pain. Clarification from Dr. Heskiaoff regarding applicant's ability to do his job is required before a determination can be made regarding his entitlement to reinstatement and lost wages and benefits. We will defer the issues of reinstatement and lost wages and benefits to allow development of the record with medical evidence as to whether and when applicant was able to return to his job with defendant. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) We will also amend the current finding regarding attorney's fees accordingly.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award served on December 15, 2009, be, and the same hereby is, **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award served on December 15, 2009, is **AFFIRMED, EXCEPT** that it is **AMENDED** as set forth below:

Findings of Fact Nos. 4, 5, and 6 are amended as follows:

FINDINGS OF FACT

4. The issue of reinstatement to applicant's position as a plumber with Mr. Rooter Plumbing is deferred.

5. The issue of applicant's entitlement to reimbursement for lost wages and work benefits is deferred.

6. The reasonable value of the services and disbursements of applicant's attorney is 15 percent of the increase in compensation.

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The Award is amended as follows:

AWARD

AWARD IS MADE in favor of RICHARD GUERRA against MR. ROOTER PLUMBING of:

Fifty percent increase in compensation, not to exceed $10,000.00, less attorney's fees of 15 percent of the increase in compensation, payable to Goldschmid, Silver & Spindel.

WORKERS' COMPENSATION APPEALS BOARD

FRANK M. BRASS

I CONCUR.

JAMES C. CUNEO

ALFONSO J. MORESI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 09 2010

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

RICHARD GUERRA
GOLDSCHMID, SILVER & SPINDEL
ELLIOT KUSHNER

CB/bea

WCAB CASE NUMBER: **ADJ2254122/VNO0535926**

RICHARD GUERRA **vs.** **MR. ROOTER PLUMBING; STATE COMPENSATION INSURANCE FUND**

WCAB JUDGE: **THOMAS L. KITCHENS**

DATE: **January 19, 2010**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1. Applicant's Occupation: Plumber.

   Applicant's Age: 44 years old.

   Date of Injury: October 15, 2006.

   Parts of Body Injured: Neck, knee, hip, back, and both feet.

   Manner in Which Injury Occurred: Automobile accident.

2. Identity of Petitioner: Employer.

   Timeliness: Yes.

   Verification: The petition is verified pursuant to Labor Code §5902.

   Defect: None.

3. Date of Issuance of Findings and Award: December 14, 2009.

4. Petitioner's Contentions: The court erred in finding defendant's termination of applicant was a detrimental act related to an industrial injury, and in disregarding evidence of business necessity.

II.
FACTS

This matter was tried on June 4, 2009, with testimony taken. The issue for trial was whether defendant violated Labor Code §132a when it terminated applicant's employment on October 3, 2007.

Applicant alleged that he was terminated due to an industrial injury which occurred on October 15, 2006. Defendant countered with the defense of business necessity, i.e. a downturn in business caused a reduction in workforce. . The court subsequently issued a Findings and Award and Opinion on Decision which found defendant intentionally and willfully terminated applicant due to his industrial injury. The court further found defendant failed in its' burden of proof on the defense of business necessity.

Defendant filed a timely verified petition for reconsideration alleging the court erred in finding defendant's termination of applicant was a detrimental act related to an industrial injury. As of the date of this report, applicant has not filed a response.

III.
DISCUSSION

In finding defendant's actions a detrimental act related to applicant's industrial injury, the court relied on the testimony of applicant and the evidence of voice mail messages left on applicant's cellular telephone by his supervisor, Askari Cannon. (See Minutes of Hearing and Summary of Evidence pgs. 3 – 8, and Exhibit 4.) The court found applicant credible. Applicant essentially testified that he began work for defendant in November 2005. He was hired as a plumber. He was paid a salary, and was provided with a company vehicle to travel to work assignments.

Applicant was injured on October 15, 2006. He was taken off work until sometime in February 2007. On that date, his treating doctor returned applicant to his usual and customary work with no restrictions. (See Exhibit No. 1.) Approximately

three weeks later, his doctor took applicant off work a second time. He was returned to work full duty by his doctor on September 13, 2007. (See Exhibit 2.) Applicant sent the return to work determination to his supervisor, Mr. Cannon via facsimile. Mr. Cannon was also the operations manager for defendant.

During a personal meeting with Mr. Cannon around September 18, 2007, he told applicant that he would have to talk to workers' compensation about applicant's return to work. The next time he heard from Mr. Cannon about returning to his job was in a voice mail message left on applicant's cellular telephone. Mr. Cannon told applicant in the message he could not work under any kind of workers' compensation. Transcripts of the voice mail message was offered and admitted into evidence. (See Exhibit 4.)

Applicant had another personal meeting with Mr. Cannon on or about September 28, 2007. Mr. Cannon told applicant the only way he could continue working was by 1099, and that applicant could not work for defendant under any kind of workers' compensation. Mr. Cannon again offered applicant an independent contractor relationship. The proposed new relationship did not include a salary or company vehicle. Applicant did not accept this offer and he was thereafter terminated on October 3, 2007.

Defendant offered the testimony of Mr. John Akhoian who is the owner of Mr. Rooter Plumbing. Mr. Akhoian in essence testified that a downturn in his business caused a reduction in workforce. However, Mr. Akhoian testified on cross-examination that applicant was not accepted back to work in September 2007, because there was no company vehicle available for him as he crashed the last vehicle he was assigned. (See Minutes of Hearing and Summary of Evidence, page 11, lines 18-20).

The court viewed this testimony as contrary to the defense of business necessity. Also, Mr. Akhoian was unaware of the voice messages Mr. Cannon left on applicant's cellular telephone about not working under any kind of workers' compensation. And, Mr. Akhoian was not privy to conversations applicant and Mr. Cannon had on September 18 and 28, 2007.

There was no admitted evidence that either Mr. Cannon or Mr. Akhoian told applicant about a downturn in business or financial problems defendant may have experienced in 2007. Therefore the court gave little weight to the testimony of Mr. Akhoian, and found defendant failed in proving a business necessity defense to the §132a allegation.

IV.
RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be otherwise denied for the reasons stated above.

THOMAS KITCHENS
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Dated: January 19, 2010

Served by mail on parties as shown
on the Official Address Record.
On: 1-19-2010
By:
Remy Melgar