WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JEANETTE FRANCE, *Applicant*

vs.

LOS ANGELES DEPARTMENT OF WATER & POWER, permissibly self-insured, *Defendants*

Adjudication Numbers: ADJ10738767; ADJ14240277; ADJ14240278
Pomona District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the March 24, 2025 Findings and Award and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found that applicant failed to prove that defendant's termination of her employment on February 1, 2017 violated Labor Code[1] section 132a.

Applicant contends she met her burden of establishing that defendant took adverse action against her following her claim for workers' compensation benefits and that defendant did not meet its burden of establishing a non-discriminatory non-retaliatory reason for the termination.

We have received an Answer from defendant.

Applicant, who is unrepresented, has also filed a Supplemental Petition for Reconsideration, averring her right to due process has been abrogated because she has not been provided with a transcript of the February 10, 2025 trial proceedings.[2]

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

[2] While we acknowledge that any party may request a transcript (Cal. Code. Regs., tit. 8, § 10800), based on our review of the record, we do not believe that transcripts of testimony will alter our decision that defendant violated section 132a. Thus, we will not order that the transcripts be prepared.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied on the merits, or dismissed as unverified and exceeding the page limit specified in our Rules.

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 discussed below, we will grant applicant's Petition, rescind the F&O, and substitute new findings of fact that defendant's discharge of applicant on February 1, 2017 violated section 132a. We will further issue an award of corresponding statutory benefits.

FACTS

Applicant sustained injury to her low back and shoulder while employed as an occupational health nurse by defendant Los Angeles Department of Water & Power on January 9, 2017. The parties settled applicant's claim for workers' compensation benefits by way of Compromise and Release, ordered approved on November 2, 2023.

On September 9, 2017, applicant filed a petition seeking benefits pursuant to section 132a, on the ground that defendant terminated her employment on February 1, 2017 as a result of her industrial injury. (Petition for Discrimination (sic) Per Labor Code 132a, dated September 19, 2017.)

On October 31, 2024, the parties proceeded to trial on the sole issue of whether defendant violated section 132a. (Minutes of Hearing and Summary of Evidence, dated October 31, 2017, at p. 2:21.) The WCJ heard testimony from applicant and continued the matter for additional testimony. On December 16, 2024, the WCJ heard additional testimony from applicant. On February 10, 2025, the WCJ heard testimony from employer witnesses Leslie Israel, D.O., and Deitra Barnett. The WCJ ordered the matter submitted for decision the same day.

On March 20, 2025, the WCJ issued his F&O, determining in relevant part that applicant "failed to prove that the termination of her employment was due to an unlawful reason and/or that it violated Labor Code section 132a." (Finding of Fact No. 5.) The WCJ found that while applicant alleged defendant was required to follow procedures applicable to defendant's civil service and/or union member employees, as an emergency appointment, applicant was not entitled any progressive discipline prior to termination of employment. (Finding of Fact No. 7.) The WCJ

further determined that applicant's employment was terminated for "legitimate nondiscriminatory reasons; i.e., poor performance that pre-dated the January 9, 2017 injury." (Finding of Fact No. 11.) Accordingly, the WCJ dismissed applicant's petition for benefits pursuant to section 132a.

Applicant alleges her employment as an "Emergency Hire" does not abrogate her right to workers' compensation protections, and that defendant has not established her termination arose out of poor job performance. (Petition, at p. 7.)

Defendant's Answer contends applicant was terminated for just cause, unrelated to her work injury. (Answer, at p. 4:27.) Defendant also contends that because applicant was hired as an "Emergency Hire," she was not entitled to progressive discipline otherwise available to civil service employees. (*Id.* at p. 5:14.)

The WCJ's Report frames the dispute in terms of the parties' respective burdens of proof, as follows:

> In the case at hand, it is undisputed that applicant suffered a January 9, 2017 injury to low back and left shoulder. It is also undisputed that the applicant was given work restrictions which defendant agreed to accommodate and that applicant continued to work until her employment was terminated by defendant on February 1, 2017. As such, applicant established a prima facie case for her claim that defendant violated Labor Code section 132a.
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> The burden then shifts to defendant to offer a legitimate nondiscriminatory reason for the adverse employment action. In this regard, defendant presented evidence and the testimony of Leslie Michelle Israel, D.O. and Deitra Fernandes (Barnett) regarding applicant's performance deficiencies as the reason for terminating her employment. The witnesses also testified that applicant was an emergency hire, that her employment was outside of the civil service process and that applicant's employment could be terminated at any time without cause. In fact, defendant presented evidence that applicant's Emergency Appointment/Emergency Hire employment was a form of temporary employment that would have eventually ended without any affirmative action to terminate said employment.
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> At this point, the burden shifts back to applicant to prove that the defendant's proffered reason(s) for terminating her employment was/were pretext. In this regard, applicant failed to prove that the alleged performance deficiencies were pretext.

(Report, at pp. 4-5.)

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
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> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on April 22, 2025, and 60 days from the date of transmission is Saturday, June 21, 2025. The next business day that is 60 days from the date of transmission is Monday, June 23, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[3] This decision is issued by or on June 23, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to

[3] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on April 22, 2025, and the case was transmitted to the Appeals Board on April 22, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on April 22, 2025.

II.

Applicant alleges that defendant illegally discriminated against her as a result of her claim for workers' compensation benefits by terminating her employment soon after she sustained industrial injury.

Pursuant to 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 of Ventura County* (1998) 18 Cal.4th 1143 [63 Cal.Comp.Cases 944].)

Section 132a states in pertinent part that:

> 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...testified or made known his or her intention to testify in another employee's case... is guilty of a misdemeanor and the employee shall be entitled to reinstatement and reimbursement for lost wages and work benefits ....

Section 132a 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." (*Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (*Lauher*) (2003) 30 Cal.4th 1281, 1298-1299 [68 Cal.Comp.Cases 831].)

In *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658 [43 Cal.Comp.Cases 1205], the California Supreme Court held that section 132a affords relief to any employee who suffers discrimination as a result of an industrial injury, even if the discriminatory conduct is not of the type specifically identified in the statute.

In *Smith v. Workers' Comp Appeals Bd.* (1984) 152 Cal.App.3d 1104, 1109 [49 Cal.Comp.Cases 212], the Court of Appeal further clarified that to establish a violation of section 132a, the worker bore the initial burden to establish that the employer engaged in conduct detrimental to the worker. Upon such a showing, the burden shifts to the employer to show that its conduct was necessitated by the realities of doing business. (*Id.* at p. 1109.)

In *Barns v. Workers' Comp. Appeals Bd.* (1989) 216 Cal.App.3d 524 [54 Cal.Comp.Cases 433], applicant sustained industrial injury resulting in his employer eventually terminating his employment on the ground that applicant was susceptible to possible reinjury, and because applicant participated in statutorily authorized vocational rehabilitation benefits. The court determined, however, that applicant's termination following his industrial injury presented a prima facie showing of adverse action in response to the filing of a claim, in violation of section 132a. (*Id.* at p. 531.) The court further determined that defendant failed in its burden of establishing that the termination was necessitated by the realities of doing business. Rather, the evidence established that defendant "permanently severed the employment relationship some five months before the injury was permanent and stable," and that "[w]ithout a showing by the employer of some compelling business necessity, such precipitous action must be deemed unwarranted." (*Id.* at p. 535.) Accordingly, the court held that applicant's termination violated section 132a, emphasizing that the "'business realities' defense rests on a showing of *necessity*." (*Id.* at p. 537, italics original.)

And in *Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (*Lauher*) (2003) 30 Cal.4th 1281, 1298-1299 [68 Cal.Comp.Cases 831], the Supreme Court clarified that "to 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." (*Id.* at p. 1300.)

Here, it is not disputed that applicant sustained industrial injury on January 9, 2017. Applicant received medical treatment and returned to modified duties.

On January 13, 2017, a meeting was held between applicant, supervisor Bedros Okhanes, and a representative from the employer's Human Resources Department, wherein the employer acknowledged applicant's work restrictions and agreed that it could accommodate the restrictions. (Ex. 14, Interactive Meeting Notes, dated January 13, 2017.) Applicant agreed to "self-monitor" to ensure she would not violate her work restrictions.

Applicant continued to work under this arrangement until February 1, 2017, at which time Medical Director Dr. Israel sent applicant to the employers' workers' compensation office. (Minutes of Hearing and Summary of Evidence, dated October 31, 2024, at p. 6:6.) Applicant met with her supervisor Mr. Okhanes and two other employees and was asked to sign a medical release form. Applicant informed them that she has obtained legal representation and asked them to send the document to her attorney. (*Id.* at p. p. 6:8.)

Following this meeting, applicant returned to her desk and was asked to join another meeting with Dr. Israel and Human Resources Director Deitra (Fernandes) Barnett. Ms. Barnett informed applicant her employment was terminated and escorted applicant out of the building. (*Id.* at p. 6:10.)

Applicant contends defendant's termination of her employment was discriminatory and violated section 132a. On this record, there is no dispute that the employer's termination of applicant's employment was adverse to applicant's interests. However, pursuant to *Smith, supra*, 152 Cal.App.3d 1104, in order to make a prima facie showing of discrimination under section 132a, applicant must further establish that she was discharged because "she [had] filed or made known his or her intention to file a claim for compensation…." (Lab. Code, §132a(1).)

We observe that an employer who discharges an employee because the employee has made known his or her intention of filing a workers' compensation claim is in violation of section 132a and that evidence of (1) a close temporal proximity between the employer's notice of the employee's intention and the employee's discharge or (2) a deviation from the employer's usual procedures following such notice may support a prima facie claim. (Lab. Code, § 132a; see, e.g., *Arteaga v. Brinks* (2008) 163 Cal.App.4th 327, 353; *San Diego Transit v. Workers' Comp. Appeals Bd.* (*Calloway*) (2006) 71 Cal.Comp.Cases 445.)

The F&O cites to *Arteaga, supra*, 163 Cal.App.4th 327, for the proposition that "temporal proximity is by itself insufficient to create a triable issue of material fact." (Finding of Fact No. 12.) In *Arteaga*, the Court of Appeal affirmed a trial court's decision dismissing a complaint filed under the California Fair Employment and Housing Act (FEHA) for physical disability discrimination and wrongful termination. Plaintiff was an armored transportation company employee who was the subject of an internal investigation regarding $7,668 in missing cash. Following notification of the investigation, plaintiff alleged physical disability in the form of numbness and pain to the upper extremities and feet. Shortly after notifying the employer of his alleged industrial injury, plaintiff was nonetheless dismissed based on the results of the employer investigation. (*Id.* at p. 339.) The trial court found that irrespective of the proximity in time between defendant being notified of an impending claim for workers' compensation benefits and plaintiff's termination, the discharge was nonetheless based on good cause and was not a result of plaintiff's claim of industrial injury. On appeal, plaintiff alleged that his termination was pretextual because he was discharged less than a week after alleging an industrial injury. (*Id.* at p. 353.) The court of appeal acknowledged that "temporal proximity between an employee's disclosure of his symptoms and a subsequent termination may satisfy the causation requirement at the first step of the burden-shifting process." (*Ibid*.) However, the court ultimately rejected this contention because "temporal proximity alone is not sufficient to raise a triable issue as to pretext *once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination*," especially when the employer raised questions about plaintiff's performance *before* he disclosed his symptoms. (*Ibid*.) The court also observed:

> This is not to say that temporal proximity is never relevant in the final step of the [burden-shifting analysis of discrimination under *McDonnell Douglas Corp. v. Green* (1973)] 411 U.S. 792]. In the classic situation where temporal proximity is a factor, an employee has worked for the same employer for several years, has a good or excellent performance record, and then, after engaging in some type of protected activity— disclosing a disability—is suddenly accused of serious performance problems, subjected to derogatory comments about the protected activity, and terminated. In those circumstances, temporal proximity, together with the other evidence, may be sufficient to establish pretext.

(*Id.* at p. 353-354.)

Thus, while not dispositive of the issue, temporal proximity between a protected activity such as filing a claim for workers' compensation benefits and adverse action against the employee

remains a relevant factor in the analysis of whether the adverse action is discriminatory. (See, e.g., *Scagliotti v. Elmore Toyota* (October 14, 2019, ADJ9298865) [2019 Cal. Wrk. Comp. P.D. LEXIS 443) [defendant's discharge of applicant after he left work to seek medical treatment industrial injury violated § 132a]; *Pierce v. Sygma Network* (September 25, 2019, ADJ2408827 (LAO0888368) [2019 Cal. Wrk. Comp. P.D. LEXIS 422] [close temporal proximity between defendant's notice of industrial injury and termination of employment suggested possible disadvantageous treatment due to claimed injury]; *Sarwary v. Walgreens Family of Cos.* (July 27, 2021, ADJ8258390, ADJ8246247, ADJ9024430) [2021 Cal. Wrk. Comp. P.D. LEXIS 178) [defendant's termination of applicant two weeks after returning to work following settlement of workers' compensation claim sufficient to establish prima facie discrimination under section 132a]; *Hopper v. City of Los Angeles/LAPD* (September 20, 2019, ADJ6620180) [2019 Cal. Wrk. Comp. P.D. LEXIS 355] [close temporal proximity between applicant's submission of claim for time off work due to industrial injury and defendant's initiation of disciplinary proceedings against applicant relevant to issue of discrimination].)

Here, defendant terminated applicant's employment without explanation three weeks after she filed a claim for workers' compensation benefits, and immediately after applicant met with her employer regarding the claim and informed them that she had retained legal counsel. We therefore agree with the WCJ's conclusion in his report that "applicant established a prima facie case for her claim that defendant violated Labor Code section 132a." (Report, at p. 5.)

Under *Barns, supra*, 216 Cal.App.3d 524, the burden now shifts to defendant to establish that applicant's termination was necessitated by the realities of doing business. Defendant contends because applicant was an "Emergency Hire," she was not entitled to progressive discipline and other protections normally afforded to civil service employees. (Answer, at p. 5:14.) Defendant further contends that defendant's termination was based on good cause arising out of applicant's poor job performance.

However, applicant's undisputed trial testimony was that she was "never written up by LADWP." (Minutes of Hearing and Summary of Evidence, dated October 31, 2024, at p. 5:3.) Indeed, the evidentiary record reflects no write-ups, disciplinary actions, warnings, or other corrective action taken while applicant was employed. The employer's own Personnel Action Notice (Termination) makes no mention of poor job performance, or indeed, any reason for applicant's termination. (Ex. L, Personnel Action Notice, dated February 8, 2017.) Nor does

defendant's Personnel Change Document (Termination) mention poor job performance or any other reason for applicant's discharge. (Ex. M, Personnel Change Document, dated February 8, 2017.)

Defense witness Dr. Israel confirmed that applicant experienced two performance issues involving a failure to return flu vaccines to the refrigerator and a failure to check patient blood pressure before administering breathing tests. (Minutes of Hearing and Summary of Evidence, dated February 10, 2025, at p. 3:8.) However, Dr. Israel could not confirm when these issues occurred or why they were not documented. Over multiple days of trial proceedings, defendant interposed no witness testimony independently confirming any other work performance issues or advice to applicant regarding those alleged issues. Medical director Dr. Israel testified that any documentation of job performance issues would have been the responsibility of applicant's supervisor, Mr. Okhanes. However, Mr. Okhanes did not testify in these proceedings. Dr. Israel could not confirm whether Mr. Okhanes ever communicated any perceived deficiencies to applicant. (Minutes of Hearing and Summary of Evidence, dated February 10, 2025, at p. 5:13.) Human Resources director Deitra Barnett testified that she was not aware that the applicant was working with accommodations at the time of termination, and that she did not know why Mr. Okhanes was not present for applicant's termination. (*Id.* at p. 6:2.) Ms. Barnett testified that applicant's employment terminated because she was at the end of an emergency appointment, and acknowledged that the discharge form of February 1, 2017 was not signed and made no mention of job performance. (*Id.* at p. 7:9) None of the defense witnesses could independently verify that applicant's job performance failed to meet applicable standards, or that job performance was the reason for applicant's termination. Nor are we persuaded that Exhibit 25, an unsigned and unauthenticated handwritten list of job performance issues prepared only after applicant's industrial injury constitutes substantial evidence upon which we can base our decision. (Ex. 25, Handwritten Document, entitled "J. France," dated February 16, 2017 and January 27, 2017.) Accordingly, the evidentiary record offers no persuasive documentary evidence of poor work performance, or when any of the alleged deficiencies occurred, no testimony from applicant's supervisor, and no evidence in defendant's own termination paperwork that applicant was discharged for performance issues or what those issues were.

Decisions of the Appeals Board must be based on evidence admitted in the record. (*Hamilton v. Lockheed Corp.* (2001) 66 Cal.Comp.Cases 473 [2001 Cal. Wrk. Comp. LEXIS

4947] (Appeals Board en banc).) Moreover, the WCAB is empowered on reconsideration to resolve conflicts in the evidence, to make our own credibility determinations, and to reject the findings of the WCJ and enter our own findings on the basis of a review of the record. Nevertheless, any award, order, or decision of the Board must be supported by substantial evidence in the light of the entire record. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280–281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

Here, following our independent review of the entire record occasioned by applicant's petition, we are persuaded that defendant has not met its burden of establishing that good cause existed for applicant's termination on February 1, 2017. Given applicant's prima facie showing of a discriminatory termination arising out of her claim of workers' compensation benefits and defendant's failure to overcome its burden of establishing good cause for the termination, we conclude that the termination violated section 132a. As was the case in *Barns, supra*, the evidence established that defendant "permanently severed the employment relationship … before the injury was permanent and stable," and that "[w]ithout a showing by the employer of some compelling business necessity, such precipitous action must be deemed unwarranted." (*Barns, supra*, 216 Cal.App.3d 524, 535.)

Accordingly, we grant applicant's Petition, and as our Decision After Reconsideration, we will rescind the F&O and substitute new findings of fact in its place that find that defendant discharged applicant in violation of section 132a. We will further issue an award of corresponding statutory benefits.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the Findings and Award and Order dated March 24, 2025, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of March 24, 2025, is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Defendant Los Angeles Department of Water & Power's discharge of Jeannette France on February 1, 2017 violated Labor Code section 132a.
2. Pursuant to Labor Code section 132a, subdivision (1), applicant is entitled to increased compensation by one–half, up to $10,000, together with costs and expenses up to $250; reinstatement; and reimbursement for lost wages and work benefits.

AWARD

As against defendant Los Angeles Department of Water & Power, applicant Jeannette France is awarded increased compensation by one–half, up to $10,000, together with costs and expenses up to $250; reinstatement; and reimbursement for lost wages and work benefits, to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 18, 2025

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

JEANETTE FRANCE
HALLET, EMERICK, WELLS & SAREEN

SAR/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*