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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. 85 LA 520163

ERNEST WRIGHT,

*Applicant,*

vs.

SOUTHERN CALIFORNIA RAPID  
TRANSIT DISTRICT,  
Permissibly Self-Insured,

*Defendants,*

OPINION AND DECISION  
AFTER RECONSIDERATION

The Board previously granted reconsideration in this case to further study the facts and legal issue presented. The issue is whether an employer who terminated an injured worker pursuant to the terms of a collective bargaining agreement and later refused to "reinstate" him to the same employment acted in violation of Labor Code section 132a. We conclude that it did not.

The record reflects that applicant, a bus driver, began his employment with defendant in 1975. Thereafter, he sustained specific industrial injuries to his back in 1980, 1981, and 1983 and cumulative industrial injury to his back through the end of his employment. It appears that the last date applicant actually performed work for defendant was October 6, 1984.

On January 18, 1985, Dr. Hirabayashi, an orthopedist, reported that applicant's condition was permanent and stationary and that he was precluded from heavy lifting, frequent bending or stooping, and prolonged sitting in one position. Dr. Hirabayashi based his work restrictions on applicant's frequent history of

1 left radicular symptoms and CT scan findings showing a bulging  
2 disc at L4-L5. The doctor stated that if modified duties were not  
3 available within those work restrictions, applicant should be  
4 placed in vocational rehabilitation for a different occupation.

5 On February 25, 1985, applicant wrote to defendant's claims  
6 examiner and stated that he was "very anxious to get started in  
7 some type of rehabilitation program." He stated that "driving a  
8 bus would only cause me further pain, suffering and possibly  
9 surgery." Thereafter, applicant was placed in vocational rehabil-  
10 itation and trained as a microcomputer technician.

11 On October 14, 1985, Dr. Green, an orthopedist, reported that  
12 applicant continued to have low back pain, "mostly when sitting  
13 for longer than an hour." The doctor reported that applicant's  
14 complaints seemed to be related to the "long sitting required  
15 while he is in rehabilitation classes." However, the doctor  
16 stated that he would not consider restricting applicant from com-  
17 pleting his rehabilitation training, "since the job he will be  
18 trained to perform seems quite within his physical capabilities."  
19 Dr. Green reiterated that applicant's condition was permanent and  
20 stationary.

21 On May 22, 1986, Dr. Hirabayashi reported that applicant had  
22 completed his rehabilitation training and was awaiting a job open-  
23 ing. The doctor reported that applicant complained of  
24 "intermittent tingling of the entire left lower extremity after  
25 sitting for about 20 to 30 minutes." The doctor stated that  
26 applicant's condition remained permanent and stationary and that  
27 his continuing symptoms were compatible with his positive CT scan

1 findings. The doctor repeated applicant's work restrictions and  
2 specifically stated that "he is unable to return to work as a bus  
3 driver."

4 On November 29, 1986, defendant terminated applicant's  
5 employment pursuant to the terms of the collective bargaining  
6 agreement between defendant and applicant's union. Although the  
7 union contract is not in evidence, it apparently provided for  
8 termination when a driver has been off work for more than two  
9 years.

10 On January 26, 1987, applicant, who was represented by an  
11 attorney, executed a compromise and release of his workers' com-  
12 pensation cases. The agreement recited that applicant discharged  
13 defendant from all claims and causes of action arising from his  
14 industrial injuries. The agreement further specified that the  
15 settlement "adequately compensates the applicant for all time off  
16 work as a result of these injuries to the date of the order  
17 approving." The joint compromise and release was approved on  
18 March 12, 1987.

19 In April 1987, applicant had a further episode of back pain  
20 while lifting boxes and moving furniture. He received two injec-  
21 tions in the back and his complaints apparently went away.

22 On or about August 1, 1987, according to applicant, he  
23 "recovered" from his injuries sufficiently to be able to return to  
24 work as a bus driver. Applicant testified that he advised defen-  
25 dant at that time of his ability to return to work and was  
26 directed to seek the advice of his union. Applicant did not  
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1 provide any medical evidence at that time of any change in his  
2 condition.

3 On November 25, 1987, applicant filed a petition for rein-  
4 statement and other benefits because of defendant's alleged viola-  
5 tion of Labor code section 132a. The petition alleged that defen-  
6 dant discriminated against him "in terminating petitioner on  
7 November 29, 1986 and in refusing petitioner to return to work  
8 after his recovery." At the time this petition was filed, appli-  
9 cant still had provided no medical evidence that he might be able  
10 to return to work as a bus driver.

11 On December 16, 1987, Dr. Andersen, an internist at Kaiser  
12 Foundation Hospitals, submitted a one page report which stated  
13 that it was his feeling that applicant's back problems "have com-  
14 pletely resolved" and that applicant "is able to perform any type  
15 of work that is necessary at this time." There is no indication  
16 whether Dr. Andersen had a complete history of applicant's work  
17 injuries or that he reviewed all of the pertinent medical records,  
18 including applicant's CT scan findings and the orthopedic reports  
19 of Dr. Hirabayashi and Dr. Green.

20 It is unclear when defendant was provided with a copy of Dr.  
21 Andersen's report. However, defendant did not pursue further  
22 medical investigation, nor did they rehire applicant based on Dr.  
23 Andersen's report.

24 On February 23, 1990, hearing was held on applicant's dis-  
25 crimination claim and it was stipulated that he was "by all  
26 accounts unable to return to work as of November 29, 1986, the  
27 date on which he was terminated from his employment pursuant to

1 the two-year off-work terms of his then pertaining collective  
2 bargaining agreement." Brief testimony was received at that hear-  
3 ing from applicant and Marlene Allen, a workers' compensation  
4 specialist with defendant employer. Ms. Allen testified that she  
5 was aware of five cases in which injured employees terminated  
6 pursuant to the collective bargaining agreement had been rein-  
7 stated by defendant in their employment. She stated that in three  
8 cases the reinstatement had been pursuant to Board order. In one  
9 case, the reinstatement was "in lieu of vocational rehabilita-  
10 tion." In the fifth case, the reinstatement was characterized as  
11 "a mistake." Ms. Allen also testified that she had never seen Dr.  
12 Andersen's report, but even if she had seen it, "policy resisted  
13 reinstatement in circumstances such as those pertaining here."

14 On June 20, 1990, workers' compensation judge (WCJ) Sosna  
15 issued a decision which found that defendant had acted in viola-  
16 tion of Labor Code section 132a and ordered that applicant be  
17 reinstated to regular duties as a bus driver. In his opinion on  
18 decision, the WCJ stated that he was "at something of a loss to  
19 understand the reason for the greatly surprising amelioration" of  
20 applicant's back condition between November 29, 1986, when he was  
21 terminated, and December 16, 1987, when Dr. Andersen submitted his  
22 report. However, the WCJ added that "at the very least defendant  
23 should have begun investigating the request to return to work of  
24 August 1, 1987," and that as of December 16, 1987, "evidence  
25 supported the proposition that [applicant] was able to return to  
26 regular duties." Based on this, the WCJ concluded that defendant

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1 had discriminated against applicant in violation of Labor Code  
2 section 132a.

3 In its petition for reconsideration, defendant contended (1)  
4 that Labor Code section 132a does not require an employer to hold  
5 open an injured worker's job indefinitely, (2) that the termina-  
6 tion of applicant's employment was non-discriminatory, (3) that no  
7 employment relationship existed at the time defendant allegedly  
8 failed to reinstate applicant, and (4) that applicant did not  
9 obtain a medical report releasing him to return to work until  
10 after the filing of his Labor Code section 132a petition.

11 The first two arguments noted above relate to the question of  
12 whether it was proper for defendant to terminate applicant's  
13 employment in the first place. In that regard, it is undisputed  
14 that applicant was terminated in accordance with the terms of the  
15 collective bargaining agreement. Also, it was stipulated that at  
16 the time of termination applicant "was by all accounts unable to  
17 return to work." However, the inquiry into possible employer dis-  
18 crimination does not end with that.

19 In Judson Steel Corp. v. Workers' Comp. Appeals Bd. (Maese)  
20 (1978), 22 Cal.3d 658, 43 Cal. Comp. Cases 1205, the Supreme Court  
21 stated that "an employer may not defend a discriminatory employ-  
22 ment practice, proscribed by section 132a, on the basis of the  
23 provisions of a collective bargaining agreement, for a union may  
24 no more bargain away its members' statutory rights against  
25 discrimination under the workers' compensation laws than it may  
26 bargain away its members' statutory rights against, for example,  
27 sexual or racial discrimination." In that case, there was uncon-

1 | troverted evidence that, despite the terms of the union contract,  
2 | it was "standard procedure" between the company and the union to  
3 | extend the time for absence from work without loss of seniority in  
4 | cases of compensable illness or injury. In upholding the Board's  
5 | finding of employer discrimination, the court concluded there was  
6 | substantial evidence that the employer "was not compelled to  
7 | terminate applicant's seniority rights, and instead eschewed its  
8 | own standard procedure for safeguarding absent employees' accumu-  
9 | lated seniority." However, in the present case, there is no  
10 | substantial evidence that the "standard procedure" was different  
11 | from that set forth in the bargaining agreement.

12 |       In Judson Steel, the court emphasized that its holding "in no  
13 | way mandates that an employer retain all employees who sustained  
14 | injuries on the job." Section 132a, the court said, "does not  
15 | compel an employer to ignore the realities of doing business by  
16 | 'reemploying' unqualified employees or employees for whom  
17 | positions are no longer available." Based on this "business  
18 | realities" exception, the court of appeal, in Western Electric  
19 | Company v. Workers' Comp. Appeals Bd. (Smith) (1979), 99  
20 | Cal.App.3d 629, 44 Cal. Comp. Cases 1145, indicated that an  
21 | employer could lawfully discharge an employee where there was no  
22 | work available which the employee could perform without the risk  
23 | of either re-injury or further injury. Likewise, in Jordan v.  
24 | Workers' Comp. Appeals Bd. (1985), 175 Cal.App.3d 162, 50 Cal.  
25 | Comp. Cases 688, the court of appeal affirmed the Board's finding  
26 | of no employer discrimination in a case where the employee was  
27 | terminated 18 months after her last day of work pursuant to the

1 terms of the collective bargaining agreement governing her  
2 position.

3 In contrast, the court of appeal found a discriminatory  
4 termination in Barns v. Workers' Comp. Appeals Bd. (1989), 216  
5 Cal.App.3d 524, 54 Cal. Comp. Cases 433. In that case, Arcata  
6 Redwood Company terminated Barns "only eight months after the  
7 injury occurred, at a time when Barns was still showing improve-  
8 ment and his injury had not been declared permanent and stable."  
9 Noting that "the employer permanently severed the employment rela-  
10 tionship some five months before the injury was permanent and  
11 stable," the court concluded that "without a showing by the  
12 employer of some compelling business necessity, such precipitous  
13 action must be deemed unwarranted."

14 In the present case, in light of the facts that (1) applicant  
15 had been off work more than 24 months, (2) all doctors stated his  
16 condition was permanent and stationary and that he should not  
17 return to bus driving work, (3) he had completed vocational  
18 retraining to a totally different occupation, and (4) he had  
19 advised the employer that "driving a bus would only cause me  
20 further pain, suffering and possible surgery," it appears to us  
21 that defendant's action in terminating applicant's employment in  
22 accordance with the terms of the union contract was reasonable and  
23 necessary under the circumstances and not in violation of Labor  
24 Code section 132a. In this connection, it is noteworthy that  
25 applicant executed a compromise and release agreement two months  
26 after his termination wherein he discharged defendant "from all  
27 claims and causes of action" arising from his industrial injuries.

1 He also agreed that the settlement adequately compensated him for  
2 all time off work as a result of his injuries. Applicant's later  
3 claim of discriminatory termination would appear inconsistent with  
4 those agreements.

5 The next question is whether defendant discriminated against  
6 applicant when it refused to "reinstate" him. The case defendant  
7 primarily relies on is City of Anaheim v. Workers' Comp. Appeals  
8 Bd. (Brazz) (1981), 124 Cal.App.3d 609, 46 Cal. Comp. Cases 1264.  
9 In that case, the worker resigned his employment with the city  
10 following his industrial injury and then became employed by a  
11 water company. Thereafter, the risk manager for the city  
12 suggested to the water company that it should discharge the worker  
13 from employment before it experienced the same trouble the city  
14 had. The water company did not discharge the worker, however, and  
15 he suffered no loss of employment or other adverse consequence as  
16 a result of what the risk manager had said. In reversing the  
17 Board's finding that the employer had violated section 132a, the  
18 court of appeal stated as follows:

19 "Applicant urges that the words 'employer' and  
20 'employee' as used in section 132a must at a  
21 minimum encompass those employers and  
22 employees who had an employment relationship  
23 at the time of the industrial injury, regard-  
24 less of whether there was an employment rela-  
25 tionship at the time of the discriminatory  
26 act. Not so. The principal remedies provided  
27 by the statute, aside from the serious and  
wilful penalty, are reinstatement and recovery  
of lost wages and employee benefits, necessar-  
ily implying an employer-employee relationship  
at the time of discharge or other act of dis-  
crimination. Moreover the statute specifies  
its own period of limitations: '[S]uch pro-  
ceedings may not be commenced more than one  
year from the discriminatory act or date of  
termination of the employee' (Emphasis added.)

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1 Clearly the statute contemplates an employer-  
2 employee relationship at the time of the dis-  
charge, threat of discharge or other discrimi-  
natory act.

3 \* \* \*

4 "...[H]ere there is no question but that the  
5 conduct found by the Board would be discrimi-  
6 natory within the meaning of the statute; the  
7 question is whether the statute applies to  
such conduct toward a nonemployee (former  
employee) by a nonemployer (former employer).  
The language of the statute, as we have seen,  
supplies the answer."

8  
9 Based on the above-quoted case, defendant contends that since  
10 applicant was not an employee of defendant at the time he was  
11 denied reinstatement, defendant's refusal to reinstate him cannot  
12 be considered a violation of section 132a.

13 Apart from the City of Anaheim case, there is language in  
14 other appellate court opinions which indicates that, under certain  
15 circumstances, refusal to reinstate a former injured employee may  
16 be a violation of section 132a. In Jordan, supra, the court of  
17 appeal stated that "if and when petitioner regains the ability to  
18 perform her regular job and seeks reinstatement, respondent's  
19 conduct at that time can be tested against section 132a and the  
20 precepts of Judson." Similarly, in Barns, supra, the court of  
21 appeal stated that "an employer's refusal to reinstate an injured  
22 worker to an available position may be justified as a business  
23 necessity if it appears that, at the time reinstatement is sought,  
24 the employer reasonably believes the worker is unable to perform  
25 the duties of the position without undue risk of reinjury."  
26 (Emphasis by the court.) Finally, in Morehouse v. Workers' Comp.  
27 Appeals Bd. (1984), 154 Cal.App.3d 323, 49 Cal. Comp. Cases 313,

1 the court of appeal found that Goodyear Tire & Rubber Company had  
2 discriminated against an injured employee who had been "laid off"  
3 when Goodyear closed its Los Angeles plant. When Morehouse  
4 requested preferential rehiring, he was told that it was against  
5 company policy to rehire anyone who had an industrial injury claim  
6 against Goodyear. The court stated that "Goodyear engaged in a  
7 discriminatory act within the meaning of section 132a by refusing  
8 to rehire on the grounds of Morehouse's industrial injury claim  
9 against the company." The court avoided a conflict with the City  
10 of Anaheim case by finding that an employee who had been "laid  
11 off" was still an employee within the meaning of section 132a when  
12 the discriminatory act occurred.

13 In addition to the foregoing appellate opinions, we are aware  
14 of two reported Board decisions involving the employer herein in  
15 which no violations of section 132a were found and appellate  
16 review was denied. In Coghill v. Workers' Comp. Appeals Bd.  
17 (1986), 51 Cal.Comp.Cases 141, the injured worker had been termi-  
18 nated in November 1982 pursuant to the terms of the collective  
19 bargaining agreement after being off work more than two years. In  
20 December 1982, he obtained a doctor's release which stated that he  
21 could return to his normal employment and had no restrictions.  
22 When defendant did not rehire him at that time, he filed a peti-  
23 tion for increased benefits alleging violation of section 132a.  
24 In its decision, the Board, obviously relying on the City of  
25 Anaheim case, stated that there had been no violation of section  
26 132a because there was no employer-employee relationship at the  
27 time of alleged discrimination. In addition, the Board stated

1 that the presentation of a conclusionary work release did not pre-  
2 cipitate a duty on defendant's part to rehire Coghill or schedule  
3 a medical examination. Thereafter, the court of appeal and  
4 Supreme Court both denied review of the Board's decision.

5 Similarly, in Martin aka Necita v. Workers' Comp. Appeals Bd.  
6 (1989), 54 Cal.Comp.Cases 184, the worker had been terminated in  
7 November 1983 pursuant to the terms of her collective bargaining  
8 agreement because she had been off work for more than two years  
9 and was unable to return to her duties as a bus driver. In  
10 October 1986, after completing rehabilitation, she requested rein-  
11 statement as a bus driver, contending that she was able to return  
12 to her duties. When defendant did not rehire her, she filed a  
13 petition for increased benefits alleging employer discrimination.  
14 In denying her petition, the Board stated that because Martin's  
15 original termination was nondiscriminatory, she was not an  
16 employee when she requested reinstatement and the sanctions of  
17 section 132a were not applicable. Subsequently, the court of  
18 appeal and Supreme Court both denied review of the Board's  
19 decision.

20 Reviewing the present case in light of these legal authori-  
21 ties, we conclude that defendant employer did not violate section  
22 132a when it refused to "reinstate" applicant's employment in the  
23 latter part of 1987. As stated earlier, the termination of appli-  
24 cant's employment in November 1986 in accordance with terms of the  
25 union contract was reasonable under the circumstances and nondis-  
26 criminatory. Following that termination, applicant no longer was  
27 an employee of defendant. Therefore, based upon the City of

1 Anaheim case, defendant cannot be held liable under section 132a  
2 for its post-employment decision not to rehire applicant.  
3 Furthermore, even if the City of Anaheim case was determined to  
4 not be controlling, the combination of that case and the Coghill  
5 and Martin cases would still give defendant employer reasonable  
6 legal basis for believing that its refusal to rehire applicant was  
7 lawful. (Cf. Kerley v. Workmen's Comp. Appeals Bd. (1971), 4  
8 Cal.3d 223, 230, 36 Cal. Comp.Cases 152, 157.)

9 In addition, given (1) applicant's prior CT scan findings  
10 showing a bulging disc at L4-L5, (2) the orthopedic opinions of  
11 Dr. Hirabayashi and Dr. Green that applicant should not return to  
12 bus driving work, and (3) applicant's own statement that driving a  
13 bus would only cause him further pain, suffering and possible  
14 surgery, it is doubtful that a prudent employer would be obliged  
15 to rehire applicant. This is particularly so where the medical  
16 opinion finally submitted was not from the orthopedists who had  
17 examined and treated him previously, but rather was a brief, con-  
18 clusionary report from an internist who gave no indication that he  
19 had a complete history of applicant's work injuries or access to  
20 all of the pertinent medical records. Moreover, that report was  
21 no obtained until after applicant had filed his section 132a  
22 claim. Under the circumstances, we do not believe that applicant  
23 has made a valid legal or factual showing of employer discrimina-  
24 tion in violation of section 132a.

25 For the foregoing reasons,

26 IT IS ORDERED that the Findings and Order filed herein on  
27 June 20, 1990, be, and the same is hereby, RESCINDED and the

1 following is SUBSTITUTED in lieu thereof as the decision after  
2 reconsideration of the Workers' Compensation Appeals Board:

3 FINDING OF FACT

4 Defendant did not discriminate against applicant because of  
5 his industrial injury in violation of Labor Code section 132a.

6 ORDER

7 IT IS ORDERED that applicant's petition for reinstatement,  
8 reimbursement of lost wages and work benefits and increased  
9 workers' compensation benefits be, and the same is hereby, DENIED.

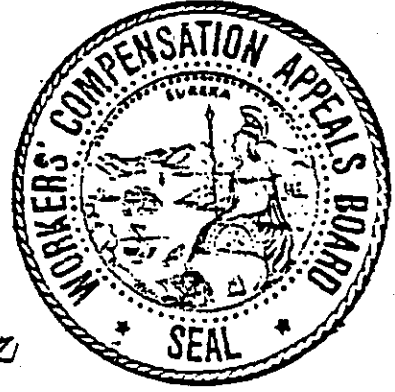
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11 WORKERS' COMPENSATION APPEALS BOARD

12  
13 John A. Oka

14 I CONCUR,

15 Dennis J. Hannigan  
16 ~~NOT PARTICIPATING~~

17  
18 Dennis J. Hannigan DEPUTY



19 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

20 MAY 15 1992 Juste C. Alexander

21 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES  
22 LISTED ON THE OFFICIAL ADDRESS RECORD.

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