

INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS

FROM: W. JOSEPH TRUCE

DATE: August 3, 2004

RE: **LABOR CODE SECTION 132a - DOES THE EMPLOYER HAVE A LEGAL DUTY TO CREATE A MODIFIED JOB TO ACCOMMODATE A WORKER'S DISABILITY?**

The Court of Appeal in the case of Silgan Containers Corporation v. WCAB answered the above question with a resounding "no." ¹

In Silgan, the Court of Appeal reversed a decision by the Appeals Board awarding a penalty pursuant to Labor Code §132a to a can plant worker who was terminated because his medical restrictions limited him to a light duty position.

It apparently was undisputed in this case that the applicant could not return to his pre-injury job as a can plant inspector due to his work restrictions.

In finding a violation of Labor Code §132a, the Board found that the employer should have given the applicant a permanent light duty position which accommodated his work restrictions.

In reversing the Board, the Court of Appeal stated as follows:

"...the statute does not mandate that an employer keep all workers injured on the job, re-employed unqualified workers or those for whom no position exists. The key questions are whether the worker is competent to perform the job despite the injury and whether their former job is open on his or her return..."

In noting the applicant's argument that the employer was required to create a modified permanent position, the court noted as follows:

"Applicant argues that he is entitled to keep working in that capacity but had not provided authority that the employer was required to change

¹The case of Silgan Containers Corporation v. WCAB (Shelton) Court of Appeal, 5th Appellate District, May 25, 2004 is reported at 32 CWCR 125. Unfortunately, the court's decision was certified for non-publication.

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the former job duties to accommodate his disability after it became permanent and stationary. In fact, an employer has no such duty, observed the court, citing Gilbert v. WCAB (1996) 60 CCC 703 (writ denied), Cook v. WCAB (1990) 55 CCC 94 (writ denied), and Dutal v. WCAB (1988) 53 CCC 136 (writ denied)...”²

In this case, the court addressed the reoccurring issue of whether or not the employer is required to “create” a modified and/or light duty position where an injured worker is unable to return to his pre-injury job. Although the court ruled in favor of the employer in this case, the decision is certified for **non-publication** meaning that the case cannot be cited as authority.

However, please note that the court refers to several writ denied cases (as noted above) and these cases can be cited to the court pursuant to the authority of the Court of Appeal in Wings West Airlines v. WCAB (1986) 187 Cal. App. 3rd 1047 (footnote on page 1053) 51 CCC 609.

WJT/tmm

²This is limited to 132(a) actions only and does not apply to other Federal or State laws, such as the ADA or Fair Employment Housing Act.