WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EHSAN ALNIMRI, *Applicant,* **vs.** **SOUTHWEST AIRLINES; ACE INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES,** ***Defendants.***	**Case No. ADJ7437447** **ADJ7437413** **(Los Angeles District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration[1].

Defendant seeks reconsideration of the Findings, Award and Orders/Opinion on Decision (FA&O) issued on December 15, 2014, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that defendant discriminated against applicant in violation of Labor Code[2] section 132a by dismissing him for the period from November 26, 2011 until June 20, 2012; that there is insufficient evidence to establish the amount of pay, retirement credit and benefits to which applicant is entitled; and that applicant is entitled to recover a $10,000.00 penalty. The WCJ awarded applicant the $10,000.00 penalty, less credit for attorneys' fees withheld, and ordered the parties to adjust the pay and benefits due applicant for the period from November 26, 2011 until June 20, 2012.

Defendant contends that (1) applicant presented insufficient evidence to establish that it subjected him to disadvantages not visited upon other employees because they were injured; (2) the WCJ erred in finding that defendant failed to follow its own procedures; (3) defendant justifiably relied upon Dr. Wakim's PQME report dated October 20, 2011; (4) defendant was not legally obligated to conduct an

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[1] Commissioners Frank M. Brass and Chairwoman Ronnie G. Caplane no longer serve on the Appeals Board; other panelists were substituted in their place.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

investigation before dismissing applicant; and (5) the WCJ erroneously weighed the deposition testimony of Dr. Wakim and improperly relied upon Dr. Sobol's medical opinion.[3]

We received an answer from applicant.

The WCJ filed a Report and Recommendation on Reconsideration (Report) recommending that we grant the Petition to correct the case number under which the FA&O was issued and otherwise deny the Petition on the grounds that applicant presented sufficient evidence to establish the elements of his section 132a claim.[4]

Defendant filed a request for leave to file a supplemental petition. We approve the request, and accept defendant's supplemental petition. (Cal. Code Regs., tit. 8, § 10848.)

We have considered the allegations of the Petition, the Answer, the contents of the Report, and defendant's Supplemental Petition. Based on our review of the record, and for the reasons stated below, we will affirm the FA&O, except that we will amend to correct the record that it was issued in case number ADJ7437447.

FACTUAL BACKGROUND

On June 20, 2010, while employed by defendant as a ramp agent, applicant sustained injury to his low back.

On August 8, 2013, the parties resolved the case in chief by Stipulations with Request for Award.

On September 16, 2014 and November 19, 2014, the matter proceeded to trial as to applicant's 132a petition. (Minutes of Hearing and Summary of Evidence, September 16, 2014, p. 2:19; Further Minutes of Hearing and Summary of Evidence, November 19, 2014, p. 1.)

The WCJ admitted the treating physician's report of Dr. Sobol dated October 20, 2011, the PQME report of Dr. Wakim dated October 20, 2011, and the deposition of Dr. Wakim dated January 23,

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[3] The Petition for Reconsideration does not argue that the evidence in the record establishes defendant's affirmative defense of business necessity.

[4] The FA&O was erroneously issued under case number ADJ7437413 instead of case number ADJ743447. (Report, p. 2., fn. 1.) The Appeals Board may correct a clerical error at any time without the need for further hearings. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543 [47 Cal.Comp.Cases 145, 154–155].)

2013, into evidence. (Ex. 3, Report of Dr. Sobol, October 20, 2011; Ex. D, Report of Dr. Wakim, October 20, 2011; Ex. A, Deposition of Dr. Wakim, January 23, 2013.)

Dr. Sobol's report states as follows:

> On September 7, 2011, the patient was returned to work at his usual and customary duties.
> He reported that his low back symptoms had returned to their prior levels . . .
> (Ex. 3, Report of Dr. Sobol, October 20, 2011, p. 5.)
> . . .
> Currently, [applicant] is performing his usual and customary duties as a ramp agent with [defendant], without apparent adverse effect and desires to continue in this capacity. It is felt that he is physically capable of continuing his current work activities.
> (*Id.*, p. 16.)

A copy of Dr. Sobol's report was mailed to defendant. (*Id.*, p. 18.)

Dr. Wakim's report states as follows:

> [Applicant] is currently working full-time with full duties for the same employer. He states he works with some pain because if he is placed on any restriction, his employer will take him off work.
> (Ex. D, Report of Dr. Wakim, October 20, 2011, 3, 4, 30.)
> . . .
> [Applicant] is precluded from very heavy lifting on the house [sic] on a constant basis and 70 lbs. [on] an occasional basis and no repetitive squatting.
> (*Id.*, p. 31.)

In deposition, Dr. Wakim testified that he examined applicant on May 23, 2012, and released him to return to work as a ramp agent. (Ex. A, Deposition of Dr. Wakim, January 23, 2013, pp. 20:24-21:4.) Dr. Wakim further testified that he deemed applicant able to work, but opined that he should not frequently lift 70 pounds or more. (*Id.*, pp. 21:5-23:16.)

At trial, applicant testified that he has been employed by defendant since 2001, working at its Ontario station since 2006. (Minutes of Hearing and Summary of Evidence, September 16, 2014, p. 10:13-14.) In October 2011, following treatment for his low back injury, Dr. Sobol released him to work without medical restrictions. (*Id.*, p. 11:14-16.) He provided the release to his supervisor, acting administrative supervisor Trent Buckman, and returned to work full time, with no lost time from work due to the discomfort in his back. (*Id.*, p. 11:16-17.) After Thanksgiving, however, Mr. Buckman advised him that he had been medically restricted from working. (*Id.*, p. 11:18-19.) He responded that he was unaware of any medical restrictions, but Mr. Buckman dismissed him. (*Id.*, p. 11:19-20.)

Applicant later learned from headquarters, in Dallas, Texas, that he had been placed on defendant's injury list, and he lost time at work from November 26, 2011 until June 19, 2012, when he returned to work without restrictions. (*Id.*, pp. 11:21-23, 12:17-18.) Defendant did not interview him about his ability to do his job, and he did not understand why he was off work until he received Dr. Wakim's report. (*Id.*, p. 12:4-6.)

Mr. Buckman testified that he was not aware of a conflict regarding whether applicant should be medically restricted from work, and did not ask applicant about the conflict, contact applicant's union, or offer a compromise allowing applicant to work pending resolution of the conflict. (Further Minutes of Hearing and Summary of Evidence, November 19, 2014, p. 5:15-19.) He further testified, however, that when he did know of such a conflict, he would make "Bruce and headquarters" aware of the situation. (*Id.*, p. 5:22-23.) He also testified that the essential job functions of a ramp worker include repetitive lifting of up to 70 pounds. (*Id.*, p. 3:24.)

Bruce Atlas, defendant's Ontario station manager, testified that it was not his job to resolve conflicts between work status reports, and when he became aware of the conflict in applicant's case he referred it to Ralph Barhan, in Dallas, Texas, for resolution. (*Id.*, pp. 6:22-7:3.) He understands that Mr. Barhan decided that applicant would be referred to a company physician for determination of the issue, but does not know whether applicant was ever examined by a company physician. (*Id.*, p. 7:4-5.)

In his Report, the WCJ states:

> On 20 October 2011 . . . Dr. Sobol issued findings . . . with no work restrictions . . . Dr. Wakim . . . found work restrictions . . .
>
> Subsequent to these conflicting reports, . . . applicant was informed that he was being removed from duty due to a doctor's report. Applicant was apparently not told which doctors report and was initially unaware of the basis for being taken off the job.
> (Report, pp. 2-3.)
>
> Mr. Bruce Atlas, a manager testified . . . [that he] referred the conflicting doctors' notes form October 2011 to Mr. Ralph Barhan at the Dallas headquarters for resolution. Mr. Atlas testified that he thought [applicant] would be referred to a company doctor to resolve this conflict between the doctor's notes. No evidence exists that applicant was ever referred to a company doctor. It appears instead that he was "pulled" from his job . . . without resolving this conflict . . .
> (Report, p. 4.)

DISCUSSION

Under 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* (1998) 18 Cal.4th 1143 [63 Cal.Comp.Cases 944] (*Moorpark*); *Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (1978) 22 Cal.3d 658 [43 Cal.Comp.Cases 1205]; *Department of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281, 1298-1299 [68 Cal.Comp.Cases 831]; *Smith v. Workers' Comp Appeals Bd.* (1984) 152 Cal.App.3d 1104, 1109 [49 Cal.Comp.Cases 212] (*Smith*); see *Usher v. American Airlines, Inc.* (1993) 20 Cal.App.4th 1520, 1526 [58 Cal.Comp.Cases 813].)

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... may be guilty of a misdemeanor and responsible for the payment of increased compensation, costs, lost wages and work benefits to the injured employee.

This section 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." (*Lauher*, *supra*, 30 Cal.4th at pp. 1298-1299 [citations omitted].)

In *Lauher*, the Supreme Court clarified its definition for "discrimination," noting that in its previous decisions in *Smith*, *supra* and *Barns v. Workers' Comp. Appeals Bd.* (1989) 216 Cal.App.3d 524, the Court held that an employer's action which caused detriment to the employee because of an industrial injury was sufficient to show a violation of the statute. (*Lauher, supra,* 30 Cal.4th at p. 1299 quoting [1 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (rev. 2d ed., Peterson et al. edits, 2002)], § 10.11[1], p. 10-20 ["[t]he critical question is whether the employer's action caused detriment to an industrially injured employee"]; see *Barns, supra*, 216 Cal.App.3d at p. 531.)

The *Lauher* court noted with approval the Court of Appeal's finding that the formulation enunciated in *Smith v. Workers' Comp. Appeals Bd.* (1984) 152 Cal.App.3rd 1104, and adopted by *Barns* to establish a prima facie case was "analytically incomplete:"

> The court explained that, although Lauher had clearly suffered a detriment by having to use his accumulated sick leave and vacation time for his visits to see Dr. Houts, he never established he 'had a legal right to receive TDI [temporary disability indemnity] and retain his accrued sick leave and vacation time, and that [his employer] had a corresponding legal duty to pay TDI and refrain from docking the sick leave and vacation time.' Thus, said the court, '[t]o 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.*' " (*Lauher, supra*, 30 Cal.4th at pp. 1299-1300, italics added.)

The Court further agreed with the Court of Appeal that "[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 that the Legislature meant to prohibit treating injured employees differently, making them subject to disadvantages not visited on other employees because the employee was injured or had made a claim." (*Lauher, supra* at p. 1300.)

As the *Lauher* court determined in the first part of its decision, the employee was no longer entitled to temporary disability indemnity (TDI) because his condition was permanent and stationary. (*Lauher, supra* at p. 1297.) Therefore, even though the employee's use of sick and vacation leave was for medical treatment and time off due to his industrial disability, because he was not entitled to TDI, the employee was treated in the same way as non-industrially disabled workers who were also required to use sick and vacation leave for medical treatment and time off due to a disability. Because the employee in *Lauher* was in the same position as non-industrially injured employees with respect to this issue, he could not show a legal right to TDI, and therefore could have only established a prima facie case for discrimination if he had been "singled out for disadvantageous treatment." (*Id.* at p. 1301; *Accord, Gelson's Markets, Inc. v. Workers' Comp. Appeals Bd.* (2009), 74 Cal.Comp.Cases 1313, *County of San Luis Obispo v. Workers' Comp. Appeals Bd.* (2005)133 Cal.App.4th 641 *(Martinez)*; Compare with *San*

Diego Transit, PSI, Hazelrigg Risk Management Services, Administrator, Petitioners v. Workers' Compensation Appeals Board (2006) 71 [Cal.Comp.Cases] 445 (*Calloway*) [writ den.; defendant violated section 132a by refusing to return applicant to her bus driver position after she was released to work by her PTP, another treating physician and an AME.]).)

Based on its specific application to the facts of *Lauher*, we view the Court's phrase "singled out for disadvantageous treatment" to be an *application* of the broader standard adopted by *Lauher*—that, in addition to showing that he or she suffered an industrial injury and that he or she suffered some adverse consequences as a result of some action or inaction by the employer that was triggered by the industrial injury, an applicant "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." (*Lauher*, *supra* at p. 1300.) Stated another way, an employee must show they were subject to "disadvantages not visited on other employees because they were injured. . . ." (*Id.*) Because the employee in *Lauher* was not deprived of a legal right to TDI, and therefore could not show he was treated differently than other employees with respect to his alleged detriment, he could not establish a prima facie case of discrimination.[5]

In the present case, defendant argues that applicant presented insufficient evidence to establish that his dismissal during the period from November 26, 2011 until June 20, 2012, subjected him to disadvantages not visited upon other employees because they were injured. We disagree. In this regard, we note that the evidence shows that Dr. Sobol released applicant to work without restrictions on September 7, 2011, that applicant returned to full-time work in September or early October 2011, and that, even as applicant continued to perform his usual and customary duties, he underwent medical evaluations related to his case in chief performed by treating physician Dr. Sobol and PQME Dr. Wakim. (Ex. 3, Report of Dr. Sobol, October 20, 2011, p. 5; Minutes of Hearing and Summary of Evidence, September 16, 2014, p. 11:14-16; Ex. D, Report of Dr. Wakim, October 20, 2011, p. 1.)

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[5] We also note that the particular standard denoted by the phrase "singled out" does not literally apply where the detriment affects injured workers as a class, although the broader standard would apply. (*Anderson*, *supra* at pp. 1377-1378.)

However, the reports of Drs. Sobol and Wakim set forth opposing work status opinions. Dr. Sobol opined that applicant could continue to work without medical restrictions. (Ex. 3, Report of Dr. Sobol, October 20, 2011, p. 16.) Dr. Wakim opined that applicant was medically restricted from occasional lifting of 70 pounds, a restriction that when accepted by defendant would result in his dismissal. (Ex. D, Report of Dr. Wakim, October 20, 2011, 31; see Further Minutes of Hearing and Summary of Evidence, November 19, 2014, p. 3:24.) The evidence demonstrates the conflict presented by these work status reports was the type that defendant usually submitted to headquarters, where it would be evaluated and resolved.

Specifically, applicant's supervisor, Trent Buckman, testified that, though he was unaware of the conflict in this case, when he did know of conflicts between work status reports, he would notify "Bruce and headquarters." (Further Minutes of Hearing and Summary of Evidence, November 19, 2014, p. 5:22-23.) Further, Bruce Atlas, defendant's station manager, testified that he was made aware of the conflict in this case, and referred it to Ralph Barhan, in Dallas, Texas, i.e., headquarters, for resolution. (*Id.*, pp. 6:22-7:3.) He learned later that Mr. Barhan had decided that applicant would be referred to a company physician to resolve the conflict, but not whether applicant was actually examined by a company physician. (*Id.*, p. 7:4-5.)

Thus, on the record before us, including the absence of evidence that defendant acted upon its decision to refer applicant to a company physician or otherwise complete its usual process for resolving conflicts between work status reports before dismissing applicant, we conclude that defendant subjected applicant to disadvantages not visited upon other employees because they were injured. (See *Calloway, supra,* 71 Cal. Comp. Cases 445, 446-557, finding section 132a discrimination under *Lauher*, *supra*, where employer deviated from its usual procedure of returning injured workers to the job by disregarding medical reports releasing employee to work.) Accordingly, we concur with the opinion of the WCJ, as expressed in the Report, that applicant presented evidence sufficient to establish that defendant discriminated against him within the meaning of section 132a. (Report, p. 7.)

Having determined that applicant presented evidence sufficient to establish that defendant discriminated against him, we nevertheless address the merits of defendant's alternative arguments that

the WCJ erred in finding section 132a discrimination. In this regard, defendant first contends that the WCJ lacked an evidentiary basis to conclude that it failed to follow its own procedures. However, pursuant to the discussion above, we conclude that the evidence in the record demonstrates that defendant failed to follow its procedure for resolving conflicts between work status reports, and, more specifically, failed to act on its decision to refer applicant for examination by a company physician or otherwise complete its usual process for resolving conflicts between work status reports. Accordingly, we concur with the conclusion of the WCJ that defendant failed to follow its own procedures.

Defendant next contends that it justifiably relied upon Dr. Wakim's report dated October 20, 2011. However, pursuant to the discussion above, the evidence demonstrates that defendant did not rely upon Dr. Wakim's report, but recognized the conflict between it and Dr. Sobol's report. (Further Minutes of Hearing and Summary of Evidence, November 19, 2014, pp. 6:33-7:3.) The evidence further shows that defendant sought to resolve the conflict by submitting the issue to headquarters for resolution, but dismissed applicant without determining whether it could justifiably rely on Dr. Wakim's report. (*Id.*) Accordingly, we are unable to discern evidence in the record to support the contention that defendant dismissed applicant in reliance of Dr. Wakim's report.

Defendant next contends that because there is no statutory obligation for the employer to resolve disputes between a treating physician and a workers' compensation evaluator except as provided by the Labor Code, it was not legally obligated to investigate the issue of whether applicant should have been subject to medical restrictions. However, section 132a prohibits employers from discriminating against industrially injured employees by, among other things, unilaterally deciding to disregard medical reports releasing employees to work without restrictions. (See, e.g., *Calloway*, *supra*, 71 Cal.Comp.Cases 445, 451, finding section 132a discrimination where employer unilaterally decided that medical reports releasing employee to work did not constitute substantial evidence.) In this case, pursuant to the discussion above, defendant's dismissal of applicant without completing its process for resolving the conflict between work status reports constituted discrimination in violation of section 132a. Accordingly, we are unable to discern merit to the argument that defendant was under no obligation to

investigate the issue of whether applicant should have been subject to medical restrictions before dismissing him.

Lastly, defendant argues that the WCJ erroneously weighed Dr. Wakim's deposition testimony and improperly relied upon Dr. Sobol's report. Specifically, defendant contends that because Dr. Wakim testified that applicant should not frequently lift 70 pounds, and Dr. Sobol's report failed to evaluate whether applicant can meet this job requirement, applicant should be medically restricted from performing his job. However, pursuant to the discussion above, defendant's ex post facto evaluation of the merits of the doctors' work status reports can have no bearing on the issue of whether defendant's dismissal of applicant without actually having evaluated the reports was in violation of section 132a. Accordingly, we are unable to discern merit to defendant's arguments that the WCJ erroneously considered the evidence on which he based his finding that defendant discriminated against applicant in violation of section 132a.

Accordingly, we will affirm the FA&O, except that we will amend to correct the case number under which it was issued.

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For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award and Opinion on Decision issued on January 13, 2015, is **AFFIRMED, EXCEPT** that it is **AMENDED** to state that it was issued in case number ADJ7437447.

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

ANNE SCHMITZ

I CONCUR,

MARGUERITE SWEENEY

CHAIR

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUL 31 2019

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

EHSAN ALNIMRI
LAW OFFICES OF THIES & CONNOLLY
LAW OFFICES OF WILLIAMS BECK & FORBES

SRO/oo

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS
WORKERS' COMPENSATION APPEALS BOARD

CASE NOS.: ADJ7437447 & ADJ7437413

EHSAN ALNIMRI	*vs.*	**SOUTHWEST AIRLINES**
WORKERS' COMPENSATION JUDGE:		**ROGER A. TOLMAN, JR.**
DATES OF INJURY:		**20 June 2010 &** **15 February 2008**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

Defendant, SOUTHWEST AIRLINES, by and through their attorneys of record, has filed a timely Petition for Reconsideration challenging the Findings and Award & Orders of 15 December 2014. In it, Defendant challenges the finding that the employer violated Labor Code § 132a. To date, no Answer to the Petition for Reconsideration has been filed. However, Applicant's attorney did file a Trial Brief on 16 September 2014 which outline's Applicant's position.

It is recommended that reconsideration be granted to correct the case number appearing on the Findings, Award and Order from ADJ7437413 to ADJ7437447. Otherwise, it is recommended that reconsideration be denied.

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II.

FACTS

EHSAN ALNIMRI, born 19 December 1961, sustained an injury arising out of and in the course of his employment on 20 June 2010 to his low back in case number ADJ7437447.[1]

Applicant worked as a ramp agent at Ontario International Airport for SOUTHWEST AIRLINES. His job duties required frequent lifting and carrying of weights up to 70 pounds and testimony established that it occasionally involved lifting up to 100 pounds. Applicant sustained several injuries culminating in the specific injury of 20 June 2010. As a result, he was taken off work by his primary treating physician Dr. Sobol until September 2010 when he was returned to full duty. [Exhibit 14.] Applicant continued to work full duty without restriction until he was taken off the job on 26 November 2011. Defense witnesses admit that he continued to do his job and did not lose any time from work during the time period from September 2010 until 26 November 2011.

On 20 October 2011, Applicant went to both the final examination with Dr. Sobol [Exhibit 3] and to the examination with the panel qualified medical evaluator (PQME) Dr. Wakim [Exhibit D.] Dr. Sobol issued findings based on the AMA Guides of approximately 28 % but with no work restrictions appearing in the report. Dr. Wakim

[1] All five cases in applicant's name were set for trial but the parties elected to proceed only on ADJ7437447. Due to clerical error by this judge, the decision was issued in ADJ7427413 instead. The undersigned recommends that this be corrected by grant of reconsideration. See "Recommendation" infra, The pleadings and exhibits referenced in this Report & Recommendation appear in ADJ7437447.

found 14% impairment under the AMA Guides and found work restrictions which stated as follows:

> "This patient is precluded from very heavy lifting on the house (sic) on a constant basis and 70 pounds on an occasional basis." [Exhibit D at p. 31.]

Subsequent to these conflicting reports, an internal document dated 22 November 2011 entitled "Employee Referral Form" indicates that the company was referring the Applicant to "Career Transitions" and that the "Station will pull him off the job." It also indicates that the referral was made by Mr. David Banta.

On 26 November 2011, the applicant was informed that he was being removed from duty due to a doctor's report. Applicant was apparently not told which doctors report and was initially unaware of the basis for being taken off the job.

During the period off from work he applied for jobs through an internal job search department known as "Career Transitions." Witnesses described "Career Transitions" as a department of SOUTHWEST AIRLINES that helped workers find other jobs within SOUTHWEST AIRLINES. Applicant applied for several positions but was unsuccessful in obtaining another job within the company. He did not receive his full pay or health care benefits during this period.

During approximately the same time period, witnesses George Francescon and Reymond Paez were also ramp agents for SOUTHWEST AIRLINES who taken off work at the Ontario Airport location. However, both of these employees were provided alternative work through another internal company program known as the "Transitional

Duty" program. In this program, the worker is allowed to continue to work for the company at full pay while doing modified duty. Mr. Francescon was a ramp agent who was allowed to work with 50 lb. work restrictions instead of the usual 70 lb. work restriction for eight weeks. Mr. Paez did not use the program but was aware of it and confirmed its existence. Both of these witnesses admitted that the transitional duty program lasts only eight weeks and is only for persons with temporary work restrictions.

Applicant eventually obtained a supplemental report from Dr. Wakim which returned him to full duty as of 23 May 2012. [Exhibit B.] He actually returned to work on 20 June 2012.

On 23 January 2013, the parties took the deposition of Dr. Wakim who defended his return of the Applicant to full duty. However, Dr. Wakim admitted Applicant should not lift over 70 lbs and only occasionally lift 70 lbs. [Exhibit A, p. 10.]

At the end of the trial in this matter, Mr. Bruce Atlas, a manager testified during part 2 of the trial. As recorded in the Minutes of Hearing for 19 November 2014 on p. 7 lines 1 – 9, Mr. Atlas referred the conflicting doctors' notes from October 2011 to Mr. Ralph Barhan at the Dallas headquarters for the company for resolution. Mr. Atlas testified that he thought Mr. ALNIMRI would be referred to a company doctor to resolve this conflict between the doctor's notes. No evidence exists that applicant was ever referred to a company doctor. It appears instead that he was "pulled" from his job and referred to Career Transitions without resolving this conflict and without clarification as to what Dr. Wakim's work restriction meant.

The witnesses for defense confirmed the essentials of the above descriptions of the "Carrier Transitions" program and the Transitional Duty program. Interestingly, they also confirmed what Mr. Paez and Mr. Francescon said, that only those without work restrictions qualified for transitional duty. See testimony of Trent Buckman on 19 November 2014 p. 4, lines 18 – 20 and testimony of Bruce Atlas on 19 November 2014 p. 6, lines 21 – 22. While Dr. Wakim discusses the essential job functions in his deposition, the witnesses from SOUTHWEST AIRLINES noted that transitional duty was denied if there was any permanent work restriction.

III.

DISCUSSION

Defendant, SOUTHWEST AIRLINES, makes six arguments in its Petition. First, they argue that the Applicant failed to establish a prima facie case of discrimination. Second, they argue that the undersigned based a finding that SOUTHWEST AIRLINES failed to follow its own procedures based on conjecture or surmise. Third, Defendant argues that defendant justifiably relied on the unchallenged opinion of Dr. Wakim. Fourth, Defendant argues that the judge's conclusion that Applicant was removed from his job without investigation or allowing Applicant to respond. Fifth, did the undersigned isolate portions of Dr. Wakim's report and fail to consider other portions of Dr. Wakim's report. Lastly, Defendant argues that Dr. Sobol demonstrated no knowledge of the essential job functions of a ramp agent and so the report was not substantial evidence.

With respect to the first Argument, the Applicant did establish a prima facie case of discrimination. As the Appeals Board is well aware, to prevail on a Labor Code § 132a Petition, the Applicant must first prove discrimination. To do that he has to prove that he must prove that he was treated differently than other workers and that this treatment was a result of filing a claim, an application, receiving a rating or a settlement. See Labor Code § 132a(1.) Since the Applicant had no differential treatment after filing the claim and the application and since the events complained of occurred before the Stipulation with Request for Award was entered into in August of 2013, the focus of this discrimination claim stems from the receipt of ratable reports from Drs. Wakim and Sobol. As noted above, Dr. Sobol's report rated 28% without work restrictions while Dr. Wakim's report rated 14% but with work restrictions. Both reports are based on examinations which took place on the same day so there is no argument that the Applicant's condition changed between the two examinations.

Once they received the two reports, SOUTHWEST AIRLINES "pulled" him from the job. When he asked for an explanation he was told only to go home. He later learned that headquarters had him on the injury list. See Minutes of Hearing 16 September 2014 p. 11, lines 21 – 23. Furthermore, he was "pulled" from the job at about the same time as Mr. Francescon was working in a modified duty position. Thus, based on the events as described in this case, there appears to be differential treatment due to receiving a ratable report. The burden then shifts to the Defendant to show a legitimate business purpose. This meets the test in Dept of Rehabilitation vs. WCAB (Lauher) (Cal.Supr Ct, 2003) 30

Cal 4th 1281; 68 CCC 831. The Applicant has shown both differential treatment and a detriment.

Defendant's second argument is that the conclusion that SOUTHWEST AIRLINES did not follow their own procedures was based on conjecture and surmise. This is not the case. Bruce Atlas, a manager at SOUTHWEST AIRLINES testified quite clearly that the procedure when there are two contradictory reports is to refer the matter to Ralph Barhan at headquarters who would refer the matter to the company doctor. The witness in fact referred the matter to Mr. Barhan but no evidence was presented that the company doctor got involved.

Defendant's third argument was that the company justifiably relied on the "unchallenged opinion of the PQME Dr. Wakim." However, this argument forgets the contemporaneous report of Dr. Sobol which finds no work restriction. Additionally, it is important to note that the report of Dr. Wakim's work restriction was unclear or perhaps even non-sensical:

> "This patient is precluded from very heavy lifting on the house (sic) on a constant basis and 70 pounds on an occasional basis." [Exhibit D at p. 31.]

There was no evidence on this record that defendant sought to clarify what this meant until the deposition of Dr. Wakim which occurred after applicant returned to full duty.

Defendant next argues that the undersigned erred in concluding that there was no investigation or means of correcting the inconsistency provided to the applicant. Defendant points out that the PQME process was designed to provide neutral reporting

and that requiring defendant to resolve disputes between the panel doctor and the treating doctor violates Labor Code § 4060 et seq. This argument mixes concepts. The undersigned does not advocate that the employer would resolve the conflict between the two reports as a judge would do in the workers' compensation case-in-chief. The employer simply has to tell its employee that they received two conflicting reports on the subject and that one of them does not make much sense (e.g. "lifting on the house.") Then, an interactive process should follow that allows the Applicant to clarify his abilities. Strangely, in this case, Applicant was summarily "pulled" from his position and simply told he was on the "injury list."

Had the employer kept the Applicant at his post until they used the company doctor as described by Mr. Atlas, they may have eventually had enough information to make an informed decision as suggested in San Diego Transit vs. WCAB (Calloway) (writ denied, 2006) 71 CCC 445. Instead, they made their decision based on one of two contradictory reports. The Calloway decision is particularly instructive in that it stresses that the employer does not have the ability to disregard a report based on whether that report is substantial evidence. Here, the employer disregarded the reports of Dr. Sobol returning Applicant to work in favor of a poorly written work restriction in Dr. Wakim's report.

Next, Defendant argues that the undersigned isolated portions of Dr. Wakim's opinion and ignored other parts of it. This argument is misplaced. It is true that Dr. Wakim later clarified his opinion and noted that while he was returning Applicant to full

duty, he notes that Applicant's condition may worsen as a result. However, that clarification occurred months after the Applicant was taken off the job.

Defendant's last argument is that the report of Dr. Sobol was not substantial evidence. Again, that only points to the duty of SOUTHWEST AIRLINES to inquire further. To simply pull him from the job without asking for clarification from both doctors does its employee a disservice. The Applicant was doing his usual and customary duties for weeks. Inquiring with the treating physician as to whether he was aware of the essential job functions seems a minimal requirement of care.

Once discrimination is shown, the burden of proof shifts to the Defendant to show a legitimate business purpose. There may be some purpose in not returning an employee to full duty just because he asks for it. However, one should not simply discharge an employee for having work restrictions. A first question should be whether the applicant can perform the essential job functions, not whether the Applicant has any work restrictions. An interactive process and an investigation should follow to allow the worker to explain his position. This did not happen here.

Months later defense counsel took Dr. Wakim's deposition. Once this occurred, Dr. Wakim gave testimony that he believed Applicant should be released to return to work but he admitted that Applicant's condition would probably worsen. With additional evidence, this may be relevant to the issue as to whether Applicant may keep his job in the future. However, for now, it does not justify summarily "pulling" one from a job that one has been doing without restriction or absence for several months.

IV.

RECOMMENDATION

It is recommended that the Petition for Reconsideration be granted to correct the applicable case number to ADJ7437447. Otherwise, it is recommended that reconsideration be denied.

Respectfully submitted,

Date: 1/20/2015

ROGER A. TOLMAN, JR.
Workers' Compensation Judge

Served by mail 1/20/2015
on parties as shown on
Official Address Record.

By: 
Linda Simien