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PROVING LABOR CODE SECTION 132a VIOLATIONS

By Sonya Arellano, LFLM San Jose

On April 12, 2019, the court in *Franco v. MV Transportation, Inc.* unanimously clarified the standard for making a prima facie showing of illegal discrimination (2019 Cal. Wrk. Comp. P.D. LEXIS 120).

The panel decision clarified the 2003 decision issued by the Supreme Court in *Department of Rehabilitation v. Workers' Comp. Appeals Bd*, (Lauher 30 Cal. 4th 1281).

The *Franco* court found that an injured worker may make a prima facie case showing of unlawful discrimination even where they cannot demonstrate a singling out for disadvantageous treatment so long as the following are met: 1) show some adverse result as a consequence of some action or inaction by the employer that was triggered by the industrial injury, and 2) that they had a legal right to receive or retain the deprived benefit or status and the employer had a corresponding legal duty to provide, or 3) refrain from taking away that benefit or status.

This means that the injured workers must show they were subject to disadvantages not visited on other employees because of the industrial injury. This case was returned to the trial level for development of the record.

To further endorse this clarification enunciated in *Franco*, a second panel decision was made in *Alnimiri v. Southwest Airlines*. The Appeals Board panel's Opinion and Decision after Reconsideration issued on July 31, 2019. In this case, the court found the industrially injured worker demonstrated that he was subjected to disadvantages that were not visited upon other employees.

In contrast to the *Franco* decision, the court in *Alnimiri* applied the *Lauher* standard as articulated in *Franco* to affirm the finding of a section 132a violation. This case illustrates what the prima facie standard enunciated by the *Franco* court looks like in action.

Alnimiri worked as a Ramp Agent for Southwest Airlines for approximately nine years when he sustained an industrial back injury. Alnimiri was placed off work for some time and later returned to his usual and customary job without restriction by his treating physician. He was able to perform his regular job duties. After approximately six weeks of engaging in regular work, the

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SUBROGATION AT A GLANCE

By Loren N. Meador, LFLM Los Angeles

Generally speaking, and with few exceptions, the exclusive remedy for an injured worker against his or her employer following a workplace injury is to file an Application for Adjudication of Claim with the Workers' Compensation Appeals Board. [California Labor Code 3602 (a).] However, a common exception to the exclusive remedy rule exists where a workplace injury is caused by a negligent third party as the civil action is brought directly against the third party, not the employer.

A common example is an employee injured in a motor vehicle accident in the course and scope of his or her employment that is caused by a third party. Here, the injured employee can maintain **both** (1) a workers' compensation claim against his or her employer, **and** (2) a civil lawsuit against the third party who is alleged to have caused the motor vehicle accident.

Where the workplace injury is alleged to have been caused by a negligent third party, the employer and/or insurer has different options in order to exercise its right to prevent an injured worker from "double recovery" and/or to recoup from the negligent third party the benefits paid to or on behalf of the injured worker through the workers' compensation proceedings.

More specifically, Labor Code 3852 states that the employer who pays, or has become obligated to pay, workers' compensation benefits is entitled to recover from a negligent third party all payments made to an employee because of the injury, including medical and hospital expenses, and disability benefits awarded. [See also, *Heaton v. Kerlan* (1946) 27 Cal.2d 716.] All benefits required to be paid by the employer are deemed the 'compensation' and 'special damages' of section Labor Code 3856 (b), and therefore, subject to the employer's lien.

The employer and/or insurer may (1) bring a civil lawsuit directly against the negligent third party [Labor Code 3852]; (2) join as a Plaintiff in Intervention into the civil action brought by the employee/injured worker against the third party [Labor Code 3853]; (3) file a lien in the civil action brought by the employee/injured worker against the third party [Labor Code 3856 (b)]; or (4) file a Petition for Credit before the Workers' Compensation Appeals Board for the net recovery the injured worker received in his or her civil action against the negligent third party [Labor Code 3861]. Where both parties file action, the actions must be consolidated and tried together for purposes of judicial economy. [Labor Code 3853]

It should also be noted that the recovery of a workers' compensation carrier's lien as part of the third party civil settlement does not preclude the employer/carrier from also filing a subsequent Petition for Credit for the employee's net recovery in the civil settlement against future benefits owed in any future workers' compensation proceedings.

Where the employer and/or insurance carrier wishes to file its own lawsuit to recover the workers' compensation benefits paid out, it is important to remember that a strict two-year statute of limitations applies to personal injury actions.

The timely filing of a complaint against a third party by either the employer or the employee tolls the statute of limitations as it pertains to the intervention in the action by the other. [*Harrison v. Englebrick* (1967) 254 Cal.App.2d 871.]

We know that generally speaking, the workers' compensation system operates as a "no fault" system.

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The Workers' Compensation Newsletter is published by Laughlin, Falbo, Levy & Moresi LLP. Contributors to this issue include Sonya Arellano (San Jose) & Loren N. Meador (Los Angeles).

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SUBROGATION AT A GLANCE

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However, in a civil action, in addition to proving that a third party is, in fact, negligent, a concurrently negligent employer is entitled to recover only the amount by which its workers' compensation lien exceeds its proportional share of responsibility for the employee's total tort damages. [*Associated Construction & Engineering Co. v. WCAB* (1978) 22 Cal.3d 829.] It is important to note, however, that any comparative negligence imputed to the employee is not imputed to the employer. [*Kremer v. Challenge Milk Co.* (1980) 105 Cal.App.3d 334.] ⌘

PROVING LABOR CODE SECTION 132a VIOLATIONS

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PQME report was issued. Although Alnimiri had been performing his regular work, the PQME issued work restrictions precluding him from very heavy lifting on a constant basis and lifting in excess of 70 pounds on an occasional basis. Alnimri's job duties required lifting of 70 pounds.

Shortly thereafter, Alnimiri was placed on an injury list and dismissed from work by his supervisor based on the PQME report even though he had been performing all of his job duties. Alnimiri was not questioned. He lost time from work from November 2011 to June 2012, when he was released to full duty.

The employer had a policy in place that made it the station manager's job to resolve conflicts in work status reports. When the station manager became aware of the conflict in this case, he referred the matter to the defendant's Dallas headquarters for resolution by a company doctor. No evidence was presented that the defendant followed its resolution process.

The panel found that Alnimiri made a prima facie showing of section 132a discrimination. First, Alnimiri showed that he suffered an adverse result as a consequence of defendant's actions in that he missed approximately seven months of work even though his treating physician had released him to work with no restriction and he had indeed been performing his work without issue. Second, the defendant did not follow its normal procedures to resolve that conflict before dismissing Alnimiri from work. The panel determined that this deviation demonstrates that defendant subjected Alnimiri to disadvantages not visited upon other employees because of his injury. Thus, Alnimiri met his burden of proof of a prima facie showing of section 132a discrimination.

The panel rejected arguments of justifiable reliance on the PQME report and the absence of a statutory mandate to resolve conflicting opinions. The defendant failed to follow its own voluntary process thus subjecting Alnimiri to unlawful discrimination under section 132a.

If employers have a policy in place to resolve issues related to injured workers, they should be advised that their policies should be followed, otherwise run the risk of setting up the framework for a prima facie case for a section 132a violation. ⌘

UPCOMING CONFERENCES & EVENTS

2019 DVICA HOLIDAY GALA
December 13, 2019
Berkeley, California
Doubletree in Berkeley (200 Marina Blvd.)
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February 25 - February 28, 2020
Monterey, California
Jesus Mendoza (LFLM San Francisco) presenting: "Latency Lost? Recent Developments in Rebutting the Cancer Presumption in Public Safety Cases"

2020 EWC
March 29 - March 30, 2020
Huntington Beach, California
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