



GELSON'S MARKET V. WORKERS' COMP. APPEALS BD. (FOWLER) (2009),
179 Cal. App. 4th 201, 74 CCC (MB) 1313, *Provided by Kay E. Tuazon of the Oakland Office*

The Court of Appeal annulled a WCAB decision holding that the applicant failed to present a prima facie case of discrimination under Labor Code section 132a. Specifically, the Court of Appeal reasoned that the employer, Gelson's Market (hereinafter "Gelson's") did not violate Labor Code Section 132a when they failed to immediately return the applicant to work based upon ambiguous reports and releases to return to work provided by applicant's primary treating physician and Agreed Medical Examiner.

Here, after his industrial injury, the applicant sought to return to work. The applicant's primary care physician (PTP) issued contradictory and unclear return to work releases within a seven day period. Due to the PTP's previous inconsistent comments regarding restrictions/no restrictions, the risk manager did not return the applicant to work because she did not believe the PTP provided any expert medical opinion. Thereafter, for clarification on applicant's ability to return to work, the parties utilized an agreed medical examiner (AME). The AME also issued a contradictory report which stated that the applicant should be given the option of returning to his usual job activities, then gave no restrictions, however, opined that the applicant lost 25 percent of his pre-injury capacity. Thus, the risk manager did not return the applicant to work as she felt no medical opinion had been issued. Then, the AME's deposition was eventually taken wherein he opined that the applicant could probably perform his usual and customary position. In response, the applicant was returned to work.

Under Labor Code Section 132a, the applicant filed for benefits and compensation. The Workers Compensation Law Judge held that the AME's report was not ambiguous and Gelson's violated Labor Code Section 132a by not reinstating him. As a result, Gelson's filed a petition for reconsideration and the WCAB found that Gelson's received an unambiguous release from the PTP and unreasonably refused to reinstate the applicant on that date.

The Court of Appeal annulled the WCAB's award reasoning that the applicant failed to make a prima facie showing of Gelson's liability for discrimination. According to Labor Code Section 132a, "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 for compensation with his employer of an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor..." The employee must establish, by a preponderance of the evidence, at least a prima facie case of lost wages and benefits caused by the employer's discriminatory acts. Here, the Court of Appeal opined that the applicant made no such showing that he was treated differently than other employees who were not injured or who did not make a claim, as was required by the Supreme Court in *Department of Rehabilitation v. WCAB (Lauher)* (2003) 68 CCC 831. Therefore, the WCAB award was annulled and the Court of Appeal held in favor of Gelson's.