WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

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| ALONSO NAVARRO,<br><br>*Applicant,*<br><br>vs.<br><br>A&A FARMING; and WESTERN GROWERS INSURANCE CO.<br><br>*Defendants.* | Case Nos. GOL 0087934<br>GOL 0087935<br>GOL 0087936<br><br>OPINION AND DECISION AFTER RECONSIDERATION (EN BANC) |

On November 13, 2001, the Board granted reconsideration of the Findings and Order issued by the workers' compensation administrative law judge ("WCJ") on August 27, 2001. In that decision, the WCJ found that defendant, A&A Farming ("A&A"), did not violate Labor Code section 132a ("section 132a") when it terminated its contributions to an ERISA group health benefits plan after applicant, Alonso Navarro, had been off work for over three months due to his industrial injuries.[1] In essence, the WCJ concluded there was no "discrimination," within the meaning of section 132a, because the ERISA plan's provision that employer contributions would be discontinued after a disabled employee had been off work for 90 days applied whether or not the disability was work-related.

On reconsideration, applicant contended in substance: (1) that it is a violation of section 132a for an employer to terminate an industrially-injured employee's group medical coverage while the employee is temporarily disabled; and (2) that ERISA does not preempt his section 132a claim. A&A filed an answer asserting in substance that ERISA does preempt applicant's section 132a claim.

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[1] All references to "ERISA" are to the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq..

Because of the important legal issue presented, and in order to secure uniformity of decision in the future, the Chairman of the Board, upon a majority vote of its members, has reassigned this case to the Board as a whole for an *en banc* decision. (Lab. Code, §115.)[2] Based on our review of the relevant statutory and case law, we conclude that where an injured employee's section 132a claim is premised upon the employer's termination of (or refusal to provide) group health plan benefits to the employee pursuant to the terms of an ERISA plan, the employee's section 132a claim "relates to" the ERISA plan and, therefore, is preempted by ERISA. (29 U.S.C. §1144(a).)[3] Accordingly, we will not reach the question of whether the employer's act of discontinuing its contributions to the ERISA plan on applicant's behalf constituted "discrimination" under section 132a.

## I. BACKGROUND

The essential facts are not in dispute.

A&A is a farming corporation that, at all times relevant here, was a participating member employer of the Western Growers Assurance Trust ("the Trust"), a multi-employer trust that provides medical, dental, vision, and other benefits to the employees of participating employers. The Trust, which is funded in part by employer contributions, is an "employee welfare benefit plan" within the meaning of ERISA (29 U.S.C. §1002(1)(A)).[4]

Under the Participation Agreement between A&A and the Trust, the only A&A employees

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[2] The Board's en banc decisions are binding precedent on all Board panels and WCJs. (WCAB/DWC Policy & Procedure Manual, Index No. 6.16.1.)

[3] Our rationale, however, could apply equally to other non-workers' compensation benefits provided by an employer pursuant to an ERISA plan.

[4] The issue of whether a group health benefit plan (or any other plan) is an "employee welfare benefit plan" within the meaning of ERISA is a question of fact on which the defendant has the burden of proof. (*Stuart v. UNUM Life Ins. Co. of America* (9th Cir. 2000) 217 F.3d 1145, 1148-1153; *Zavora v. Paul Revere Life Ins. Co.* (9th Cir. 1998) 145 F.3d 1118, 1120-1121; *Qualls v. Blue Cross of California, Inc.* (9th Cir. 1994) 22 F.3d 839, 842-844; *Kanne v. Connecticut General Life Ins. Co.* (9th Cir. 1989) 867 F.2d 489, 491-493, cert. denied, 492 U.S. 906 [109 S.Ct. 3216, 106 L.Ed.2d 566] (1989).) Here, the WCJ's Opinion on Decision stated "[t]he facts show that [the Western Growers Assurance Trust] ... was ... an ERISA Trust." Without discussing this question in detail, we concur with the WCJ that A&A carried its burden of establishing the Trust was an "employee welfare benefit plan" under ERISA. (See particularly, Trial Transcript, 6/19/01, at 16:15-21:15; Defendant's Exhs. A, D & E.) Among other things, participating employers, including A&A, make contributions to the Trust, as noted above.

eligible for health coverage were those who actively worked at least 20 hours per week. The Trust terms also provided, however, that upon approval by the Trust at the time the employer became a participating member, a participating employer could establish a general policy to continue making contributions to the Trust on behalf of a disabled employee for up to 180 days after the employee became disabled and ceased active work. In accordance with the Trust terms, A&A adopted a general policy providing that it would continue to make Trust contributions for its disabled employees for a period of 90 days, whether or not the disability was work-related.

Applicant was employed as a working foreman/irrigator by A&A for nine years. On August 6, 1996, on November 18, 1999, and during a period from August 6, 1996 to April 5, 2000, he sustained industrial injuries to his back. As result of his injuries, he stopped working on April 5, 2000 and he had back surgery two days later. While off work following his surgery, he received temporary disability indemnity. With the exception of one partial-day attempt to return to work, he never worked for A&A after April 5, 2000, although he would have done so had he been physically able.

While applicant was actively working, A&A made contributions to the Trust on his behalf. In addition, he contributed $20 per month (which was deducted from his paycheck).

After applicant stopped working in April 2000 due to his industrial injuries, A&A made contributions to the Trust on his behalf for the months of May, June, and July 2000, in accordance with its continuation policy. Applicant also sent checks to A&A covering his $20 contributions for each of these months, plus the month of August 2000.

By a letter dated August 15, 2000, however, A&A stated it was returning applicant's $20 contribution for the month of August because it would only provide medical coverage for disabled employees for a period of 90 days after they commenced leave due to their disability. It also notified him that, after this 90-day period, continuation of his health coverage was available under COBRA.[5]

By a letter dated August 25, 2000, applicant's counsel wrote to A&A stating that any

[5] All references to "COBRA" are to the Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. §1161 et seq.

termination of applicant's health coverage while he was temporarily disabled due to his industrial injuries would constitute discrimination under section 132a. The letter also enclosed a $40 check from applicant for his September and October 2000 health plan contributions. The letter stated that, because A&A is "obligated to continue applicant's health care," then A&A should "process applicant's co-pay premium checks without delay." A&A, however, did not comply with applicant's request.

On September 21, 2000, applicant filed a "Petition for Benefits-Discrimination [Labor Code Sec. 132a]," alleging in substance that A&A's failure to continue contributing to the Trust on his behalf while he was temporarily disabled on an industrial basis constituted unlawful discrimination against an industrially-injured worker in violation of section 132a.

On June 19, 2001, the issue of applicant's section 132a petition was tried.

On August 27, 2001, the WCJ issued the decision now before us. To reiterate, the WCJ concluded in substance that applicant had failed to establish a violation of section 132a because A&A's policy of continuing health coverage for a limited period of 90 days applied to all of its employees, not just applicant, whether the disability was industrial or not. Thus, the WCJ found, there was no section 132a discrimination against applicant.

## II. DISCUSSION

Section 132a states that "[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" and it provides that, where unlawful discrimination is found, the employer is liable to the injured employee for various penalties, including a 50% increase in workers' compensation benefits (up to $10,000) and reimbursement of lost wages and/or benefits. (Lab. Code, §132a.) Although section 132a provides that certain specific employer acts constitute unlawful discrimination,[6] violations of section 132a are not limited to its express discriminatory acts. Rather, whenever an employee's industrial injury causes an employer to take an adverse action against the injured

[6] For example, an employer may violate section 132a if it "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 [workers' compensation] claim." (Lab. Code, §132a.)

employee, the employer may have engaged in unlawful discrimination within the meaning of section 132a, unless the employer establishes that the adverse action was "necessitated by the 'realities of doing business.' " (*Judson Steel Corp. v. Workers' Comp. Appeals Bd. (Maese)* (1978) 22 Cal.3d 658, 666-667 [43 Cal. Comp. Cases 1205, 1210].) Discrimination in violation of section 132a "is just as obnoxious to the interests of the State and contrary to public policy and sound morality as sexual or racial discrimination." (*City of Moorpark v. Superior Court* (1998) 18 Cal.4th 1143, 1153 [63 Cal. Comp. Cases 944, 952].)[7]

Nevertheless, under the Supremacy Clause, Congress may preempt any state law either by express provision or by implication. (*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.* ("*Travelers*") (1995) 514 U.S. 645, 654 [115 S.Ct. 1671, 131 L.Ed.2d 695].)[8] ERISA contains a preemption clause which expressly provides that ERISA "shall supersede any and all State laws insofar as they ... relate to any employee benefit plan ... ." (29 U.S.C. §1144(a).)

This ERISA preemption provision " '[is] not a model of legislative drafting' " (*Pilot Life Ins. Co. v. Dedeaux* ("*Pilot Life*") (1987) 481 U.S. 41, 47 [107 S.Ct. 1549, 95 L.Ed.2d 39] (quoting *Metropolitan Life Ins. Co. v. Massachusetts* ("*Met Life*") (1985) 471 U.S. 724, 739 [105

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[7] Although we are resolving applicant's section 132a claim on ERISA preemption grounds, we note the issue of what constitutes "discrimination" under section 132a is pending again before the California Supreme Court. That is, in *State of Cal. Dept. of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)* (August 14, 2001, D035665) 66 Cal. Comp. Cases 993, 2001 WL 1335828, 2001 Cal. Wrk. Comp. LEXIS 3838 [nonpub. opn.], the Court of Appeal held:

> "To 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." (66 Cal. Comp. Cases at 1018.)

On October 24, 2001, the California Supreme Court granted review in *Lauher*. (S100557.)

[8] The Supremacy Clause states, in relevant part: "This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const., art. VI, cl. 2.)

S.Ct. 2380, 85 L.Ed.2d 728]) and the Courts have had some difficulty in delineating the exact range of its rather enigmatic and nebulous phrase "relate to."[9]

Recently, however, the Supreme Court has emphasized that we "simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of ... ERISA ... as a guide to the scope of the state law that Congress understood would survive." (*Travelers, supra,* 514 U.S. at 656; see, also, *Egelhoff, supra*, 532 U.S. at __ [121 S.Ct. at 1327]; *California Div. of Labor Standards Enforcement v. Dillingham Const., N.A., Inc.* ("*Dillingham*") (1997) 519 U.S. 316, 324 [117 S.Ct. 832, 136 L.Ed.2d 791].)

In enacting ERISA, the essential objective of Congress was "to establish the regulation of employee welfare benefit plans 'as exclusively a federal concern.' " (*Travelers, supra*, 514 U.S. at 656 [quoting from *Alessi v. Raybestos-Manhattan, Inc.* ("*Alessi*") (1981) 451 U.S. 504, 523 [101 S.Ct. 1895, 68 L.Ed.2d 402].) More specifically, Congress intended " 'to ensure that plans and plan sponsors would be subject to a uniform body of benefits law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government ..., [and to prevent] the potential for conflict in substantive law ... requiring the tailoring of plans and employer conduct to the peculiarities of the

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[9] As stated in *Travelers, supra,* "one might be excused for wondering, at first blush, whether the words of limitation ('insofar as they ... relate') do much limiting. If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course, for '[r]eally, universally, relations stop nowhere.' " (514 U.S. at 655; see also, *DeBuono v. NYSA-ILA Medical and Clinical Services Fund* (1997) 520 U.S. 806, 813, fn. 7 [117 S.Ct. 1747, 138 L.Ed.2d 21] ("[A]pplying the 'relate to' provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else").)

It is clear that "[p]re-emption does not occur ... if the state law has only a tenuous, remote, or peripheral connection" to an ERISA plan. (*Travelers, supra,* 514 U.S. at 661; *District of Columbia v. Greater Washington Bd. of Trade* ("*Greater Washington Bd. of Trade*") (1992) 506 U.S. 125, 130, fn.1 [113 S.Ct. 580, 121 L.Ed.2d 513].) Beyond that, however, the parameters of ERISA preemption, as set by the limiting phrase "relate to," have been somewhat muddy and indefinite. At one point, the Supreme Court announced a standard that "[a state] law 'relates to' an employee benefit plan ... if it has a connection with or reference to such a plan." (*Shaw v. Delta Air Lines, Inc.* ("*Shaw*")(1983) 463 U.S. 85, 97 [103 S.Ct. 2890, 77 L.Ed.2d 490].) Ultimately, though, the Supreme Court essentially concluded that this standard did not solve the "relate to" problem. (See, *Egelhoff v. Egelhoff* ("*Egelhoff*") (2001) 532 U.S. 141, __, [121 S.Ct. 1322, 1327, 149 L.Ed.2d 264] (stating that "[the phrase] 'connection with' is scarcely more restrictive than 'relate to' "); *Travelers, supra,* 514 U.S. at 656 (stating that "[f]or the same reasons that infinite relations cannot be the measure of pre-emption, neither can infinite connections").)

law of each jurisdiction.' " (*Travelers, supra*, 514 U.S. at 656-657 [quoting from *Ingersoll-Rand Co. v. McClendon* ("*Ingersoll-Rand*") (1990) 498 U.S. 133, 142 [111 S.Ct. 478, 112 L.Ed.2d 474].) Thus, "[t]he basic thrust of the [ERISA] pre-emption clause ... was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." (*Travelers, supra*, 514 U.S. at 657.)

In light of these Congressional objectives in creating ERISA, it appears that at least three kinds of state laws "relate to" ERISA for preemption purposes: (1) those that "mandate[] employee benefit structures or their administration;" (2) those that "bind employers or plan administrators to [a] particular choice" or "preclude uniform administrative practice," thereby functioning as a regulation of an ERISA plan itself; and (3) those that "provid[e] alternative enforcement mechanisms." (*Travelers, supra*, 514 U.S. at 657-658, 659-660.)

Regardless of which preemption test is employed, however, we are guided by the repeated observations of the United States Supreme Court that ERISA's preemption provision is "clearly expansive" (*Egelhoff, supra*, 532 U.S. at __ [121 S.Ct. at 1327]; *Travelers, supra*, 514 U.S. at 655), it is "deliberately expansive" (*Greater Washington Bd. of Trade, supra*, 506 U.S. at 129; *Morales v. Trans World Airlines, Inc.* ("*Morales*") (1992) 504 U.S. 374, 384 [112 S.Ct. 2031, 119 L.Ed.2d 157]; it is "broadly worded" (*Egelhoff, supra*, 532 U.S. at __ [121 S.Ct. at 1327]; *Ingersoll-Rand, supra,* 498 U.S. at 138), it has a "broad scope" (*Dillingham, supra,* 519 U.S. at 324; *Met Life, supra*, 471 U.S. at 739), it has an "expansive sweep" (*Dillingham, supra,* 519 U.S. at 324; *Pilot Life, supra*, 481 U.S. at 47), and it is "conspicuous for its breadth." (*Morales, supra*, 504 U.S. at 384; *FMC Corp. v. Holliday* (1990) 498 U.S. 52, 58 [111 S.Ct. 403, 112 L.Ed.2d 356].)

In assessing whether applicant's section 132a claim here is preempted by ERISA, we begin by reviewing several Supreme Court cases which, when read together, establish that ERISA preempts any state law discrimination claim where the existence of, the implementation of, or the specific terms of an employer's ERISA plan are central to (indeed, critical to) that claim.

In *Shaw, supra*, 463 U.S. 85, the Supreme Court considered the interplay between the ERISA preemption statute (29 U.S.C. §1144(a)) and New York's Human Rights Law

(N.Y.Exec.Law §290 et seq.). The Human Rights Law included a comprehensive state anti-discrimination provision prohibiting, among other practices, discrimination in the compensation, terms, conditions or privileges of employment on the basis of sex. (*Id.*, §296.1(a).) The New York Court of Appeals had held that, if a private employer's employee benefit plan treated pregnancy differently from other nonoccupational disabilities, this constituted sex discrimination within the meaning of the Human Rights Law. (*Brooklyn Union Gas Co. v. New York State Human Rights Appeal* Board (1976) 41 N.Y.2d 84, 390 [N.Y.S.2d 884, 359 N.E.2d 393].) Several employers, however, had established ERISA medical and disability plans that did *not* provide benefits to employees disabled by pregnancy, which would have been a violation of New York's Human Rights Law. Yet, the Supreme Court held that the Human Rights Law was preempted by ERISA to the extent it prohibited employment practices that are lawful under federal law, i.e., Title VII of the Civil Rights Act of 1964. (42 U.S.C. §2000e et seq.)[10]

In so holding, the Supreme Court noted, "ERISA does not mandate that employers provide any particular benefits, and does not itself proscribe discrimination in the provision of employee benefits." (*Shaw*, *supra*, 463 U.S. at 91.)[11] The Court further stated it had "no difficulty" in concluding that New York's Human Rights Law "relates to" employee benefit plans because the law "prohibits employers from structuring their employee benefit plans in a manner that

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[10] Of course, ERISA does not preempt discrimination claims based on *federal* law. (See 29 U.S.C. §1144(d).) The ERISA plans in *Shaw*, however, were created prior to the federal Pregnancy Discrimination Act of 1978, which made discrimination based on pregnancy unlawful under Title VII of the Civil Rights Act of 1964.

Similarly, ERISA does not preempt state discrimination laws that prohibit the same discriminatory acts that federal law prohibits. (*Shaw*, *supra*, 463 U.S. at 100-104, 108-109; accord *Humana, Inc. v. Forsyth* ("*Humana*")(1999) 525 U.S. 299, 310 [119 S.Ct. 710, 142 L.Ed.2d 753] ("We held in *Shaw* that the [state discrimination] law was preempted only to the extent it prohibited practices lawful under [federal law]. ... To the extent the [state] law prohibited practices also prohibited under federal law, we explained, the [state] law was not preempted ... .").) Presently, however, there is no federal law precluding discrimination on the basis of an industrial injury per se.

[11] See also, *Bronk v. Mountain States Telephone & Telegraph, Inc.* (10th Cir. 1998) 140 F.3d 1335, 1338 ("It is well established that ERISA does not prohibit an employer from distinguishing between groups or categories of employees, providing benefits for some but not for others"); *McGann v. H&H Music Co.* (3d Cir. 1991) 946 F.2d 401, 407-408, cert. denied 506 U.S. 981, 113 S.Ct. 482, 121 L.Ed.2d 387 (1992) (noting that it was "Congress's intent that employers remain free to create, modify and terminate the terms and conditions of employee benefits plans without [state or local] governmental interference" and that, therefore, "ERISA does not broadly prevent an employer from 'discriminating' in the creation, alteration or termination of employee benefit plans.")

discriminates on the basis of pregnancy." (*Id.*, at 96-97.) Finally, the Court concluded the Human Rights Law was preempted because, if the employers' ERISA plans were subject to New York's anti-discrimination law, this would be inconsistent with "the reservation to Federal authority the sole power to regulate employee benefit plans" and inconsistent with Congress's intention to "eliminate[] the threat of conflicting state and local regulation." (*Id.*, at 99-100.)

In *Metropolitan Life Ins. Co. v. Taylor* ("*Taylor*") (1987) 481 U.S. 58 [107 S.Ct. 1542, 95 L.Ed.2d 55], an employee sustained an industrial back injury in 1961 for which he received workers' compensation benefits. Eventually, he returned to work. Nearly 20 years later, the employee filed a supplemental disability claim under the employer's ERISA benefits plan, alleging that his industrial back injury disabled him from continuing his work. The plan sent him to an orthopedist to be examined, but the physician found no orthopedic problems and the employee's supplemental disability claim was denied. Six months later, the employee filed state law tort and contract claims for wrongful denial of ERISA plan benefits. The Supreme Court concluded, however, that the state law claims were preempted by ERISA because they " 'relate[] to [an] employee benefit plan.' " (481 U.S. at 60-62, 62-63.)[12]

In *Greater Washington Board of Trade*, *supra*, 506 U.S. 125, an employer sponsoring an ERISA health benefits plan sued to enjoin enforcement of a provision of the District of Columbia Workers' Compensation Equity Amendment Act of 1990. The provision in dispute stated:

> "Any employer who provides health insurance coverage for an employee shall provide health insurance coverage equivalent to the existing health insurance coverage of the employee while the employee receives or is eligible to receive workers' compensation benefits under this chapter." (D.C. Code, §36- 307(a-1)(1).)

The Supreme Court held that this provision was preempted by ERISA.

In so concluding, the Court pointed out that the District of Columbia law "specifically refers" to health benefit plans covered by ERISA and "on that basis alone is pre-empted" because

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[12] See also, *Pilot Life, supra,* 481 U.S. 41 (ERISA preempts employee's state law claim for wrongful denial of ERISA plan benefits); *Ingersoll Rand, supra,* 498 U.S. 133 (ERISA preempts employee's state law claim of wrongful discharge in order to avoid paying pension benefits).

"any state law imposing requirements [on ERISA regulated health insurance] programs must yield to ERISA." (*Greater Washington Board of Trade*, *supra*, 506 U.S. at 130-131.) The Court observed, however, that ERISA will preempt *any* state law that "relates to" a covered plan " 'even if the [state] law is not specifically designed to affect such plans, or the effect is only indirect.' " (*Greater Washington Board of Trade*, *supra*, 506 U.S. at 129-130 (quoting from *Ingersoll-Rand*, *supra*, 498 U.S. at 139).)

Similarly, in *Alessi*, *supra*, 451 U.S. 504, the Supreme Court considered an action brought by retirees who had received workers' compensation awards subsequent to their retirements. The retirees challenged provisions in their employers' ERISA pension plans which required that a retiree's pension benefits be offset (reduced) by an amount equal to any workers' compensation award for which the retiree is eligible. The retirees asserted that such offset provisions in their employers' ERISA pension plans violated a New Jersey workers' compensation law prohibiting such offset. (N.J. Stat., §34:15-29.) The Supreme Court held that the New Jersey workers' compensation law was preempted by ERISA.

In so concluding, the Supreme Court noted:

> "[F]or the pre-emption provision to apply here, the New Jersey law must be characterized as a state law 'that relate[s] to any employee benefit plan.' 29 U.S.C. §1144(a). [Footnote omitted.] That phrase gives rise to some confusion where, as here, it is asserted to apply to a state law ostensibly regulating a matter quite different from pension plans. The New Jersey law governs the State's workers' compensation awards, which obviously are subject to the State's police power." (451 U.S. at 523-524.)

Nevertheless, the Court went on to state:

> "Whatever the purpose or purposes of the New Jersey statute, we conclude that it 'relate[s] to pension plans' governed by ERISA because it eliminates one method for calculating pension benefits – integration -- that is permitted by federal law. ... New Jersey's effort to ban pension benefit offsets based on workers' compensation applies directly to this calculation technique. We need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible intrusion on the federal regulatory scheme." (451 U.S. at 524-525.)

The clear import of the foregoing Supreme Court cases leaves little doubt that applicant's section 132a claim here is preempted by ERISA.

As demonstrated by *Shaw*, ERISA does not itself proscribe discrimination in the provision of employee benefits and, like the state anti-discrimination statute in *Shaw*, section 132a cannot make unlawful a failure or refusal to provide ERISA-regulated benefits where such failure or refusal is not prohibited by federal law. Moreover, to conclude that section 132a was not preempted would be inconsistent with "the reservation to Federal authority the sole power to regulate employee benefit plans" and inconsistent with Congress's intention to "eliminate[] the threat of conflicting state and local regulation." (*Shaw*, *supra,* 463 U.S. at 99-100.)

Similarly, as demonstrated by *Met Life* and *Pilot Life*, a state law action based on an employer's allegedly wrongful denial of ERISA benefits is preempted. Therefore, applicant's section 132a action (which, essentially, is premised on an allegation that his ERISA benefits were wrongfully terminated following his industrial injuries) is also preempted.

Further, as demonstrated by *Greater Washington Board of Trade*, a state statute cannot require an employer to provide an industrially injured worker with the same health benefits he or she would have received absent the industrial injury. We recognize that *Greater Washington Board of Trade* involved a state statute that directly attempted to regulate employee health benefits, while section 132a's effect on health benefits would be solely indirect. That difference, however, is immaterial because a state law may "relate to" an ERISA benefit plan, and thereby be pre-empted, " 'even if the [state] law is not specifically designed to affect such plans, or the effect is only indirect.' " (*Greater Washington Board of Trade*, *supra*, 506 U.S. at 129-130 (quoting from *Ingersoll-Rand*, *supra*, 498 U.S. at 139; see also, 29 U.S.C. §1144(c) (ERISA preempts any state action that "purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans" (emphasis added).)

Finally, like *Alessi*, to the extent that section 132a would require employers to provide industrially injured employees with ERISA benefits to which they otherwise would not be entitled under their ERISA plans, section 132a would impermissibly intrude on the federal scheme.

Of course, these Supreme Court cases only establish by analogy that applicant's section

132a claim is preempted; none of them specifically address any section 132a claim. There are, however, non-Supreme Court cases that specifically address ERISA preemption in the context of section 132a. And, like the Supreme Court cases, these cases also establish that a section 132a claim is preempted by ERISA where the claim is premised upon and dependent upon the existence of an ERISA plan and the benefits provided (or not provided) thereunder.

In *Pacific Bell v. Workers' Comp. Appeals Bd.* (*Grigsby*) (1987) 186 Cal.App.3d 1603 [51 Cal. Comp. Cases 529], the applicant sustained an industrial injury that resulted in a period of disability from July 10, 1977 through September 30, 1981. During this period, she received a disability pension that was at least equal to her temporary disability indemnity (TDI) and vocational rehabilitation temporary disability indemnity (VRTD) rates. After she returned to work, her employer sent her a notice stating that, because she had received a disability pension through September 30, 1981, that period was being "deducted" from her total number of years of continuous service and that she would not receive credit toward her service pension for any portion of that period. As a result of this revision, her total net credited time of service toward her pension was reduced from about 18-1/2 years to about 16-1/2 years. When the applicant challenged this reduction of service credit, the employer responded that no service credits are given to anyone on a disability pension because that person is not considered an employee under the employer's ERISA plan and that the employer takes "an inflexible position in this regard, due to the corporation's interpretation of its duties pursuant to ERISA." Thereafter, applicant filed a petition with the WCAB seeking additional service credits and increased compensation pursuant to section 132a. She contended that, in violation of section 132a, the employer had discriminated against her based on her industrial injury by refusing to grant her service credit during her disability period.

The California Court of Appeal concluded, however, that ERISA preempted applicant's claim that her employer discriminated against her, in violation of section 132a, when it denied her service credits toward her pension for the period she did not work due to industrial disability. (*Grigsby*, *supra*, 186 Cal.App.3d at 1612-1615 [51 Cal. Comp. Cases at 535-539].) In so concluding, the Court noted "the broad scope of preemption by ERISA ... as explained in *Shaw*

... , *supra,* 463 U.S. 85, ... and *Alessi* ... , *supra,* 451 U.S. 504 ... ." (*Grigsby*, *supra*, 186 Cal.App.3d at 1615 [51 Cal. Comp. Cases at 538]) and it observed that "ERISA expressly preempts state action regulating ERISA-controlled employee benefit plans ... including [state action] that "purport[s] to regulate, directly or indirectly, the terms and conditions of [ERISA-regulated] employee benefit plans....' (29 U.S.C. §1144(c).)" (*Grigsby*, *supra*, 186 Cal.App.3d at 1612 [51 Cal. Comp. Cases at 536].) The Court further pointed out that ERISA and its related regulations (29 U.S.C. §1054(b)(3); 29 C.F.R. §§2530.200b-2(a), 2530.200b-3) specifically "allow an employer to deny service credits for the time during which an absent employee receives or is entitled to receive disability indemnity pursuant to a self-insured employer's workers' compensation plan ... and also allow an employer to deny service credits for a year during which the employee performs less than 1,000 hours of service." (*Grigsby*, *supra*, 186 Cal.App.3d at 1612-1614 [51 Cal. Comp. Cases at 539].)

Here, as in *Grigsby*, we conclude that ERISA preempts applicant's claim that his employer discriminated against him, in violation of section 132a, when it terminated its contributions to the ERISA health benefits plan after he had been disabled for over 90 days due to his industrial injuries. As observed by *Grigsby*, ERISA has fashioned a "broad scope of preemption" (*Grigsby*, *supra*, 186 Cal.App.3d at 1615 [51 Cal. Comp. Cases at 538]) and "ERISA expressly preempts state action regulating ERISA-controlled employee benefit plans ... including [state action] that "purport[s] to regulate, directly or indirectly, the terms and conditions of [ERISA-regulated] employee benefit plans....' (29 U.S.C. §1144(c).)" (*Grigsby*, *supra*, 186 Cal.App.3d at 1612 [51 Cal. Comp. Cases at 536].) Thus, even though the effect of section 132a on A&A's ERISA plan would be indirect, there is still preemption. Moreover, although we do not believe that the existence of a federal statute or regulation specifically allowing an employer to take a particular action was critical to *Grigsby's* preemption analysis (see *Grigsby*, *supra*, 186 Cal.App.3d at 1612-1614 [51 Cal. Comp. Cases at 539]),[13] we nevertheless observe that federal law does allow an employer to discontinue its contributions to an ERISA health benefits plan after an employee has

[13] If, however, federal law specifically *prohibited* the employer's action, the result might be different. (See *Shaw*, 463 U.S. at 100-104, 108-109.)

been disabled for twelve weeks (i.e., 84 days) or more.[14]

Even more directly on point is *Scotti v. Los Robles Regional Center* ("*Scotti*") (C.D.Cal. 2000) 117 F.Supp.2d 982.

In *Scotti*, the applicant was covered by an ERISA group health benefits plan funded by employer contributions. The ERISA plan provided that the employer could discontinue funding an employee's coverage if the employee was on a leave of absence greater than six months, whether or not the leave was related to an industrial injury. When employer-funded coverage was discontinued, however, the employee was given the option of continuing coverage under COBRA.

After applicant's industrially-related disability had extended beyond six months, the employer notified her that it was terminating her group medical benefits in accordance with the terms of its ERISA plan. Applicant then filed a petition with the WCAB alleging that her employer's termination of her group medical benefits after a six-month industrially-caused leave of absence constituted discrimination under section 132a. Following removal of the section 132a claim to federal district court, however, the court dismissed applicant's section 132a claim on the basis that it was preempted by ERISA.

In finding that the applicant's section 132a claim was preempted by ERISA, the Court began with the general observations that "[t]he phrase 'relates to' has been read expansively in

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[14] ERISA provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States ... " (29 U.S.C. §1144(d).) Thus, ERISA does not supersede the provisions of the federal Family and Medical Leave Act ("FMLA") which, among other things, provides that "[i]t shall be unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under this subchapter." (29 U.S.C. §2615(a)(1).)

The FMLA, however, requires an employer to continue a disabled employee's group health benefits only during the first twelve weeks of the disabled employee's leave. That is, the FMLA provides: (1) that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period ... [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee" (29 U.S.C. §2612(a)(1)(D)) and (2) that "during any period that an eligible employee takes leave under section 2612 ... , the employer shall maintain coverage under any 'group health plan' ... for the duration of such leave at the level and under the conditions coverage would have been provided if the employee had continued in employment continuously for the duration of such leave." (29 U.S.C. §2614(c)(1).)

Because the FMLA only provides for the continuation of group health benefits during the first twelve weeks (i.e., 84 days) of a disabled employee's leave, an employer is permitted by the FMLA (and, therefore, by ERISA) to terminate its contributions to a group health plan after an employee has been disabled for 84 days.

order to achieve uniformity in employee benefit laws," that "[e]ven indirect state action affecting private [ERISA plans] may impermissibly encroach on an exclusively federal area," and that "[a] direct relationship to a plan need not be established because an indirect relation to a plan is sufficient to establish preemption." (*Scotti, supra*, 117 F.Supp.2d at 986.) Turning to section 132a itself, the Court stated:

> "[T]he Court ... holds that the enforcement of §132a would relate to the employee benefit Plan [and] reach the terms and conditions of that Plan ... .
>
> "First, §132a does not directly mention employee benefit plans covered under ERISA. However, the Plan would be essential to analyzing whether Defendants violated §132a. Such analysis would connect the state law to the ERISA-controlled Plan. The Plan allows the employer to discontinue employer-funded medical coverage when employees are on leave of absence for longer than six months, regardless of their reason for the leave. To determine whether Defendants discriminated against [applicant] under §132a, the reviewing body would have to consider the Plan's terms for allowing discontinuation of benefits upon leave of absence. The Plan could potentially serve as the justification for the Defendants' conduct and disprove the allegation of discrimination. A violation of §132a could not be shown without reference to the Plan, nor can the state law's enforcement stay clear of affecting the Plan's administration. Thus, the state law relates to the Plan in this case.
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> "Second, §132[a] reaches the Plan's terms and conditions by punishing conduct set forth in the Plan for the purpose of its administration. [Applicant] is claiming rights to group medical benefits. 'Any attempt to establish a right to benefits' has been held to 'involve a determination [or clarification] of the terms of the plan.' [Citations omitted.]
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> "While §132[a] is an anti-discrimination law, preemption depends on 'the conduct to which such law applie[s], not on the form or label of the law.' [Citation omitted.] The determination of whether Defendants' conduct was discriminatory under §132a would necessitate an analysis of the terms of the Plan. The Plan's terms set forth the events that justify termination of benefits, the exact conduct challenged in this case and to which §132a would apply. Section 132[a] mandates that work benefits be reinstated if the employer is found to have discriminated. The state law further orders the employer to increase the employee's compensation. Hence, [applicant's] claim under §132a would potentially require

> benefits to be reinstated, provide the amount of such medical benefits, and provide a remedy for misconduct arising from the administration of the plan. Such state laws are clearly preempted by ERISA." (*Scotti, supra*, 117 F.Supp.2d at 988.)

The analysis set forth in *Scotti* applies with full and equal force here. There is no material difference of fact or law between the section 132a claim in *Scotti* and the section 132a claim presently before us. As with *Scotti*, applicant's section 132a claim could not prevail without making reference to the terms of the ERISA plan and without determining that there was misconduct (discrimination) in the administration of the plan. Moreover, in this context, the remedies afforded by section 132a could not be effectuated without requiring the employer to violate or amend the provisions of the ERISA plan.[15]

In his petition for reconsideration, applicant contends ERISA does not preempt his section 132a claim because, under the terms of the Trust, A&A could have elected to extend its group health plan contributions on his behalf for a period of 180 days (as opposed to 90 days). Applicant further argues that A&A's refusal to provide 180 days of continuation coverage, where such coverage was available under the terms of the Trust, is a clear violation of section 132a.

It is true that, under the terms of the Trust, a member employer could elect to establish a policy to continue its health plan contributions on behalf of its disabled employees for a maximum of 180 days after the commencement of the employees' disability. This policy, however, had to be established by the participating employer at the time it became a member of the Trust and the

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[15] We recognize that, in his petition for reconsideration, applicant relies upon *Maraviov v. Tenet Health Systems Hospital, Inc.* (1997) RDG 75444, 25 Cal. Workers' Comp. Rptr. 341. In *Maraviov*, a Board panel found: (1) that an employer violated section 132a when, pursuant to the medical leave of absence provisions of its ERISA health benefits plan, it terminated its contributions on the employee's behalf to the plan after the employee had been off work 12 weeks due to industrial disability; and (2) that the employee's section 132a claim was not preempted by ERISA.

The decisions of Board panels, however, have no stare decisis effect (*cf.*, e.g., *Tenet/Centinela Hosp. Med. Center v. Workers' Comp. Appeals Bd.* (*Rushing*) (2000) 80 Cal.App.4th 1041, 1047, fn. 4 [65 Cal.Comp.Cases 477, 481, fn. 4]; *Bowen v. Workers' Comp. Appeals Bd.* (1999) 73 Cal.App.4th 15, 21, fn. 10 [64 Cal.Comp.Cases 745, 750, fn. 10]) and, unlike *en banc* decisions of the Board, they are in no way binding on the Board or its WCJs. (*Ford v. Lawrence Berkeley Lab.* (1997) 62 Cal.Comp.Cases 153, 159 (Board en banc); WCAB/DWC Policy & Procedure Manual, Index No. 6.16.1.) For all the reasons set forth in our present opinion, we expressly disapprove of the *Maraviov* holding that ERISA does not preempt section 132a claims in circumstances like those present here.

employer's policy had to be approved by the Trust. Moreover, once the employer's policy was established, the Trust could not accept employer health plan contributions beyond the period established by the employer's policy. Accordingly, once A&A established its policy (prior to applicant's disability) that it would continue to pay health plan contributions for its disabled employees for 90 days, it appears that A&A (and the Trust) had no discretion to extend the continuation period to 180 days without amending the Participation Agreement between A&A and the Trust. And, of course, it would contravene ERISA to require an employer to amend or alter the terms of its participation in an ERISA plan in order to comply with a state discrimination law. That is, such a requirement would mandate a particular employee benefit structure and administration, it would govern the payment of plan benefits, and it would affect the very terms of the ERISA plan.

In any event, the terms of the Trust did not *require* a participating employer to provide 180 days of continuation coverage to its disabled employees and, as discussed above, federal law only requires continuation coverage for twelve weeks (84 days). (See pp. 13-14 & fn. 14.) Moreover, a state discrimination law is saved from ERISA preemption only where the state law targets conduct that is also prohibited by federal law, i.e., ERISA preempts state discrimination laws that target conduct that federal law permits. (*Shaw*, *supra*, 463 U.S. at 100-104, 108-109; *Humana, supra*, 525 U.S. at 310.) Again, there is no federal law prohibiting discrimination on the basis of an industrial injury per se.

In his petition for reconsideration, applicant also contends that there is no preemption because ERISA does not permit an employer to avoid its liability under a state's workers' compensation laws, citing *Employee Staffing Services, Inc. v. Aubry* (9th Cir. 1994) 20 F.3d 1038 and other cases.

It is true that, based on uniform federal interpretation of 29 U.S.C. §1003(b)(3),[16] an employer may not escape a state's workers' compensation laws by establishing a multibenefit

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[16] 29 U.S.C. §1003 provides: "(b) [t]he provisions of this subchapter shall not apply to any employee benefit plan if ... (3) such plan is maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws ... ."

ERISA plan which, among other things, would provide disability benefits and medical treatment for industrial injuries in accordance with the terms of the ERISA plan, rather than in accordance with state law. (*Employers Resource Management Co., Inc. v. James* (4th Cir. 1995) 62 F.3d 627, 632; *Contract Services Network, Inc. v. Aubry* (9th Cir. 1995) 62 F.3d 294, 297; *Contract Services Employee Trust v. Davis* (10th Cir. 1995) 55 F.3d 533, 535-536; *Combined Management, Inc. v. Superintendent of the Bureau of Insurance of the State of Maine,* 22 F.3d 1, 7 (1st Cir. 1994), *cert. denied,* 513 U.S. 943, 115 S.Ct. 350, 130 L.Ed.2d 306 (1994); *Employee Staffing Services, Inc. v. Aubry* (9th Cir. 1995) 20 F.3d 1038, 1040–1041.) As stated by one Court, an employer cannot "don the mantle of ERISA preemption simply by including workers' compensation benefits in its welfare benefit plan and thereby escape the requirements of [state] law." (*Combined Management, Inc.,* 22 F.3d at 5.)

This does not mean, however, that ERISA cannot preempt a state workers' compensation law that "relates to" an ERISA plan which provides, for example, group medical, dental and vision benefits outside of any workers' compensation scheme. To the contrary, in *Greater Washington Board of Trade*, the Supreme Court held that ERISA preempted a District of Columbia law requiring employers to provide disabled employees on workers' compensation with health insurance coverage equivalent to that which they would have received had they been working. (D.C. Code, §36-307(a-1)(1).) The Court specifically concluded that 29 U.S.C. §1003(b)(3) did *not* alter the result:

> "It makes no difference that [the District of Columbia law's] requirements are part of the District's regulation of, and therefore also 'relate to,' ERISA-exempt workers' compensation plans. The exemptions from ERISA coverage set out in ... 29 U.S.C. §1003(b) ... do not limit the pre-emptive sweep of [29 U.S.C. §1144(a)] once it is determined that the law in question relates to [an ERISA] covered plan." (*Greater Washington Board of Trade, supra,* 506 U.S. at 131.)

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Accordingly, based on all the grounds discussed above, we conclude that applicant's section 132a claim "relates to" his employer's ERISA plan and is preempted by ERISA. (29 U.S.C. §1144(a).) In essence, he is asserting that his employer's action in setting up, executing, and administering the terms of its ERISA plan discriminated against him as an industrially-injured worker because, but for his injury, he would have continued working and he would have continued receiving health benefits under the ERISA plan. Thus, applicant's section 132a claim is directly premised upon the existence of his employer's ERISA plan and upon his employer's refusal (pursuant to the terms of the ERISA plan) to continue its plan contributions on his behalf.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Board (En Banc) that the Findings and Order issued by the workers' compensation administrative law judge on August 27, 2001 be, and it is hereby, **RESCINDED** and that the following is **SUBSTITUTED** therefor:

## FINDINGS OF FACT

1. Applicant's Labor Code section 132a discrimination claim is preempted by the provisions of the Employee Retirement Income Security Act of 1974.

2. All other issues are moot.

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## ORDER

**IT IS ORDERED** that applicant take nothing by reason of his Labor Code section 132a claim herein.

*WORKERS' COMPENSATION APPEALS BOARD (EN BANC)*

*MERLE C. RABINE, Chairman*

*COLLEEN S. CASEY, Commissioner*

*WILLIAM K. O'BRIEN, Commissioner*

*JAMES C. CUNEO, Commissioner*

*FRANK M. BRASS, Commissioner*

*JANICE J. MURRAY, Commissioner*

*DATED AND FILED AT SAN FRANCISCO, CALIFORNIA*

FEB 13 2002

*SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD*

*NPS/tab*

WORKERS' COMPENSATION APPEALS BOARD EUREKA SEAL