

**Labor and the Law:**  
**News and Current Events from the**  
**LERA Section on Labor and Employment Law**

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**Labor and Employment Law News**

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**Card Check, Majority Status, and the Duty to Bargain in the Construction Industry – Who Decides?**

This is case, which grows out of a dispute related to a union's right to represent a group of employees, raises special topics in the construction industry. It would make a great Labor Law exam question, but for readers of this newsletter, I'll make it open book. *Painters Local 159 v. J&R Flooring*, Case No.08-17089 (9th Cir. July 30, 2010) <http://www.ca9.uscourts.gov/datastore/opinions/2010/07/30/08-17089.pdf>

The flow of work in the construction industry often highly skilled work done by workers brought in for short stints as needed. As a result, employers need a structure for bringing in employees whose work practices are uniform so work is not delayed. These needs shape union representation and create special structures to make work attractive, so workers will invest in the training required. One structure is the hiring hall, which dispatches workers as employers need them. Another is the joint employer-union benefit fund and multi-employer collective bargaining agreements with provide employment benefits, such as pensions, health, and vacations, even though an employee does not work long for any one employer. These collectively bargained benefits are provided through a special construction industry process for union representation under Sec. 8(f). That 1959 amendment, was lobbied for by both employers and unions and became law in 1959.

A construction worker's time on a job can be so short that there is no time to conduct an NLRB election. Sec. 8(f) allows a construction employer to recognize a union before any workers are hired for a job, without violating Sec. 8(a)(2), which makes it an unfair labor practice to recognize a union that does not represent a majority of an employer's employees. The union in this case was recognized as an 8(f) union but then wanted to become a representative under Sec. 9(a) by showing that it represented a majority of employees. When a union establishes its majority status, by an election or card check, that status continues indefinitely, including after a collective bargaining agreement expires, and the employer has a legal obligation to recognize and bargain in good faith with the union. Unions in an 8(f) relationship do not have that status, so an employer may refuse to recognize a union when no collective bargaining agreement is in force.

Here, the employers refused to recognize the union after their contract expired. After the employers refused to recognize the union, it filed an unfair labor practice charge with the NLRB and also filed a lawsuit in federal court to compel arbitration of the collective bargaining agreement's card check recognition terms.

The basic question in this case is: Who decides whether the union had majority status - an arbitrator or the National Labor Relations Board?

The National Labor Relations Act gives the NLRB the sole responsibility for deciding issues related to union representation in the private sector. If the dispute is primarily about whether the union represents a majority of employees, then the NLRB has the jurisdiction to decide the dispute. But an arbitrator decides disputes that are primarily about interpreting terms of the parties' contract.

In this case, the union and employer' contract said the employer must recognize the union if a card check by a third party showed that the union represented a majority of employees and any disputes must be resolved by expedited arbitration.

No employer attended the card check, which showed that the union had signed, authenticated cards from 20 of 22 employees, but the process did not comply with NLRB rules for conducting card checks. One employer refused to bargain for a new contract, while the other employers bargained with the union but refused to accept the card check results and to recognize the Union as a majority Sec. 9(a) representative.

The court saw the issues as (1) whether the parties were required to arbitrate whether the employers had a duty to bargain and (2) whether the employers had a duty to bargain, which (3) depended on whether the union proved that it represented a majority of the employees based on the parties' agreement. Courts have long supported arbitration to resolve disputes about the interpretation of collective bargaining agreements, but Congress gave the NLRB primary jurisdiction over unfair labor practices.

The court found that the basic issue was whether the union had proven its majority status: "We hold that where the parties have contractually agreed only to use a card check to determine whether a union has established its § 9(a) majority status, the issue of whether the union established its § 9(a) status remains primarily representational and within the NLRB's primary jurisdiction." All the contract said was that there would be a third-party card check but provided no details about the card check process. "We do not see how an arbitrator could possibly resolve the dispute . . . without resorting to general principles derived from our national labor policy. The Board is better suited to such a task."

### **The Americans with Disabilities Act, Family and Medical Leave Act, and Fitness-for-Duty Examinations, Case No.1**

There are two cases on this subject this month

Legal issues related to the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) are likely to arise together, as can workers compensation issues if there is a job-related injury. This dispute in this case, which involves a police officer who had suffered a head injury, is whether the employer violated the ADA and FMLA by requiring a fitness for duty examination, without showing that the employee's conduct had seriously deteriorated. The court found that the employer could order the examination if the combination of the employee's injury and the potential that his injury made him a danger to the public. The court held that ADA does not require a police department to forego a fitness for duty examination or to wait until questionable behavior results in injuries. *Brownfield v. Yakima*, Washington, Case No.09-35628 (9th Cir. July, 27, 2010). [http://www.ca9.uscourts.gov/opinions/view\\_subpage.php?pk\\_id=0000010689](http://www.ca9.uscourts.gov/opinions/view_subpage.php?pk_id=0000010689)

The decision emphasizes that the legal standard for ordering a fitness for duty examination is that the concern is job related and the examination is required by business necessity. The decision reviews the evidence of behavior that showed the business necessity standard had been met. When the employee refused to submit to the examination, the employer was justified in terminating him. The court said: "We reiterate that the business necessity standard 'is quite high, and is not to be confused with mere expediency.'" The court found that the employer had presented evidence to support its concerns that it might be liable for negligent retention. Therefore, the employer had an objective, legitimate basis to doubt the employee's ability to perform his duties.

### **The Americans with Disabilities Act, Family and Medical Leave Act, and Fitness-for-Duty Examinations, Case No. 2**

The second case, which concerns a emergency services dispatcher, also involves the same grouping of legal issues. This case also notes that the "ADA prohibits an employer from requiring a medical examination or inquiring into the disability status of an employee 'unless such examination or inquiry is shown to be job-related and consistent with business necessity'" and that to demonstrate compliance with the law, "the employer bears the burden to show the asserted 'business necessity' is vital to the business and the request for a medical examination or inquiry is no broader or more intrusive than necessary." *Wisbey v. Lincoln*, Case No.09-2100 (8th Cir. July 6, 2010). <http://www.ca8.uscourts.gov/opndir/10/07/092100P.pdf>

The court affirmed that the law allows employers to use reasonable means to ascertain the cause of an employee's troubling behavior, and fitness for duty exams are considered a reasonable means to make the decision whether an employee is able to perform the job's essential functions.

### **Workers Compensation, the Burden of Proof, and the Scope of Review**

Back injuries are common, painful, and often difficult to diagnose accurately. Decisions must be made as to which complex facts about the injury to believe. Then the standards of law must be applied to the facts to decide the outcome. A recent workers compensation case shows how various tools are used to help make decisions. These tools, which are used throughout our legal system, include (1) how to decide whether evidence and testimony are credible, (2) whether a party has met a burden of proof, and (3) on appeal, how narrow or broad the court's review can be. A reviewing court or agency board must put all of these issues together, and a person charged with putting in evidence in a case needs to pay as much attention to how these tools will be used as to the evidence.

The decision in a recent Michigan workers compensation case shows how all of these tools are used. The case includes detailed discussions of whether specific evidence was credible and why. American Axle & Manufacturing Holdings and Zurich-American Insurance Co., Case No.291117 (Mich. Ct. App. Aug. 12 2010)<http://www.michbar.org/opinions/appeals/2010/081210/46587.pdf>

Here is a brief overview of types of tools regularly used in the case issues you during as appeals were taken from the hearing officer's decision. The party with the burden of proof – usually the plaintiff – will lose unless she can present more evidence on the issues than the other side. The level of proof required varies depending on the issue. In the workers compensation case, the burden of proof was "by a preponderance of the evidence." That is the easiest burden to carry and is often used in civil cases. Clear and convincing evidence requires is a higher level of proof and is also used in civil cases. The highest burden, beyond a reasonable doubt, is used in criminal trials.

When a case is appealed, the reviewing court's scope of review also has a presumption built in about who wins. A reviewing court or board considers the evidence and whether it was credible along with the burden of proof in deciding whether the decision below should be left undisturbed or overturned. Some deference is given to the trial judge's credibility decisions, because the hearing officer saw the witnesses testify. Common standards of review include whether the decision below was supported by the evidence; arbitrary and capricious; contrary to law; or clearly erroneous. Other standards apply to appeals from administration agencies.

So take a look at the case and see how these tools were used to make the decision.