WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LAWRENCE WEINER,

Applicant,

vs.

RALPHS COMPANY, Permissibly Self-Insured; and SEDGWICK CLAIMS MANAGEMENT SERVICES, INC. (Adjusting Agent),

Defendant(s).

Case No. ADJ347040 (MON 0305426)

OPINION AND ORDER DENYING RECONSIDERATION (EN BANC)

Applicant, Lawrence Weiner, seeks reconsideration of the Opinion and Decision After Reconsideration (En Banc) issued by the Appeals Board on June 11, 2009. (See *Weiner v. Ralphs Company* (2009) 74 Cal.Comp.Cases 736 (Appeals Board en banc) (*Weiner I*).) In our current en banc decision,[1] we deny applicant's petition for reconsideration.

Our June 11, 2009 en banc decision rescinded the January 13, 2009 Findings and Award of the workers' compensation administrative law judge (WCJ). The WCJ had found that applicant is entitled to retroactive vocational rehabilitation maintenance allowance benefits (VRMA) at his temporary disability indemnity (TD) rate from June 13, 2003, the date he initially requested vocational rehabilitation) through March 7, 2005, the day before defendant voluntarily commenced vocational rehabilitation benefits and services.

In rescinding the WCJ's decision, our initial en banc opinion held that: (1) the repeal of

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1 En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation judges. (Lab. Code, § 115; Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd.* (*Garcia*) (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5] (*Garcia*); *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6].) In addition to being adopted as a precedent decision in accordance with Labor Code section 115 and Appeals Board Rule 10341, this en banc decision is also being adopted as a precedent decision in accordance with Government Code section 11425.60(b).

Labor Code section 139.5,[2] effective January 1, 2009, terminated any rights to vocational rehabilitation benefits or services pursuant to orders or awards that were not final before January 1, 2009; (2) a saving clause was not adopted to protect vocational rehabilitation rights in cases still pending on or after January 1, 2009; (3) the vocational rehabilitation statutes that were repealed in 2003 do not continue to function as "ghost statutes" on or after January 1, 2009; (4) effective January 1, 2009, the Workers' Compensation Appeals Board (WCAB) lost jurisdiction over non-vested and inchoate vocational rehabilitation claims, but the WCAB continues to have jurisdiction under sections 5502(b)(3) and 5803 to enforce or terminate vested rights; and (5) subject matter jurisdiction over non-vested and inchoate vocational rehabilitation claims cannot be conferred by waiver, estoppel, stipulation, or consent.

In his petition, applicant contends: (1) there was a period of retroactive VRMA benefits payable at the non-delay rate[3] over which there was no good faith dispute – i.e., the period between the date of his second vocational rehabilitation request, which was supported by medical evidence declaring him a qualified injured worker (QIW), through the date defendant voluntarily commenced vocational rehabilitation benefits and services; therefore, these benefits were "vested" and should have been allowed; (2) the repeal of section 139.5 did not automatically terminate the right to benefits owed before January 1, 2009; (3) he is entitled to retroactive benefits because section 5502(b)(3), which allows hearings before the WCAB on vocational rehabilitation issues, was not repealed; (4) he is entitled to retroactive benefits because section 5410, which allows for requests for vocational rehabilitation benefits for up to five years from the date of injury, was not repealed; (5) he is entitled to retroactive benefits because no supplemental job displacement benefits are provided for injuries before January 1, 2004; (6) the "ghost statute" principles of *Godinez*[4] give the

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[2] All further statutory references are to the Labor Code.

[3] Under former section 139.5, VRMA benefits were payable at no more than $246 per week (the "non-delay rate"), which often was less than the injured employee's TD rate. (See former Lab. Code, § 139.5(d)(1).) However, former section 4642(a) provided that "[i]f the employer fails to … commence vocational rehabilitation service[s] in a timely manner … or otherwise causes any delay in the provision of vocational rehabilitation services," then the employer was liable for VRMA at the TD rate (the "delay rate"). (See former Lab. Code, § 4642.)

[4] *Godinez v. Buffets, Inc*. (2004) 69 Cal.Comp.Cases 1311 (Appeals Board Significant Panel Decision).

WCAB continuing jurisdiction to enforce section 139.5 for back benefits owed prior to its January 1, 2009 repeal; and (7) due process and public policy considerations dictate that he is at least entitled to back due benefits owed prior to January 1, 2009.

We deny reconsideration for the reasons stated in our June 11, 2009 opinion, which we adopt and incorporate herein, and for the following reasons.

I. BACKGROUND

To briefly reiterate the facts, applicant sustained a cumulative injury from 1967 through September 30, 2002. He made an initial demand for vocational rehabilitation on June 13, 2003. However, the first medical evidence opining that he needed vocational rehabilitation was the June 15, 2004 report of applicant's treating physician, Philip A. Sobol, M.D. Applicant made a second demand for vocational rehabilitation on July 12, 2004. On March 8, 2005, defendant started providing vocational rehabilitation benefits and services. Some three years later, defendant requested closure of vocational rehabilitation and applicant objected. On April 8, 2008, a stipulated Findings and Award issued finding 60% permanent disability and a need for further medical treatment. The stipulated award did not address retroactive VRMA. On July 9, 2008, the Rehabilitation Unit determined that applicant is entitled to retroactive VRMA at the TD rate from June 13, 2003 through March 7, 2005. Defendant appealed the Rehabilitation Unit's determination and a trial was held before the WCJ on November 24, 2008. On January 13, 2009, the WCJ issued his decision awarding retroactive VRMA at the TD rate from June 13, 2003 to March 7, 2005. Defendant timely sought reconsideration, leading to our June 11, 2009 en banc decision that rescinded the WCJ's decision for lack of jurisdiction because it issued after the January 1, 2009 effective date of the repeal of section 139.5.

II. DISCUSSION

The chief issue not specifically addressed in our prior opinion is applicant's claim that he is at least entitled to VRMA at the non-delay rate from July 12, 2004 – the date of his second vocational rehabilitation request, which was supported by a medical report from his treating physician declaring him to be a QIW – through March 8, 2005, when defendant voluntarily

commenced vocational rehabilitation benefits and services. Applicant claims there was no dispute over his entitlement to these VRMA benefits at the non-delay rate for this period – i.e., the only dispute was over payment at the TD rate. Therefore, applicant contends that the non-disputed VRMA at the non-delay rate was "vested."

Preliminarily, we question applicant's allegation that there was never any good faith dispute regarding retroactive VRMA at the non-delay rate. For example, although at one point defendant's rehabilitation appeal suggests it might have been willing to concede liability for VRMA at the non-delay rate retroactive to June 15, 2004, its rehabilitation appeal also makes arguments inconsistent with any such concession (e.g., that applicant had voluntarily retired, thereby removing himself from the workforce; applicant had rehabilitated himself and found his own suitable gainful employment, etc.).

Nevertheless, we will address applicant's contention using the assumption that there was no dispute over defendant's liability for VRMA at the non-delay rate for a period prior to March 8, 2005.

Before January 1, 2009, if an employer disputed an employee's request for vocational rehabilitation that was supported by a QIW determination from a treating physician, former section 139.5 mandated that the employee be paid VRMA at the non-delay rate until the dispute was resolved. That is, as applicant points out, former section 139.5 provided that "[i]f the employer disputes the treating physician's determination of medical eligibility [for vocational rehabilitation], the employee *shall* … *receive* … *the maintenance allowance* … pending final determination of the dispute." (See former Lab. Code, § 139.5(d) (emphasis added).) The term "shall" ordinarily means a mandatory duty. (Lab. Code, § 15; see *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357; *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907.)

Indeed, where an injured employee was ultimately determined to be a QIW, former section 139.5 was interpreted to mean that the employee was entitled to VRMA retroactive to the date he or she first requested vocational rehabilitation, even if there was no prima facie medical evidence of QIW status when the request was made. (*San Diego Transit Corp. v. Workers' Comp. Appeals Bd.*

(*Renfro*) (1980) 28 Cal.3d 635, 637-638 [45 Cal.Comp.Cases 1292, 1294-1295]; *Johnson v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 197, 201 [63 Cal.Comp.Cases 717, 719]; *Pereira v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 1, 6 [52 Cal.Comp.Cases 456, 460-461].)

Yet, even if we assume that some VRMA was indisputably due to applicant, this does not mean that his right to this VRMA had vested. As our June 11, 2009 opinion emphasized, (1) a statutory right is inchoate, incomplete, or unperfected until it is vested; (2) a statutory right vests through a final order or award;[5] and (3) if the statutory right has not been vested through a final order or award, the repeal of the statute extinguishes the right. (*Weiner I*, *supra*, 74 Cal.Comp.Cases at pp. 742-749.)

When SB 899 was enacted on April 19, 2004, it provided that section 139.5 "shall remain in effect only until January 1, 2009, and as of that date is repealed … ." (See former Lab. Code, § 139.5(l).) Therefore, applicant had some four years – i.e., from April 19, 2004 to December 31, 2008 – to obtain a final order or award directing defendant to pay retroactive VRMA at the non-delay rate (with jurisdiction reserved over the disputed issue of the delay rate). However, there was no such provision in the stipulated Findings and Award of April 8, 2008. Further, no such order was entered into at either the July 2008 proceeding before the Rehabilitation Unit or the November 24, 2008 trial before the WCJ. Therefore, any statutory right applicant may have had to retroactive VRMA at the non-delay rate did not vest before the January 1, 2009 effective date of section 139.5's repeal.

Applicant asserts that "there [was] no clear language in Labor Code Section 139.5 that its revocation would apply to retroactive benefits owed before the repeal of the statute." Yet, it is immaterial that SB 899's repeal of section 139.5 effective January 1, 2009 did not expressly state that the repeal would apply to benefits due before that date. As our prior decision states, "the right to workers' compensation benefits is wholly statutory." (*Weiner I*, *supra*, 74 Cal.Comp.Cases at p.

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[5] As observed by our prior decision, "[i]t is conceivable there may be other ways to vest a right to vocational rehabilitation other than through an order that had become final before January 1, 2009. However, we have no occasion to address that question now." (*Weiner I*, *supra*, 74 Cal.Comp.Cases at p. 737, fn. 3.)

743.) And, as that decision made clear, a right or remedy dependent on a statute falls with the repeal of that statute unless the right has been vested through a final order or award. (*Id*., 74 Cal.Comp.Cases at pp. 742-749.) "The justification for this rule is that all statutory remedies are pursued with full realization that the Legislature may abolish the right to recover at any time." (*Governing Bd. of Rialto Unified School Dist. v. Mann* (1977) 18 Cal.3d 819, 829.) Indeed, as provided by Government Code section 9606, "Any statute may be repealed at any time, except when vested rights would be impaired. *Persons acting under any statute act in contemplation of this power of repeal*." (Emphasis added.)

Applicant further contends that "Denying workers injured prior to January 1, 2004 continued rehabilitation benefits per the statute in existence at the time of their injuries and not providing any alternative vocational assistance to these individuals is a violation of due process and the California Constitution." The provision of the California Constitution to which applicant refers is the statement in Article XIV, section 4, about injured workers receiving "adequate" compensation for their injuries.

The Appeals Board lacks the authority to declare a statute unconstitutional. (Cal. Const., art. III, § 3.5; *Greener v. Workers' Comp. Appeals Bd.* (1993) 6 Cal.4th 1028, 1038 [58 Cal.Comp.Cases 783, 798].) Implicitly, we also lack the authority to declare unconstitutional either the Legislature's repeal of section 139.5 or its failure to concurrently amend section 4658.5 to allow workers injured before January 1, 2004 to receive supplemental job displacement benefits. We will observe, however, that there is no express constitutional right to vocational rehabilitation or some alternative form of vocational assistance. (Cal. Const., art. XIV, § 4.)[6] Moreover, in *Graczyk v. Workers' Comp. Appeals Bd.* (1986) 184 Cal.App.3d 997 [51 Cal.Comp.Cases 408] (*Graczyk*), the applicant was a student athlete who was injured while playing football for a state university on an athletic scholarship. At the time of his injury, the applicant fell within the definition of "employee" as interpreted in *Van Horn v. Industrial Acc. Com.* (1963) 219 Cal.App.2d 457 [28 Cal.Comp.Cases

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[6] Indeed, as pointed out by our June 11, 2009 opinion: "Prior to 1965, the workers' compensation laws made no provision for vocational rehabilitation." (*Weiner I*, *supra*, 74 Cal.Comp.Cases at p. 740.)

187]; however, before his workers' compensation claim became final, the Legislature added a subdivision (k) to section 3352 to expressly exclude student athletes from workers' compensation coverage. In rejecting his constitutional challenge to the Legislature's action, the Court of Appeal said: "[A]pplicant's inchoate right to benefits under the workers' compensation law is wholly statutory and had not been reduced to final judgment before the Legislature's 1981 addition of subdivision (k) further clarifying the employee status of athletes. Hence, applicant did not have a vested right, and his constitutional objection has no bearing on the issue." (*Graczyk*, *supra*, 184 Cal.App.3d at p. 1006 [51 Cal.Comp.Cases at p. 414].)

Applicant's remaining arguments were considered and rejected by our June 11, 2009 opinion.

For the foregoing reasons,

IT IS ORDERED, as the Decision of the Workers' Compensation Appeals Board (En

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Banc), that applicant's petition for reconsideration, filed July 1, 2009, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Joseph M. Miller
JOSEPH M. MILLER, Chairman

/s/ James C. Cuneo
JAMES C. CUNEO, Commissioner

/s/ Frank M. Brass
FRANK M. BRASS, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

/s/ Alfonso J. Moresi
ALFONSO J. MORESI, Commissioner

/s/ Deidra E. Lowe
DEIDRA E. LOWE, Commissioner

/s/ Gregory G. Aghazarian
GREGORY G. AGHAZARIAN, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

8/17/09

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

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