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)

ORDER ALLOWING AMICUS BRIEFS (EN BANC)

On April 10, 2009, the Appeals Board granted reconsideration to further study the factual and legal issues presented by the petition for reconsideration filed by defendant, Ralphs Grocery Company.

Defendant sought reconsideration of the Findings and Award issued by the workers' compensation administrative law judge (WCJ) on January 13, 2009. In that decision, the WCJ accepted the parties' stipulation that applicant, Lawrence Weiner, sustained an industrial injury to his right hip, cervical spine, and lumbar spine from 1967 through September 30, 2002, while employed as a checker by defendant. In relevant part, the WCJ further found that applicant is entitled to retroactive vocational rehabilitation maintenance allowance benefits (VRMA), payable at his stipulated temporary disability indemnity (TD) rate, for the period of June 13, 2003 to March 7, 2005. Accordingly, the WCJ awarded those benefits.

In its petition, defendant contends, in summary, that: (1) the WCJ lacked jurisdiction to award VRMA at the TD rate on January 13, 2009 because (a) the Legislature repealed the vocational rehabilitation statute, Labor Code section 139.5,[1] effective January 1, 2009; (b) the right to vocational rehabilitation benefits is wholly statutory, and the Legislature could repeal that

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

right at any time; (c) the repeal of a statutory right stops all pending actions where the repeal finds them, even if the repeal becomes effective while an action is pending on appeal, unless the repeal contains a savings clause that protects the right in pending litigation; and (d) therefore, all rights to vocational rehabilitation benefits were abolished effective January 1, 2009, unless those rights were vested through a final order; (2) the award of VRMA cannot be justified under the vocational rehabilitation "ghost statutes" because, by repealing section 139.5, the Legislature ended the tenure of any "ghost statutes" by ending vocational rehabilitation itself; (3) injured employees were not prejudiced by the January 1, 2009 abolishment of all rights to vocational rehabilitation benefits, because they had five years to litigate vocational rehabilitation issues and to obtain final awards; (4) although the Labor Code still mentions vocational rehabilitation in other sections, such as section 5803, these sections merely give the WCAB continuing jurisdiction to enforce awards under section 139.5 that became final before January 1, 2009; and (5) even assuming the WCJ had jurisdiction to award retroactive VRMA at the TD rate, his decision violated section 5313 because it did not address whether retroactive VRMA at the TD rate can be construed as a penalty under section 5814 and it did not explain how retroactive VRMA at the TD rate may be awarded retroactively to a date before the employer had some specific knowledge of the employee's possible QIW status.

Applicant filed an answer. He contends, in summary, that: (1) his right to retroactive VRMA at the TD rate is based on the statutory law in effect at the time those benefits should have been provided; (2) his right to retroactive VRMA at the TD rate is based on the statutory law in effect on November 24, 2008, when the issue was submitted for decision to the WCJ; (3) it would be unconscionable to deny him retroactive VRMA at the TD rate where defendant delayed these benefits without any basis and where a hearing on defendant's vocational rehabilitation appeal was continued because of its counsel's unavailability; (4) the vocational rehabilitation "ghost statutes" gave the WCJ jurisdiction to deny defendant's vocational rehabilitation appeal and to find and award retroactive VRMA at the TD rate; (5) section 5502(c)(3), which was not repealed, constitutes a savings clause that allows the WCAB to hear and determine issues of entitlement to

vocational rehabilitation benefits under repealed section 139.5; and (6) because he is a QIW, he is entitled to VRMA at the TD rate retroactive to the date he first requested vocational rehabilitation.

Because of the important legal issues surrounding the effect of the Legislature's repeal of section 139.5, effective January 1, 2009, and to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, has assigned this case to the Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)

In accordance with our broad powers on reconsideration (Lab. Code, § 133; see also Cal. Code Regs., tit. 8, § 10848), we will give any interested person or entity until 5pm on Monday, May 11, 2009 to file an amicus curiae brief, *limited to the jurisdictional issues relating to the Legislature's repeal of section 139.5*.[2] Any such amicus briefs shall concurrently be served on both counsel in the *Weiner* case.[3] Then, each counsel in the *Weiner* case shall have until 5pm on Monday, June 1, 2009 to file a single consolidated reply brief that responds to *all* of the amicus briefs. These time limitations for filing mean that a brief must be *received* by the Appeals Board by the applicable deadline, and not merely mailed by that deadline. (Cal. Code Regs., §§ 10845(a), 10230(a).) Untimely briefs will *not* be considered.

We are allowing the submission of amicus briefs because we are aware that the question of the WCAB's jurisdiction to act on vocational rehabilitation issues following the January 1, 2009 effective date of the repeal of section 139.5 is of great interest to the workers' compensation community. In particular, we are aware that, on February 3, 2009, the Acting Court Administrator

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[2] We observe it is not unusual for the Appeals Board to invite amicus curiae briefs relating to our en banc cases. The Appeals Board has periodically done so for over 30 years. For example, on April 6, 2009, we invited amicus briefs following our grants of reconsideration of our February 3, 2009 en banc decisions in *Almaraz* and *Guzman* (74 Cal.Comp.Cases 201) and in *Ogilvie* (74 Cal.Comp.Cases 248). We also accepted amicus curiae briefs in each of the following cases: *Costa v. Hardy Diagnostic* (2006) 71 Cal.Comp.Cases 1797 (Appeals Board en banc); *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc); *Phillips v. Sacramento Municipal Utilities District* (2000) 63 Cal.Comp.Cases 585 (Appeals Board en banc); *Moran v. Bradford Building* (1992) 57 Cal.Comp.Cases 273 (Appeals Board en banc); *Lechner v. Solar Turbines, Inc.* (1992) 57 Cal.Comp.Cases 366 (Appeals Board en banc); *Rocha v. Puccia Construction Co.* (1982) 47 Cal.Comp.Cases 377 (Appeals Board en banc); (5) *Greenwald v. Carey Distributing Co.* (1981) 46 Cal.Comp.Cases 703 (Appeals Board en banc); *Cabrera v. Intercell Industries* (1980) 45 Cal.Comp.Cases 3 (Appeals Board en banc); *Rountree v. Time D.C.* (1979) 44 Cal.Comp.Cases 223 (Appeals Board en banc); *Thomas v. Sports Chalet, Inc.* (1977) 42 Cal.Comp.Cases 625 (Appeals Board en banc); and *Cabello v. NL Industries* (1976) 41 Cal.Comp.Cases 605 (Appeals Board en banc).

[3] The addresses for counsel are set forth beneath the service declaration at the end of this opinion.

of the Division of Workers' Compensation issued a "Notice of Intention to Order Statewide Consolidation of Designated Cases on the Issue of the Repeal of Labor Code Section 139.5 and to Issue an Order Staying Action on all other Cases in which the Effect of the Repeal of Labor Code Section 139.5 is Presented Pending a Determination on the Consolidated Action" (NIT). The NIT reflects an intention to determine whether "a limited number of … cases should be consolidated" for "the purpose of … determining the common issue of the effect of the repeal of Labor Code Section 139.5 on injured workers' entitlement to vocational rehabilitation benefits and services for injuries occurring prior to January 1, 2004." The NIT also reflects an intention to determine whether "all other cases statewide in which th[is] common issue is presented" should be stayed if a limited number of such cases are consolidated. The NIT noticed a hearing for March 27, 2009 and, among other things, it directed that every Presiding Judge of the WCAB was to post a copy of the NIT in a prominent public location at their respective district offices.

We believe that, by taking the section 139.5 issue for an en banc decision, we may obviate the need for any possible consolidated proceedings at the trial level because our en banc decision will become binding.[4] Moreover, because it seems likely that any consolidated decision at the trial level would come before us on reconsideration, we believe that taking the section 139.5 issue for an en banc decision would reduce the chance that any consolidated proceedings at the trial level might result in "a wasteful spinning of the wheels." (See *Albert Van Luit Wallpaper Co. v. Workmen's Comp. Appeals Bd.* (*Taylor*) (1973) 36 Cal.App.3d 88, 92 [38 Cal.Comp.Cases 802, 804].)

Additionally, by inviting amicus curiae briefs, we believe we will receive a broad perspective on any section 139.5 jurisdictional issues, we will receive assistance in analyzing those issues, and we will help ensure that all sides of those issues are fairly and completely presented. (*In re Marriage Cases* (2008) 43 Cal.4th 757, 792, fn. 10; *Preserve Shorecliff Homeowners v. City*

[4] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation judges. (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]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Gov. Code, § 11425.60(b).)

of San Clemente (2008) 158 Cal.App.4th 1427, 1435.)

The amicus briefs shall not exceed 15 pages and they shall comply with the form and size requirements of Rule 10845(a) (see § 10232(a)(1) through (a)(5) and (a)(11)), except that the amicus briefs need not comply with the provisions of Rule 10845(a) that relate to document folding and stapling, document cover sheets, and documents separator sheets (see § 10232(a)(11) and (b)). This is because we will order that these briefs be filed directly with the Appeals Board, and not with any district office. The Appeals Board will process these documents and scan them into EAMS. Any amicus brief not complying with all of these requirements (including the time deadlines and service requirements set forth above) shall not be accepted for filing or deemed filed and shall be discarded without notification to the filing person or entity. We note that, for the benefit of any potential amicus, we have posted copies of defendant's petition for reconsideration and of applicant's answer on our website at http://www.dir.ca.gov/wcab/wcab_info_wcc.htm.

After the period for filing amicus briefs has elapsed, counsel in the *Weiner* case will each be given until 5pm on Monday, June 1, 2009 to file a reply brief that responds to *all* of the amicus briefs – that is, each counsel may file a single consolidated reply brief. The reply briefs shall not exceed 15 pages and they shall comply with the form and size requirements of Rule 10845(a) (see § 10232(a)(1) through (a)(5) and (a)(11)), except, as above, they need not comply with the provisions of Rule 10845(a) that relate to document folding and stapling, document cover sheets, and documents separator sheets (see § 10232(a)(11) and (b)). The parties' replies to the amicus briefs shall be served on opposing counsel, but the replies need not be served on amici.

Any brief, whether filed by a party or by an amicus, which requests that the Appeals Board take judicial notice of legislative history shall comply with *all* of the following requirements: (1) the brief shall append a copy of the matter to be judicially noticed or explain why it is not practicable to do so; (2) the body of the brief shall *quote* the specific language of legislative history that the party or amicus seeks to be judicially noticed and considered and it shall specifically identify where in the document the quoted language appears (e.g., "Sen. Com. on Labor and Industrial Relations, Analysis of Sen. Bill No. 714 (2003-2004 Reg. Sess.) as amended

Apr. 21, 2003, pp. 1-2") (cf. Cal. Code Regs., tit. 8, § 10842(b)); and (3) the body of the brief shall explain why the matter to be judicially noticed is relevant. The appended legislative history documents shall not count toward the page limitations set out above, however, the requisite quoted language and explanation of its relevance shall count toward the page limitations. We shall consider only those requests for judicial notice of legislative history that strictly adhere to all of these requirements. We impose these requirements so that: (1) the parties and amici focus only on the most important elements of legislative history; (2) we are not deluged with a tsunami of requests for judicial notice of legislative history documents that have only minimal relevance to our deliberations; and (3) we and the parties are assured of having ready access to the legislative history documents. A failure to comply with any one these requirements may result in the denial of the request for judicial notice.

For the convenience of amici, who will not have ready access to the record, we will set out the following history, which appears to be undisputed.

Applicant sustained an industrial injury to his right hip and his cervical and lumbar spine while employed as a checker from 1967 through September 30, 2002. Although the parties ultimately stipulated to injury, the issue of injury was initially disputed.

Applicant voluntarily retired on September 30, 2002, based on an offer of a pension. From that date through March 7, 2005, he was ready, willing and able to participate in vocational rehabilitation.

Applicant filed an application on June 7, 2003 and made a demand for vocational rehabilitation on June 13, 2003.

In a report of June 15, 2004, applicant's treating physician, Philip A. Sobol, M.D., found that applicant had sustained industrial injury and declared him to be a QIW. This was the first report indicating a need for vocational rehabilitation. Applicant made a second demand for vocational rehabilitation on July 12, 2004.

On March 8, 2005, defendant accepted applicant's injury claim and commenced the provision of vocational rehabilitation benefits.

On March 31, 2005, applicant was evaluated by Alexander Angerman, M.D., as the agreed medical evaluator (AME) in orthopedics. On May 6, 2005, Dr. Angerman issued a report finding cumulative industrial injury and agreeing that applicant is a QIW.

Except for a period when vocational rehabilitation was interrupted for medical treatment (including total hip replacement surgery), applicant participated in vocational rehabilitation from March 8, 2005 through approximately March 26, 2008, when defendant requested closure of vocational rehabilitation. Applicant objected to closure and the parties appeared before the Rehabilitation Unit on July 7, 2008.

On July 9, 2008, the Rehabilitation Unit issued a determination that applicant is entitled to retroactive VRMA at his TD rate from June 13, 2003 (the date of his initial request for vocational rehabilitation) through March 7, 2005 (the day before defendant voluntarily commenced vocational rehabilitation benefits and services).

On July 29, 2008, defendant filed a timely rehabilitation appeal, together with a declaration of readiness.

Defendant's rehabilitation appeal initially was set for a September 8, 2008 status conference; however, the conference was continued to October 14, 2008 at defendant's request due to its attorney's calendar conflict.

A trial took place on November 24, 2008, at which time the matter was submitted for decision.

On January 13, 2009, the WCJ issued his decision confirming the Rehabilitation Unit's determination that applicant is entitled to retroactive VRMA at the TD rate from June 13, 2003 through March 7, 2005.

For the foregoing reasons,

IT IS ORDERED that any interested person or entity shall have until 5pm on Monday, May 11, 2009 to file and serve an amicus curiae brief, in accordance with the requirements set out above.

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1 **IT IS FURTHER ORDERED** that, after the period for the filing of amicus curiae briefs
2 has elapsed, each counsel for the parties in *Weiner* shall have until 5pm on Monday, June 1, 2009
3 to file and serve a single consolidated reply brief in response to the amicus curiae briefs, in
4 accordance with the requirements set out above. The matter will then be deemed submitted for
5 decision.
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IT IS FURTHER ORDERED that pending the issuance of a further Decision After Reconsideration (En Banc), all further correspondence, objections, motions, requests and communications shall be filed only with the Workers' Compensation Appeals Board at either its street address (455 Golden Gate Avenue, 9th Floor, San Francisco, CA 94102) or its Post Office Box address (P. O. Box 429459, San Francisco, California 94142-9459) and shall not be filed with any district office of the WCAB.

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/ Alfonnso 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

4/14/09

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

Lawrence Weiner
Michael Sullivan & Associates, 6151 West Century Boulevard, Suite 700, Los Angeles, CA 90045
Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, 3580 Wilshire Boulevard, Suite 1800, Los Angeles, CA 90010

NPS/aml