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8 WORKERS' COMPENSATION APPEALS BOARD

9 STATE OF CALIFORNIA

10
11 LAWRENCE WEINER,) CASE NO: MON 0305426
12)
13 Applicant,) ANSWER TO PETITION FOR
14 vs.) RECONSIDERATION
15)
16 RALPHS GROCERY COMPANY,)
17 Defendants.)
18)

18 COMES NOW Applicant, through counsel, and answers
19 Defendant's Petition for Reconsideration as follows:

- 20 1. By the Order, Decision, or Award, the Workers'
21 Compensation Judge (WCJ) acted within its powers;
22 2. The evidence does justify the Findings of Fact;

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I.

APPLICANT'S CONTENTIONS

A. The WCJ had jurisdiction to deny Defendant's appeal of a Rehab Unit Decision and Order of July 9, 2008, which was tried and submitted on November 24, 2008.

B. Back due benefits are owed from the date of demand for rehab.

STATEMENT OF RELEVANT FACTS

As indicated by Defendant, Applicant filed an application for adjudication of claim on June 13, 2003. However, omitted is the fact that on June 13, 2003, Applicant also sent additional correspondence to Defendant demanding rehab.

Defendant initially denied the claim.

Thereafter, Dr. Sobol, Applicant's treating doctor issued a report on June 15, 2004 indicating Applicant was unable to return to his prior job and was a qualified injured worker due to his industrial injury.

On July 12, 2004, Applicant sent additional correspondence to Defendant again demanding vocational rehabilitation benefits.

On March 31, 2005, Agreed Medical Examiner Dr. Angerman found injury, the need for rehab, and indicated that Applicant's condition was permanent and stationary in September of 2002.

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He thus found that Applicant had been permanent and stationary and in need of rehab at the time of Applicant's initial demand for rehabilitation on June 13, 2003.

Despite demands for rehabilitation of June 13, 2003, (prior to medical confirmation), and again on July 12, 2004 (after confirmation by Dr. Sobol), Defendant did not pick up vocational rehabilitation benefits until March 8, 2005.

After an interruption of vocational rehab for additional medical treatment, including a total hip replacement, Applicant again participated and completed a rehabilitation plan.

On March 26, 2008, Defendant requested closure of rehab, providing an accounting of the rehab benefits that had been paid; confirming that benefits were not initiated until March 8, 2005. Applicant timely objected to Defendant's request for closure of rehab on April 8, 2008, and a Rehabilitation Unit conference was held on July 7, 2008. Their Decision and Order of July 9, 2008, found Applicant was entitled to benefits, at the delay rate, from June 13, 2003 through March 7, 2005, based on Labor Code Section 139.5(d)(2).

Defendant appealed this D&O and requested a hearing at the WCAB.

This hearing was initially set for September 8, 2008; however, Defendant requested a continuance claiming unavailability. To accommodate Defendant's schedule, the September 8, 2008 hearing was continued to October 14, 2008. When the parties were unable to resolve the issue on such

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2 date, trial was scheduled for November 24, 2008. The matter
3 was submitted on said date. At said time, jurisdiction was
4 also reserved concerning Applicant's penalty claim.
5 Defendant has never provided any argument why benefits are
6 not payable at least as of Applicant's second request on July
7 12, 2004, which was supported by medical reporting.

8 Applicant testified at his hearing that since his
9 retirement on September 20, 2002, he had been ready, willing,
10 and able to participate in vocational rehabilitation.

11 On January 13, 2009, the WCJ issued his Opinion that
12 Applicant was entitled to back due benefits from June 13,
13 2003 through March 7, 2005, confirming the Rehab Unit's
14 Order.

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ARGUMENT

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I.

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JURISDICTION

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20 There is no merit in Defendant's claim that the WCAB
21 does not have jurisdiction to deny Defendant's appeal of this
22 2004 Rehab Unit Order. Further, this matter was submitted to
23 the WCAB in November 2004.

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Defendant requested a continuance of the hearing on
their appeal because of their "unavailability." They have
failed to pay benefits even from July 12, 2004 through March
7, 2005 without providing any basis why at least such
benefits are not owed. Why should Applicant be denied

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2 benefits, that were otherwise statutorily owed at the time,
3 because of delays in DEFENDANT'S appeal of these previously
4 ordered benefits? No legislation would intend such an
5 unconscionable result.

6 Quite frankly, given that a final order from the Rehab
7 Bureau issued, if the WCAB did not have jurisdiction to hear
8 Defendant's appeal, wouldn't that Order be final? Applicant
9 should then be paid benefits per such Rehabilitation Bureau
10 Order.

11 The case cited by Defendant, Ricky Graczyk v. WCAB, 184
12 Cal.Ap3d 997 (1996) concerning the student athlete/employee
13 issue, is inapplicable to the present case. The enactment of
14 the statute in such case did not change prior statutory law.
15 The retroactivity of such a statute determining an issue
16 previously interpreted only by case law is totally different
17 than a new statute, changing prior statutory law.

18 Applicant's right to the back due benefits is based on
19 statutory law at the time the benefits should have been
20 provided. Under the "ghost statute" existence of the laws
21 for injuries prior to January, 2004 as discussed in Godines
22 69 CCC 1311 and Pebworth v. WCAB (2004) 69 CCC 199, the WCAB
23 has jurisdiction to enforce such laws.

24 Pursuant to Labor Code Section 5502(b)(3), the
25 legislature did authorize continuing jurisdiction of the WCAB
26 over vocational rehabilitation benefits. Such Labor Code has
27 not been repealed, and confers the right to a hearing
28 regarding vocational rehabilitation matters. Hence, Labor

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2 Code Section 5502(b)(3) is a general "savings clause." If
3 there is a general savings clause, any action predicated upon
4 a repealed statute may be commenced and prosecuted to it's
5 conclusion under the provisions of the repealed statute.
6 Cross v. Bonded Adjustment Bureau 48 Cal.App4th 266 (1996).
7 Since the legislature did not repeal L.C. 5502(b)(3) which
8 entitles Applicants a hearing regarding rehab issues, it is a
9 savings clause as to rehab benefits owed under the prior
10 statute.

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12 II.

13 BACK DUE BENEFITS

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15 After Applicant retired due to these physical symptoms,
16 he filed a Workers' Compensation claim, and also requested
17 rehabilitation. Such request was first made on June 13,
18 2003. Injury was denied.

19 Applicant's doctor confirmed the need for rehab in a
20 report of June 15, 2004. Applicant again requested rehab on
21 July 12, 2004.

22 In a report of March 8, 2005, the AME confirmed injury
23 and the need for rehab. He also concluded that Applicant had
24 been P&S, and was in need of rehab, prior to Applicant's June
25 13, 2003 request.

26 As found by both the WCJ and Rehab Bureau, given such
27 facts, benefits are owed from Applicant's demand of such
28 benefits per Pereira v. WCAB (1987) 52 CCC 456. As in such

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case, benefits are to be paid from the date of demand when rehab benefits were ultimately found needed at said time.

The Cervantes case discussed by Defendant is inapplicable. In such case, no separate demand for rehab was ever made. Applicant claimed that such benefits were due because of Defendant's failure to meet notice requirements. However, Defendant was never served medical reports supporting a need for rehab. Such facts do not apply to this case.

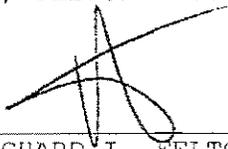
CONCLUSION

The WCAB certainly had jurisdiction to deny Defendant's appeal of the 2008 Rehab Unit Order, when the matter was also submitted to the WCAB in 2008. Further, Labor Code Section 5502(b)(3) is a savings clause, allowing the WCAB to order benefits owed under the prior statute. As the Board stated in Godinez, rehabilitation continues to "walk the stage" like "ghosts" for those injured before 2004.

DATED: February 12, 2009

Respectfully submitted,

GORDON, EDELSTEIN, KREPACK
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By: 
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