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RECEIVED
DIV. OF IND. ACCIDENT
SANTA MONICA

8 WORKERS' COMPENSATION APPEALS BOARD
9

10
11 Lawrence Weiner,) CASE NO. ADJ347040 (MON 0305426)
12)
Applicant,)
13)
v.)
14)
Ralphs Grocery Company,)
Administered by Sedgwick CMS, Inc.)
15)
Defendants.)
16)

17
18 TO ALL INTERESTED PARTIES AND TO THEIR ATTORNEYS OF RECORD:
19 COMES NOW, DEFENDANT, Ralphs Grocery Company, administered by Sedgwick Claims
20 Management Services, Inc., and represented by Michael Sullivan and Associates, to present this
21 Petition For Reconsideration.

22 In this matter, a Findings and Order was filed via U.S. mail in the above-entitled case on
23 January 13, 2009. The Defendant is aggrieved and hereby petitions for reconsideration upon the
24 following grounds:

1 II. THE WCJ'S SPARSE OPINION ON THE COMPLEX REHABILITATION
2 ISSUES, WHICH HE WAS ASKED TO DECIDE, CONSTITUTES PREJUDICIAL
3 ERROR, AS DEFENDANT CANNOT PROPERLY ARGUE THE CASE ON
4 RECONSIDERATION. EVANS V. WCAB, 68 C2D. 753, 33 CCC 350 (1961).

5 A. WCJ did not address issues raised by defendant on the Appeal of VR
6 Determination.

7 B. WCJ either misinterpreted the law when he relied on the case of Pereira v.
8 WCAB (1987) 196 Ca 3rd. 1, 241 CR 202 or did not provide adequate explanation why
9 Pereira is controlling to the facts of this case as opposed to the case of Maria Cervantes v.
10 WCAB, 68 Cal. Comp. Case 1380, (2003).

11 STATEMENT OF FACTS:

12 The applicant filed an Application for Adjudication of Claim on June 13, 2003 alleging a
13 continuous trauma injury from 1967 through September 30, 2002. The applicant did voluntarily
14 retire in September of 2002, while working his usual and customary duties.

15 The applicant was referred to Dr. Sobol, who produced an orthopedic Qualified Medical
16 Evaluation report on October 29, 2003. On page 12 of his report, Dr. Sobol stated that he is
17 unable to determine if there will be any permanent residual disability. On June 15, 2004,
18 Dr. Sobol produced a primary treating physician permanent and stationary report where he found
19 the applicant to be a Qualified Injured Worker.

20 On March 3, 2005, a NOPE letter was issued to the applicant and on March 8, 2005, the
21 parties agreed to use Career Options as the QRR in this case.

22 On March 31, 2005, Dr. Angerman produced an Agreed Medical Evaluation report where
23 he states that the patient continued working until retired, and therefore, there have not been any
24 periods of total temporary disability on an orthopedic industrial basis for the applicant.

1 On March 3, 2008, the applicant completed his vocational rehabilitation retraining. On
2 March 26, 2008, a Notice of Termination of Vocational Rehabilitation was issued to the
3 applicant. On April 8, 2008, the applicant's attorney issued a Notice of Objection to Termination
4 of Vocational Rehabilitation Services.

5 The matter proceeded to a vocational rehabilitation conference and a Determination was
6 issued and served on July 9, 2008, awarding retro VRMA benefits for the applicant from June 13,
7 2003 through March 7, 2005. Defendant filed a timely Appeal on July 28, 2008.

8 The matter proceeded to Trial before Judge Seiden on November 24, 2008. Judge Seiden
9 issued a Findings and Award and Opinion on Decision on January 13, 2009 finding that applicant
10 is entitled to VRMA at the TD rate commencing June 13, 2003 to March 7, 2005.

11 **ARGUMENT:**

12 **I. THE WORKER'S COMPENSATION JUDGE (WCJ) ACTED WITHOUT**
13 **JURISDICTION WHEN, ON JANUARY 13, 2009, HE AWARDED THE APPLICANT**
14 **VRMA AT THE TD RATE.**

15 **A) Legislature can repeal a statutory provision thereby abolishing statutory**
16 **benefit unless there is a final award regarding said benefit.**

17 As of the date of the Decision, on January 13, 2009, the WCJ had no jurisdiction to
18 award VRMA. Prior to January 1, 2009, reenacted Labor Code §139.5 granted authority to
19 WCJ to decide VR issues and award VR benefits. However, Labor Code § 139.5(l) clearly
20 states: "This section shall remain in effect only until January 1, 2009, and as of that date is
21 repealed, unless a later enacted statute, that is enacted before January 1, 2009, deletes or
22 extends that date." Labor Code 2008 Edition. In the 2009 Edition of the Labor Code, under
23 §139.5 it states: "Enacted 2004. Repealed operative January 1, 2009, by its own provision."

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1 A well-established line of authority holds: "The unconditional repeal of a special
2 remedial statute without a saving clause stops all pending actions where the repeal finds
3 them. If final relief has not been granted before the repeal goes into effect it cannot be
4 granted afterwards, even if a judgment has been entered and the case is pending on appeal.
5 The reviewing court must dispose of the case under the law in force when its decision is
6 rendered." Rio Linda Union School District v. WCAB (Scheftner), 131 Cal. App. 4th 517
7 (2005).

8 In the case of Kleemann v. WCAB, 70 Cal. Comp. Case 133; (2005), the Appeal
9 Court held that when new legislation repeals existing law, statutory rights normally end with
10 repeal unless the rights are vested pursuant to contract or common law. In addition, statutory
11 rights end during litigation with repeal or amendment of the statute, unless appeals were
12 exhausted and there is a final judgment.

13 Applying the above rule to this, the trial on the issue of the defendant's Appeal to the
14 Determination of the VR Unit was held on November 24, 2008 and the Decision was issued
15 on January 13, 2009. Defendant is now filing its Petition for Reconsideration. Clearly,
16 appeals were not exhausted, and there is no final judgment regarding the applicant's
17 entitlement to VRMA. Furthermore, VR benefit is a statutory right, and in this case, this
18 statutory right has not vested yet; therefore, the statutory right of the applicant to VR benefits
19 ends when the statute allowing for VR benefits was repealed as of January 1, 2009. On
20 January 13, 2009 when WCJ made his decision, he should have honored legislative intent.
21 Instead, WCJ acted without jurisdiction in awarding VRMA benefits at the TD rate from
22 June 13, 2003 to March 7, 2005.

23 The case at hand is similar to the case of Ricky D. Graczyk v. WCAB, 184 Cal. App.
24 3d 997 (1986). In that case, the applicant, a student athlete, was considered to be an

1 employee at the time of his injury on September 9, 1978. In 1981, the statute was enacted
2 excluding student athletes as employees. The trial judge found that the applicant was an
3 employee at the time of his injury and that the statute enacted in 1981 could not properly be
4 applied retroactively to deprive the applicant of his vested right to employee status under the
5 law existing at the time of the injury. The Board granted reconsideration and found that the
6 applicant was not an employee. The Court of Appeal affirmed the Board's decision.

7 The court reasoned that California workers' compensation law (§ 3200 et seq.) is a
8 statutory system enacted pursuant to constitutional grant of plenary power to the Legislature
9 to establish a complete and exclusive system of workers' compensation. The right to
10 workers' compensation benefits is wholly statutory. Graczyk v. WCAB, *supra*. The court
11 further held that where a right of action does not exist at common law, but depends solely on
12 statute, the repeal of the statute destroys the inchoate right, unless it has been reduced to final
13 judgment, or unless the repealing statute contains a saving clause protecting the right in
14 pending litigation. Graczyk v. WCAB, *supra*. Applying its holding to the case, the Court of
15 Appeal declared: "Moreover, applicant's inchoate right to benefits under the workers'
16 compensation law is wholly statutory and had not been reduced to final judgment before the
17 Legislature's 1981 addition of subdivision (k) further clarifying the employee status of
18 athletes. Hence, the applicant did not have a vested right, and his constitutional objection has
19 no bearing on the issue." Graczyk v. WCAB, *supra*.

20 In the case at hand, the applicant's right to VR benefits is wholly statutory and has not
21 been reduced to final judgment prior to January 01, 2009. Following the reasoning in the
22 cases of Scheftner, Kleemann, and Graczyk, since the statute allowing for provision of VR
23 benefits (§139.5) was repealed, and repealed statute did not contain a saving clause, the right
24 of the applicant to VR benefits was destroyed as of January 1, 2009. Therefore, the WCJ

1 should not have awarded VRMA on January 13, 2009 and the WCJ acted without jurisdiction
2 to support his award.

3 Similar reasoning has been applied in the case of Abney v. Aera Energy, 69 Cal. Comp.
4 Case 1552, (2004). In that case, On March 24, 2004, the applicant petitioned for penalties
5 under the Labor Code § 5814. On June 1, 2004, a new Labor Code § 5814 was enacted.
6 Following a July 26, 2004 hearing, the judge applied newly enacted § 5814 and awarded
7 penalties on August 5, 2004. The applicant filed a timely Petition for Reconsideration
8 arguing that the WCJ erred in applying newly enacted §5814. The Court of Appeals
9 concluded that WCJ properly applied newly enacted §5814.

10 The court first discussed cannons of construing the Legislative intent, "In construing a
11 statute, the Appeals Board's fundamental purpose is to determine and effectuate the
12 Legislature's intent. When the statutory language is clear and unambiguous, there is no room
13 for interpretation and the WCAB must simply enforce the statute according to its plain
14 terms." Abney v. Aera Energy, *supra*. Thereafter, the court stated: "It is well settled that
15 where a right or a right of action, depending solely on statute is altered or repealed by the
16 Legislature, in the absence of contrary intent, e.g., a savings clause, the new statute is applied
17 even where the matter was pending prior to the enactment of the new statute," and added:
18 "The justification for this rule is that all statutory remedies are pursued with the full
19 realization that the Legislature may abolish the right to recover at any time." Abney v. Aera
20 Energy, *supra*.

21 The above referenced cases clearly demonstrates that the legislature can repeal any
22 statutory provision granting benefits to the applicant, thereby effectively abolishing the right
23 to such benefit at any time. With respect to Vocational Rehabilitation benefits, the
24 Legislature clearly manifested its intent to allow a window of five years for injured workers

1 to pursue vocational rehabilitation and complete retraining programs. Therefore, as of
2 January 1, 2009, legislature repealed §139.5 and abolished rights to VR benefits. Hence,
3 after January 1, 2009, WCJ has no jurisdiction to decide VR issue or award VR benefits.

4 **B. Reenacted Labor Code § 139.5 provided jurisdiction to resolve VR disputes**
5 **and award VR benefits only until it was repealed by its own provision on 01/01/2009.**

6 Analysis of the Legislative intent as it pertains to VR benefits clearly reveals that the
7 Legislature intended to abolish all rights to VR benefits as of January 1, 2009. By repealing
8 Labor Code section 139.5, the Legislature ended the tenure of any "ghost statutes" and in fact
9 ended vocational rehabilitation itself.

10 Before January 1, 2009, "ghost statutes" were justified by statute. This has come to an
11 end. In the case of City of Santa Rosa v. Workers' Compensation Appeals Board, 72 Cal.
12 Comp. Case 122 (2007) the defendant argued that the WCAB lacked jurisdiction to order
13 VRMA at the delay rate. The Court of Appeal acknowledged that the WCAB noted that the
14 definition of VR and the parties' respective rights and duties in this matter were governed by
15 former Labor Code §§ 4635 et seq. and 139.5, which were repealed in 2003. Labor Code §
16 139.5 was replaced with a new section that applied to injuries occurring on or before January
17 1, 2004. In 2004, as part of SB 899, former Labor Code § 139.5 was reenacted, with
18 modifications, to apply to injuries occurring before January 1, 2004. However, former Labor
19 Code § 4635 et seq. were not reenacted, creating a period of time for which there is no
20 operative law. Therefore, the WCAB concluded: "former Labor Code § 4635 et seq. are
21 "ghost statutes" that continue to operate to govern the rights and duties of injured workers
22 and employers regarding VR for injuries occurring prior to January 1, 2004." City of Santa
23 Rosa, supra

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1 Moreover, the court held that like ghosts "doomed for a certain term to walk the night"
2 (*Hamlet I, v*), these statutes have no material existence, but linger until their work is done.
3 *Teresa Godinez, v. Buffets, Inc.*, 69 Cal. Comp. Case 1311 (2004). The court further
4 reasoned: "Because there is no other operative law, we hold that former section 4645 is a
5 similar 'ghost statute' that continues to govern the timeliness of appeals from decisions of the
6 Rehabilitation Unit. *Teresa Godinez, v. Buffets, Inc.*, *supra*."

7 The same reasoning was applied in the case of *Carlos Medrano, v. WCAB*, 167 Cal.
8 App. 4th 56; (2008), where the court endeavor to ascertain the intent of the Legislature as to
9 the purpose of the law by first looking at the plain meaning of the words in the statute. The
10 court concluded: "Although the Legislature has eliminated the workers' compensation
11 vocational rehabilitation program, the Board has held that the repealed vocational
12 rehabilitation statutes remain applicable to prior injuries. Even though these sections were
13 repealed in 2003 and not reenacted in 2004, they still have a shadowy existence for injuries
14 prior to January 1, 2004... these statutes have no material existence, but linger until their
15 work is done." *Medano v. WCAB*, *supra*."

16 While 'ghost statutes' granted jurisdiction to WCJ to decide VR issues and award VR
17 benefits, the life of 'ghost statutes' was not indefinite. 'Ghost statutes' were predestined to
18 cease existence as of January 1, 2009 when §139.5 was repealed and the right to VR benefits
19 abolished.

20 The purpose of reenacting Labor Code § 139.5 was to accommodate injured workers
21 already enrolled in the program. *Gamble v. WCAB*, 71 CCC 1015, 1020 (2006). To this end,
22 the legislature provided an additional five years for employees to complete their vocational
23 rehabilitation programs. After analyzing the history of the vocational rehabilitation system in
24 conjunction with the legislative intent, the court noted: "Ten years later, the Legislature

1 decided to scrap the entire vocational rehabilitation program, and repealed section 139.5.
2 However, within three months, the section was re-enacted to accommodate injured workers
3 already enrolled in the program. Consequently, §139.5 now has limited application to
4 workers injured before January 1, 2004, and the program will expire on January 1, 2009,
5 unless a new statute is enacted extending the benefit. Gamble v. WCAB, *supra*.

6 Since the reenacted Labor Code § 139.5 gave birth to the ghost statutes, and since
7 139.5(l) had a self destructing provision, the death of ghost statutes was immanent on
8 January 1, 2009, absent clear legislative provision to delete or extend this date. The
9 legislature clearly chose not to save ghost statutes, thereby, repealing the entire vocational
10 rehabilitation system and abolishing all rights to VR benefits as of January 1, 2009.

11 **C. There is no prejudice to applicants in abolishing all rights to VR benefits as**
12 **of 01/01/09 since applicants had five years to litigate VR issues and obtain final awards.**

13 In the case at hand, the parties agreed on the QRR and the applicant was provided
14 with benefits on or around March 08, 2005. The applicant's attorney alleged that the
15 applicant was due VRMA benefits at the TD rate from the date of Application until March 8,
16 2005. Since March 8, 2005, the applicant had sufficient time to complete and did complete
17 his vocational rehabilitation program on March 3, 2008. Furthermore, since March of 2005,
18 the applicant and the applicant's attorney had more that two years and six months to apply
19 for and litigate the issue of VRMA. Instead, the applicant's attorney waited until April of
20 2008 to request dispute resolution regarding the VRMA issue.

21 A Determination was issued on July 9, 2008 and a timely Appeal followed. The issue
22 was presented to the trial judge on November 24, 2008; however, the Decision was not
23 issued until January 13, 2009. At the point when the WCJ issued his Decision, the
24 Legislature clearly intended to abolish all rights under the vocational rehabilitation system,

1 and close the five year window of opportunity for the applicant to litigate the issue, thereby
2 extinguishing any and all rights to VR benefits after January 1, 2009.

3 If the applicant timely litigated the issue of VRMA, it is more than probable that all
4 appeals would have been exhausted, and the applicant would have had a vested right to
5 VRMA. However, the facts clearly demonstrate that as of January 1, 2009, this applicant did
6 not have a vested right to VRMA. The law favors vigilance, and as of January 1, 2009, the
7 Legislature clearly intended to abolish applicant's right to VR benefits as of the date that
8 §139.5 was repealed.

9 **D. Even though Labor Code still mentions § 139.5 in other sections, such as**
10 **Labor Code § 5803, these sections that make reference to §139.5 deal with continuous**
11 **jurisdiction of the court and only apply to enforcement of final awards under §139.5**
12 **and do not provide jurisdiction to award benefits under § 139.5.**

13 The Labor Code still mentions Section 139.5 in Labor Code § 5803. In pertinent part,
14 this section provides: "The Appeals Board has continuing jurisdiction over all its Orders,
15 Decisions, and Awards made and entered under the provisions of this division, and the
16 decisions and orders of the Rehabilitation Unit established under Section 139.5" However,
17 the court in Kleemann v. WCAB, *supra*, clearly held: "Sections 5410, 5803 and 5804
18 normally apply to Orders, Decisions or Awards that are beyond the reconsideration period
19 under sections 5900 et seq." Based on this reasoning, the court concluded that Kleemann's
20 claims are still pending and are not final judgments, and sections 5410, 5803 and 5804 are
21 not relevant. Kleemann v. WCAB, *supra*.

22 Therefore, in the case at hand, the Board cannot assert jurisdiction over VR benefits
23 based on Labor Code § 5803, since this applicant's claim for VRMA is still pending and has
24 not been reduced to a final judgment.

1 II. THE WCJ'S SPARSE OPINION ON THE COMPLEX REHABILITATION
2 ISSUES, WHICH HE WAS ASKED TO DECIDE, CONSTITUTES PREJUDICIAL
3 ERROR, AS DEFENDANT CANNOT PROPERLY ARGUE THE CASE ON
4 RECONSIDERATION. EVANS V. WCAB, 68 C2D. 753, 33 CCC 350 (1961).

5 Labor Code § 5313 states, inter alia, that "together with the Findings, Decision, Order or
6 Award there shall be served upon the parties to the proceedings a summary of the evidence
7 received and relied upon and the reasons or grounds upon which the determination was
8 made". In the Opinion on Decision, the WCJ stated that pursuant to Pereira v. WCAB
9 (1987) 196 Ca 3rd. 1, 241 CR 202, vocational rehabilitation benefits relate back to the date
10 the demand is first made. Based upon the above, it was held that the applicant is entitled to
11 VRMA at the TD rate commencing June 13, 2003 to March 7, 2005, with 15 percent of those
12 fees to be withheld for attorney's fees. The WCJ further acknowledged that the first time the
13 applicant was determined to be a Qualified Injured Worker was by Dr. Sobol on June 15,
14 2004 and that an Application for Adjudication of Claim was filed on June 13, 2003
15 demanding, among other benefits, vocational rehabilitation benefits.

16 The WCJ did not sufficiently address or explain all issues raised on Appeal by the
17 defendant.

18 First, one of the issues the defendant requested the judge to address was whether retro
19 VRMA at TD rate can be construed as a penalty per Labor Code § 5814. In the case of
20 Gamble, the court clearly established that VRMA is not a wage replacement; however, the
21 issue whether VRMA at the TD rate is a penalty on the employer for delay of benefits has not
22 been addressed or mentioned in the WCJ's Decision.

23 Second, reliance on the case of Pereira is misleading. If WCJ meant to state that the case
24 of Pereira stands for the proposition that VR benefits relate back to the date the demand is

1 first made, then WCJ misinterpreted the law as was clarified in the case of Cervantes. In
2 Pereira, the applicant sustained an industrially related injury on September 29, 1981, and on
3 March 26, 1982, the applicant filed an Application for workers' compensation benefits,
4 including vocational rehabilitation.

5 On August 13, 1984, the WCJ concluded that there should be no retroactive VRTD
6 because until August 13, 1984 there was no prima facie case of entitlement to vocational
7 rehabilitation.

8 In its Decision, the Court of Appeal of California, Second Appellate District, stated that
9 because the Board erroneously concluded that the absence of a prima facie case of Qualified
10 Injured Worker status precludes entitlement to retroactive VRTD, the remand is necessary to
11 enable the Boards to determine when entitlement to VRTD commenced pursuant to
12 Rule 10016. To accurately determine the appropriate starting date of VRTD, the Board must
13 review the Bureau's file in this matter. Pereira v. WCAB, supra.

14 The decision clearly indicates that the ruling does not stand for the proposition that the
15 applicant is entitled to VRTD benefits from the time that Application for Adjudication of
16 Claim is filed requesting vocational rehabilitation benefits, or from the time demand is first
17 made. Otherwise, there would be no need for the Court of Appeals, which was fully aware of
18 the date when applicant filed the Application for Adjudication, to remand the Decision to
19 further determine when VRTD should commence.

20 That was elaborated in great detail in the case of Maria Cervantes v. WCAB, supra. In
21 this decision, Court of Appeals, Second Appellate District stated that in no case has it ever
22 been held that an applicant can withhold medical reports, either deliberately or inadvertently,
23 and then surface years later claiming retroactive vocational rehabilitation benefits based
24 solely on the filing of an Application for Adjudication. Cervantes v. WCAB, supra.

1 In that case, the applicant filed a Claim Form in 1990, an Application for Adjudication of
2 Claim in 1994, and filed medical reports in 1998. The Appellate Court acknowledged that in
3 the case of Pereira v. Workers' Compensation Appeals Board the Court of Appeals
4 determined that an applicant ultimately found to be Qualified Injured Worker is entitled to
5 retroactive benefits at the time of the initial request, given the prima facie evidence of
6 eligibility is not presented until later. In the Cervantes case, however, a doctor had stated in
7 the report that he needed a job analysis to determine whether the applicant was a Qualified
8 Injured Worker, but the carrier nevertheless neglected to inform the applicant or the Bureau
9 of potential eligibility in violation of administrative regulations. Contrary, the court did
10 remand the case to the Board in part to determine when a crucial report had been received by
11 the employer. Thus, the court requires some specific knowledge of the applicant's condition
12 to create notification of obligation on the part of the employer. Cervantes v. WCAB, supra.

13 Defendant contends that the case of Maria Cervantes establishes that some form of
14 medical report, or some type of evidence regarding Qualified Injured Worker status should
15 exist prior to the employer's duty to provide benefits to the applicant.

16 In the case at issue, the records clearly demonstrated that applicant retired from
17 employment while performing his usual and customary work. The AME report of
18 Dr. Angerman established that the applicant was permanent and stationary as of the last date
19 of his work. No medical report prior to the medical report of Dr. Sobol, dated June 13, 2004
20 exists, and no evidence prior to June 13, 2004 exists, hinting that the applicant was a
21 Qualified Injured Worker. Thus, there is no evidence prior to June 13, 2004 that would
22 trigger employer's duty to provide benefits for the applicant.

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1 WHEREFORE, petitioner prays that reconsideration be granted and that the
2 Board finds:

3 1) As of January 1, 2009 there exists no right to VR benefits and the WCJ
4 acted without jurisdiction in awarding VRMA at the TD rate on January 13, 2009. Therefore,
5 applicant is not entitled to VR benefits which have not vested as of 01/01/2009.

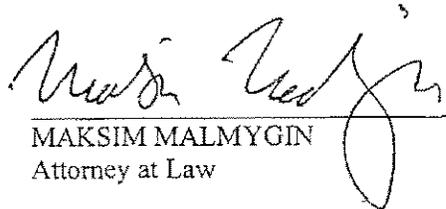
6 2) The WCJ did not comply with Labor Code § 5313 by failing to address
7 issued raised in the Appeal by defendant.

8 3) WCJ erred in applying Periera v. WCAB and neglecting to consider the
9 case of Cervantes v. WCAB, thus, the case should be remanded to WCJ to determine when
10 applicant was first entitled to VRMA benefits consistent with this opinion
11

12 DATE: February 6, 2009

Respectfully submitted,

MICHAEL SULLIVAN & ASSOCIATES

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16 MAKSIM MALMYGIN
Attorney at Law