

Would you like a PDF version?

Visit <http://ww2.judgeobrien.com/FSKLawJune182009.pdf> or [Click here](#)

# FS&K FLOYD, SKEREN & KELLY, LLP

FSK News Flash

June 18, 2009

This Firm Means Business (TM)

**Dear Subscriber,**

## **The Death of Vocational Rehabilitation Benefits: An Inside Perspective**

Although there have been numerous discussions, newsletters and memorandums regarding the recent en banc WCAB decision in *Weiner v. Ralphs Company*, No. ADJ347040 (06/10/09)[full cite pending], we at Floyd, Skeren and Kelly have the unique opportunity to present an insider's perspective of the opinion from the attorney who handled the litigation in the case, Maxim Malmygin, Esquire of Floyd, Skeren and Kelly.

Below, you will find a summary of the holding with analysis and thoughts of the future for vocational rehabilitation in California, as presented by the handling attorney of the *Weiner* case, Maxim Malmygin.

Thursday, June 11, 2009 marks the death of VR benefits not reduced to final order prior to 01/01/2009. The ruling affects thousands of cases featuring vocational rehabilitation issues at WCAB offices throughout the state. The case title is *Weiner v. Ralphs Company*, No. ADJ347040, 6/10/09, en banc. I had a privilege of working on this case, appearing for VR conference, drafting an Appeal to determination of VR unit, taking the case to trial, and drafting Petition for Reconsideration. I am pleased to announce that at this time the case is a complete and total victory for the defense.

The unanimous ruling states:

1. "The repeal of section 139.5 terminated any rights to vocational rehabilitation benefits or services pursuant to orders or awards that were not final before Jan. 1, 2009."
2. "A saving clause was not adopted to protect vocational rehabilitation rights in cases still pending on or after Jan. 1, 2009."
3. "The vocational rehabilitation statutes that were repealed in 2003 do not continue to function as 'ghost statutes' on or after Jan. 1, 2009."
4. "Effective Jan. 1, 2009, the WCAB lost jurisdiction over

**Online This Spring -  
2009!**

### **WorkCompAcademy.com**

An online accredited learning experience for attorneys, medical and claim professionals taught by industry leaders.

### **JudgeOBrien.com**

An online, up-to-date searchable version of Judge O'Brien's time honored text, California Workers' Compensation Claims and Benefits.

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."

5. "Subject matter jurisdiction over non-vested and inchoate vocational rehabilitation claims cannot be conferred by waiver, estoppel, stipulation, or consent."

The core concern of the case was to discern the legislative intent in repealing *Labor Code* §139.5. Defendant argued, and the en banc decision ultimately confirmed our position, that as of January 1, 2009, the legislature intended to completely abolish all rights to VR benefits that have not yet vested (or those without an existing final order). In order for the applicant to collect any VR benefits, there must be a final order awarding said benefits and parties either chose not to appeal the order, or all appeals have been exhausted thereby making the order final.

The advice to all defendants is not to provide either vocational rehabilitation, VRMA or VRTD benefits in all cases where these issues are still pending.

Looking into the not so distant future, the 2nd District Court of Appeal will consider oral arguments on August 4, 2009 in the case of *Beverly Hilton Hotel v. WCAB*, No. B212205. The *Beverly Hilton* case originally featured two issues. First, applicant challenged whether the applicant was a "qualified injured worker". Second, whether the employer was liable for a six-figure retroactive vocational rehabilitation maintenance allowance (VRMA) award. However, as the 2nd District Court of Appeal considered the petition for a writ of review filed in late 2008, the statute expired, and the justices requested additional briefing in 2009.

I anticipate that the court will give great deference to the en banc decision in *Weiner v. Ralphs Company*. In essence, the *Beverly Hills* case was kept alive because defendant had grounds to appeal and pursue the issue of QIW status of the applicant. However, now that the jurisdictional argument has been decided by *Weiner*, I anticipate that the defense will argue that QIW is a moot point, as it no longer makes any difference if the employee is a QIW. Even if employee is found to be QIW, the conclusion in *Weiner* dictates that WCAB lost jurisdiction to award VR benefits as of January 1, 2009. The applicant's attorney in the *Beverly Hills* case raised the jurisdictional and "ghost statute" arguments, both of which were soundly defeated in the *Weiner* case.

Looking further ahead, I believe there is a strong likelihood that applicant's attorney in Wiener will file an Appeal. Given the gravity and controversy of this issue, there is strong incentive on the applicant's side to continue the appellate process. However, I also predict that the 2nd District will rule in line with the *Weiner* en banc decision, and will deny the writ once applicant's attorney files an Appeal in the *Weiner* case.

Ultimately, I predict that this most recent nail in the coffin of VR

is, in fact, final, and no ghosts will linger to haunt defendants with massive retro VRTD awards.

Again, we thank you for your interest in FS&K Work Comp News and look forward to keeping you informed on the Workers' Compensation issues that most affect you.

Sincerely,  
**The FSK Newsletter Team**

**DISCLAIMER:** This is designed for general information only. The information presented at this site should not be construed to be formal legal advice nor the formation of a lawyer/client relationship. Persons accessing this site are encouraged to seek independent counsel for advice regarding their individual legal issues.

**© Copyright 2009 FSK Publishing, ALL RIGHTS RESERVED**