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Dear Subscriber,

### Sunset of Vocational Rehabilitation Awakens The Industry

The workers' compensation industry has been waiting for the inevitable beginning of litigation in response to the sunset of vocational rehabilitation services in California. In anticipation of the voluminous amount of litigation certain to begin, and as a result of more than 1,000 declarations of readiness to proceed, a conference with workers' compensation practitioners was held at the Los Angeles WCAB on 01/29/09. The conference was set by motion of Presiding Workers' Compensation Appeals Board Judge Jorja Frank, and overseen by Judge Frank and Judge Mark Kahn.

The core issue presented at the conference is whether a consolidation of a sample of the matters presented before the WCAB relating to entitlement for vocational rehabilitation services would be appropriate. During the course of the conference, Judge Kahn proposed several stipulations that could be entered into for purposes of clarifying the issues, including:

1. date of injury occurring prior to 01/01/04;
2. the applicant may be entitled to services under Labor Code §139.5;
3. a current denial of benefits is based on the sunset of Labor Code §139.5;
4. Labor Code §139.5 was repealed on 01/01/09.

During the conference, Judge Kahn separated the defense and applicant attorneys to allow each side of the issue to begin discussing lead counsel, additional issues or stipulations to be proposed and other preliminary matters.

Judge Kahn continued the conference to February 27, 2009 for further discussion and arguments for and against the potential consolidation.

Following the January 29, 2009 meeting, Judge Kahn announced that he planned to issue a notice of intent to stay proceedings relating to the issues presented for consolidation. It is not believed that such a stay will affect regular issues on the consolidated cases or other cases where those issues exist. The stay would likely only apply to the vocational rehabilitation aspect of pending claims.

**Fifth District Court of Appeal Holds That Permanent and Stationary Status Before January 1, 2005 is Not Necessary**

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## to Apply 1997 Rating Schedule

In *Sensient Technologies v. WCAB (12/31/08)* [Fifth District, Unpublished], another of a flurry of cases addressing applicability of the 1997 permanent disability rating schedule (PDRS), the Fifth District Court of Appeal held that a permanent and stationary finding from a physician before January 1, 2005 is not a prerequisite for preserving the 1997 rating schedule.

The applicant claimed industrial injury to his right shoulder, lumber spine and cervical spine as a result of a December 2003 injury and a cumulative trauma extending through May 2005. Following the initial injury, and in addition to being seen by his treating physician, the applicant had been seen by a qualified medical examiner (QME) who opined that the applicant was not yet permanent and stationary. When the matter moved to trial, the Workers' Compensation Judge found that the applicant was entitled to a rating under the 1997 PDRS.

On reconsideration and subsequent appeal to the Fifth District Court of Appeal, defendant argued, among other positions, that because there was no finding of permanent and stationary status until after 01/01/05, the 2005 PDRS must apply. The defendant's Petition for Reconsideration was denied by the WCAB, and the Fifth District rejected the argument.

In rejecting defendant's argument, the Court of Appeal acknowledged that the state of the law in the appellate courts on this issue is in flux, though ultimately noted that the majority of appellate districts favored an interpretation of the Labor Code that did not require a permanent and stationary finding before 01/01/05, rather a finding supported by substantial evidence that permanent disability did exist before 01/01/05. The Court upheld the WCAB in applying the 1997 PDRS.

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**  
Jason C. Hilfrink  
(Chief Legal Editor)

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