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# FS&K FLOYD, SKEREN & KELLY, LLP

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**Dear Subscriber,**

## **Defining Moment Reached for Vocational Rehabilitation in California**

As most in the Workers' Compensation community know, on June 10, 2009 the Workers' Compensation Appeals Board issued an en banc opinion in the case of *Weiner v. Ralphs Company*, No. ADJ347040. The *Weiner* case resulted in the first en banc opinion from the Appeals Board in the issue of whether the provisions of Labor Code section 139.5 survived beyond the "sunset" date of January 1, 2009 and, if so, for which cases.

The attorney handling the work on the *Weiner* case, Maksim Malmygin previously with Sullivan and Associates, now with Floyd, Skeren and Kelly's Thousand Oaks office, previously provided an insiders perspective on the impact of the *Weiner* decision. For the benefits of all of our subscribers, it is re-printed below:

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 *"The vocational rehabilitation statutes that were repealed in 2003 do not continue to function as 'ghost statutes' on or*

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after Jan. 1, 2009."

4. "Effective Jan. 1, 2009, the WCAB lost jurisdiction over 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 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 not so distant future, the 2nd District Court of Appeal will consider oral arguments, on August 4th, 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," and, 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 1/1/2009. The applicant's attorney in Beverly Hills case raised the jurisdictional and "ghost statute" arguments, both of which were soundly defeated in *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.

## **Second District Court of Appeal Holds the Line on Apportionment**

Following the much anticipated published opinion in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, the Second District Court of Appeal has issued two unpublished opinions consistent with the *Benson* case, holding that each separate date of injury must receive a separate permanent disability or impairment rating. Prior to the enactment of SB 899, multiple injuries that became permanent and stationary simultaneously would be combined into a single higher rate of permanent disability, typically resulting in a higher monetary disability value. However, SB 899 repealed a key provision relied upon for the combined rating and created new provisions providing that prior disability is presumed to continue to exist and that the employer is only liable for the portion of disability caused by the injury occurring while in their employ.

In *Benson*, the First District Court of Appeal held in a published opinion that each injury must be rated separately and not combined into a single larger disability award. The California Supreme Court subsequently denied review.

The Second District Court of Appeal has now issued two separate unpublished opinions consistent with the decision in *Benson*.

In *Vilkitis v. WCAB*, the applicant filed claims for a cumulative trauma and a specific injury. The injuries were each compensable and were separately rated. If combined, the injuries would have resulted in a 71% disability award. Independently, the awards were rated at 62% and 14%. The monetary difference was approximately \$32,000.

At trial, the Judge awarded two permanent disability awards to the applicant, as outlined above. The WCAB, en banc, upheld the trial judge.

In upholding the WCAB, the Second District Court of Appeal reasoned that the repeal of the provisions relied upon to combine permanent disability ratings prior to the enactment of SB 899, coupled with the language in new Labor Code sections 4663 and 4664 required separate ratings. The Court stated :

*[c]urrent sections 4663 and 4664 require physicians to consider each industrial injury sustained, and apportion the injured worker's disability for cause. [citations omitted]. Physicians must parcel out the direct cause of disability, discount past injuries and any other causes, and apportion PD for cause.*

In the also unpublished case of *Forzetting v. WCAB*, the Second

District Court of Appeal also held that each injury must be rated independently of any other prior or subsequent injuries, and not combined into a single disability rating. The Court's reasoning was the same as that set forth above in *Vilkitis*.

**Editor's Note:** The reader should be aware that in both of the above opinions, the Court noted the fact that where the Doctor is unable to separate the causation for two or more independent injuries, it still is possible that the disability will be combined into a single award

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**

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