WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SUSAN DADVAR, ***Applicant,*** **vs.** **REGIS HAIRSTYLIST and ATLANTIC MUTUAL INSURANCE CO., Adjusted by REM,** ***Defendant(s).***	**Case Nos. ADJ3628897 (SJO 0253335)** **ADJ1121410 (SFO 0462353)** **OPINION AND DECISION AFTER RECONSIDERATION**

On August 31, 2009, the Workers' Compensation Appeals Board (Appeals Board) granted reconsideration to further study the factual and legal issues. This is our decision after reconsideration.

In the Findings and Award of June 9, 2009, the workers' compensation judge (WCJ) found, in relevant part, that applicant sustained industrial injury to her bilateral upper extremities during the cumulative trauma (CT) period ending December 27, 2000, that the Order of Rehabilitation of October 15, 2007 found that applicant was a QIW and entitled to VRMA "per TD at the daily rate from June 13, 2002," that the Order was affirmed by the WCJ on July 29, 2008 and by the Appeals Board by Order Denying Reconsideration on September 23, 2008, that applicant's average weekly earnings are based on 2001, the year after injury, when she earned $55,708.64, resulting in a TD rate of $714.21, and that defendant is not entitled to take credit for wages or wage loss against the VRMA award.

Defendant sought reconsideration of the WCJ's decision, contending that the WCJ's awards of July 29, 2008 and June 9, 2009 are not valid, enforceable awards because they were not final as of January 1, 2009, that the repeal of Labor Code section 139.5 terminated any right to vocational rehabilitation benefits pursuant to orders or awards that were not final before January 1, 2009, that the WCJ incorrectly based applicant's TD rate on her post-injury earnings rather than

Labor Code section 4453(c)(1), and that the WCJ exceed her authority in reversing her prior award that allowed a credit for wages earned against VRMA at the delay rate.

Applicant filed an Answer.

We adopt and incorporate the "Background" section of the WCJ's Report and Recommendation, which describes the relevant factual chronology. We do not adopt or incorporate the remainder of the Report.

As reflected in the WCJ's findings herein, the Rehabilitation Unit found applicant entitled to vocational rehabilitation benefits by Order dated October 15, 2007, which the WCJ upheld by decision dated July 29, 2008. Thereafter, this Board denied defendant's petition for reconsideration on September 23, 2008. Defendant timely filed a petition for writ of review of the Board's decision of September 23, 2008. The Court of Appeal summarily denied review on January 8, 2009.

On June 10, 2009, the Board issued its decision in *Weiner v. Ralphs Company* (2009) 74 Cal. Comp. Cases 736 [Appeals Board en banc] ("*Weiner I*"), wherein the Board held that (1) the repeal of Labor Code section 139.5 terminated any rights to vocational rehabilitation benefits or services pursuant to orders or awards that were not final before January 1, 2009; (2) a saving clause was not adopted to protect vocational rehabilitation rights in cases still pending on or after January 1, 2009; (3) the vocational rehabilitation statutes that were repealed in 2003 do not continue to function as "ghost statutes" on or after January 1, 2009; (4) effective January 1, 2009, the WCAB lost jurisdiction over non-vested and inchoate vocational rehabilitation claims, but the WCAB continues to have jurisdiction under Labor Code sections 5502(b)(3) and 5803 to enforce or terminate vested rights; and (5) subject matter jurisdiction over non-vested and inchoate vocational rehabilitation claims cannot be conferred by waiver, estoppel, stipulation, or consent.

In *Weiner v. Ralphs Company* (2009) 74 Cal. Comp. Cases 958 ("*Weiner II*"), the Board affirmed the foregoing holdings by denying applicant's petition for reconsideration of *Weiner I*.

We further note that in *Beverly Hilton Hotel v. Workers' Compensation Appeals Board (Boganim)* (2009) – Cal. App.4th – [74 Cal. Comp. Cases 927 at 935], the Court of Appeal agreed

with *Weiner I* and commented that the fact "[t]hat the Legislature did not intend to allow vocational rehabilitation services to applicants whose cases were not final on January 1, 2009, is sufficiently clear, such that we do not have to consider admonitions (see §3202) to interpret the Labor Code liberally." (74 Cal. Comp. Cases at 935, citing *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1332 [72 Cal. Comp. Cases 565]).

In the instant case, the foregoing authorities persuade us that applicant is not entitled to vocational rehabilitation benefits because the repeal of Labor Code section 139.5 terminated any rights to vocational rehabilitation benefits or services pursuant to orders or awards that were not final before January 1, 2009, and here the Rehabilitation Unit's October 15, 2007 decision, the WCJ's July 29, 2008 decision, and the Board's September 23, 2008 decision were under appeal and thus had not become final, and applicant's rights had not vested, by January 1, 2009. Therefore, we will reverse the WCJ's decision.

In the *Boganim* case, as here, the Rehabilitation Unit's decision, the WCJ's decision affirming the Rehabilitation Unit, and the Board's decision affirming the WCJ were all issued before January 1, 2009. In *Boganim*, the Court described the issue of section 139.5's repeal as not having been ripe. (74 Cal. Comp. Cases 929.)

More important for determination of the instant case, in *Boganim* the Court also discussed the legal effect of the absence of a "final judgment" before section 139.5's repeal on January 1, 2009:

> "Section 5908 provides for actions that can be taken by the Board on reconsideration of an order. Thereafter, a party may apply to an appellate court for a writ of review. (§ 5950.) The appellate court may deny review (see *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd., supra,* 87 Cal.App.3d at p. 347), but if the court grants a writ of review, then the court enters judgment either affirming or annulling the award, or the court may remand the matter back to the Board. (§ 5953.) *Until judgment is entered and the appellate process or other proceedings are completed, the matter is not final, and there is no vested right.* (*Graczyk, supra,* 184 Cal.App.3d at p. 1006; *County of San Bernardino v. Ranger Ins. Co.* (1995) 34 Cal.App.4th 1140, 1149 [41 Cal. Rptr. 2d 57] [" 'statutory remedy does not vest until final judgment' "].) Awards are only final when the entire process, including appellate review, is concluded. In the instant case, Hotel timely filed this petition for review, which was pending at the time of the effective date of the repeal of section 139.5. *Only in those cases in which the*

> *decision was final before the repeal would the parties be able to enforce or terminate the award.* (See § 5803.) Because this matter has been subject to review by this court after January 1, 2009, former section 139.5, can no longer can be applied or enforced in this case." (74 Cal. Comp. Cases at 933, italics added.)

In the instant case, the foregoing principles compel the conclusion that the District Court of Appeal's denial of defendant's writ of review on January 8, 2009, which absent section 139.5's repeal a week earlier may have upheld applicant's right to vocational rehabilitation benefits, is of no legal effect because the right had not vested by that time. However, our decision herein does not turn on the issue of whether the Court of Appeal had jurisdiction to affirm vocational rehabilitation benefits by denying defendant's petition for writ of review on January 8, 2009.

First, applicant's right to such benefits had not vested as of January 1, 2009, before the Court denied review. Second, any suggestion that the Court's denial of defendant's writ petition could somehow resurrect applicant's unvested right to vocational rehabilitation benefits is contradicted by the long line of well-established authority cited by the *Boganim* Court, i.e., *Governing Board v. Mann (Mann)* (1977) 18 Cal.3d 819, 829, *Southern Service Co., Ltd. v. Los Angeles* (1940) 15 Cal.2d 1, 11-12, *Krause v. Rarity* (1930) 210 Cal. 644, 653, *Napa State Hospital v. Flaherty* (1901) 134 Cal. 315, 317, *Graczyk v. Workers' Comp. Appeals Bd. (Graczyk)* (1986) 184 Cal.App.3d 997 [51 Cal. Comp. Cases 408], *Callet v. Alioto* (1930) 210 Cal. 65, 67-68, *Willcox v. Edwards* (1912) 162 Cal. 455, 465, *Kleemann v. Workers' Comp. Appeals Bd. (Kleemann)* (2005) 127 Cal.App.4th 274 [70 Cal. Comp. Cases 133], *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (2005) 131 Cal.App.4th 517 [70 Cal. Comp. Cases 999], *Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1436 [70 Cal. Comp. Cases 294], and *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1978) 87 Cal.App.3d 336, 350 [43 Cal. Comp. Cases 1300].

Third, in *Boganim* the Court of Appeal stated that subject matter jurisdiction does not confer jurisdiction to award benefits which are not authorized by statute:

> "Applicants had rights to vocational rehabilitation awards up to January 1, 2009. After that, there were no such statutory rights available as to claims that were not vested by that date. Thus, neither the Board nor this court has jurisdiction to

award such rights. " 'Even when a court has jurisdiction over the subject matter and the parties in a fundamental sense, it may have no 'jurisdiction' or power to make orders which are not authorized by statute.' " (*Janzen v. Workers Comp. Appeals Bd.* (1997) 61 Cal.App.4th 109, 113 [71 Cal. Rptr. 2d 260, 63 Cal. Comp. Cases 9].) It is in this respect that we conclude there is no jurisdiction or power to award vocational rehabilitation benefits in this case." (74 Cal. Comp. Cases at 937.)

The same is true in the instant case. Therefore, we will reverse the WCJ's decision. In view of this disposition, the other issues of earnings and credit are moot, and there are no benefits from which to award an attorney's fee.

For the foregoing reasons,

IT IS ORDERED, as the Appeals Board's Decision After Reconsideration, that the Findings and Award of June 9, 2009 is **RESCINDED**, and the following Findings are **SUBSTITUTED** in its place:

FINDINGS

1. Susan Dadvar, born January 6, 1969, while employed during the cumulative trauma period ending December 27, 2000, as a hairstylist, in San Jose, California, by Regis Hairstylist, insured by Atlantic Mutual, and administered by REM, sustained injury arising out of and occurring in the course of her employment to her bilateral upper extremities.

2. Pursuant to *Weiner v. Ralphs Company* (2009) 74 Cal. Comp. Cases 736 [Appeals Board en banc], *Weiner v. Ralphs Company* (2009) 74 Cal. Comp. Cases 958 [Appeals Board en banc], and *Beverly Hilton Hotel v. Workers' Compensation Appeals Board (Boganim)* (2009) – Cal. App.4th – [74 Cal. Comp. Cases 927], applicant is not entitled to vocational rehabilitation benefits by reason of the Order of Rehab dated October 15, 2007, the WCJ's decision of July 29, 2008, the Appeals Board's decision of September 23, 2008, or the Court of Appeal's decision of January 8, 2009.

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3. The issue of applicant's average weekly earnings is moot.

4. The issue of defendant's entitlement to credit is moot.

5. There are no benefits from which to award an attorney's fee.

WORKERS' COMPENSATION APPEALS BOARD

JAMES C. CUNEO

I CONCUR,

RONNIE G. CAPLANE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCT 14 2009

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

Bradford & Barthel
Edwin Bridges
Niloufar Mazhari
Susan Dadvar

JTL/ara

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SUSAN DADVAR, *Applicant,* vs. REGIS HAIRSTYLIST and ATLANTIC MUTUAL INSURANCE CO., ADJUSTED BY REM, *Defendant(s).*	Case No. ADJ 3628897 (SJO 0253335) ADJ 1121410 (SFO 0462353) **OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION**

Reconsideration has been sought by defendant with regard to a decision filed on June 6, 2009.

Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted in order to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration will be granted for this purpose and for such further proceedings as we may hereinafter determine to be appropriate.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration be, and it hereby is, **GRANTED**.

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IT IS FURTHER ORDERED that pending the issuance of a Decision After Reconsideration in the above case, all further correspondence, objections, motions, requests and communications shall be filed with the Workers' Compensation Appeals Board, P. O. Box 429459, San Francisco, California 94142-9459, **ATTENTION**: Office of the Commissioners, and not with any local office.

WORKERS' COMPENSATION APPEALS BOARD

JAMES C. CUNEO

I CONCUR,

RONNIE G. CAPLANE

FRANK M. BRASS

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUG 31 2009

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

SUSAN DADVAR
EDWIN BRIDGES
BRADFORD & BARTHEL
NILOUFAR MAZHARI

RD/jrr

8/31
Cal. C, B

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

Case No. ADJ3628897; SJO 253335

ADJ1121410; SFO0462353

SUSAN DADVAR V. REGIS HAIRSTYLIST and ATLANTIC MUTUAL INS. CO.

Workers' Compensation Judge (WCJ): Colleen S. Casey

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. Background

The issue in this case is what is the correct calculation of applicant's average weekly earnings (AWE) and what is the exact payout of monies owed applicant in a previously decided trial.

The original Findings and Award (F&A) in this case was issued on 7.29.08, affirming the Rehab Unit's determination that applicant was a Qualified Injured Worker (QIW) and that she was entitled to TD at the VRMA rate from-6.13.02 and continuing, less credit for wages earned. The exact manner of payout of these funds was to be adjusted by the parties, with WCAB jurisdiction reserved. Defense filed a Petition for Reconsideration which was denied by the WCAB on 9.23.08. The defense then filed a Petition for Writ of Review which the DCA denied on 1.8.09.

The parties were not able to agree on the amount of funds to be distributed to the applicant per the 7.29.08 award, so an Expedited Hearing was set on the issue of TD on 5.22.09. An F&A issued on 6.9.09 allowing a TD rate of $714.21 a week, with no credit for wage loss.

Defendant has again filed a timely, verified petition for reconsideration arguing:

(1) The case of ***Weiner v. Ralphs***, (2009) 74 CCC – would extinguish the WCJ's 7.29.08 F&A awarding applicant VR benefits.

(2) The WCJ should have calculated AWE based on LC §4453(c)(1), rather than LC §4453(c)(4).

(3) The WCJ should have allowed defendants credit for wage loss

We have received a document which cannot be properly identified and acted upon because it has no SSA#. Please provide us with the SSA #

II. **Discussion - Response to Defense contention:**

A. ***Weiner v. Ralphs***, (2009) 74 CCC –

Defense argues that the case of ***Weiner v. Ralphs***, (2009) 74 CCC – would extinguish the WCJ's 7.29.08 F&A awarding applicant VR benefits. The ***Weiner case, supra,*** held that the right to all VR benefits was extinguished in all cases pending on or after 1.1.09. In the ***Weiner case, supra,*** the injured worker's VR benefits were extinguished because the WCJ's F&A awarding said benefits issued on January 13, 2009, which was **AFTER** January 1, 2009. Defense argues on page 5:18 of their Petition for Reconsideration, that "Our case is squarely on point with ***Weiner.***" However, the facts in the instant case are significantly different than ***Weiner,*** because in this case, the F&A awarding VR benefits issued on 7.29.08, **PRIOR** to January 1, 2009. Therefore, the applicant should be entitled to VR benefits as set forth in the F&A of 7.29.08, which was subsequently affirmed by the WCAB and the DCA.

The ***Weiner case, supra,*** held that the WCAB still has jurisdiction under Labor Code §5803 to conduct hearings and make determinations regarding enforcement of the VR benefits previously awarded. That is what occurred at the hearing on 5.22.09. The parties were not able to agree on the amount of money to be paid to the injured worker as a result of her prior award of 7.29.08 and they needed WCAB assistance in the form of an expedited hearing to resolve that issue. To allow the defendants to reopen the 7.29.08 F&A (the Petition for Recon of which was denied by the WCAB), would allow defendant's two bites of the apple and is contrary to res judicata case law and statute.

B. **Average Weekly Earnings (AWE) - LC §4453(c)(1) versus LC §4453(c)(4).**

Defendant suggests that I should have followed LC §4453(c)(1) versus LC §4453(c)(4) in calculating the rate of the applicant's AWE. **But under either calculation, it would appear that the maximum TD rate of $490 is reached.**

1. *Calculation of AWE using LC §4453(c)(1):*

LC §4453(c)(1) provides that Average weekly earnings (AWE) "shall be the number of working days a week times the daily earnings at the time of the injury."

Applicant's wage statement is set forth in Exhibit "Y" and indicates that for the two week period prior to her injury from 12/1/00 – 12/15/00, her earnings were $1724.59, not including tips. So if you divide $1724.59 into two parts, (since it represents two weeks of earnings,) the average weekly earnings would be: $862.30. This is consistent with applicant's credible testimony. (See MOH page 4:39-31.) This amount of AWE $862.30 x 2/3rds = $574.29, exceeds the **maximum weekly TTD rate** for this date of injury which **is $490**. (See LC §4453(a)(7).

Defendant writes at page 8:4 of the Petition for Reconsideration, "Here, Applicant had AWE of $599.12 or a TD rate of $399.41 on the date of her injury (12/27/00) when calculated using the method noted in 4453(c)(1)."

I'm not clear on how defendant arrived at a AWE calculation of $599.12 pursuant to the LC §4453(c)(1) method. The evidence he cites to support this calculation is applicant's deposition transcript (at page 24:7 and page 28:1) wherein she states she was working 9 hours a day and that "everyone was pretty much busy..." However, he does not cite any numerical data or numerical evidence to support this amount. Nor does he show how he reached this particular calculation.

Whereas LC §4453(c)(4) provides in part that "Where... for any reason the foregoing methods at arriving at the average weekly earnings cannot reasonably and fairly be applied, the AWE shall be taken at 100 percent of the sum which reasonably represents the AWE capacity of the injured employee at the time of his or her injury..."

2. *Calculation of AWE using LC §4453(c)(4):*

If we were to use applicant's earnings for the year following her date of injury as permitted by LC §4453(c)(4), and as discussed in my Opinion on Decision as set forth below, the AWE's would be $1071.32. This is based on her yearly wages for 2001, the year period immediately following her date of injury, which is set forth in the wage

statement (Exhibit "Y") as $52,866.58 of earnings + $2842.06 of tips for a total of $55,708.64. This amount divided by 52 would equal $714.14. However, this amount also exceeds the maximum TD rate for this date of injury which is $490.00.

It would appear that under either calculation, the maximum TD rate of $490 is reached. However, I set forth my reasoning for following the calculation as set forth in LC §4453(c)(4) in my Opinion on Decision as follows:

"AVERAGE WEEKLY EARNINGS

The applicant was working as a Hairstylist at the time of her injury on 12/27/00 for defendant. Prior to her injury, she was just starting up her business as a Hairstylist and had a limited clientele list. The year after her injury, she was starting to increase her business and as is the nature of the hairstyling business, her client list and wages increased due to her increase in experience, increase in education due to additional classes taken in hairstyling and increase in business due to word of mouth.

The issue in this case is how to calculate applicant's average weekly earnings. Defendant contends that applicant's average weekly earnings should be based on the year prior to her date of injury per the standard set forth in Labor Code section 4453(c)(1).

Applicant contends that her capacity to increase her wages after her date of injury should be factored into the calculation to allow for an increased TT rate pursuant to Labor Code section 4453(c)(4).

It is clear from the evidence that her start-up business, prior to her date of injury, resulted in only $31,153.93 of income for the year 2000 (see Exhibit Y, Wage Statement). In contrast, her income following her date of injury for the year 2001 would be $55,708.64. (See Exhibit Y).

The case law is relatively consistent that it is possible to consider possible injury earnings pursuant to Labor Code section 4453(c)(4) Argonaut Insurance Company v. IAC (1964) 27 CCC 130 and Goytia v. WCAB (1970) 35 CCC 27, Thrifty Drug Stores v. WCAB (1979) 44 CCC 809 and Lujan v. WCAB (1985) 50 CCC 693. Given the circumstances of this case in that applicant was just starting up her business and the nature of the hairstyling business which would have increased over time pursuant to her increase in education, experience and talent, her income would have also increased rather than being a speculative increase in income. This was duly proven during her start-up phase. Prior to her date of injury, her income was substantially less than during the time when her business was really taking off which was immediately after her date of injury and the wage statement backs up this calculation.

It would, therefore, seem to be the exact type of circumstance the legislature contemplated when they enacted 4454(c)(4) when they stated, "Wherefore any reason the foregoing method of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 100% of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury."

Clearly under this case the injured worker's capacity to earn increased amounts of income each year was demonstrated by the fact that she actually did this, and therefore, that would be the most reasonable and fair way of calculating her income by using the one-year post injury income as a gauge of what her capacity to earn reasonably and fairly would be. This is a much more reasonable method of calculation than using the first year of her start-up business which would not be an indication of her capacity to earn an income as a hairstylist."

C. **Credit for Wage Loss.**

When I prepared the F&A of 7.29.08, I inserted the template language for awarding VRMA including the template language, "less credit for wages earned during that time to

be adjusted by the parties with WCAB jurisdiction reserved." When the parties entered the process of adjusting the amount to be paid, the applicant attorney correctly informed opposing counsel that the amount must be adjusted to without taking credit since the law clearly provides that VRMA is not subject to wage loss credit." I addressed the issue of Credit for Wage Loss in my Opinion on Decision as follows.

"CREDIT

Defendant argues that since the Findings and Award issued on July 29, 2008, state that the VR is awarded as, "VRMA award at the daily rate from 6/13/02 and continuing, less credit for wages earned during that time to be adjusted by the parties with WCAB jurisdiction reserved," that defendant is entitled to credit for wages earned after 6/13/02.

However, this was not a Finding determination of the amount to be paid, and in fact, this amount was specifically designated to be adjusted by the parties with WCAB jurisdiction reserved. Since the date of this issuance, the appropriate case law has come to the attention of the Judge which, in fact, holds that, "VRMA is not a wage replacement benefit, and thus, is not subject to wage loss credit. There is no double recovery as here a worker is awarded VRMA during the period of time that he or she also has earnings because VRMA is merely a way of benefits available for vocational rehabilitation services." Medrano v. WCAB (2008) 167 Cal App 4th 56 and Gamble v. WCAB (2006) 71 CCC 1015.

As stated, the issue of the amount of payment was deferred and to be adjusted by the parties with WCAB jurisdiction reserved. There was no final order with regard to the amount of cash that should be paid out to the injured worker, and therefore, this issue came on for trial on this date. The case law is clear that credit is not allowed in these circumstances, and therefore, none would be awarded in this case."

III. **Recommendation**

IT IS RESPECTFULLY RECOMMENDED that the petition for reconsideration filed by defendant in this case be denied.

Colleen S. Casey 7.14.09

Colleen S. Casey, WCJ (Date)

Served by mail : 7/15/09
On the attorneys of record
By: