WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHEKONA BROWN, *Applicant,* vs. ON ASSIGNMENT/LAB SUPPORT, TENET HEALTHCARE, *Defendant(s).*	Case No. ADJ914442 (LBO 0321658) ADJ4172569 (LBO 0321657) OPINION AND DECISION AFTER RECONSIDERATION

On September 21, 2009, we granted defendant's Petition for Reconsideration of the May 7, 2009 Findings and Award issued by the Workers' Compensation Administrative Law Judge (WCJ). Therein, the WCJ found that applicant is entitled to vocational rehabilitation services from November 29, 2006. The underlying claim involves applicant's claim of admitted injury to her left ankle, foot, and back while employed as an admitting clerk on November 14, 2000 and on November 29, 2000. On June 4, 2009, the WCJ issued an Amended Findings and Order identifying the proper defendant.[1] We issued a Notice of Intention to admit into evidence the October 31, 2005 letter from defendant's claim examiner to applicant confirming an agreement to interrupt vocational rehabilitation services and advising applicant of the procedure to reinstate those services. We did not receive written objection or any other type of filing from any party. We now issue our Opinion and Decision After Reconsideration.

In its Petition for Reconsideration, defendant contended that the WCJ erred in finding applicant entitled to rehabilitation services from November 29, 2006. Defendant argues that

[1] The June 4, 2009 Amended Findings and Order named Tenet Healthcare rather than California Insurance Guarantee Association as the proper defendant.

applicant did not request benefits until March 6, 2007.

Applicant did not file an answer. However, the WCJ issued a Report and Recommendation of Workers' Compensation Judge on Petition for Reconsideration (Report) recommending that we deny reconsideration.

Based upon our review of the record and for the reasons stated below, we will admit the October 31, 2005 letter from defendant's claim examiner to applicant into evidence as Appeals Board Exhibit Z and will amend the WCJ's Decision to find that applicant is entitled to vocational rehabilitation services from March 6, 2007. We will otherwise affirm the June 4, 2009 Amended Findings and Order.

In its verified Petition for Reconsideration, defendant noted that Frederic Nicola, M.D., found applicant to be permanent and stationary and a qualified injured worker (QIW) on September 10, 2004. On December 1, 2004, applicant began vocational rehabilitation services. However, pursuant to stipulation of the parties, vocational rehabilitation services were interrupted on August 26, 2005. In relevant part, and by letter to applicant dated October 31, 2005, defendant's claims examiner stated:

> "I am confirming our agreement to interrupt or defer vocational rehabilitation from 8/26/05 through 11/29/05. The reason for this action is you have requested an interruption of service.
>
> "To start vocational rehabilitation services, you must contact me no later than 11/29/05. Please call me at (916) 636-4882 or return the second page of this form." (Appeals Board Exhibit Z.)

On or about November 29, 2006, applicant's attorney filed a Declaration of Readiness to Proceed (DOR) noting that applicant had been evaluated by an AME and requesting a mandatory settlement conference on several issues including "Rehabilitation." Following additional proceedings, applicant's attorney notified defendant of applicant's willingness to settle vocational rehabilitation for a $10,000.00 "or else she is continuing her demand for full services," by letter dated March 6, 2007. (Joint Exhibit Y.) On January 30, 2008, the WCJ approved a Stipulated Award providing for 55% permanent disability and future medical treatment.

On May 6, 2008, the Rehabilitation Unit issued a Determination finding applicant to be a QIW and "entitled to rehabilitation services and benefits in line with Labor Code[2] [Section] 139.5, from the date of request." On May 20, 2008, defendant filed a DOR and an Appeal of the Rehabilitation Unit Determination. The WCJ issued a Joint Findings and Order on October 17, 2008 denying defendant's Appeal and finding the May 6, 2008 Rehabilitation Unit Determination to be enforceable. The WCJ further found that applicant was entitled to rehabilitation services "from the date of demand."

Next, the matter was heard on February 2, 2009. At that time, the parties stipulated that applicant was entitled to VRMA at temporary total disability rate of 320.00 per week through March 26, 2008. The sole issue was the date upon which applicant's entitlement began. Applicant claimed November 29, 2006 and defendant claimed March 6, 2007. Following that hearing, the WCJ issued the May 7, 2009 Findings and Award from which defendant seeks reconsideration herein.

On June 11, 2009, we issued an en banc decision in *Weiner v. Ralphs Company* (2009) 74 Cal.Comp.Cases 736 (Appeals Board en banc) holding, in relevant part, that the repeal of section 139.5, effective January 1, 2009, terminated any rights to vocational rehabilitation benefits or services pursuant to orders or awards that were not final before January 1, 2009 and that the Appeals Board lost jurisdiction over non-vested and inchoate vocational rehabilitation claims but continues to have jurisdiction to enforce or terminate vested rights under sections 5502(b)(3) and 5803.

Therefore, the first issue we must address is whether applicant's rights are vested. In a recent case, the Court of Appeal held that:

> "'When new legislation repeals existing law, statutory rights normally end with repeal unless the rights are vested pursuant to contract or common law.' (*Kleemann, supra*, 127 Cal.App.4th at p. 283; see *Strauss v. Horton* (2009) 46 Cal.4th 364, 473 [93 Cal. Rptr. 3d 591, 207 P.3d 48] [vested right includes marriage].) The 'final relief' necessary for a vested right occurs when the award is final and any appeals have been concluded by a final judgment. (See *Mann,*

[2] All further statutory references are to the Labor Code, unless otherwise noted.

supra, 18 Cal.3d at p. 831.)

"Similarly, in *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (2005) 131 Cal.App.4th 517 [31 Cal. Rptr. 3d 789] (*Rio Linda*), the court held that the newly enacted sections 4663 and 4664 should have been applied to a case submitted to a WCJ before the effective date of the statute, but on which the award and findings were not issued until four days after the effective date of those statutes. The court held that " ' " ' "The unconditional repeal of a special remedial statute without a saving clause stops all pending actions where the repeal finds them. If final relief has not been granted before the repeal goes into effect[, such relief] cannot be granted afterwards, even if a judgment has been entered and the cause is pending on appeal. The reviewing court must dispose of the case under the law in force when its decision is rendered." ' [Citations.]" [Citations.]'" (*Rio Linda, supra*, 131 Cal.App.4th at p. 528.) 'The repeal of such statutory right applies to *all* pending cases, at whatever stage the repeal finds them, unless the Legislature has expressed a contrary intent by an express saving clause or by implication from contemporaneous legislation.'(*Ibid.*)

"The instant case involves the application of the traditional rule that 'statutory rights end during litigation with repeal ... of the statute, unless appeals were exhausted and there is a final judgment.' (*Kleemann, supra*, 127 Cal.App.4th at p. 286; see *Green v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1436 & fn. 16 [26 Cal. Rptr. 3d 527].) Thus, to this extent, the repeal applies to injuries and claims that occurred prior to the repeal. If as here, the right involved is inchoate, it can be said that the law or repeal of the law is not being applied retroactively. (See *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (1978) 87 Cal.App.3d 336, 350 [151 Cal. Rptr. 368].)

"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 former 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 be applied or enforced in this case." (*Beverly*

Hilton Hotels v. Workers' Comp. Appeals Bd. (Boganim) (2009) 176 Cal.App.4th 1597 [74 Cal.Comp.Cases 927, 932-933].)

As opposed to the facts in *Boganim* where the defendant filed a petition for review of the Appeals Board's decision awarding vocational rehabilitation benefits, the award of vocational rehabilitation benefits in this case became final when they were not appealed. On October 17, 2008, the WCJ issued a Joint Findings and Order denying defendant's Appeal of the Rehabilitation Unit and finding that the May 6, 2008 Rehabilitation Unit Determination was enforceable and that applicant is entitled to vocational rehabilitation services from the date of the demand. Defendant did not seek reconsideration of that decision thereby terminating the appellate process. Consequently, we find that, applicant's rights are vested and enforceable. The only issue that remains is determining the proper date of demand.

Turning to that remaining issue, we note that the May 6, 2008 Rehabilitation Unit Determination found that applicant was "entitled to rehabilitation services ... from the date of request." A dispute arose between the parties as to the date of request. Then, in the May 7, 2009 Findings and Award, the WCJ found that applicant was entitled to vocational rehabilitation services from November 29, 2006 because applicant had listed "Rehabilitation" as an issue on a DOR filed on that date. We disagree.

On August 26, 2005, the parties interrupted vocational rehabilitation by stipulation. Thereafter, defendant sent the October 31, 2005 letter to applicant notifying her of the proper procedure to reinstate services. The letter states, "[t]o start vocational rehabilitation services, you must contact me no later than 11/29/05. Please call me at (916) 636-4882 or return the second page of this form."

Former Administrative Director's rule 10129 stated that:

> "(a) The provision of vocational rehabilitation services may be interrupted or deferred upon the request of the employee and agreement by the claims administrator, or if the agreement cannot be reached, upon a finding of good cause by the Rehabilitation Unit. [¶] The claims administrator shall within 10 days of the agreement, confirm the deferral or interruption in writing to the employee including advice concerning procedures to be followed by the

employee to commence or continue vocational rehabilitation services." (Former Cal. Code of Regs., tit. 8, §10129.)

Here, defendant informed applicant of the procedures to be followed to reinstate vocational rehabilitation services. Applicant was to call defendant's claims examiner at the telephone number provided or return the second page of the form. Yet, applicant never requested reinstatement of services pursuant to defendant's instructions. Then, on November 29, 2006, applicant filed a DOR listing "Rehabilitation" as an issue. However, we are not persuaded that listing "Rehabilitation" as an issue on a DOR sufficiently complies with Rule 10129 so as to constitute a request for services.

While there are cases holding that the indication of the existence of a dispute over entitlement to vocational rehabilitation benefits in an application for adjudication of claim qualifies as a request for vocational rehabilitation benefits for statute of limitations purposes (See *Belmontez v. Workers' Comp. Appeals Bd.* (1992) 7 Cal. App. 4th 786, 794-795 [57 Cal. Comp. Cases 412, 419]; *Los Angeles United School District v. Workers' Comp. Appeals Bd.* (1989) 54 Cal. Comp. Cases 42 (writ denied); and *Taft Electric v. Workers' Comp. Appeals Bd.* (1989) 54 Cal. Comp. Cases 133 (writ denied)), we find these cases distinguishable from the facts herein because they all involved initial requests for services. Here, applicant was requesting reinstatement of vocational rehabilitation benefits following an interruption. Thus, she was required to comply with former Administrative Director Rule 10129. Because she did not do so, we find that the proper date of demand was March 6, 2007.

Accordingly, we will admit the October 31, 2005 letter from defendant's claim examiner to applicant into evidence as Appeals Board Exhibit Z and amend the WCJ's Decision to find that applicant is entitled to vocational rehabilitation services from March 6, 2007. We will otherwise affirm the June 4, 2009 Amended Findings and Order.

For the forgoing reasons,

IT IS ORDERED that the October 31, 2005 letter from defendant's claim examiner to applicant is hereby admitted into evidence as Appeals Board Exhibit Z.

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IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 4, 2009 Amended Findings and Order be, and the same hereby is **AFFIRMED, EXCEPT** that paragraph 3 of the Findings of Fact is **AMENDED**, as provided below.

FINDINGS OF FACT

* * *

3. Applicant is entitled to vocational rehabilitation services beginning March 6, 2007.

* * *

WORKERS' COMPENSATION APPEALS BOARD

FRANK M. BRASS

I CONCUR,

JAMES C. CUNEO

DEIDRA E. LOWE

WORKERS' COMPENSATION APPEALS BOARD EUREKA SEAL

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

FEB 23 2010

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

CHEKONA BROWN
JACKSON & JACKSON
TROVILLION, INVEISS & DEMAKIS

PAG/csl

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHEKONA BROWN, *Applicant,* vs. ON ASSIGNMENT/LAB SUPPORT, TENENT HEALTHCARE, *Defendant(s).*	Case No. ADJ914442 (LBO 0321658) ADJ4172569 (LBO 0321657) **OPINION AND ORDERS GRANTING RECONSIDERATION AND NOTICE OF INTENTION TO ADMIT EVIDENCE INTO THE RECORD**

Defendant seeks reconsideration of the May 7, 2009 Findings and Award and the June 4, 2009 Amended Findings and Order issued by the Workers' Compensation Administrative Law Judge (WCJ) wherein the WCJ found that applicant is entitled to vocational rehabilitation services from November 29, 2006, less sums previously paid. Previously, applicant's underlying claim of injury to her left ankle, foot, and back while employed as an admitting clerk on November 29, 2000 was settled by a January 30, 2008 Stipulated Award providing for 55% permanent disability and need for medical treatment.

On May 6, 2008, the Rehabilitation Unit issued a Determination finding applicant to be a qualified injured worker and "entitled to rehabilitation services and benefits in line with Labor Code [Section] 139.5, from the date of request." On May 20, 2008, defendant filed a Declaration of Readiness to Proceed and an Appeal of the Rehabilitation Unit Determination. The WCJ issued a Joint Findings and Order on October 17, 2008 denying defendant's Appeal and finding the May 6, 2008 Rehabilitation Unit Determination to be enforceable. The WCJ further found that applicant was entitled to rehabilitation services from the date of demand.

Next, the matter was heard on February 2, 2009 at which time the sole issue was a dispute as to the period of time during which applicant was entitled to vocational rehabilitation services.

Following that hearing, the WCJ issued the May 7, 2009 Findings and Award and the June 4, 2009 Amended Findings and Award from which defendant seeks reconsideration herein.

Defendant contends that the WCJ erred in finding applicant entitled to rehabilitation services from November 29, 2006. Defendant argues that applicant did not request benefits until March 6, 2007.

Applicant did not file an answer. However, the WCJ issued a Report and Recommendation of Workers' Compensation Judge on Petition for Reconsideration (WCJ) recommending that we deny reconsideration.

Based upon our review of the record and for the reasons stated below, we will grant reconsideration and issue a notice of intention to admit into evidence an October 31, 2005 letter from defendant's claim examiner to applicant confirming the agreement to interrupt vocational rehabilitation services and advising applicant of the procedure to reinstate those services. The October 31, 2005 letter is attached as Exhibit B to defendant's Trial Brief dated October 15, 2008. The letter is also listed as a defense exhibit on an October 16, 2008 Pretrial Conference Statement. However, because we are not able to locate the Minutes of Hearing for the October 16, 2008 hearing either in the Appeals Board file or on EAMS, we are unable to determine whether the October 31, 2005 letter was already admitted into evidence. The parties are invited to file a copy of the October 16, 2008 Minutes of Hearing if they exist.

Accordingly, we will grant reconsideration and issue a notice of intention to admit into evidence the October 31, 2005 letter to the extent that it has not already been received into the record. The parties are provided 15 days from the service of this notice to file any written objection and demonstration of good cause as to why the letter should not be admitted.

For the forgoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the May 7, 2009 Findings and Award and the June 4, 2009 Amended Findings and Order, be, and the same hereby is **GRANTED**.

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NOTICE IS HEREBY GIVEN that the Appeals Board will admit as evidence the October 31, 2005 letter from defendant's claim examiner to applicant confirming the agreement to interrupt vocational rehabilitation services and advising applicant of the procedure to reinstate those services absent written objection and demonstration of good cause to the contrary 15 days from the service of this notice.

IT IS FURTHER ORDERED that pending further action by the Appeals Board in the above-entitled case, all further written correspondence, objections, motions, requests, and communications shall be filed with the Workers' Compensation Appeals Board, P.O. Box 429459, San Francisco, CA 94142-9459, ATTENTION: Reconsideration Unit, and not with any local office.

WORKERS' COMPENSATION APPEALS BOARD

JAMES C. CUNEO

I CONCUR,

DEIDRA E. LOWE

FRANK M. BRASS

WORKERS' COMPENSATION APPEALS BOARD SEAL

DATED AND FILED IN SAN FRANCISCO, CALIFORNIA

SEP 21 2009

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

CHEKONA BROWN
JACKSON & JACKSON
TROVILLION, INVEISS & DEMAKIS

PAG/csl

BROWN, CHEKONA

STATE OF CALIFORNIA

Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NO. LBO 321658/ADJ914442

CHEKONA BROWN **–vs-** **SPECIALTY RISK SERVICES for TENET HEALTHCARE**

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

Defendant, Specially Risk Services, Inc has filed a verified Petition for Reconsideration received by the undersigned July 22, 2009.

I
INTRODUCTION

Procedural Background:
May 7, 2009 Finding and award issued, naming SRS and CIGA as employers.

May 29, 2009 Amended Finding and Award removing CIGA from the Finding and Award.

July 22, 2009 Mr. Jackson requested status and provided Specialty Risk Services Petition for Reconsideration.

II
DISCUSSION

FACTS
The sole issue presented when are benefits due. Defendant asserts benefits do not accrue until a demand has been made.

Ms. Brown, while employed as an admitting clerk, sustained left ankle, foot, and back injury. When injured, applicant's general employer was On Assignment insured by Legion Insurance, now in Liquidation. The special employer Tenet Healthcare, permissibly self-insured, adjusted by Specialty Risk Services has filed the subject petition.

There is no dispute; applicant is a qualified injured worker. Rehabilitation services commenced December 1, 2004, but were interrupted August 26, 2005. Determination of the Rehabilitation Unit issued May 2, 2008 finding applicant entitled to services and benefits from the date of the request.

Agreement could not be reached regarding the date of request. Dispute arose as to what date should vocational rehabilitation services resume or accrue.

The facts are, November 29, 2006 applicant filed a Declaration of Readiness to Proceed, VR services were at issue. Next, Applicant's attorney issued correspondence to defendant March 6, 2007 wherein he proposed settlement of a number of benefits, including VR services or in the alternative applicant would continue to demand services.

Permanent disability was resolved by Stipulated Award January 30, 2008, issues relating to VR services specifically not resolved.

Defendant's dispute rehabilitation raised as an issue on a DOR presents sufficient notice that would require the need to act. They claim benefits are not due until there is specific contact with defendant expressing a willingness to proceed.

Applicant asserts the Declaration of Readiness to Proceed is sufficient; defendants should have resumed services as of said date. I agree.

__56 Cal. Comp. Cases 21) held that checking a box on an application for adjudication indicating that VR was disputed is sufficient to constitute a request for rehabilitation benefits. Here, checking the box is sufficient to trigger a resumption of entitlement to benefits.

III
RECOMMENDATION

For the reasons stated above I respectfully recommend that the Petition for Reconsideration be denied or whatever action the board deems appropriate.

DONNA DAVID
Workers' Compensation
Administrative Law Judge

Served by mail on persons
As shown on the Official
Address Record.
Date: July 23, 2009
By: S. Duhon