

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. ADJ347040 (MON 0305426)**

4 **LAWRENCE WEINER,**

5 *Applicant,*

6 **vs.**

7 **RALPHS COMPANY, Permissibly Self-
8 Insured; and SEDGWICK CLAIMS
9 MANAGEMENT SERVICES, INC.
(Adjusting Agent),**

10 *Defendant(s).*

**ORDER ALLOWING
AMICUS BRIEFS
(EN BANC)**

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12 On April 10, 2009, the Appeals Board granted reconsideration to further study the factual
13 and legal issues presented by the petition for reconsideration filed by defendant, Ralphs Grocery
14 Company.

15 Defendant sought reconsideration of the Findings and Award issued by the workers'
16 compensation administrative law judge (WCJ) on January 13, 2009. In that decision, the WCJ
17 accepted the parties' stipulation that applicant, Lawrence Weiner, sustained an industrial injury to
18 his right hip, cervical spine, and lumbar spine from 1967 through September 30, 2002, while
19 employed as a checker by defendant. In relevant part, the WCJ further found that applicant is
20 entitled to retroactive vocational rehabilitation maintenance allowance benefits (VRMA), payable
21 at his stipulated temporary disability indemnity (TD) rate, for the period of June 13, 2003 to March
22 7, 2005. Accordingly, the WCJ awarded those benefits.

23 In its petition, defendant contends, in summary, that: (1) the WCJ lacked jurisdiction to
24 award VRMA at the TD rate on January 13, 2009 because (a) the Legislature repealed the
25 vocational rehabilitation statute, Labor Code section 139.5,¹ effective January 1, 2009; (b) the
26 right to vocational rehabilitation benefits is wholly statutory, and the Legislature could repeal that

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¹ All further statutory references are to the Labor Code.

1 right at any time; (c) the repeal of a statutory right stops all pending actions where the repeal finds
2 them, even if the repeal becomes effective while an action is pending on appeal, unless the repeal
3 contains a savings clause that protects the right in pending litigation; and (d) therefore, all rights to
4 vocational rehabilitation benefits were abolished effective January 1, 2009, unless those rights
5 were vested through a final order; (2) the award of VRMA cannot be justified under the vocational
6 rehabilitation “ghost statutes” because, by repealing section 139.5, the Legislature ended the
7 tenure of any “ghost statutes” by ending vocational rehabilitation itself; (3) injured employees
8 were not prejudiced by the January 1, 2009 abolishment of all rights to vocational rehabilitation
9 benefits, because they had five years to litigate vocational rehabilitation issues and to obtain final
10 awards; (4) although the Labor Code still mentions vocational rehabilitation in other sections, such
11 as section 5803, these sections merely give the WCAB continuing jurisdiction to enforce awards
12 under section 139.5 that became final before January 1, 2009; and (5) even assuming the WCJ had
13 jurisdiction to award retroactive VRMA at the TD rate, his decision violated section 5313 because
14 it did not address whether retroactive VRMA at the TD rate can be construed as a penalty under
15 section 5814 and it did not explain how retroactive VRMA at the TD rate may be awarded
16 retroactively to a date before the employer had some specific knowledge of the employee’s
17 possible QIW status.

18 Applicant filed an answer. He contends, in summary, that: (1) his right to retroactive
19 VRMA at the TD rate is based on the statutory law in effect at the time those benefits should have
20 been provided; (2) his right to retroactive VRMA at the TD rate is based on the statutory law in
21 effect on November 24, 2008, when the issue was submitted for decision to the WCJ; (3) it would
22 be unconscionable to deny him retroactive VRMA at the TD rate where defendant delayed these
23 benefits without any basis and where a hearing on defendant’s vocational rehabilitation appeal was
24 continued because of its counsel’s unavailability; (4) the vocational rehabilitation “ghost statutes”
25 gave the WCJ jurisdiction to deny defendant’s vocational rehabilitation appeal and to find and
26 award retroactive VRMA at the TD rate; (5) section 5502(c)(3), which was not repealed,
27 constitutes a savings clause that allows the WCAB to hear and determine issues of entitlement to

1 vocational rehabilitation benefits under repealed section 139.5; and (6) because he is a QIW, he is
2 entitled to VRMA at the TD rate retroactive to the date he first requested vocational rehabilitation.

3 Because of the important legal issues surrounding the effect of the Legislature's repeal of
4 section 139.5, effective January 1, 2009, and to secure uniformity of decision in the future, the
5 Chairman of the Appeals Board, upon a majority vote of its members, has assigned this case to the
6 Appeals Board as a whole for an en banc decision. (Lab. Code, § 115.)

7 In accordance with our broad powers on reconsideration (Lab. Code, § 133; see also Cal.
8 Code Regs., tit. 8, § 10848), we will give any interested person or entity until 5pm on Monday,
9 May 11, 2009 to file an amicus curiae brief, *limited to the jurisdictional issues relating to the*
10 *Legislature's repeal of section 139.5.*² Any such amicus briefs shall concurrently be served on
11 both counsel in the *Weiner* case.³ Then, each counsel in the *Weiner* case shall have until 5pm on
12 Monday, June 1, 2009 to file a single consolidated reply brief that responds to *all* of the amicus
13 briefs. These time limitations for filing mean that a brief must be *received* by the Appeals Board
14 by the applicable deadline, and not merely mailed by that deadline. (Cal. Code Regs., §§ 10845(a),
15 10230(a).) Untimely briefs will *not* be considered.

16 We are allowing the submission of amicus briefs because we are aware that the question of
17 the WCAB's jurisdiction to act on vocational rehabilitation issues following the January 1, 2009
18 effective date of the repeal of section 139.5 is of great interest to the workers' compensation
19 community. In particular, we are aware that, on February 3, 2009, the Acting Court Administrator
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21 ² We observe it is not unusual for the Appeals Board to invite amicus curiae briefs relating to our en banc
22 cases. The Appeals Board has periodically done so for over 30 years. For example, on April 6, 2009, we invited
23 amicus briefs following our grants of reconsideration of our February 3, 2009 en banc decisions in *Almaraz* and
24 *Guzman* (74 Cal.Comp.Cases 201) and in *Ogilvie* (74 Cal.Comp.Cases 248). We also accepted amicus curiae briefs in
25 each of the following cases: *Costa v. Hardy Diagnostic* (2006) 71 Cal.Comp.Cases 1797 (Appeals Board en banc);
26 *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc); *Phillips v. Sacramento Municipal*
27 *Utilities District* (2000) 63 Cal.Comp.Cases 585 (Appeals Board en banc); *Moran v. Bradford Building* (1992) 57
Cal.Comp.Cases 273 (Appeals Board en banc); *Lechner v. Solar Turbines, Inc.* (1992) 57 Cal.Comp.Cases 366
(Appeals Board en banc); *Rocha v. Puccia Construction Co.* (1982) 47 Cal.Comp.Cases 377 (Appeals Board en banc);
(5) *Greenwald v. Carey Distributing Co.* (1981) 46 Cal.Comp.Cases 703 (Appeals Board en banc); *Cabrera v.*
Intercell Industries (1980) 45 Cal.Comp.Cases 3 (Appeals Board en banc); *Rountree v. Time D.C.* (1979) 44
Cal.Comp.Cases 223 (Appeals Board en banc); *Thomas v. Sports Chalet, Inc.* (1977) 42 Cal.Comp.Cases 625
(Appeals Board en banc); and *Cabello v. NL Industries* (1976) 41 Cal.Comp.Cases 605 (Appeals Board en banc).

³ The addresses for counsel are set forth beneath the service declaration at the end of this opinion.

1 of the Division of Workers' Compensation issued a "Notice of Intention to Order Statewide
2 Consolidation of Designated Cases on the Issue of the Repeal of Labor Code Section 139.5 and to
3 Issue an Order Staying Action on all other Cases in which the Effect of the Repeal of Labor Code
4 Section 139.5 is Presented Pending a Determination on the Consolidated Action" (NIT). The NIT
5 reflects an intention to determine whether "a limited number of ... cases should be consolidated"
6 for "the purpose of ... determining the common issue of the effect of the repeal of Labor Code
7 Section 139.5 on injured workers' entitlement to vocational rehabilitation benefits and services for
8 injuries occurring prior to January 1, 2004." The NIT also reflects an intention to determine
9 whether "all other cases statewide in which th[is] common issue is presented" should be stayed if a
10 limited number of such cases are consolidated. The NIT noticed a hearing for March 27, 2009
11 and, among other things, it directed that every Presiding Judge of the WCAB was to post a copy of
12 the NIT in a prominent public location at their respective district offices.

13 We believe that, by taking the section 139.5 issue for an en banc decision, we may obviate
14 the need for any possible consolidated proceedings at the trial level because our en banc decision
15 will become binding.⁴ Moreover, because it seems likely that any consolidated decision at the trial
16 level would come before us on reconsideration, we believe that taking the section 139.5 issue for
17 an en banc decision would reduce the chance that any consolidated proceedings at the trial level
18 might result in "a wasteful spinning of the wheels." (See *Albert Van Luit Wallpaper Co. v.*
19 *Workmen's Comp. Appeals Bd. (Taylor)* (1973) 36 Cal.App.3d 88, 92 [38 Cal.Comp.Cases 802,
20 804].)

21 Additionally, by inviting amicus curiae briefs, we believe we will receive a broad
22 perspective on any section 139.5 jurisdictional issues, we will receive assistance in analyzing those
23 issues, and we will help ensure that all sides of those issues are fairly and completely presented.
24 (*In re Marriage Cases* (2008) 43 Cal.4th 757, 792, fn. 10; *Preserve Shorecliff Homeowners v. City*

26 ⁴ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers'
27 compensation judges. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)*
(2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5]; *Gee v. Workers' Comp. Appeals Bd.*
(2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Gov. Code, § 11425.60(b).)

1 | *of San Clemente* (2008) 158 Cal.App.4th 1427, 1435.)

2 | The amicus briefs shall not exceed 15 pages and they shall comply with the form and size
3 | requirements of Rule 10845(a) (see § 10232(a)(1) through (a)(5) and (a)(11)), except that the
4 | amicus briefs need not comply with the provisions of Rule 10845(a) that relate to document
5 | folding and stapling, document cover sheets, and documents separator sheets (see § 10232(a)(11)
6 | and (b)). This is because we will order that these briefs be filed directly with the Appeals Board,
7 | and not with any district office. The Appeals Board will process these documents and scan them
8 | into EAMS. Any amicus brief not complying with all of these requirements (including the time
9 | deadlines and service requirements set forth above) shall not be accepted for filing or deemed filed
10 | and shall be discarded without notification to the filing person or entity. We note that, for the
11 | benefit of any potential amicus, we have posted copies of defendant’s petition for reconsideration
12 | and of applicant’s answer on our website at http://www.dir.ca.gov/wcab/wcab_info_wcc.htm.

13 | After the period for filing amicus briefs has elapsed, counsel in the *Weiner* case will each
14 | be given until 5pm on Monday, June 1, 2009 to file a reply brief that responds to all of the amicus
15 | briefs – that is, each counsel may file a single consolidated reply brief. The reply briefs shall not
16 | exceed 15 pages and they shall comply with the form and size requirements of Rule 10845(a) (see
17 | § 10232(a)(1) through (a)(5) and (a)(11)), except, as above, they need not comply with the
18 | provisions of Rule 10845(a) that relate to document folding and stapling, document cover sheets,
19 | and documents separator sheets (see § 10232(a)(11) and (b)). The parties’ replies to the amicus
20 | briefs shall be served on opposing counsel, but the replies need not be served on amici.

21 | Any brief, whether filed by a party or by an amicus, which requests that the Appeals Board
22 | take judicial notice of legislative history shall comply with all of the following requirements:
23 | (1) the brief shall append a copy of the matter to be judicially noticed or explain why it is not
24 | practicable to do so; (2) the body of the brief shall *quote* the specific language of legislative
25 | history that the party or amicus seeks to be judicially noticed and considered and it shall
26 | specifically identify where in the document the quoted language appears (e.g., “Sen. Com. on
27 | Labor and Industrial Relations, Analysis of Sen. Bill No. 714 (2003-2004 Reg. Sess.) as amended

1 Apr. 21, 2003, pp. 1-2”) (cf. Cal. Code Regs., tit. 8, § 10842(b)); and (3) the body of the brief shall
2 explain why the matter to be judicially noticed is relevant. The appended legislative history
3 documents shall not count toward the page limitations set out above, however, the requisite quoted
4 language and explanation of its relevance shall count toward the page limitations. We shall
5 consider only those requests for judicial notice of legislative history that strictly adhere to all of
6 these requirements. We impose these requirements so that: (1) the parties and amici focus only on
7 the most important elements of legislative history; (2) we are not deluged with a tsunami of
8 requests for judicial notice of legislative history documents that have only minimal relevance to
9 our deliberations; and (3) we and the parties are assured of having ready access to the legislative
10 history documents. A failure to comply with any one these requirements may result in the denial
11 of the request for judicial notice.

12 For the convenience of amici, who will not have ready access to the record, we will set out
13 the following history, which appears to be undisputed.

14 Applicant sustained an industrial injury to his right hip and his cervical and lumbar spine
15 while employed as a checker from 1967 through September 30, 2002. Although the parties
16 ultimately stipulated to injury, the issue of injury was initially disputed.

17 Applicant voluntarily retired on September 30, 2002, based on an offer of a pension. From
18 that date through March 7, 2005, he was ready, willing and able to participate in vocational
19 rehabilitation.

20 Applicant filed an application on June 7, 2003 and made a demand for vocational
21 rehabilitation on June 13, 2003.

22 In a report of June 15, 2004, applicant’s treating physician, Philip A. Sobol, M.D., found
23 that applicant had sustained industrial injury and declared him to be a QIW. This was the first
24 report indicating a need for vocational rehabilitation. Applicant made a second demand for
25 vocational rehabilitation on July 12, 2004.

26 On March 8, 2005, defendant accepted applicant’s injury claim and commenced the
27 provision of vocational rehabilitation benefits.

1 On March 31, 2005, applicant was evaluated by Alexander Angerman, M.D., as the agreed
2 medical evaluator (AME) in orthopedics. On May 6, 2005, Dr. Angerman issued a report finding
3 cumulative industrial injury and agreeing that applicant is a QIW.

4 Except for a period when vocational rehabilitation was interrupted for medical treatment
5 (including total hip replacement surgery), applicant participated in vocational rehabilitation from
6 March 8, 2005 through approximately March 26, 2008, when defendant requested closure of
7 vocational rehabilitation. Applicant objected to closure and the parties appeared before the
8 Rehabilitation Unit on July 7, 2008.

9 On July 9, 2008, the Rehabilitation Unit issued a determination that applicant is entitled to
10 retroactive VRMA at his TD rate from June 13, 2003 (the date of his initial request for vocational
11 rehabilitation) through March 7, 2005 (the day before defendant voluntarily commenced
12 vocational rehabilitation benefits and services).

13 On July 29, 2008, defendant filed a timely rehabilitation appeal, together with a declaration
14 of readiness.

15 Defendant's rehabilitation appeal initially was set for a September 8, 2008 status
16 conference; however, the conference was continued to October 14, 2008 at defendant's request due
17 to its attorney's calendar conflict.

18 A trial took place on November 24, 2008, at which time the matter was submitted for
19 decision.

20 On January 13, 2009, the WCJ issued his decision confirming the Rehabilitation Unit's
21 determination that applicant is entitled to retroactive VRMA at the TD rate from June 13, 2003
22 through March 7, 2005.

23 For the foregoing reasons,

24 **IT IS ORDERED** that any interested person or entity shall have until 5pm on Monday,
25 May 11, 2009 to file and serve an amicus curiae brief, in accordance with the requirements set out
26 above.

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1 **IT IS FURTHER ORDERED** that, after the period for the filing of amicus curiae briefs
2 has elapsed, each counsel for the parties in *Weiner* shall have until 5pm on Monday, June 1, 2009
3 to file and serve a single consolidated reply brief in response to the amicus curiae briefs, in
4 accordance with the requirements set out above. The matter will then be deemed submitted for
5 decision.

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