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LEGAL BRIEFS NEWSLETTER

CASES & COMMENTS ON WORKERS' COMPENSATION

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WHAT DO I DO ABOUT MY REHAB CASES?

Injured workers with dates of injury subsequent to January 1st, 2004 are not entitled to Vocational Rehabilitation Benefits, but what about those with earlier dates of injury? Up until now, the answer was easy: If the injured worker was a "Qualified Injured Worker" they were entitled to the benefits including payment of the maintenance allowance, job training and job placement services. Labor Code 139.5, the enabling statute for the Rehabilitation benefits, contained a provision repealing itself as of January 1st 2009. The effect of this "sunset clause" is now open to great dispute and litigation is already underway.

As we indicated in our January "E-Alert", on 1/30/09 at the L.A. Appeals Board, a Status Conference was held on 800+ cases concerning rehabilitation appeal issues. Assistant Chief Judge Mark Kahn and Presiding Judge Jorja Frank were the moderators. Presiding Judge Hjelle from Marina Del Rey was also present.

According to Judge Frank, the Los Angeles Board has received over 1,000 Declarations of Readiness to Proceed (to trial)

concerning appeals on rehabilitation issues. She scheduled the first 800 cases for hearing pursuant to the Labor Code. (The Labor Code indicates this would be a subject for an Expedited Hearing).

Judge Kahn was present in order to facilitate the procedures for consolidation of some of these cases. Pursuant to the actions taken on the [Remedy Temp](#) case to ultimately obtain an *En Banc* decision from the WCAB after Reconsideration, Judge Kahn opined that consolidation would be the more economical method to hear framed issues concerning Rehabilitation. He suggested two issues be addressed in the consolidation:

1) Were applicant's rights to rehabilitation extinguished by the repeal of Labor Code Section 139.5 where the right to rehabilitation vested on the date of injury (pre-2004)?

2) Since the Rehabilitation Bureau no longer exists, is jurisdiction now before the WCAB?

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In raising these issues upon consolidation, Judge Kahn suggested that it be done “as clean as possible,” and to include only cases with dates of injury prior to 1/1/04, that the parties stipulate as follows: 1) that the applicant *may be* entitled to rehabilitation (without waiver of applicable defenses), 2) that at least part of the denial of rehabilitation is based on the sunset argument and challenging the jurisdiction of the WCAB on rehabilitation, and 3) that the parties stipulate that Labor Code Section 139.5 was repealed.

It was Judge Kahn’s stated hope that sending a few hundred consolidated cases on these issues would increase the chance that the Appeals Board would issue an *En Banc* decision. However, Judge Kahn also acknowledged that there are constitutional issues involved, and the cases would likely be further sent to the Court of Appeal and eventually the California Supreme Court. He urged parties whose cases met the above criteria to stipulate to consolidation of their cases. After further discussion, Judges Kahn and Frank agreed to continue the matter to a further Status Conference on 2/27/09 at 9:30 a.m. at the Ronald Reagan Building.

Judge Kahn indicated that the issues of a state-wide stay order on all cases on rehabilitation where the sunset and jurisdiction argument have been raised by defendant will be decided at the next hearing. Furthermore, he indicated a Notice of Intent for a state-wide consolidation would be sent to all presiding judges and posted on all major workers’ compensation websites, such as Work Comp Central or the DWC Newline. We also plan to provide this information to everyone on our Legal Briefs subscribers list.

Presiding Judge Frank advised that all

Los Angeles WCAB rehabilitation issues concerning the sunset and jurisdiction arguments would be stayed pending the consolidation. Presiding Judge Hjelle indicated a future determination regarding the same for Marina Del Rey cases.

What does all of this mean, as a practical matter, for your cases where Vocational Rehabilitation is an issue? First of all, since Labor Code 5814 only provides for penalties where delay in the provision of a benefit has been unreasonable, and since not even the WCAB knows for sure whether it still has any jurisdiction over claims for vocational rehabilitation, delays in the provision of the benefit should not be the subject of LC Section 5814 penalties petitions at this time. That being said, however, there are other potential liabilities that need to be considered.

We have already addressed this topic somewhat in our [November 2008 Legal Briefs](#), and we noted that there have already been decisions suggesting that, although gone, the statutes still has an ephemeral existence and may still control certain classes of Rehabilitation disputes. And, of course, there is the specter of the old *Elizondo* decision, mandating that the defendant shall pay temporary disability benefits during the time a dispute is pending. A final determination that benefits may still be awarded in certain cases could impose a lengthy retroactive indemnity liability.

We suspect the WCAB will draw a distinction between cases where no demand or no *prima facie* basis for a demand existed prior to 1/1/2009, and those cases which were already in progress or where an appeal existed or where some other timely dispute is pending under the old statutes. We think the latter

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cases more likely to find some salvation from the Court of Appeal, but it is hard to predict where the dividing lines will be drawn as to which cases may proceed and which won't.

So, in the end, what does all this give us? A solid basis to negotiate settlements of these pending cases where the potential exposure for delay may be very high if the ultimate decisions on this issue are not favorable. At the same time, the applicants' bar has strong incentive to recommend much discounted resolutions on these cases, knowing that there may be no benefits available somewhere down the line. We recommend taking a hard look at your open cases where Vocational Rehabilitation is still an issue, and to consider negotiation of a compromise settlement. We are hoping, of course, that the WCAB will at least decide it has jurisdiction to *approve* such settlements (which we expect to find out soon).

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