

DEPARTMENT OF INDUSTRIAL RELATIONS

SELF-INSURANCE PLANS
107 S. BROADWAY
ROOM NO. 5043
LOS ANGELES, CALIFORNIA 90012
(213) 620-5578



June 20, 1983

Kegel, Tobin & Hamrick
Attorneys at Law
P. O. Box 76907
3325 Wilshire Blvd.
Los Angeles, CA 90076

Attn: Mr. W. Joseph Truce
Attorney at Law

RE: Percy Scullark v. The Garrett Corporation
Case No. 80 LB 109-244
Self-Insurance Certificate No. 1020

Dear Mr. Truce:

This will confirm our telephone conversation of June 16, 1983.

I feel Mr. Scullark is due rehabilitation temporary disability indemnity payments for the period that he was being evaluated by the independent vocational evaluator. Please refer to the Opinion and Order Granting Reconsideration and Decision After Reconsideration dated October 8, 1982 wherein it states, "It is further ordered that the Decision and Order of the Rehabilitation Bureau dated January 4, 1982 be, and is hereby, REINSTATED." The Rehabilitation Bureau states in part, "... it is the feeling of this consultant that further services are warranted to Mr. Scullark for his industrial injury of 10/25/79. ..." If you refer to the Administrative Director's Rules & Regulations section 10016, "Rehabilitation temporary disability indemnity payments... such payment shall continue during the pendency of vocational rehabilitation services unless the Rehabilitation Bureau otherwise orders. ..." The Rehabilitation Bureau made no such order.

Also, please refer to two panel decisions: Aguja v. Industrial Indemnity 798F280-205, August 10, 1982 which was printed in the CWCR October 1982, page 205, and also Elilaytzi v. State Compensation Insurance Fund 1981 9CWCR 212. These cases state that rehabilitation benefits are to be provided a worker even if he is determined to be an unqualified worker.

If, as you stated, the independent rehabilitation counselor, Mr. Ira Cohen, has not done his duty as ordered by the court which was to determine if Mr. Scullark was a qualified injured worker, then I would think it would be the

Kegal, Tobin & Hamrick
Attn: Mr. W. Joseph Truce

- 2 -

June 20, 1983

practical approach to have the counselor determine whether or not Mr. Scullark is a qualified injured worker at this time and avoid payment of further temporary disability payments by further litigation.

This office is mandated by the legislature to insure that all injured workers of self insureds receive all of their benefits. However, we are not directed to secure unwarranted payments. In this case I believe action should be taken to minimize the exposure to the employer, Garrett Corporation.

My recommendation would be at the minimum to pay Mr. Scullark rehabilitation temporary disability payments for the period that he is being evaluated by the independent rehabilitation counselor, Mr. Ira Cohen. I would further recommend that action be taken to speed up such things as determination of Mr. Scullark as to whether or not he is a qualified injured worker. I feel you are in a penalty situation at the present time and you may be assessed a 10% penalty for the entire period of temporary disability and 10% interest on all payments not paid to date. If your present plan of operation is maintained, I can see Garrett Corporation being stuck with a tremendous bill needlessly.

As one additional comment, payment cannot be held up if you may possibly somewhere in the future come up with additional proof that the situation does not exist. If you do not have proof at this time, payment should be made. You have had since January 4, 1983 to search for this information.

In the interest of speeding up this case that has obviously been going at a snail's pace and because Mr. Scullark has complained he is not getting any money and that he feels he is being "starved out", I am sending a copy of this letter to the Garrett Corporation as well as to their administrator, CDS, in the hopes that something will be done as soon as possible.

I appreciated the time and consideration you gave me on the phone and although I may agree with you on several points and I believe you have given this case your best shots, there are certain basic laws that must be followed.

Please get back to me as soon as possible.

Very truly yours,


John W. Buck
Supervising Consultant
Self-Insurance Plans

JWB/lv
Copy/CDS of California
Attn: Sharron Sacks;

Mr. A. J. Luckevich,
V.P./Controller
THE GARRETT CORPORATION



The Garrett Corporation

9851 SEPULVEDA BLVD.
P.O. BOX 92248
LOS ANGELES
CALIFORNIA 90009
Tel: (213) 670-0131 / 776-1010
Twx: 910-346-6729

DIRECT LINE:
(417)6678

July 8, 1983

Mr. John W. Buck
Department of Industrial Relations
Self-Insurance Plans
107 So. Broadway, Room 5043
Los Angeles, CA 90012

Re: Percy Scullark v. The Garrett Corporation
Case No. LB 109-244
Self-Insurance Certificate No. 1020
Our Docket 83-066

Dear Mr. Buck:

I am responding on behalf of The Garrett Corporation to your letter to Mr. Truce dated June 20, 1983, a copy of which was directed by you to Mr. Luckevich. Although I am uncertain as to your official interests in writing such a letter, Garrett is appreciative of your stated intention of reducing the Corporation's potential exposure in the above-referenced case.

In response to your letter, I have reexamined in greater depth the documents and evidence gathered in this case, particularly as to the potentially fraudulent nature of the claim, as well as considered many of the issues you raised with our cognizent managers, independent program administrator and outside counsel. This reexamination has resulted in even greater conviction on the part of all concerned that the Corporation is following the only prudent course of conduct available to it. I appreciate your position that certain presently undisbursed funds may arguably be past due, assuming the claim is found non-fraudulent and that certain compensable non-precedential Board Decisions are held to be controlling despite an applicable Supreme Court decision to the contrary, and that, therefore, a 10% penalty and interest might apply to the claim amount. I am convinced, however, by the substantial evidence of fraud existing in this case that the Corporation's position, as implemented by Mr. Truce, is the correct one. The Corporation's actual loss would be greater if such payments were made to the claimant, his claim then denied at trial, and the claimant found to be judgement-proof when ordered to refund the payments.

One of The Signal Companies

FORM

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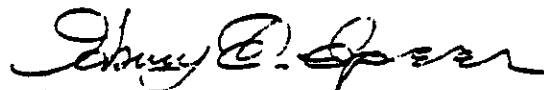
As to bringing this case to a swift resolution, The Garrett Corporation is wholeheartedly interested in resolving proper claims against the Corporation in a timely manner. The trial is set for August 8, and we have no control over the Judge's calendar nor any proper procedure available to us to acquire an earlier trial date. As to an earlier settlement, your non-confidential letter might operate counterproductive to your stated purpose in that it could give to an unsophisticated claimant what appears to be an endorsement by a State agency of the propriety of his claim, particularly where that agency is not fully cognizant of the relevant evidence. Nevertheless, Garrett is continuing in good faith to consider any fair and equitable settlement opportunities that may become available.

Since there is no basis for belief under your legislative mandate that Garrett would not have the financial stability to make payment should an adverse judgement be rendered, I trust that you will be as patient as the parties are to allow the judicial process to run its proper course.

Please direct all future communications, either oral or written, regarding our self-insurance plan to our outside counsel and/or the Corporation's Legal Department. Directing such correspondence to our plan administrator is improper in view of the fact that this claim is in litigation and that the administrator as agent of the Corporation in this matter is represented by counsel. Thank you for your interest in The Garrett Corporation's welfare.

Sincerely yours,

THE GARRETT CORPORATION



Gary D. Speer
General Attorney

GDS:keh

cc: Mr. W.J. Truce, Kegel, Tobin & Hamrick
Ms. B. Hunt, The Garrett Corporation - Safety
Mr. A. Luckevich, The Garrett Corporation, V.P.,
Controller
Mr. R. Anderson, Manager Self-Insurance Programs
Ms. K. Maele, CDS of California

WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

WT

CASE No. 80 LB 109-244

PERCY SCULLARK,

Applicant

vs.

GARRETT CORPORATION,
Permissibly self-insured,

Defendant

OPINION AND ORDER
DENYING RECONSIDERATION
GRANTING RECONSIDERATION
(BOARD MOTION) AND DECISION
AFTER RECONSIDERATION

Applicant has petitioned for reconsideration from the decision issued by the workers' compensation judge (WCJ) in this case on September 21, 1983 which granted defendant's petition to reopen, which rescinded the Rehabilitation Bureau's order requiring payment of retroactive benefits and which gave defendants a credit for permanent disability indemnity advanced pursuant to the prior award. Defendant contends that the report of Dr. Jack Vandernoot does not indicate that any improvement had taken place in petitioner's condition and that no substantial evidence exists to support the denial of petitioner's retroactive temporary disability benefits.

The Board believes that the judge's decision on the issue of permanent disability, is justified by the report of Dr. Vandernoot and by the photographs that were admitted in evidence. Since petitioner has not pointed to anything specific in the films that would tend to suggest that the judge has inaccurately characterized what was shown therein, we cannot say that the WCJ erred in

AY



1 as a production machine operator." First, this is inaccurate.
2 Dr. Vandernoot's report does demonstrate this capability. Second-
3 ly, the argument that petitioner makes, fails to take into
4 account the fact that the only reason that applicant had been
5 awarded temporary disability indemnity for the period before
6 December 28, 1982, was that such payments were to be made on a
7 rehabilitation basis rather than a medical basis. Thirdly, even
8 assuming the issue of temporary disability indemnity for that
9 period on a medical basis is in fact properly before us, then we
10 are still faced with the problem of whether applicant has
11 satisfied his burden of proof in establishing that he is
12 entitled to temporary disability indemnity on a medical basis
13 through that date. (Labor Code Section 5705) Petitioner does
14 not refer to such medical evidence, and in fact at the trial
15 level, petitioner did not contend that he was entitled to tem-
16 porary disability indemnity on a medical basis after the date
17 that defendant had actually furnished benefits.

18 To clarify the judge's decision, we will grant reconsider-
19 ation for the sole purpose of issuing a finding that the injury
20 caused no permanent disability

21 For the foregoing reasons,

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SCULLARK

1 IT IS ORDERED that applicant's petition for reconsideration
2 filed on October 11, 1983 be, and it is hereby, DENIED.

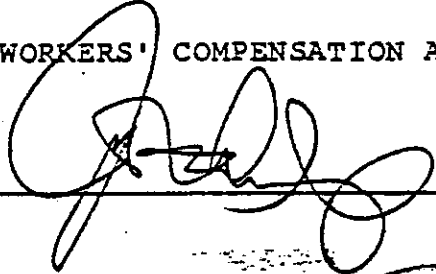
3 IT IS FURTHER ORDERED that reconsideration be, and is hereby
4 GRANTED ON MOTION OF THE BOARD.

5 IT IS FURTHER ORDERED that the decision of September 21,
6 1983 be, and it is hereby, AFFIRMED and the following added
7 thereto:

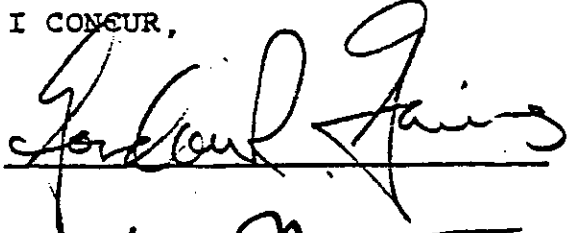
8 SUPPLEMENTAL FINDING

9 6. Applicant's industrial injury caused no permanent
10 disability.

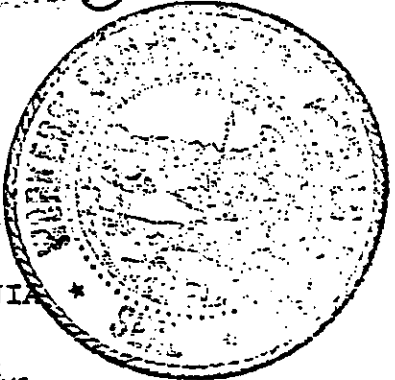
11 WORKERS' COMPENSATION APPEALS BOARD

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14 I CONCUR,

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19 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA *
20 NOV 10 1985 

21 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES
22 LISTED ON THE OFFICIAL ADDRESS RECORD.

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26 SCULLARK
80 LB 109-244

WT

CASE NO. 80 LB 109-244

PERCY SCULLARK

vs.

GARRETT CORP.

WORKERS' COMPENSATION JUDGE: MAURICE J. CAREY

DATE: October 24, 1983

RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Order Granting Petition to Reopen issued on September 21, 1983 granting the defendant's Petition to Reopen for decreased disability, and rescinding the Order and Decision of the Rehabilitation Bureau requiring the defendant to make payment on certain retroactive benefits. The trial Judge also held that the applicant was not entitled to further rehabilitation services.

The applicant filed a timely appeal contesting these decisions.

II
DISCUSSION

Originally this Judge issued a Findings and Award on July 23, 1982 granting the applicant 14 1/4% permanent disability based upon the defense medical of Dr. William Rhorer (who implaced a work restriction against very heavy work). There was no appeal by the defendant from that decision. However, the defendant filed a Petition to Reopen for reduced permanent disability rating contending that there was substantial

improvement in the applicant's condition since the issuance of the prior award. In addition the defendant filed a timely appeal from the Decision and Order of the Rehabilitation Bureau, which had issued on May 4, 1983, wherein the applicant was held entitled to temporary disability maintenance benefits from December, 1981 to present and continuing. The defendant contended that the applicant was not a qualified injured worker under L.C. Sec. 139.5, alleging that the applicant had no permanent disability or work restriction barring him from returning to his usual and customary occupation.

The decisive factor in this case is the film, although it is retained in the custody of the defendant, the factors which were sufficiently covered in the Judge's Opinion (incorporated by reference herein), indicating the use of a wheelbarrow, pick axe, and basketball playing, convincing this Judge that the applicant's permanent disability was non-existent. The motion pictures, together with Dr. Vandernoot's analysis that there were no objective findings (report of June 13, 1983) and his opinion that there was no indication that the applicant required any type of rehabilitation at all, was persuasive in the Judge's findings against the applicant.

The defendant put the applicant through a vocational rehabilitation program and the applicant secured a job on his own.

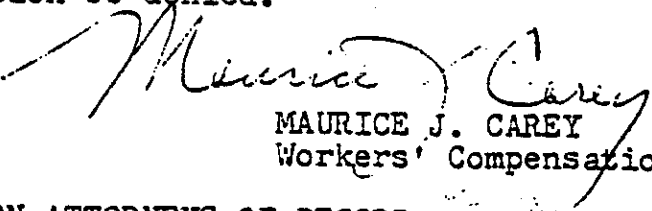
He did not leave that job subsequently because of any physical inabilities or complaints, but merely because of a personality confrontation with management. This was a credibility finding by the instant Judge. The fact that he had left the subsequent employment for personal reasons was not decisive in the Judge's conclusion, but was merely cumulative evidence that the applicant was able to return to work unimpeded by any significant permanent disability, and, in fact, he did not leave the subsequent employment because of any physical impairment or physical complaints. This last factor was also evidence tending to support a finding that the applicant essentially has no permanent disability. In the original Findings and Award the Judge gave the applicant a prophylactic work restriction based upon defense Dr. Rhorer's prescription against very heavy work. That restriction might have been arguably proper when the Findings and Award issued in July, 1982, but was certainly not proper when the matter came before the Judge again in 1983.

The fact that the defendants voluntarily provided the applicant with vocational rehabilitation services initially is certainly not conclusive. The defendant was merely following Dr. Myron Koch's recommendations of prophylactically precluding the applicant from heavy lifting, repeated bending an/or stooping. Dr. Koch had recommended that rehabilitation services be provided for the applicant, and they were. These

services consisted of direct job placement efforts as well as some on-the-job training. The results of the rehabilitation services were not successful for the applicant. The applicant secured his own job with Interparts, Inc. The applicant tried to convince the court that he left his employment with Interparts, Inc., because of physical inability to perform the job. Credible witnesses from Interparts testified and convinced the trier of fact that the applicant's story was not believable. In view of all the evidence it was this Judge's decision that the applicant was fully able to return to his usual and customary occupation and that no realistic work restriction should have been imposed. That being the situation, the applicant then was realistically not a qualified injured worker in the first place. He was not even a motivated injured worker, as the unsuccessful efforts of the rehabilitation vendor displayed.

III
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.


MAURICE J. CAREY
Workers' Compensation Judge

SERVED BY MAIL ON ATTORNEYS OF RECORD.

Date: October 24, 1983

By: *E. Matsumoto*

WT

CASE NO. 80 LB 109-244

PERCY SCULLARK

vs.

GARRETT CORP.

WORKERS' COMPENSATION JUDGE: MAURICE J. CAREY

DATE: September 20, 1983

OPINION ON DECISION

At the hearing of August 15, 1983 the parties were allowed 15 days each for the filing of written Points and Authorities.

The defendant's Points and Authorities have been filed, but the applicant's have not arrived. Nevertheless, in accordance with the disposition at the last hearing, the matter is ready for submission, and decision follows.

Findings and Award originally issued in this case on July 23, 1982 wherein the applicant was awarded a work restriction against very heavy work, in accordance with the opinion of Dr. William Rhorer, and after adjustment for age and occupation, was awarded 14 1/2% permanent disability, equivalent to \$3,307.50, payable forthwith. On the issue of rehabilitation, wherein the applicant sought retroactive benefits from September 1, 1981 to present and continuing, it was found by the instant Judge that the applicant had disqualified himself from further rehabilitation within the purview of L.C. Sec. 139.5. The applicant filed Petition for Reconsideration challenging the court's denial of rehabilitation. In its Opinion and Order Granting Reconsideration and Decision After Reconsideration issued by the Appeals Board on October 8, 1982 the Board held that the Rehabilitation Bureau's decision issued January 4, 1982 be reinstated. In its Decision and Order the Rehabilitation Bureau found that further services were warranted to the applicant for his industrial injury; that a rehabilitation plan had not been submitted and approved; that it was no longer productive to the applicant to continue working with the counselors of record; and that an independent vocational evaluator would have to be appointed in order to review all the records, meet with the applicant, and make further recommendations. The Bureau appointed as independent vocational evaluator, Ira Cohen. This was done and the reports of Ira Cohen, the independent vocational evaluator, are now in evidence.

The parties appeared for trial on August 8, 1983, and the issues set forth were as follows:

1. Petition to Reopen to reduce.
2. Appeal of rehabilitation and whether the applicant was a qualified injured worker, and whether further rehabilitation was appropriate.
3. Attorneys fees, and attorneys fees on rehabilitation.

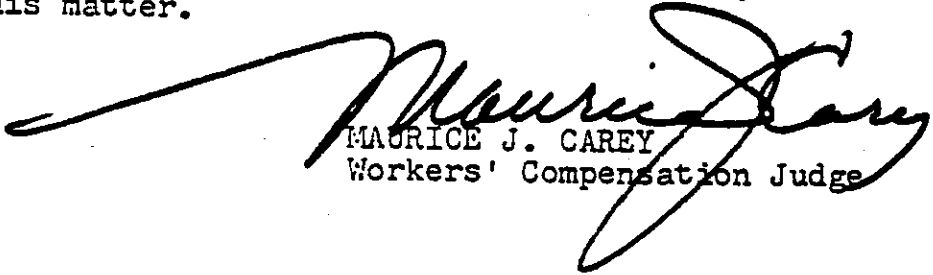
This Judge had an opportunity to listen to the applicant's testimony and the opportunity to evaluate his demeanor and manner of testifying. This Judge was also able to review the films taken of the applicant. It is this Judge's considered opinion that the applicant, having been observed playing an active game of basketball, including running, shooting baskets, etc., after observing the applicant move a wheelbarrow and use a pickaxe, that the applicant is suffering from no permanent disability whatsoever. In retrospect, it was error to have granted the applicant a work restriction in the first place, but we all make mistakes. The applicant's contentions to the contrary are rejected in total, since this Judge is convinced that he lacks credibility and believability; and for this purpose, in the analysis and opinion of Dr. Jack Vandernoot in his report of June 13, 1983, it is noted that there are no objective findings. The applicant is not entitled to restriction against very heavy work, or even against very heavy lifting, or any work restriction whatsoever. Therefore the defendant's Petition to Reopen to Reduce is granted, and the applicant is awarded no permanent disability. The defendant is entitled to credit for permanent disability benefits advanced pursuant to the prior award.

On the issue of rehabilitation, Dr. Vandernoot's analysis that there is no indication that the applicant requires any type of rehabilitation program seems reasonable. Defendant originally considered the applicant a qualified injured worker and provided him with counseling and, pursuant to the applicant's request, provided him with job placement. The applicant obtained a subsequent job with Kerr Glass Co. and left that job not because of any physical inabilities or impairment but because he had a personality confrontation with management. The applicant subsequently worked for a friend who owns a janitorial service and lived at a laundromat in return for providing sundry services around the facility. According to Mr. Cohen's report dated May 12, 1983, the applicant refused to cooperate with vocational training and placement on various grounds, including lack of reliable transportation, and the allegation that the carrier was unwilling to pay him benefits during vocational rehabilitation.

The applicant's pre-injury job at Garrett Corp. was that of a production machine operator, and the carrier provided rehabilitation services through the offices of American Rehabilitation Management in order to retrain the applicant into his new occupation. At the applicant's request, as noted above, he was given direct job placement efforts and an attempt was made to put him onto an on-the-job program, but all without success. The applicant obtained a job of his own with Interparts, Inc., and left that job for personal reasons unrelated to any physical incapacity despite his allegation to the contrary that he could not fulfill the alleged lifting requirements of the job. As the Appeals Board pointed out in its decision on the subject, leaving the Interparts job did not in itself disqualify the applicant from further rehabilitation services, i.e., whether the employer had satisfied its obligation under L.C. Sec. 139.5. The Rehabilitation Bureau in a Decision and Order issued on May 4, 1983, directed that temporary disability benefits be provided the applicant from December 15, 1981, the date of the conference at which further evaluation was ordered, through planned completion or termination, less wages earned on a wage loss basis and allowable liens, at the legal temporary disability rate. The independent rehabilitation evaluator, Mr. Cohen, presumed that the applicant had been precluded from returning to his usual and customary occupation and was therefore to be considered a qualified injured worker. The evaluator then proposed a rehabilitation plan, the details of which are in his reports in evidence. As pointed out by the defendant in its Points and Authorities, the remand by the Appeals Board was for the matter to go to the independent vocational evaluator with the question still remaining as to whether the applicant was a qualified injured worker and, if so, whether the defendant had complied with its obligation to furnish vocational rehabilitation services. Based upon review of the entire record it is this Judge's considered opinion that the applicant is not a qualified injured worker and never was one. The applicant is and always was, after he had reached a permanent and stationary level and achieved the benefits of treatment, able to return to his usual and customary occupation, i.e., to his pre-injury job. The fact that the various medical reports on file seem to be in contradiction to themselves is of no matter since it is concluded that the doctors only had the benefit of applicant's self-serving statements, all designed to, I am sorry to say, exaggerate his symptoms and disability. It requires no great depth of judicial knowledge or extensive training for a Judge to evaluate a case by the use of just common ordinary eyesight and common ordinary sense.

An applicant who can swing a pickaxe, pull a loaded wheelbarrow, play an active game of basketball in competition with others, and do a series of repetitive bending, stooping, jumping and running, does not suffer from any great permanent disability. The applicant's protestations that he cannot lift over 25-35 lbs.; that he can sit for only one or two hours, and has difficulty in a confined area such as a car; that he can stand but has problems in reaching, leaning or stretching; can only do occasional squatting, bending and stooping and twisting of his body, must all be taken with a grain of salt. As Dr. Vandernoot noted in his June 13, 1983 report, the applicant has minimal disability. The applicant's pre-injury job was production machine operator, a job which required certain dexterity, all of which the applicant could very readily reassume. In order to be a qualified injured worker within the meaning of L.C. Sec. 139.5 the applicant must as a result of his job injuries be incapable of returning to his usual and customary occupation. It is clear from the foregoing that the applicant is not a qualified injured worker and the defendant had no obligation as such to provide rehabilitation services or benefits. The fact that it voluntarily did is no admission of liability and does not foreclose a later ruling to the contrary, as this opinion represents. The applicant has fooled many people in this case, including the Judge in his prior decision. The applicant's whole testimony lacked any credibility whatsoever. Accordingly the applicant is denied the retroactive maintenance benefits that he is seeking. Accordingly the employer has more than satisfied its obligation under L.C. Sec. 139.5. Accordingly the Rehabilitation Bureau's Order and Decision requiring the payment of said retroactive benefits is rescinded and overruled. In effect, a take nothing issues herein.

In addition, even though attorneys fees were earned both in the normal issues and rehabilitation matter, there are no funds from which to make said payments. All sums paid in attorneys fees are not ordered to be repaid since they were for past services earned. No further attorneys fees are awarded in this matter.


MAURICE J. CAREY
Workers' Compensation Judge

EM

1 WORKERS' COMPENSATION APPEALS BOARD

2 STATE OF CALIFORNIA

3 CASE No. 80 LB 109-244

4 PERCY SCULLARK,

5 Applicant

6 vs.

7 GARRETT CORP., permissibly
8 self-insured,

9 Defendant

ORDER GRANTING PETITION
TO REOPEN AND DECISION
THEREON

10
11 Petition to Reopen for Reduced Permanent Disability

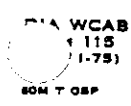
12 Rating having been filed herein; all parties having appeared, and
13 the matter having been regularly submitted, Honorable MAURICE J.
14 CAREY, Workers' Compensation Judge, finds and orders as follows:

15 FINDINGS OF FACT

- 16 1. Defendant's Petition to Reopen is granted.
- 17 2. Rehabilitation Bureau's Order and Decision requiring
18 payment of retroactive benefits is rescinded and overruled.
- 19 3. Defendant is entitled to credit for permanent
20 disability benefits advanced pursuant to prior award herein.
- 21 4. Applicant is not entitled to further rehabilitation
22 services.
- 23 5. There are no funds from which attorneys fees may be
24 awarded.

25 O R D E R


26 IT IS ORDERED that defendant's Petition to Reopen for
27 Reduced Permanent disability, filed herein on May 31, 1983, be



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and is hereby granted.

IT IS FURTHER ORDERED that applicant take nothing.


Workers' Compensation Judge
WORKERS' COMPENSATION APPEALS BOARD

SERVED BY MAIL ON PARTIES SHOWN
ON OFFICIAL ADDRESS RECORD.

Date: September 21, 1983 By: *E. Matsunoto*

FOR FILING
SEP 27 1983
COURT CLERK

80 LB 109-244