

ANOTHER INSTALLMENT IN THE *GEORGE THE BARTENDER* SERIES

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RE: **GEORGE THE BARTENDER AND THE WRECK OF THE MONEY TRAIN OR THE TRAGEDY OF THE *WEBB/RENFRO* DECISION**

FROM THE LOBBY BAR AT THE HYATT:

After a hard day denying benefits I raced over to the lobby bar as the Board, in its *en banc* decision in *Weiner v. Ralphs*, had finally shut down the ATM otherwise known as vocational rehabilitation in California.¹

In *Weiner*² the Board ruled that Labor Code §139.5(l) (Subsection l was courtesy of the SB899 reform law) actually meant what it said as follows:

“This section [referring specifically to vocational rehabilitation] shall remain in effect only until January 1, 2009, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2009 deletes or extends that date. (emphasis added)”

At this moment George the Bartender’s workers’ compensation attorney, Ron Summers, walked into the lobby bar with his band of merry men (Dr. Ratbar and Dr. Nickelsberg). Their demeanor reminded me of a funeral dirge.

Ron and I had both started in the practice of workers’ compensation in 1973 and at that time workers’ compensation consisted of a voluntary vocational rehabilitation program.

However, in 1974 the legislature amended Labor Code §139.5 to implement a mandatory vocational rehabilitation program as follows:

¹Over the years applicant attorneys who are friends of mine (I actually do have some friends that are applicant attorneys) have laughingly referred to our vocational rehabilitation as an ATM, which is open for business 24/7.

² Very important: The trial judge in the *Weiner* case wants the industry to know that the case name is pronounced *Weiner* and not “Wiener” which is what you place in a hot dog bun.

George the Bartender and the Wreck of the Money Train or the Tragedy of the Webb/Renfro Decision

June 29, 2009

Page 2

“The administrative director shall establish a rehabilitation unit.”³

Labor Code §139.5 went on to state that when a Qualified Injured Worker *chooses* to enroll in a rehabilitation program, he shall *continue* to receive temporary disability indemnity payments, plus additional living expenses necessitated by the rehabilitation program, together with all reasonable and necessary vocational training at the expense of the employer or the insurance carrier.

At the time Ron and I argued about what the above sentence meant. I felt the meaning was clear—that on the date that an injured worker commenced a vocational rehabilitation program temporary disability benefits would also begin and would terminate on an applicant’s completion of the vocation rehabilitation plan.

However, Ron and the California Applicants’ Attorneys Association (CAAA) interpreted this rather innocent sounding clause differently.

Ron argued that once one of his physicians, such as Dr. Nickelsberg, found that an applicant was a Qualified Injured Worker (QIW), that the applicant would be eligible to receive retroactive temporary disability benefits to be spread out through multiple vocational rehabilitation plans. These plans were usually not successful in that any failure on behalf of an employer and/or carrier to fully inform an injured worker as to his rehabilitation rights mandated the payment of retroactive temporary disability benefits.

To the defense QIW status meant identification of an injured worker that was medically unable to return to his/her usual and customary job.

To Ron and Dr. Nickelsberg QIW meant an injured worker who was not working for any reason including layoffs, terminations for cause, retirements or simply a desire not to work.

³ My first memory or notice of the 1974 vocational rehabilitation law was in the Pro Bar at the Bull and Bush Restaurant in Los Angeles. Every Friday night Jim Tobin and I would meet with some clients from the Fireman's Fund Insurance Company, including a lady by the name of Nancy Lake who is now a senior attorney in our Ventura office and her last name is now Hankinson. On that particular night, Nancy apologized for being late, indicating that she had been attending a seminar on the new “rehabilitation law” that would become effective on January 1, 1975. As I had not heard of this law, I asked Nancy to fill me in and she indicated that the goal of this law was to return injured workers to the labor market. I told Nancy that this was a very laudable goal. However, Nancy pointed out to me that she and her claims manager were somewhat concerned with the provision that injured workers would also be eligible for temporary disability benefits throughout the rehabilitation period. I quickly told her that was the wrong motivation and would never work and went back to my scotch and water. At that time, the lobby bar and Beefeater martinis were not even a gleam in my eye.

SUPREME COURT DECISION IN *WEBB/RENFRO* SPELLS THE BEGINNING OF THE END FOR VOCATIONAL REHABILITATION IN CALIFORNIA:

On December 22, 1980, the Supreme Court issued its unfortunate decision in *Webb/Renfro* upholding Ron's position that an employer and/or carrier who failed to send out the proper notices or did not communicate immediately to an applicant as to his and/or her rights to receive vocational rehabilitation would be liable for retroactive rehabilitation benefits, or what was then referred to as vocational rehabilitation temporary disability or VRTD.⁴

After the Supreme Court decision in *Webb/Renfro*, carriers and employers lost all of their challenges to the veritable feeding frenzy of the applicants' bar in filing for retroactive VRTD and/or VRMA benefits.

Sadly, post *Webb/Renfro* the goal of returning the applicant to suitable gainful employment was just a footnote in the rush to board the money train known as retroactive VRTD or VRMA.

Ron instructed all of his treating physicians, including Dr. Nickelsberg and Dr. Ratbar, to reprogram their software packages to include the language that all of Ron's applicants were Qualified Injured Workers, even though most of these applicants had no interest in participating in vocational rehabilitation or going back to work.

A cottage industry of vocational rehabilitation companies quickly sprang up to assist in implementing vocational rehabilitation plans. Though vocation rehabilitation was an abject failure in returning injured workers to the labor market it did succeed in creating jobs and career opportunities for a veritable bonanza of vocational counselors.

Regrettably, the driving force behind vocational rehabilitation was not the goal of returning an applicant to what was referred to as "suitable gainful employment" but rather dragging out the period in which an applicant would receive vocational rehabilitation temporary disability benefits and/or vocational rehabilitation maintenance allowance benefits as long as possible.

Defense horror stories began to surface as to awards of retroactive VRTD and/or VRMA benefits to applicants, sometimes in the neighborhood of \$100,000.00 plus.

⁴ VRTD benefits were benefits paid at the temporary disability rate and were viewed the same as medical temporary disability. The 1989 Margolin Reform Package changed VRTD to vocational rehabilitation maintenance benefits (VRMA) which was a reduced benefit payable up to \$246.00 per week. However, the Rehabilitation Unit held that any delay in paying retroactive VRMA benefits would bring the benefit up to the temporary disability rate which is not what the law said but by this time the law was universally ignored and the defense industry was losing all of its challenges to the rehabilitation system.

George the Bartender and the Wreck of the Money Train or the Tragedy of the Webb/Renfro Decision

June 29, 2009

Page 4

Although there certainly are exceptions, it would not appear that the vocational rehabilitation program succeeded in returning injured workers to the labor market. Certainly, a lot of injured workers did return to work but this was seldom in the job contemplated by the vocational rehabilitation plan.

The Supreme Court decision in *Webb/Renfro* was the consolidation of two cases as follows:

1. *Webb*: This was the case championed by Ron and CAAA. Applicant attorneys argued for a claim of retroactive VRTD benefits from the date that their selected treating physician found that the applicant was QIW or the date that the defendant had breached its duty to notify an injured worker as to his rehabilitation rights, whichever came first;
2. *Renfro*: In this case, the Court of Appeal ruled that VRTD did not commence until the applicant actually enrolled in a vocational rehabilitation program, which in my opinion is actually what the statute provided.

Unfortunately, the Supreme Court chose the *Webb* interpretation and therefore destroyed any hope that vocational rehabilitation, as originally contemplated, would be successful.

Since the *Webb/Renfro* decision, the emphasis by applicant attorneys has been on collecting money, i.e., retroactive VRTD and/or VRMA benefits and at this they have been wildly successful.

Ron confided in me months ago that he was becoming concerned with the approaching vocational rehabilitation sunset date of January 1, 2009, and, with other applicant attorneys, had filed Declarations of Readiness to Proceed on all of his cases with injury dates prior to January 1, 2004.⁵

Ron, as a sole practitioner applicants' attorney, is an e-filer in the EAMS system and with other attorneys files Declarations of Readiness to Proceed by e-filing.⁶

⁵ As vocational rehabilitation is only available or I should say was only available to those applicants with injury dates prior to January 1, 2004, these were the only cases in which there was a potential to collect retroactive VRMA/VRTD benefits.

⁶ Ron confided in me that he was even thinking about filing a DOR on behalf of George the Bartender as Dr. Nicklesberg had found that George was a QIW as a result of his tennis elbow for repetitively serving me martinis. I told Ron that this was absurd as how did he expect to collect retroactive VRMA benefits as George had not missed any time from work. Ron smiled and told me that he had a Court of Appeal Decision in his pocket holding that defendants could not take credit for a prior income or wages earned and that George would be eligible for retroactive VRMA benefits going all the way back to the finding of QIW regardless of wages earned. Talk about absurd.

George the Bartender and the Wreck of the Money Train or the Tragedy of the Webb/Renfro Decision

June 29, 2009

Page 5

The difference between e-filing a Declaration of Readiness to Proceed and going about it the way we normal attorneys do is that you receive an immediate hearing date (within seconds) upon filling out the Declaration of Readiness to Proceed online.

The simultaneous filing by e-filers as to the volumes of cases with injury dates prior to January 1, 2004, seeking retroactive VRMA benefits (notice that I did not say job training or placement) before the January 1, 2009, sunset date caused absolute panic with the Division of Workers' Compensation. The e-filers would simultaneously receive conference dates on all of their cases thereby crowding out other cases in which applicants were attempting to adjudicate their rights to benefits.

There were immediate discussions on consolidation of all these cases and the Board finally hit on the definitive solution by accepting the *Weiner* case *en banc* and quickly resolved this issue.

Certainly the Board's decision in *Weiner* will be appealed, but the decision is amply supported by appellate cases dealing with the same issues. Specifically, the Board in *Weiner* declared as follows:

“The repeal of Labor Code §139.5 terminated any rights to vocational rehabilitation benefits or services pursuant to orders or awards that were not final before January 1, 2009; . . . a saving clause was not adopted to protect the vocational rehabilitation rights in cases still pending on or after January 1, 2009.”

Had the Supreme Court adopted the *Renfro* approach rather than *Webb*, vocational rehabilitation may have survived.

However, as the Supreme Court adopted the *Webb* approach the goal of actually returning an applicant to work became secondary, if it existed at all, and the emphasis was to collect retroactive VRTD and/or VRMA benefits, in other words the long green or money.

Therefore former Governor Davis gave birth to legislation which decreed that for injuries on or after January 1, 2004, vocational rehabilitation would be abolished and replaced by a **voucher system**.

The voucher program provides that there is no cash going to either the applicant or the applicant's attorney but mandates that the monetary value of the voucher will go toward payment of tuition and/or fees for vocational training.

Not surprisingly “vouchers” are seldom requested.

George the Bartender and the Wreck of the Money Train or the Tragedy of the Webb/Renfro Decision

June 29, 2009

Page 6

DISCLAIMER:

The above historical events as to the evolution of “vocational rehabilitation” in our system are largely from my own imperfect memory.

I seem to recall that at the oral arguments on *Webb/Renfro* one of the defense attorneys suggested that opening up vocational rehabilitation claims for retroactive VRTD benefits would motivate applicants to delay vocational rehabilitation so as to collect retroactive temporary disability benefits.

One of the Justices, no longer on the Court, replied that such an argument did a disservice to the good working men and women and the State of California.

In my opinion our experience with the "cash cow" misnamed vocational rehabilitation and the January 1, 2004, repeal of vocational rehabilitation lends credence to that defense attorney's comments.⁷

Make mine a double, George.

-Joe Truce

⁷It is extremely ironic that when former Governor Davis signed legislation in 2003 which did away with vocational rehabilitation as we know it that Governor Davis and other interested parties announced that the vocational rehabilitation law of 1974 had not been successful. I think this was apparent to everyone immediately following the Board's decision in *Webb/Renfro* in December of 1980. In prior George the Bartender memos I have referred to the fable: “The Emperor's New Clothes” and the analogy here is clear: “For over two decades we have been pretending that Labor Code §139.5 as enacted by the legislature in 1974 had clothes on.”