INTER-OFFICE MEMORANDUM

TO: ALL ATTORNEYS/CLIENTS

FROM: JOE TRUCE

DATE: December 31, 2002

RE: COURT OF APPEAL REVERSES WCAB'S DECISION AWARDING APPLICANT $150,000 IN RETROACTIVE VOCATIONAL REHABILITATION MAINTENANCE ALLOWANCE BENEFITS (VRMA)

In a previous memo I noted that the Court of Appeal had granted a Petition for Writ of Review filed by Debbie Kaye of our Los Angeles office on a very important issue involving retroactive VRMA.

On Christmas Eve the Court of Appeal filed its decision in the case of **Queen of Angels/Hollywood Presbyterian Hospital v. WCAB and ROSTAM GABRI** finding that the applicant, Rostam Gabri, was not entitled to retroactive vocational rehabilitation maintenance allowance benefits and overturned the decision of the WCAB.[1]

The facts in Gabri are not dissimilar to other cases in this system in which applicant's attorneys try to reap a bonanza in retroactive VRMA benefits. In reading between the lines of the decision, it appears that the court was troubled by not only the lack of thoughtful decision making at the WCAB level but by the actions of the applicant's attorney in trying to reap a veritable bonanza of retroactive VRMA benefits which the court estimated at $150,000.[2]

The facts of this case are rather straightforward. The applicant sustained an injury on December 5, 1991 to his hands for which benefits were provided. On page 2 of its decision the court noted with **approval** that the employer almost immediately sent the applicant a letter advising the applicant as to his rights under the workers' compensation law and also as to rehabilitation. The court also noted

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[1]A copy of the court's decision is enclosed. Please note that the decision of the court is **not** certified for publication.

[2]Based on my conversation with Debbie Kaye, the court's estimate is low, as Debbie estimates that our client's petition of liability on this case was around $300,000.

that the letter enclosed a pamphlet entitled "**Facts for Injured Workers.**"[3]

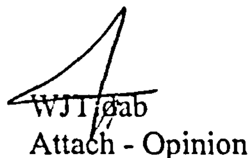
The court then went on to note that the applicant was released to return to work by his treating physician and that the employer had again sent the employee a benefit notice enclosing a pamphlet "**fully explaining workers' compensation benefits.**" The court noted that the employee then returned to his regular work on January 22, 1992 and was terminated on January 30, 1992 "**for a serious safety violation.**"

The court went on to note that **after termination** the applicant retained a lawyer and the lawyer sent the employer a notice of representation. However, the tip off as to how this case was going to go was the fact that the court described the applicant's attorney's letter as a "boiler plate" letter which requested all workers' compensation benefits including vocational rehabilitation benefits.

The court then went on to note that the applicant's treating physician, Dr. Phillip Hill, found the applicant to be permanent and stationary in May of 1992 and advised that the applicant could return to work and was not a Qualified Injured Worker. Although Dr. Hill's report contained a description of the applicant's job duties, Dr. Hill did not review a formal Job Analysis. Therefore on the basis that Dr. Hill did not review a formal Job Analysis, the applicant's attorney in 1998 went to the Rehabilitation Unit and convinced the Rehabilitation Unit that a Job Analysis should now be prepared. The applicant's attorney then sent the applicant out to Dr. Paul Leonard, who, to no one's surprise, reviewed the Job Analysis and found that the applicant was a Qualified Injured Worker. The Rehabilitation Unit then awarded VRMA benefits going back to 1992.

Eventually the WCAB affirmed the decision of the Rehabilitation Unit that our client was liable for retroactive VRMA benefits going back to 1992.

In reversing the decision of the WCAB, the court took great pains to point out that the employer did everything right and at every step of the proceedings, notified the applicant and/or the applicant's attorney as to not only the applicant's rights in workers' compensation but also specifically as to the applicant's rights with regards to vocational rehabilitation. The court dismissed applicant's argument that the employer could not rely on Dr. Hill's report in May of 1992 simply because Dr. Hill did not review a formal Job Analysis. In noting that Dr. Hill took a history as to the applicant's job duties, the court concluded that the employer "**was entitled to rely on this medical opinion.**"



WJT/øab
Attach - Opinion

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[3]If there is a lesson to be learned here, it is that the initial letter of our client advising the applicant as to his and/or her rights including the right to rehabilitation should always be entered into evidence as it was in this case. The court seemed to be very impressed that the employer had given the employee prompt notification as to his rights.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

QUEEN OF ANGELS/HOLLYWOOD PRESBYTERIAN HOSPITAL,

Petitioner,

v.

WORKERS' COMPENSATION APPEALS BOARD AND ROSTAM GABRI,

Respondents.

No. B159101

(W.C.A.B. Nos. PAS 0024554 & PAS 0024555)

COURT OF APPEAL - SECOND DIST.
FILED
DEC 24 2002
[illegible]

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Annulled.

Kegel, Tobin & Truce and Debbie Kaye for Petitioner.

Ulysses L. Cook, Jr., for Respondent Rostam Gabri.

No appearance on behalf of Respondent Workers' Compensation Appeals Board.

Petitioner and defendant Queen of Angels/Hollywood Presbyterian Hospital (employer) seeks to overturn the findings of respondent Workers' Compensation Appeals Board (WCAB) of retroactive vocational rehabilitation maintenance allowance benefits commencing May 14, 1992. We issued a writ of review. We conclude applicant and real party in interest Rostam Gabri (employee) is not entitled to retroactive vocational rehabilitation maintenance allowance benefits. We overturn the findings of the WCAB and annul the decision.

FACTS AND PROCEDURAL BACKGROUND

Employee worked at employer as a maintenance engineer, which included electrical work. On December 5, 1991, employee's hands were injured by an electrical shock while working. On December 27, 1991, employer sent employee a letter advising employee of his rights under the workers' compensation law. The letter contained the following information concerning vocational rehabilitation: "REHABILITATION – If you are unable to continue in your present employment as a result of your injury, you are entitled to re[h]abilitation, and we will make an appointment for you to meet with one of our trained rehabilitation counselors." Enclosed with the letter was a "facts for injured workers" brochure.

On January 2, 1992, employee was released by Dr. Richard Sterz, his treating physician, to return to work on January 18, 1992. On January 10, 1992, employer sent employee a notice that employee had been released to work and a check for temporary disability benefits. Enclosed with the notice was a pamphlet fully explaining workers' compensation benefits. Employee returned to his regular work on January 22, 1992. He was able to engage in his regular work with a few more breaks than before his injury. Employee was terminated on January 30, 1992, for a serious safety violation. If he had not been terminated, employee would have continued working at his regular job. Employee was not temporarily disabled after January 30, 1992. On February 20, 1992, a

lawyer representing employee sent employer a "boilerplate" letter submitting employee's claim for workers' compensation benefits, including vocational rehabilitation benefits.

Dr. Philip Hill, employee's treating physician, issued a medical report dated May 23, 1992, entitled "Permanent and Stationary Orthopedic Evaluation." Dr. Hill had examined employee on February 6, 1992. Under a section of the report, entitled "Vocational Rehabilitation," Dr. Hill wrote, "Not applicable as the patient may return to work." The report includes the following job description: "The patient states that he was employed for approximately ten years as an electrician by Queen of Angels Hospital. His job duties consisted of repairing electrical pipes among other electrical work duties. In this capacity he was required to constantly grasp, grip, bend, stoop, squat, pull, push, stand, walk, carry, kneel, climb and crawl. He used both his hands in a repetitive manner in order to perform electrical duties. His job duties also required occasional lifting of electrical pipes weighing up to 50 pounds. He worked an eight[-]hour shift per day with occasional overtime." Under a section of the report, entitled "Work Restrictions," Dr. Hill wrote, "The patient should be precluded from limited force hand gripping."

A report was prepared by Dr. Richard Sherwood, a qualified medical examiner, on March 2, 1994, which concluded employee was not a qualified injured worker. "In my opinion, [employee] is capable of working at his regular job duties. There are no limitations or restrictions applicable for him."

On July 29, 1997, based on Dr. Hill's and Dr. Sherwood's medical reports and testimony at an April 16, 1996 hearing, the workers' compensation judge (WCJ) found: (1) employee had suffered an industrial injury to his hands; (2) employee had been temporarily disabled from December 6, 1991, to January 22, 1992; (3) employee's injury had become permanent and stationary on May 13, 1992; (4) employee's injury caused 38 percent permanent disability; (5) employee was entitled to permanent disability payments payable until approximately May 1995; and (6) employee was not

temporarily disabled from January 31, 1992, to May 13, 1992, but was able to perform his job and would still be working at his job if he had not been discharged.[1]

On January 28, 1998, employee sought vocational rehabilitation benefits. Employer denied the request based on the May 13, 1992 report of Dr. Hill indicating that employee was able to return to his regular duties. Employer advised employee, pursuant to section 9813, subdivision (a)(3) of title 8 of the California Code of Regulations, of his rights to dispute the denial. Employee sought rehabilitation benefits from the Rehabilitation Unit. The Rehabilitation Unit determined a job analysis had not been prepared at the time of Dr. Hill's report and should now be prepared. Employee was seen by Dr. Paul Leonard, who determined, in a report dated December 12, 1998, that employee was medically eligible for vocational rehabilitation. On February 19, 1999, the Rehabilitation Unit found employee was a qualified injured worker and also entitled to retroactive vocational rehabilitation benefits from 1992. These retroactive benefits totaled approximately $150,000.

Employer appealed the retroactive benefits finding, but began making vocational rehabilitation maintenance payments as of February 19, 1999. Payments were made until May 7, 1999, when they were interrupted by agreement of the parties due to employee's absence from the country. Benefits were again paid commencing on November 27, 2001.

The original WCJ granted the appeal and set aside the decision of the Rehabilitation Unit. The WCJ based his decision on his previous determination that employee had not been temporarily disabled after January 31, 1992.

Employee petitioned the WCAB for reconsideration. The WCJ recommended against reconsideration. Nevertheless, the WCAB, with one commissioner dissenting, rescinded the order granting the appeal and remanded the matter to the WCJ for further proceedings. The WCAB determined employee was entitled to retroactive vocational

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1 The minutes of the hearing note that "vocational rehabilitation benefits have been requested."

rehabilitation benefits from May 14, 1992. Employer petitioned for reconsideration. A different WCJ recommended against reconsideration. The petition was denied. Employer petitioned this court for a writ of review. We granted the petition.

DISCUSSION

Vocational rehabilitation maintenance allowance (VRMA) is generally due upon a finding of medical eligibility for vocational rehabilitation and a written request for vocational rehabilitation. (Lab. Code, §§ 139.5(c), 4635(a)(1); *San Diego Transit Corp. v. Workers' Comp. Appeals Bd. (Renfro)* (1980) 28 Cal.3d 635, 637; *Webb v. Workers' Comp. Appeals Bd.* (1980) 28 Cal.3d 621, 628; *Industrial Indemnity Co. v. Workers' Comp. Appeals Bd. (Elizondo)* (1985) 165 Cal.App.3d 633, 639.) However, if the employer has failed to notify the employee of his or her *potential* right to vocational rehabilitation, then VRMA at the full vocational rehabilitation temporary disability rate will be due from the date of the breach of the duty to notify. (*San Diego Transit Corp. v. Workers' Comp. Appeals Bd. (Renfro), supra,* 28 Cal.3d at p. 637; *Pereira v. Workers' Comp. Appeals Bd.* (1987) 196 Cal.App.3d 1, 6; *Kenai Drilling, National Union Ins. Co. v. Workers' Comp. Appeals Bd. (Vastbinder)* (1998) 63 Cal.Comp.Cases 643.) Within ten days of receipt of a physician's report that an employee is medically eligible for vocational rehabilitation, the employer must notify the employee of his or her potential eligibility for vocational rehabilitation services. (Lab. Code, § 4637, subd. (a)[2]; Cal. Code Regs., tit. 8, § 9813, subd. (c)(2).)[3]

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[2] Labor Code section 4637, subdivision (a) provides in pertinent part: "Within 10 days after the employee is medically eligible under subdivision (c) of Section 4636, or the employer receives a physician's report, or knowledge of a physician's opinion, indicating an employee is medically eligible, the employer shall notify the employee of his or her medical eligibility for vocational rehabilitation services."

[3] California Code of Regulations, title 8, section 9813, subdivision (c)(2) provides in pertinent part: "Potential Eligibility for Rehabilitation. Within 10 days of receipt of a

An employee is entitled to vocational rehabilitation if the employee cannot perform his or her usual and customary occupation. (*Doherty v. Pacific Employers Inc. Co.* (80 SF 281-856, 04/05/83) 11 Cal. Workers' Comp. Rptr. 92.) Such an employee is a "qualified injured worker" as defined in Labor Code section 4635, subdivision (a).[4] Entitlement to vocational rehabilitation is based on the job the employee was performing on the date of injury. (*Western Employers Ins. Co. v. Workers' Comp. Appeals Bd. (Lewis)* (1979) 44 Cal.Comp.Cases 671 (writ denied).)

In this case, a finding of employee's medical eligibility for vocational rehabilitation was first made by the Rehabilitation Unit on February 19, 1999, following employee's January 28, 1998 request and Dr. Leonard's December 12, 1998 report. Thus, unless employer was required and failed to notify employee of his potential right to vocational rehabilitation, employee is entitled to VRMA from the date of the finding. We conclude employer did not fail to give employee any required notifications of vocational rehabilitation..

First, employer notified employee of his vocational rehabilitation rights. On December 27, 1991, employer notified employee generally of his rights under the workers' compensation law, including vocational rehabilitation. On January 10, 1992,

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physician's report or knowledge of a physician's opinion indicating that an employee is medically eligible for vocational rehabilitation, or if prior notice has not been sent, within 10 days after the employee has been totally temporarily disabled for an aggregate of more than 365 days, the claims administrator shall notify the employee of his or her potential eligibility for vocational rehabilitation services."

4 Labor Code section 4635, subdivision (a) provides: " 'Qualified injured worker' means an employee who meets both of the following requirements: [¶] (1) The employee's expected permanent disability as a result of the injury, whether or not combined with the effects of a prior injury or disability, if any, permanently precludes, or is likely to preclude, the employee from engaging in his or her usual occupation or the position in which he or she was engaged at the time of injury, hereafter referred to as 'medical eligibility.' [¶] (2) The employee can reasonably be expected to return to suitable gainful employment through the provision of vocational rehabilitation services, hereafter referred to as 'vocational feasibility.'"

employer again notified employee generally concerning his rights under the workers' compensation law.

Second, employee was represented by an attorney and was aware of his rights in the area of vocational rehabilitation benefits. Indeed, his attorney made a pro forma claim for vocational rehabilitation benefits in his letter dated February 20, 1993, after employee had been terminated for a serious safety violation.

Finally, employee was not a qualified injured worker. Employee was temporarily disabled for only six weeks. He was released to return to work by Dr. Sterz, apparently without any work restrictions. Employee in fact returned to work and was able to perform his regular work, provided he take a few additional breaks. Employee believed he could perform his regular work and would have continued to perform his regular work had he not been terminated for a serious safety violation. Dr. Hill, in his May 23, 1992 report, concluded vocational rehabilitation was inapplicable because employee could return to work. Dr. Sherwood, in his March 2, 1994 report, concluded employee was not a qualified injured worker.

Employee argues, however, that Dr. Hill's report of May 23, 1992, was inconsistent and sufficient to put employer on notice that employee was potentially eligible for vocational rehabilitation benefits. In our view, to draw such an inference from Dr. Hill's report is unreasonable. Dr. Hill expressly stated that employee was able to return to work and therefore no vocational rehabilitation was appropriate. The job description in Dr. Hill's report noted that employee's work required constant grasping and gripping. Under work restriction, Dr. Hill noted, "[Employee] should be precluded from limited force hand gripping." Thus, Dr. Hill, aware of employee's job description and work restrictions, was of the opinion that employee was able to return to his regular work. Nothing in the record suggests the work restriction indicated by Dr. Hill would have prevented employee from doing his regular work with some modification or accommodation. Employer was entitled to rely on this medical opinion.

We note that Dr. Hill's opinion was consistent with employee's opinion at the time concerning his ability to perform his regular work. We also note that Dr. Hill's opinion was consistent with the fact of employee's return to work and ability to perform his regular work. In addition, it is clear that neither employee nor his attorney viewed Dr. Hill's report as a medical opinion that employee was a qualified injured worker. No request for vocational rehabilitation was made until January 1998. Although vocational rehabilitation benefits were at issue at the time of the hearing and findings by the WCJ in 1996 and 1997, no evidence was presented and no findings were sought as to the necessity of vocational rehabilitation. In addition, Dr. Leonard's opinion of December 12, 1998, that employee was not capable of performing his regular work was based on many more work restrictions than the single work restriction noted in Dr. Hill's report. Dr. Leonard's report read: "It is clear that this man is not capable of performing the work required as a maintenance mechanic for the Queen of Angels Hospital, which requires removing or replacing beds and televisions, pulling electrical wiring, removing air conditioning units, doing plumbing, occasional lifting to 100 pounds, occasional lifting to 75 pounds, occasional lifting to 50 pounds, and with other workers lifting in excess of 100 pounds. There was occasional to frequent carrying of the same items that were required for lifting, e.g., up to 100 pounds. There was frequent forceful pushing and pulling. The cart was hard to handle; it contained his tools and equipment. He did occasional to intermittent climbing on ladders, and has to utilize manual dexterity while performing all job duties, with fine finger manipulation, power grasping frequently through the work shift. The patient also added in the fact that he used a 70[-]pound jackhammer as well as a smaller one, and would frequent[ly] spend a substantial part of the day working on ladders and would pull wiring over long distances to replace them. Other items being moved would be freezers and refrigerators, lifting fire doors weighing over 100 pounds, transformers, compressors, water pumps, sheets of drywall, and would have to use wrenches to break down pipes and drains that were corroded and rusted of industrial size."

DISPOSITION

The decision of the WCAB is annulled and the finding that employee is entitled to retroactive vocational rehabilitation maintenance allowance benefits, based on the asserted failure of employer to notify employee of his potential right to vocational rehabilitation following receipt of Dr. Hill's May 23, 1992 report, is vacated. The matter is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED.

GRIGNON, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.