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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE KROGER COMPANY et al., v. Petitioners, v. WORKERS' COMPENSATION APPEALS BOARD and GEORGE VELASQUEZ, Respondents.	No. B236608 (W.C.A.B. Nos. ADJ6759922, ADJ1988208, ADJ721289, ADJ820025)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Annulled and remanded with directions.

Bradford & Barthel, Louis A. Larres for Petitioners.

No appearance for Respondents.

Law Offices of Shandler & Associates, Jaclyn Shandler for amicus curaie on behalf of Respondents.

On June 21, 2011, the workers' compensation judge (WCJ) awarded respondent George Velasquez vocational rehabilitation benefits under Labor Code section 139.5. Petitioner The Kroger Company dba Ralphs Grocery Co. (Ralphs) maintained that the repeal of section 139.5, effective January 1, 2009, had deprived the WCJ of the authority to award vocational rehabilitation benefits. The Workers' Compensation Appeals Board (WCAB) disagreed with petitioners and affirmed the WCJ's order. We conclude that respondent's award of vocational rehabilitation benefits was not final on January 1, 2009, and can no longer be enforced. We therefore annul the WCAB's decision.

PROCEDURAL HISTORY

On August 30, 2005, the Rehabilitation Unit of the Division of Workers' Compensation awarded respondent rehabilitation benefits from August 10, 2004. In practice, parties aggrieved by an award of the Rehabilitation Unit had 20 days within which to file a notice of appeal, which went to the WCAB.[1] Petitioners filed a notice of appeal from this award timely on September 15, 2005. The Rehabilitation Unit acknowledged, in writing, that the notice of appeal had been filed with the WCAB.

The matter was set twice for a hearing before the WCAB in March and May 2007, but both times the case was taken off calendar, the second time for purposes of further discovery. The balance of 2007 and 2008 passed with the parties in disagreement whether the case was ready to proceed to trial.[2] Thus, after Ralphs filed its declaration of readiness to proceed on February 1, 2008, respondent objected, pointing out that the continued deposition of the agreed medical examiner, Robert Woods, M.D., was set for October 24, 2008. The last filing prior to January 1, 2009, was respondent's objection to

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[1] Labor Code section 4645, subdivision (d) provided that "[a]ny determination or recommendation of the Office of Benefit Determination shall be binding unless a petition is filed with the appeals board within 20 days . . . ." Section 4645 was repealed in 2003. (But see *Beverly Hilton Hotel v. Workers' Comp. Appeal Bd.* (2009) 176 Cal.App.4th 1597, 1610-1611 (*Beverly Hilton*).)

[2] Also in 2007, a supplemental medical report issued in September which stated that respondent could return to work in the warehouse, which he did in December 2007.

Ralphs' declaration of readiness to proceed, filed on December 12, 2008, contending that discovery had not been completed.

The first hearing on the merits took place on April 26, 2011. Respondent testified in part about the fact that he had not received, and had not been offered, vocational rehabilitation. Ralphs' trial brief took the position that because it had taken a timely appeal from the Rehabilitation Unit's award and because that appeal was still pending on January 1, 2009, the award was not final on the date Labor Code section 139.5 was repealed (January 1, 2009) and respondent was therefore not entitled to rehabilitation benefits. Ralphs relied on *Beverly Hilton*, *supra*, 176 Cal.App.4th at page 1611, which so held, as we discuss below.

On June 21, 2011, the WCJ entered findings that respondent was entitled to rehabilitation benefits at the delay rate from February 17, 2005 through December 16, 2007. But the WCJ concluded that Ralphs' appeal, taken on September 15, 2005, was defective in that Ralphs had not filed a declaration of readiness along with the notice of appeal.

In coming to this conclusion, the WCJ relied on California Code of Regulations, title 8, section 10955 (section 10955), which provided in part: "Appeals from decisions of the Division of Workers' Compensation Rehabilitation Unit or an arbitrator appointed pursuant to Labor Code Sections 4645, subdivisions (b) and (c), shall be commenced as follows: [¶] (1) if an Application for Adjudication is already on file, by filing a Declaration of Readiness and a petition setting forth the reason for the appeal; [¶] (2) if no Application for Adjudication is on file, by filing an application, a Declaration of Readiness, and a petition setting forth the reason for the appeal."

The WCJ's opinion states that Ralphs "correctly points out there is no case indicating the failure to file a Declaration of Readiness to Proceed makes the filing defective. However, filing a DOR is required by this rule . . ." i.e., section 10955.

In his report on the petition for reconsideration, the WCJ called the filing of the declaration of readiness, or DOR, a "mandatory procedure" for which there were "no

exceptions." The WCAB, without filing its own opinion, adopted and incorporated the WCJ's report and denied reconsideration.

DISCUSSION

I. The Rule of *Beverly Hilton*

There is no need to repeat the thorough analysis of the statutory framework and governing rules of construction that appear in *Beverly Hilton*. (176 Cal.App.4th at pp. 1601-1610.) Suffice it to say that Labor Code section 139.5, which provided for vocational rehabilitation benefits, was repealed in 2004 and reenacted with the proviso that it would be in effect only until January 1, 2009, "and as of that date is repealed," unless that date would be extended by a statute enacted prior to January 1, 2004. (*Beverly Hilton*, *supra*, 176 Cal.App.4th at p. 1602, fn. 2.) The court summarized the operations of these enactments: "In reenacting section 139.5, the Legislature added subdivision (k), which stated, 'This section shall apply only to injuries occurring before January 1, 2004.' It also added in subdivision (*l*), 'This section 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.' [Citation.] There was no newly enacted statute, nor was the effective sunset date extended before January 1, 2009, or thereafter. The Legislature, in effect, preserved or saved vocational rehabilitation claims for nearly five years, but did not save nonfinal vocational rehabilitation rights as of or past January 1, 2009. As noted, although the Legislature provided for the possibility of a later statute that 'deletes or extends' that January 1, 2009 date, no such statute was ever enacted." (*Beverly Hilton*, at p. 1608.)

The court in *Beverly Hilton* concluded that vocational rehabilitation awards that were final by January 1, 2009, could be enforced but those that had not vested by that date, i.e., were not final, could not be awarded, in that neither the WCAB nor a court had the jurisdiction to award such rights. (176 Cal.App.4th at pp. 1610-1611.) Here, the WCJ's decision, adopted by the WCAB, does not assert otherwise. Rather, it was the WCAB position that the award was final because petitioners' appeal was defective and of no effect.

II. The Notice of Appeal Was Not Defective

The WCJ did not find, and apparently it was not contended, that, considered by itself, there was any defect in the notice of appeal. In fact, it was not defective. It was clear and unambiguous and more complete than some, in that it also stated the grounds for the appeal. Importantly, it was timely under subdivision (d) of former Labor Code section 4645, timeliness being the only statutory requirement imposed on the notice of appeal.

The WCJ's conclusion, adopted by the WCAB, was that section 10955, which was an administrative regulation, imposed the further *jurisdictional* requirement of filing a declaration of readiness. That conclusion does not square with practice, usage, common understanding or logic.

Practice and usage is that an appeal has been taken when the notice of appeal has been filed. While a number of additional documents are required for an appeal, once the notice of appeal has been filed, an appeal in fact has been taken. That is, the taking of the appeal is signaled by the filing of the notice of the appeal. As Witkin puts it, an appeal is perfected when the notice of appeal is filed. (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 17, p. 78.)

Common understanding is no different. It would not occur to anyone, in our opinion, to say that a notice of appeal is defective because the notice designating the record, required by rule 8.121 of the California Rules of Court to be filed 10 days after the notice of appeal, is late or has not been filed. If the notice designating the record is late, that defect must then be cured; the notice of appeal is not voided by the lateness of the notice designating the record. It would be chaotic if a notice of appeal would suddenly become inoperative because a later document is not filed on time or is defective.

The WCJ's conclusion suffers from several logical deficiencies. There is no basis, in the first place, for giving section 10955 a *jurisdictional* effect. While the failure to file a declaration of readiness may have ultimately resulted in staying the appeal until the defect was cured, or perhaps may have led to a sanction (even dismissal), it is quite

another matter to state that the failure to file this declaration automatically leads to a voiding of the appeal. In fact, it is unprecedented in the realm of appellate procedure that failing to file a supporting document, such as the notice designating the record, results in elimination of the appeal. It is only when such a defect has not been cured, after notice of the defect, that the sanction may be a dismissal. Even then, however, the appeal may be reinstated after the defect is cured. In short, the rule devised by the WCJ and approved by the WCAB is simply extraordinary. What makes it literally unprecedented is that there is absolutely nothing in section 10955 that suggests that it is a jurisdictional rule.

While section 10955 states how an appeal is "commenced," it is clear that the declaration of readiness, together with a statement of the grounds for the appeal, was preceded by a notice of appeal. That is, section 10955 spelled out the documents that supported an existing appeal, much like the notice to designate the record. It simply does not follow from this that if the declaration was lacking, the notice of appeal was jurisdictionally defective. From a pragmatic perspective, a defect in the section 10955 documents could in most cases be cured; section 10955 imposed no time limits and allowed the appellant to set the pace of the appeal. If a defect can be cured, it makes no sense to impose the draconic, even punitive, sanction of a dismissal of the appeal.

The complete lack of authority for the WCJ's startling theory that section 10955 operates jurisdictionally is yet another substantive flaw. This theory that relies on the invention of a jurisdictional rule is without support.

The Rehabilitation Unit dealt with the appeal as one that was properly perfected. This is another important factor that the WCJ ignored.

Finally, respondent's counsel filed a "RESPONSE TO DEFENDANTS [*sic*] APPEAL" on September 21, 2005, in which counsel responded to the substantive points in the notice of appeal. Not surprisingly, there is no mention of the section 10955 theory in this response. Such an implied concession should have been given some weight by the WCJ.

In sum, we find the WCJ's theory that section 10955 operated jurisdictionally to invalidate an otherwise valid notice of appeal to be completely without merit.

DISPOSITION

The decision of the WCAB is annulled and the cause is remanded with directions to proceed with petitioners' appeal to the WCAB as deemed timely filed. The parties to bear their own costs on appeal.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.