

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3 **Case No. ADJ347040 (MON 0305426)**

4 **LAWRENCE WEINER,**

5 *Applicant,*

6 **vs.**

7 **RALPHS COMPANY, Permissibly Self-
8 Insured; and SEDGWICK CLAIMS
9 MANAGEMENT SERVICES, INC. (Adjusting
Agent),**

10 *Defendant(s).*

**OPINION AND DECISION
AFTER
RECONSIDERATION
(EN BANC)**

11
12 We granted the petition for reconsideration of defendant, Ralphs Grocery Company, to
13 allow time to further study the record and applicable law. Thereafter, to secure uniformity of
14 decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members,
15 assigned this case to the Appeals Board as a whole for an en banc decision (Lab. Code, § 115)¹
16 regarding the effect of the Legislature's repeal of Labor Code section 139.5,² effective January 1,
17 2009, on injured employees' entitlement to vocational rehabilitation benefits and services after that
18 date and on the jurisdiction of the Workers' Compensation Appeals Board (WCAB) to address
19 vocational rehabilitation issues after that date. Concurrently, the Appeals Board invited amicus
20 curiae briefs and allowed the parties to reply to the amicus briefs. We have now completed our
21 deliberations.

22 For the reasons below, we hold that: (1) the repeal of section 139.5 terminated any rights to
23 vocational rehabilitation benefits or services pursuant to orders or awards that were not final
24

25 ¹ En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers'
26 compensation judges. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)*
(2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109, 120, fn. 5]; *Gee v. Workers' Comp. Appeals Bd.*
(2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Gov. Code, § 11425.60(b).)

27 ² All further statutory references are to the Labor Code, unless otherwise specified.

1 before January 1, 2009;³ (2) a saving clause was not adopted to protect vocational rehabilitation
2 rights in cases still pending on or after January 1, 2009; (3) the vocational rehabilitation statutes
3 that were repealed in 2003 do not continue to function as “ghost statutes” on or after January 1,
4 2009; (4) effective January 1, 2009, the WCAB lost jurisdiction over non-vested and inchoate
5 vocational rehabilitation claims, but the WCAB continues to have jurisdiction under sections
6 5502(b)(3) and 5803 to enforce or terminate vested rights; and (5) subject matter jurisdiction over
7 non-vested and inchoate vocational rehabilitation claims cannot be conferred by waiver, estoppel,
8 stipulation, or consent.

9 **I. Background**

10 Applicant, Lawrence Weiner, sustained an industrial injury to his right hip, cervical spine,
11 and lumbar spine from 1967 through September 30, 2002, while employed as a checker by
12 defendant. Although the parties ultimately stipulated to injury, the issue of injury was initially
13 disputed.

14 Applicant voluntarily retired on September 30, 2002 based on an offer of a pension. From
15 that date through March 7, 2005, he was ready, willing and able to participate in vocational
16 rehabilitation.

17 Applicant filed an application on June 7, 2003 and made a demand for vocational
18 rehabilitation on June 13, 2003.

19 In a report of June 15, 2004, applicant’s treating physician, Philip A. Sobol, M.D., opined
20 that applicant’s injury was industrial and declared him to be a qualified injured worker (QIW).
21 This was the first report indicating a need for vocational rehabilitation. Applicant made a second
22 demand for vocational rehabilitation on July 12, 2004.

23 On March 8, 2005, defendant accepted applicant’s injury claim and commenced the
24 provision of vocational rehabilitation benefits.

25
26
27 ³ It is conceivable there may be other ways to vest a right to vocational rehabilitation other than through an
order that had become final before January 1, 2009. However, we have no occasion to address that question now.

1 On March 31, 2005, applicant was evaluated by Alexander Angerman, M.D., as the agreed
2 medical evaluator (AME) in orthopedics. On May 6, 2005, Dr. Angerman issued a report
3 determining that applicant sustained a cumulative industrial injury and agreeing that applicant is a
4 QIW.

5 Except for a period when vocational rehabilitation was interrupted for medical treatment,
6 applicant participated in vocational rehabilitation from March 8, 2005 through approximately
7 March 26, 2008, when defendant requested closure of vocational rehabilitation. Applicant
8 objected to closure.

9 On April 8, 2008, a stipulated Findings and Award issued which determined that applicant
10 had sustained cumulative industrial injury to his right hip and his cervical and lumbosacral spine,
11 resulting in 60% permanent disability and a need for further medical treatment.

12 On July 7, 2008, the parties appeared before the Rehabilitation Unit. The only issue
13 addressed at the Rehabilitation Unit conference was whether applicant is entitled to retroactive
14 vocational rehabilitation maintenance allowance (VRMA) at his temporary disability indemnity
15 (TD) rate from June 13, 2003 (the date of his initial request for vocational rehabilitation) through
16 March 7, 2005 (the day before defendant voluntarily commenced vocational rehabilitation benefits
17 and services). The issue of case closure was not raised.

18 On July 9, 2008, the Rehabilitation Unit issued a determination that applicant is entitled to
19 retroactive VRMA at his TD rate from June 13, 2003 through March 7, 2005.

20 On July 29, 2008, defendant filed a timely rehabilitation appeal, together with a declaration
21 of readiness.

22 Defendant's rehabilitation appeal initially was set for a September 8, 2008 status
23 conference; however, the conference was continued to October 14, 2008 at defendant's request due
24 to its attorney's calendar conflict.

25 A trial took place before a workers' compensation administrative law judge (WCJ) on
26 November 24, 2008, at which time the matter was submitted for decision.

27 On January 13, 2009, the WCJ issued a Findings and Award. In that decision, the WCJ

1 found in relevant part that applicant is entitled to retroactive VRMA at his TD rate for the period
2 of June 13, 2003 to March 7, 2005. Accordingly, the WCJ awarded those benefits.

3 In its petition for reconsideration, defendant contended, in substance, that: (1) the WCJ's
4 January 13, 2009 order awarding retroactive VRMA at the TD rate on January 13, 2009 issued in
5 excess of the WCAB's jurisdiction because (a) the Legislature repealed the vocational
6 rehabilitation statute, section 139.5, effective January 1, 2009; (b) the right to vocational
7 rehabilitation benefits is wholly statutory, and the Legislature could repeal that right at any time;
8 (c) the repeal of a statutory right stops all pending actions where the repeal finds them, even if the
9 repeal becomes effective while an action is pending on appeal, unless the repeal contains a saving
10 clause that protects the right in pending litigation; and (d) therefore, all rights to vocational
11 rehabilitation benefits were abolished effective January 1, 2009, unless those rights were vested
12 through a final order; (2) the award of retroactive VRMA at the TD rate cannot be justified under
13 the vocational rehabilitation "ghost statutes" because, by repealing section 139.5, the Legislature
14 ended the tenure of any "ghost statutes" by ending vocational rehabilitation itself; (3) injured
15 employees were not prejudiced by the January 1, 2009 abolishment of all rights to vocational
16 rehabilitation benefits, because they had five years to litigate vocational rehabilitation issues and to
17 obtain final awards; (4) although the Labor Code still mentions vocational rehabilitation in other
18 sections, such as section 5803, these sections merely give the WCAB continuing jurisdiction to
19 enforce awards under section 139.5 that became final before January 1, 2009; and (5) even
20 assuming the WCJ had jurisdiction to award retroactive VRMA at the TD rate, it was error to do
21 so.

22 Applicant filed an answer. He contended, in substance, that: (1) his right to retroactive
23 VRMA at the TD rate is based on the statutory law in effect at the time those benefits should have
24 been provided; (2) his right to retroactive VRMA at the TD rate is based on the statutory law in
25 effect on November 24, 2008, when the issue was submitted for decision to the WCJ; (3) it would
26 be unconscionable to deny him retroactive VRMA at the TD rate where defendant delayed these
27 benefits without any basis and where a hearing on defendant's vocational rehabilitation appeal was

1 continued because of its counsel's unavailability; (4) the vocational rehabilitation "ghost statutes"
2 gave the WCJ jurisdiction to deny defendant's vocational rehabilitation appeal and to find and
3 award retroactive VRMA at the TD rate; (5) section 5502(c)(3), which was not repealed,
4 constitutes a saving clause that allows the WCAB to hear and determine issues of entitlement to
5 vocational rehabilitation benefits under repealed section 139.5; and (6) he is entitled to VRMA at
6 the TD rate retroactive to the date he first requested vocational rehabilitation.

7 Pursuant to our invitation, we received several amicus curiae briefs.⁴ Applicant and
8 defendant each filed replies to the amicus briefs.

9 **II. The History of Vocational Rehabilitation in California**

10 In order to address the issues presented to us on reconsideration, we will first trace the most
11 important elements of the history of vocational rehabilitation in California.

12 Prior to 1965, the workers' compensation laws made no provision for vocational
13 rehabilitation. In 1965, however, the Legislature adopted section 139.5, which initially established
14 a "voluntary" rehabilitation program. (Stats. 1965, ch. 1513, § 44.5.) At the same time, the
15 Legislature amended section 3207 to include "vocational rehabilitation" within the statutory
16 definition of "compensation." (Stats. 1965, ch. 1513, § 52.)

17 In 1974, the Legislature amended section 139.5 to mandate that a qualified injured worker
18 (QIW) was entitled to vocational rehabilitation at the expense of the employer or its insurance
19 carrier. (Stats. 1974, ch. 1435, § 1; see also *Webb v. Workers' Comp. Appeals Bd.* (1980) 28
20 Cal.3d 621, 628 [45 Cal.Comp.Cases 1282].) Concurrently, the Legislature amended section
21 139.5 to provide that when a QIW elected to enroll in a vocational rehabilitation program, he or
22 she "shall continue to receive temporary disability indemnity payments, plus additional living
23 expenses necessitated by the rehabilitation program, together with all reasonable and necessary
24 vocational training" (Former Lab. Code, § 139.5(c).) The temporary disability payments
25 during vocational rehabilitation became commonly known as VRTD.

26 _____
27 ⁴ We have received and considered the timely amicus briefs from: Daniel V. Anaya, Esq.; California Applicants' Attorneys Association; California Workers' Compensation Institute; County of Los Angeles; Floyd, Skeren & Kelly, LLP; Shandler & Associates; and State Compensation Insurance Fund.

1 In 1982, the Legislature made further changes to vocational rehabilitation, including
2 amending section 139.5 to add a subdivision (e), which provided: “The time within which an
3 employee may request vocational rehabilitation benefits is set forth in Sections 5405.5, 5410, and
4 5803.” (Stats. 1982, ch. 922, § 2.) Concurrently, the Legislature added section 5405.5, which
5 stated: “Except as otherwise provided in Section 5410, the period within which an employee may
6 request vocational rehabilitation benefits provided by Section 139.5 is one year from the date of
7 the last finding of permanent disability by the appeals board, or one year from the date the appeals
8 board approved a compromise and release of other issues.” (Stats. 1982, ch. 922, § 14.) The
9 Legislature also amended section 5410, relating to new and further disability, to add references to
10 vocational rehabilitation. (Stats. 1982, ch. 922, § 15.) Specifically, section 5410 was amended to
11 read, in relevant part:

12 “Nothing in this chapter shall bar the right of any injured worker to institute
13 proceedings for the collection of compensation, *including vocational*
14 *rehabilitation services*, within five years after the date of the injury upon the
15 ground that the original injury has caused new and further disability *or that the*
16 *provision of vocational rehabilitation services has become feasible because the*
17 *employee’s medical condition has improved or because of other factors not*
18 *capable of determination at the time the employer’s liability for vocational*
19 *rehabilitation services otherwise terminated. The jurisdiction of the appeals*
20 *board in these cases shall be a continuing jurisdiction within this period.”*

21 (Lab. Code, § 5410 (emphasis added).)

22 Additionally, the Legislature amended section 5803, relating to the WCAB’s continuing
23 jurisdiction, to add a reference to vocational rehabilitation. (Stats. 1982, ch. 922, § 16.)

24 Specifically, section 5803 was amended to read:

25 “The appeals board has continuing jurisdiction over all its orders, decisions, and
26 awards made and entered under the provisions of this division, *and the*
27 *decisions and orders of the rehabilitation unit established under Section 139.5.*
At any time, upon notice and after an opportunity to be heard is given to the
parties in interest, the appeals board may rescind, alter, or amend any order,
decision, or award, good cause appearing therefor.

“This power includes the right to review, grant or regrant, diminish, increase, or
terminate, within the limits prescribed by this division, any compensation

1 awarded, upon the grounds that the disability of the person in whose favor the
2 award was made has either recurred, increased, diminished, or terminated.”

3 (Lab. Code, § 5803 (emphasis added).)

4 In 1989, the Legislature extensively modified vocational rehabilitation. Among other
5 things, section 139.5 was amended to require a new fee schedule reducing the cost of vocational
6 rehabilitation services by 10% (see former Lab. Code, § 139.5(a)(4)) and to provide that a QIW
7 was entitled to VRTD only until he or she became medically permanent and stationary, after which
8 he or she became entitled to VRMA (see former Lab. Code, § 139.5(c) & (d)), which was normally
9 substantially lower than VRTD. (Stats. 1989, ch. 892, § 24.) Additionally, the Legislature added
10 an entire Article to the Labor Code entitled “Vocational Rehabilitation”, which adopted new
11 sections 4635 through 4647. (Stats. 1989, ch. 892, § 33.) Finally, the Legislature added a new
12 section 5502 (Stats. 1989, ch. 892, § 51) that, in pertinent part, required that “[t]he administrative
13 director shall establish a priority calendar for issues requiring an expedited hearing and decision,”
14 including the issue of an “employee’s entitlement to vocational rehabilitation services, or the
15 termination of an employer’s liability to provide these services to an employee.” (Lab. Code, §
16 5502(b)(3).)

17 In 1993, the Legislature made further dramatic changes to vocational rehabilitation. The
18 most significant of these changes included amending section 139.5 (Stats. 1993, ch. 121, § 22) to
19 place a \$16,000 cap on vocational rehabilitation services and a \$4,500 cap on vocational
20 counseling fees (former Lab. Code, § 139.5(a)(5)) and to place a 52-week aggregate cap on
21 VRMA, except in certain circumstances (former Lab. Code, § 139.5(c)). Also, section 4644 was
22 amended (Stats. 1993, ch. 121, § 22) to provide that an employer would not be liable for
23 vocational rehabilitation if it offered the injured employee modified or alternative work meeting
24 certain criteria (former Lab. Code, § 4644(a)(5)-(7)) and to provide that an employee was normally
25 limited to only one vocational rehabilitation plan (former Lab. Code, § 4644(c)).

26 In 2002, the Legislature amended section 4646 (Stats. 2002, ch. 6, § 64) to delete the
27 prohibition against settling an applicant’s right to vocational rehabilitation and to allow a

1 represented injured employee to settle his or her right to prospective vocational rehabilitation
2 services for a lump sum not to exceed ten thousand dollars (\$10,000), for his or her use in “self-
3 directed vocational rehabilitation.”

4 In 2003, the Legislature completely changed the landscape for vocational rehabilitation.
5 (Stats. 2003, ch. 635.) It entirely repealed both former section 139.5 (Stats. 2003, ch. 635, § 14)
6 and the Article of the Labor Code entitled “Vocational Rehabilitation,” which had contained
7 sections 4635 through 4647 (Stats. 2003, ch. 635, § 14.3). In place of these vocational
8 rehabilitation provisions, the Legislature added a new section 139.5 (Stats. 2003, ch. 635, § 14.2) –
9 plus sections 4658.5 and 4658.6 (Stats. 2003, ch. 635, §§ 14.4 & 15) – which, together, created a
10 much more limited supplemental job displacement benefit, which applied to injuries sustained on
11 or after January 1, 2004. The Legislature also repealed former section 5405.5 (Stats. 2003, ch.
12 635, § 16), which had been a vocational rehabilitation statute of limitations provision. The
13 Legislature, however, did *not* amend sections 3207, 5410, 5502(b)(3), or 5803 to delete their
14 references to vocational rehabilitation.

15 In 2004, in Senate Bill 899 (SB 899), the Legislature made wholesale changes to the entire
16 workers’ compensation system. (Stats. 2004, ch. 34.) As relevant here, SB 899 repealed the 2003
17 version of section 139.5 relating to supplemental job displacement benefits for injuries sustained
18 on or after January 1, 2004 (Stats. 2004, ch. 34, § 4), but it left intact sections 4658.5 and 4658.6
19 that also relate to those benefits. Further, the Legislature largely re-enacted the previous version
20 of section 139.5 relating to vocational rehabilitation (Stats. 2004, ch. 34, § 5), but with two very
21 significant additions. First, the 2004 version of section 139.5 added a subdivision (k), which
22 stated: “This section shall apply only to injuries occurring before January 1, 2004.” Second, the
23 2004 version of section 139.5 added a subdivision (l), which stated: “This section shall remain in
24 effect only until January 1, 2009, and as of that date is repealed, unless a later enacted statute, that
25 is enacted before January 1, 2009, deletes or extends that date.” In re-enacting section 139.5, SB
26 899 did not re-enact the provisions of the Article of the Labor Code entitled “Vocational
27 Rehabilitation” that had contained sections 4635 through 4647; however, new section 139.5 did

1 refer to some of those sections. Finally, as pertinent here, SB 899 amended section 3207 to delete
2 the reference to “vocational rehabilitation” from the statutory definition of “compensation.” (Stats.
3 2004, ch. 34, § 10.) Again, however, the Legislature made no amendments to the language of
4 sections 5410, 5502(b)(3), or 5803 relating to vocational rehabilitation.

5 **III. The Repeal of Section 139.5 Terminated Any Rights to Vocational Rehabilitation**
6 **Benefits or Services Pursuant to Orders or Awards that Were Not Final Before January 1,**
7 **2009**

8 It is settled law that the right to workers’ compensation benefits is wholly statutory.
9 (*DuBois v. Workers’ Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 388 [58 Cal.Comp.Cases 286, 290];
10 *Rio Linda Union School Dist. v. Workers’ Comp. Appeals Bd. (Scheftner)* (2005) 131 Cal.App.4th
11 517, 527 [70 Cal.Comp.Cases 999, 1006] (*Scheftner*); *Graczyk v. Workers’ Comp. Appeals Bd.*
12 (1986) 184 Cal.App.3d 997, 1002-1003 [51 Cal.Comp.Cases 408, 411] (*Graczyk*.) Because any
13 entitlement to workers’ compensation benefits is entirely statutory, a right of action based on a
14 workers’ compensation statute “exists only so far and in favor of such person as the legislative
15 power may declare.” (*Graczyk, supra*, 184 Cal.App.3d at pp. 1006-1007 [51 Cal.Comp.Cases at p.
16 415]; see also *Justus v. Atchison* (1977) 19 Cal.3d 564, 575 [disapproved on another ground in
17 *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171].)

18 Moreover, as established by Government Code section 9606, “Any statute may be repealed
19 at any time, except when vested rights would be impaired. Persons acting under any statute act in
20 contemplation of this power of repeal.” Thus, as stated by our Supreme Court over 30 years ago:

21 “[W]hen a pending action rests solely on a statutory basis, and when no rights
22 have vested under the statute, a repeal of such a statute without a saving clause
23 will terminate all pending actions based thereon. [¶] ... It is also a general rule,
24 subject to certain limitations not necessary to discuss here, that a cause of action
25 or remedy dependent on a statute falls with the repeal of the statute, even after
26 the action thereon is pending, in the absence of a saving clause in the repealing
27 statute. ... The justification for this rule is that all statutory remedies are
pursued with full realization that the Legislature may abolish the right to
recover at any time. [¶¶] ... If final relief has not been granted before the repeal
goes into effect it cannot be granted afterwards, even if a judgment has been
entered and the cause is pending on appeal. The reviewing court must dispose
of the case under the law in force when its decision is rendered.” (*Governing
Bd. of Rialto Unified School Dist. v. Mann* (1977) 18 Cal.3d 819, 829-831

1 [internal quotation marks omitted] (*Mann*); see also *Callet v. Alioto* (1930) 210
2 Cal. 65, 67 (*Callet*).

3 Unlike a common law right, “[a] statutory remedy does not vest until final judgment.”
4 (*South Coast Regional Com. v. Gordon* (1978) 84 Cal.App.3d 612, 619.) If a statutory right has
5 not been vested through the entry of final judgment, the right remains “inchoate, incomplete, or
6 unperfected” and “the repeal operates to extinguish [the right].” (*People v. One 1953 Buick 2-Door*
7 (1962) 57 Cal.2d 358, 365.) Moreover, “the test to be applied in determining the effect to be given
8 to the repeal is not whether the changes in the law are ‘substantive’ or ‘procedural’ but rather
9 whether the rights affected are ‘vested’ or ‘inchoate’.” (*Id.*)

10 These principles have been applied in various workers’ compensation cases, including
11 cases involving SB 899.

12 For example, SB 899 provided that former section 5814 (relating to penalties for
13 unreasonable delays in the payment of benefits) would become “inoperative” on June 1, 2004, that
14 former section 5814 was “repealed” as of January 1, 2005, and that new section 5814 “shall
15 become operative on June 1, 2004” and “shall apply to all injuries.” (Stats. 2004, ch. 34, §§ 42,
16 43.) In various cases, injured employees asserted that former section 5814 should be applied to
17 penalty claims filed before its repeal, even if those penalty claims had not yet become final. These
18 assertions were consistently rejected, based on the principles of law just discussed above.
19 (*McCarthy v. Workers’ Comp. Appeals Bd.* (2006) 135 Cal.App.4th 1230, 1235-1237 [71
20 Cal.Comp.Cases 16, 20-21] (*McCarthy*); *Green v. Workers’ Comp. Appeals Bd.* (2005) 127
21 Cal.App.4th 1426, 1436 [70 Cal.Comp.Cases 294, 301-302] (*Green*); *Abney v. Aera Energy* (2004)
22 69 Cal.Comp.Cases 1552, 1558-1560 (Appeals Board en banc) (*Abney*)). For example, in
23 *McCarthy*, the Court stated:

24 “In the *Abney* decision, the WCAB applied several well-established rules of
25 statutory construction. As summarized in *Abney*, the WCAB held that ‘based
26 on the language of the statute itself, the stated intent and purpose of SB 899, the
27 wholly statutory nature of the workers’ compensation system and existing case
law, we find that section 5814, as enacted by SB 899 and operative June 1,
2004, also applies to alleged unreasonable delays or refusals to pay

1 compensation that occurred prior to the operative date.’ (*Abney, supra*, 69
2 Cal.Comp.Cases at p. 1560.)

3 ***

4 “*Abney* ... properly relies on the statutory repeal rule, stating that ‘[i]t is well
5 settled that where a right or a right of action depending solely on statute is
6 altered or repealed by the Legislature, in the absence of contrary intent, e.g., a
7 savings clause, the new statute is applied even where the matter was pending
8 prior to the enactment of the new statute. (*Abney, supra*, 69 Cal.Comp.Cases at
9 p. 1558, citing *Governing Bd. of Rialto Unified School Dist. v. Mann* (1977) 18
10 Cal.3d 819, 829-830 (*Governing Bd.*)) ‘ “The justification for this rule is that
11 all statutory remedies are pursued with the full realization that the Legislature
12 may abolish the right to recover at any time.” ’ (*Abney, supra*, at p. 1558,
13 quoting *Governing Bd., supra*, at p. 829.)

14 “In *Rio Linda Union School Dist. v. Workers’ Comp. Appeals Bd.* [(*Scheftner*)]
15 (2005) 131 Cal.App.4th 517, 528, a recent decision construing another section
16 of SB 899, we explained: ‘[T]he repeal of a statutory right or remedy triggers
17 the application of rules distinct from the traditional law regarding the
18 prospective or retroactive application of a statute. “A well-established line of
19 authority holds: ‘ “The unconditional repeal of a special remedial statute
20 without a saving clause stops all pending actions where the repeal finds them.
21 If final relief has not been granted before the repeal goes into effect it cannot be
22 granted afterwards, even if a judgment has been entered and the cause is
23 pending on appeal. The reviewing court must dispose of the case under the law
24 in force when its decision is rendered.’ ” ... “The justification for this rule is
25 that all statutory remedies are pursued with full realization that the [L]egislature
26 may abolish the right to recover at any time.” [Citation.]’ Here, as in *Rio Linda*
27 [(*Scheftner*)], we conclude the statutory repeal rule applies since the Legislature
by SB 899 repealed the purely statutory right to a particular formula for
calculating penalties for the unreasonable delay or refusal to pay compensation.
‘The repeal of such statutory right applies to all pending cases, at whatever
stage the repeal finds them, unless the Legislature has expressed a contrary
intent by an express saving clause or by implication from contemporaneous
legislation. [Citation.]’ (*Rio Linda* [(*Scheftner*)], *supra*, at p. 528, italics
omitted.) We agree with *Abney* that it did not. (*Abney, supra*, 69
Cal.Comp.Cases at p. 1558.)”

(*McCarthy, supra*, 135 Cal.App.4th at pp. 1235-1237 [71 Cal.Comp.Cases at
pp. 20-21] (parallel non-official citations omitted).)

Similarly, the Court of Appeal in *Green* said:

“When new legislation repeals statutory rights, the rights normally end with
repeal unless vested pursuant to contract or common law. In workers’
compensation, where rights are purely statutory and not based on common law,
repeal ends the right, absent a savings clause. Rights end during litigation if
statutory repeal occurs before final judgment; by definition there is no final

1 judgment if an appeal is pending. There is no injustice if statutory rights end
2 before final judgment because parties act and litigate in contemplation of
possible repeal.”

3 (*Green, supra*, 127 Cal.App.4th at p. 1436 [70 Cal.Comp.Cases at pp. 301-302]
4 (footnotes omitted).)

5 And in one of its footnotes, *Green* observed:

6 “... In *Graczyk*, the Court of Appeal ... ruled that ... [w]here a right depends on
7 statute and not common law as in workers’ compensation, repeal of the statute
8 destroys the right unless reduced to final judgment or the statute has a savings
9 clause. ... Application is justified because statutory remedies are pursued with
the realization that the Legislature may abolish the right to recovery at any
time.”

10 (*Green, supra*, 127 Cal.App.4th at p. 283, fn. 18 [70 Cal.Comp.Cases at p. 300,
11 fn. 16] (internal citations omitted).)

12 Similarly, SB 899 repealed former sections 4663 and 4750 – relating to apportionment of
13 permanent disability – and enacted new sections 4663 and 4664. (Stats. 2004, ch. 34, §§ 33, 34,
14 35, 37.) In various cases, injured employees asserted that the apportionment provisions of former
15 sections 4663 and 4750 should be applied to their cases, even though those cases were still
16 pending and non-final as of the April 19, 2004 effective date of those statutes’ repeals. Utilizing
17 the principles outlined above, however, the appellate courts held that the apportionment provisions
18 of new sections 4663 and 4664 must be applied to all cases that had not become final by April 19,
19 2004. (*Scheftner, supra*, 131 Cal.App.4th at pp. 527-528 [70 Cal.Comp.Cases at pp. 1006-1007];
20 *Kleemann v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 283 [70 Cal.Comp.Cases
21 133, 138-139] (*Kleemann*).) For example, in *Scheftner*, the Court of Appeal held that repealed
22 former sections 4663 and 4750 could not be applied to applicant’s pending case, and new sections
23 4663 and 4664 must be applied – even though the issue of apportionment had been submitted for
24 decision over a month before the April 19, 2004 effective date of SB 899 – because the WCJ’s
25 April 23, 2004 decision never became “final” due to defendant’s petition for reconsideration and
26 subsequent petition for writ of review. The *Scheftner* Court said:

1 “The right to workers’ compensation benefits is ‘wholly statutory’ ..., and is not
2 derived from common law. ... This statutory right is exclusive of all other
3 statutory and common law remedies, and substitutes a new system of rights and
obligations for the common law rules governing liability of employers for
injuries to their employees. ...

4 ***

5 “... [T]he repeal of a statutory right or remedy triggers the application of rules
6 distinct from the traditional law regarding the prospective or retroactive
7 application of a statute. A well-established line of authority holds: The
8 unconditional repeal of a special remedial statute without a saving clause stops
9 all pending actions where the repeal finds them. If final relief has not been
10 granted before the repeal goes into effect it cannot be granted afterwards, even
11 if a judgment has been entered and the cause is pending on appeal. The
reviewing court must dispose of the case under the law in force when its
decision is rendered. ... The justification for this rule is that all statutory
remedies are pursued with full realization that the [L]egislature may abolish the
right to recover at any time. ...

12 “This rule is applicable here since the Legislature by Bill No. 899 repealed the
13 purely statutory right to workers’ compensation for any industrial injury
14 resulting in permanent disability because of the aggravation of a prior
15 nondisabling disease as may reasonably be attributed to the injury. The repeal
of such statutory right applies to all pending cases, at whatever stage the repeal
finds them, unless the Legislature has expressed a contrary intent by an express
saving clause or by implication from contemporaneous legislation. ...”

16 (*Scheftner, supra*, 131 Cal.App.4th at pp. 527-528 [70 Cal.Comp.Cases at pp.
17 1006-1007].)

18 Similarly, in *Kleemann*, the Court said:

19 “When new legislation repeals existing law, statutory rights normally end with repeal
20 unless the rights are vested pursuant to contract or common law. In a case such as this,
21 where workers’ compensation rights which are purely statutory and not based on
common law are at issue, repeal ends the right absent a savings clause. Rights end
during litigation if repeal occurs before final judgment.”

22 (*Kleemann, supra*, 127 Cal.App.4th at p. 283 [70 Cal.Comp.Cases at pp. 138-139]
23 (footnotes omitted).)

24 Moreover, in a footnote, *Kleemann* recited:

25 “... In *Graczyk*, the Court of Appeal ... noted that workers’ compensation is
26 wholly statutory ... Where a right depends on statute and does not exist under
27 common law, repeal of the statute destroys the right unless reduced to final
judgment or the statute has a savings clause. ... The repeal of a statutory right
is justified because statutory remedies are pursued with the realization that the

1 Legislature may abolish the right to recovery at any time. ... Although the law
2 in force at the time of injury is usually determinative in workers' compensation,
3 a statutory change may be applied retroactively if clearly intended by
4 Legislature.”

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27

(*Kleemann, supra*, 127 Cal.App.4th at p. 283, fn. 18 [70 Cal.Comp.Cases at p. 139, fn. 18] (internal citations omitted).)

Of course, the application of these statutory repeal principles has not been limited to workers' compensation cases under SB 899. The seminal workers' compensation case is *Graczyk, supra*, 184 Cal.App.3d 997 [51 Cal.Comp.Cases 408]. In *Graczyk*, the applicant was a student athlete who was injured while playing football for a state university on an athletic scholarship. At the time of his injury, the applicant fell within the definition of “employee” as interpreted in *Van Horn v. Industrial Acc. Com.* (1963) 219 Cal.App.2d 457 [28 Cal.Comp.Cases 187] (student who participates for compensation as a member of a college football team is a statutory employee). However, before the applicant's workers' compensation claim had become final, the Legislature added a subdivision (k) to section 3352, which expressly excluded student athletes from workers' compensation coverage. In holding that applicant did not have a vested right in the unamended version of section 3352, the *Graczyk* Court said:

“[A]pplicant's inchoate right to benefits under the workers' compensation law is wholly statutory and had not been reduced to final judgment before the Legislature's 1981 addition of subdivision (k) further clarifying the employee status of athletes. Hence, applicant did not have a vested right, and his constitutional objection has no bearing on the issue. ... Where a right of action does not exist at common law, but depends solely on statute, the repeal of the statute destroys the inchoate right unless it has been reduced to final judgment, or unless the repealing statute contains a saving clause protecting the right in pending litigation. ... Because it is a creature of statute, the right of action exists only so far and in favor of such person as the legislative power may declare.

“Thus, although the law in force at the time of the injury is determinative of a person's right to recovery of compensation benefits, this general rule is subject to circumstances where the legislative intent is to the contrary, provided that in making substantial changes which enlarge or diminish existing rights and obligations, the Legislature's intent to do so retroactively must be clear. ... Here, the Legislature clearly stated its intent that its 1981 amendment to section 3352 further clarifying the statutory definition of employee status of athletes be retroactive.

1 “For the foregoing reasons, we conclude that applicant did not have a vested
2 right in employee status at the time of his injury.”

3 (*Graczyk, supra*, 184 Cal.App.3d at pp. 1006-1007 [51 Cal.Comp.Cases 414-
4 415].)

5 Here, when SB 899 re-enacted section 139.5, it specifically added language which stated:
6 “This section shall remain in effect only until January 1, 2009, *and as of that date is repealed*,
7 unless a later enacted statute, that is enacted before January 1, 2009, deletes or extends that date.”
8 (Lab. Code, § 139.5(l) (emphasis added).) No such legislative action was taken by January 1,
9 2009.

10 The language that section 139.5 “is repealed” as of January 1, 2009 is clear and
11 unambiguous. Although it hardly needs stating, the term “ ‘[r]epeal’ ordinarily means revocation,
12 rescission, abrogation, or destruction’ ” (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 75 [quoting from
13 *Rains v. County of Contra Costa* (1951) 37 Cal.2d 263, 265].) Thus, as two appellate courts stated
14 earlier in dicta, the repeal of section 139.5 means it no longer remains “in effect” and it has
15 “expire[d].” (See *Medrano v. Workers’ Comp. Appeals Bd.* (2008) 167 Cal.App.4th 56, 65 [73
16 Cal.Comp.Cases 1407, 1412]; *Gamble v. Workers’ Comp. Appeals Bd.* (2006) 143 Cal.App.4th 71,
17 83 [71 Cal.Comp.Cases 1015, 1020].)⁵

18 Accordingly, in keeping with the discussion above, the repeal of section 139.5 stopped all
19 pending and non-final vocational rehabilitation actions at the point where the repeal found them.
20 This is true even if vocational rehabilitation benefits and services “should” have been provided
21 while section 139.5 was still in effect and even if section 139.5 was still in effect at the time a
22 vocational rehabilitation issue was submitted for decision. Unless an injured employee’s
23 vocational rehabilitation rights have become vested under a final order that issued before January
24

25 ⁵ *Medrano* states in full: “As a result of legislation enacted in 2004, section 139.5 is now applicable only to
26 injuries occurring before January 1, 2004 (§ 139.5, subd. (k)), *and will remain in effect only until January 1, 2009*,
unless extended by subsequent legislation (§ 139.5, subd. (l)).” (Emphasis added.)

27 *Gamble* states in full: “[S]ection 139.5 now has limited application to workers injured before January 1,
2004, and the [vocational rehabilitation] program *will expire on January 1, 2009*, unless a new statute is enacted
extending the benefit. (§ 139.5, subs. (k), (l).)” (Emphasis added.)

1 1, 2009, these inchoate and unperfected rights are extinguished and forever lost, except if section
2 139.5 had a saving clause.

3 We turn next to the saving clause issue.

4 **IV. The Legislature Did Not Adopt a Saving Clause to Protect Vocational Rehabilitation**
5 **Rights in Cases Still Pending As Of the January 1, 2009 Effective Date of the Repeal of**
6 **Section 139.5**

7 As indicated above, the repeal of a statute “without a saving clause” will terminate all
8 pending actions based on the statute. (*Mann, supra*, 18 Cal.3d at p. 829.)

9 When the Legislature repeals a statute but intends to save the rights of litigants in pending
10 actions, it may accomplish that purpose by including a saving clause in the repealing act or in any
11 other act on the same subject passed by the Legislature at the same legislative session. (*County of*
12 *Alameda v. Kuchel* (1948) 32 Cal.2d 193, 198 (*Kuchel*); *Bourquez v. Superior Court* (2007) 156
13 Cal.App.4th 1275, 1284 (*Bourquez*); *Traub v. Edwards* (1940) 38 Cal.App.2d 719, 721 (*Traub*)).

14 An express saving clause is not necessary; it is sufficient if the intention to preserve and continue
15 such rights is clearly apparent. (*Kuchel, supra*, 32 Cal.2d at p. 198; *Bourquez, supra*, 156
16 Cal.App.4th at p. 1284; *Traub, supra*, 38 Cal.App.2d at p. 722; cf. *In re Pedro T.* (1994) 8 Cal.4th
17 1041, 1048.)

18 In re-enacting section 139.5 on April 19, 2004, the Legislature added subdivision (k),
19 which stated: “This section shall apply only to injuries occurring before January 1, 2004.” It also
20 added subdivision (l), which stated: “This section shall remain in effect only until January 1, 2009,
21 and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2009,
22 deletes or extends that date.”

23 By providing in April 2004 that section 139.5 would not be repealed until January 1, 2009,
24 the Legislature, in effect, “saved” both pending and impending vocational rehabilitation claims for
25 a period of nearly five years. This gave affected employees a reasonable time within which to
26 avail themselves of vocational rehabilitation before the repeal would take effect. (See *Rosefield*
27 *Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122-123 (the Supreme Court held that if the
Legislature retroactively shortens a statute of limitations, “there must be a reasonable time

1 permitted for the party affected to avail himself of his remedy before the statute takes effect”; the
2 Court further concluded that an amendment to the Code of Civil Procedure, requiring trial within
3 five years of filing suit, did not violate plaintiff’s due process rights, since plaintiff had a year to
4 bring its case to trial after the amendment); see also *Green, supra*, 127 Cal.App.4th at p. 1441 [70
5 Cal.Comp.Cases at p. 305] (“[D]elaying implementation of new section 5814 allowed injured
6 workers and employers to conclude some matters under former section 5814. ... [B]y delaying the
7 inoperative status of former section 5814 and the operative status of new section 5814, the
8 Legislature provided an additional period to avoid the two-year statute of limitations created by
9 new section 5814, subdivision (g), consistent with *Rosefield Packing*.” [Footnote omitted].);
10 *Abney, supra*, 69 Cal.Comp.Cases at pp. 1561-1562 (citing *Rosefield Packing* and stating, “in
11 order to provide due process to parties who had not yet filed their [section 5814] penalty claims for
12 alleged unreasonable delays or refusals to pay compensation that would soon be beyond the reach
13 of the new two-year limitations period, the Legislature allowed them until June 1, 2004 to bring
14 such actions”).)

15 However, there is nothing in SB 899 – or in any other workers’ compensation statute
16 enacted during the 2003-2004 legislative session – that reflects either an express or clearly
17 apparent legislative intention to *indefinitely* save non-final and non-vested vocational rehabilitation
18 rights *beyond* January 1, 2009. Moreover, although SB 899 indicates that subsequent legislative
19 sessions also could have enacted a saving clause sometime before January 1, 2009,⁶ no legislative
20 sessions after 2003-2004 took any action with respect to vocational rehabilitation.

21 Furthermore we must reject applicant’s contention that section 5502(b)(3) – or, indeed,
22 sections 5410 or 5803 – constitute saving clauses that protect non-final and non-vested vocational
23 rehabilitation claims after January 1, 2009. None of these sections were part of SB 899, which
24 contained the provision repealing section 139.5, nor were they part of any other legislative act
25

26 _____
27 ⁶ See Lab. Code, § 139.5(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.*”
(Emphasis added).)

1 relating to workers' compensation passed during the 2003-2004 legislative session or thereafter.
2 Accordingly, these three sections fail to meet the criteria for a saving clause, as set out above.

3 Applicant asserts that, under the liberal construction mandate of section 3202, we must
4 interpret section 5502(b)(3) to be a saving clause that specifically confers the WCAB with
5 jurisdiction over timely appeals of disputes already decided by orders of the Rehabilitation Unit,
6 even if those orders had not become final before January 1, 2009. Yet, as the Court of Appeal
7 recently observed:

8 “We are well aware that section 3202 provides that the workers’
9 compensation statutes ‘shall be liberally construed by the courts with the
10 purpose of extending their benefits for the protection of persons injured in the
11 course of their employment.’ However, ‘[s]ection 3202 is a tool for resolving
12 statutory ambiguity where it is not possible through other means to discern the
13 Legislature’s actual intent.’ (*Brodie [v. Workers’ Comp. Appeals Bd. (2007)]*
14 40 Cal.4th [1313,] 1332 [72 Cal.Comp.Cases 565, 580-581].) Section 3202
15 ‘ “cannot supplant the intent of the Legislature as expressed in a particular
16 statute.” (*Fuentes v. Workers’ Comp. Appeals Bd. [(1976)]* 16 Cal.3d [1,] 8
17 [41 Cal.Comp.Cases 42, 46].) If the Legislature’s intent appears from the
18 language and context of the relevant statutory provisions, then we must
19 effectuate that intent, “even though the particular statutory language ‘is
20 contrary to the basic policy of the [workers’ compensation law].’ ” [Citation.]’
21 (*Kopping v. Workers’ Comp. Appeals Bd. [(2006)]* 142 Cal.App.4th [1099,]
22 1106 [71 Cal.Comp.Cases 1229, 1233].) [Where] the Legislature’s intent is
23 ascertainable from the language of the [relevant] statutes and the legislative
24 history, we cannot rely on section 3202 to defeat that intent.” (*Benson v.*
25 *Workers’ Comp. Appeals Bd. (2009)* 170 Cal.App.4th 1535, 1558-1559 [74
26 Cal.Comp.Cases 113, 131] (parallel citations to Cal.Comp.Cases added).)

20 Here, section 139.5 was unambiguously repealed effective January 1, 2009. By statute
21 (Gov. Code, § 9606) and case law, this repeal terminated all non-final and non-vested vocational
22 rehabilitation rights as of that date. Moreover, the Legislature gave injured employees from April
23 19, 2004 to January 1, 2009 to perfect their vocational rehabilitation rights before the repeal
24 became effective. Given all this, we cannot rely on the liberal construction provision of section
25 3202 to conclude that section 5502(b)(3) – which was enacted *before* the SB 899 amendments to
26 section 139.5 – acts as a saving clause for vocational rehabilitation rights not vested by a
27 pre-January 1, 2009 final order. Rather, as we will discuss later, the continued existence of section

1 5502(b)(3) merely gives the WCAB authority to hear and determine issues regarding vocational
2 rehabilitation rights that had vested pursuant to a final order or award that issued before January 1,
3 2009.

4 One amicus curiae brief also argues that section 139.5(f) is a saving clause. Section
5 139.5(f) provided: “The time within which an employee may request vocational rehabilitation
6 services is set forth in former Section 5405.5 and Sections 5410 and 5803.” However, section
7 139.5 was entirely repealed effective January 1, 2009. Therefore, section 139.5(f) was also
8 repealed as of that date. Amicus cites no authority for the proposition that a repealed statute may
9 be deemed a saving clause, and we are not aware of any such authority.

10 **V. The Vocational Rehabilitation Statutes that Were Repealed in 2003 Do Not Continue to**
11 **Function As “Ghost Statutes” After January 1, 2009**

12 Applicant asserts that the WCJ had the authority to award retroactive VRMA at the TD rate
13 after January 1, 2009 because, after that date, former section 4642 still had effect as a “ghost
14 statute,” even though it had been repealed in 2003 – along with the other statutes (i.e., sections
15 4635 through 4647) in the Article of the Labor Code entitled “Vocational Rehabilitation.”⁷

16 The “ghost statute” rationale was first presented in *Godinez v. Buffets, Inc.* (2004) 69
17 Cal.Comp.Cases 1311 (Appeals Board Significant Panel Decision) (*Godinez*). In *Godinez*, the
18 Appeals Board was addressing the question of how to determine timeliness of a vocational
19 rehabilitation appeal after the repeal of former section 4645(d). The Board noted that former
20 section 4645(d) had provided that an appeal of a decision of the Rehabilitation Unit must be filed
21 with the WCAB within 20 days of that decision. The Board further noted that when section 139.5
22 was re-enacted by SB 899 (after it had been repealed in 2003), neither former section 4645(d) nor
23 any of the other statutes in its Article (i.e., sections 4635 through 4647) were re-enacted.
24 Nevertheless, re-enacted section 139.5 expressly referred to former sections 4642 and 4644. The

25 _____
26 ⁷ Former section 4642(a) had provided, in relevant part: “If the employer fails to ... commence vocational
27 rehabilitation service[s] in a timely manner as required by Section 4637, or otherwise causes any delay in the
provision of vocational rehabilitation services, the full maintenance allowance shall be paid in its entirety by the
employer, including the amount payable under paragraph (2) of subdivision (d) of Section 139.5, for the period of the
delay.” The amount payable under former section 139.5(d)(2) was the temporary disability indemnity rate.

1 Board then said:

2 “[E]ven though these sections were repealed in 2003 and not reenacted in
3 2004, they still have a shadowy existence for injuries prior to January 1, 2004.
4 Like ghosts ‘doomed for a certain term to walk the night’ (Hamlet I, v), these
5 statutes have no material existence but linger until their work is done.
6 Because there is no other operative law, we hold that former section 4645 is a
7 similar ‘ghost statute’ that continues to govern the timeliness of appeals from
8 decisions of the Rehabilitation Unit.”

(*Godinez, supra*, 69 Cal.Comp.Cases at p. 1313.)

9 In reaching this conclusion, the Appeals Board noted that, in *Pebworth v. Workers’ Comp. Appeals*
10 *Bd.* (2004) 116 Cal.App.4th 913, 916, fn. 2 [69 Cal.Comp.Cases 199, 200, fn.2], the Court of
11 Appeal had reached a similar conclusion, holding that former section 4646 (which permitted the
12 settlement of prospective vocational rehabilitation services under limited circumstances)
13 “continues to apply to injuries occurring prior to January 1, 2004” even though it “was repealed by
14 the Legislature effective January 1, 2004.”

15 Subsequently, in *Simi v. Sav-Max Foods, Inc.* (2005) 70 Cal.Comp.Cases 217 (Appeals
16 Board en banc) (*Simi*), the Appeals Board cited to *Godinez* and implicitly applied its “ghost
17 statute” rationale to a situation in which SB 899 had created a new procedure for obtaining
18 medical-legal reports for represented employees who had sustained injuries *on or after* January 1,
19 2005, but had repealed the procedure that had applied to represented employees with injuries
20 *before* January 1, 2005. In *Simi*, the Board stated:

21 “In the present case there is no operative law other than former section 4062
22 to provide a procedure for obtaining AME and QME medical-legal reports for
23 cases involving represented employees who sustained injuries prior to January
24 1, 2005. Therefore, we hold that for injuries occurring prior to January 1,
25 2005, section 4062, as it existed before its amendment by SB 899, continues
26 to provide the procedure by which AME and QME medical-legal reports are
27 obtained in cases involving represented employees.” (70 Cal.Comp.Cases at p.
28 221.)

29 In *Nunez v. Workers’ Comp. Appeals Bd.* (2006) 136 Cal.App.4th 584, 591-593 [71
30 Cal.Comp.Cases 161, 166-168], the Court of Appeal cited to both *Godinez* and *Simi* and reached
31 the same result as *Simi*. The Court stated, among other things, “The Legislature did not intend

1 total deregulation of the abuses historically associated with medical evaluation and reporting in
2 workers' compensation. [Footnote omitted.] Moreover, the statutory scheme should not be
3 interpreted so that either side is arbitrarily deprived of the right to medical evaluation or
4 reporting.” (Accord: *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 601 [71
5 Cal.Comp.Cases 155, 159] (“For the reasons stated in *Nunez*, we conclude that the medical
6 evaluation and reporting procedure of former section 4062 applies to represented cases with a date
7 of injury before January 1, 2005.”).)

8 However, we conclude that, as of the January 1, 2009 effective date of former section
9 139.5's repeal, former section 4642 no longer has any “ghost statute” effect. If we were to
10 conclude otherwise, this would lead to the utterly absurd result that a statute that was repealed in
11 2003 (i.e., former section 4642) would still be given legal effect, even though the statute on which
12 its preternatural continued legal effect was entirely based (i.e., former section 139.5) is also now
13 repealed.

14 **VI. After the Repeal of Section 139.5, the WCAB Lost Jurisdiction Over Vocational**
15 **Rehabilitation Issues, Except to Enforce or Terminate Vested Rights**

16 The WCAB is a judicial body of limited jurisdiction, with no powers beyond those
17 conferred on it by the Constitution and the Labor Code. (*State Comp. Ins. Fund v. Ind. Acc. Com.*
18 (*Hansen*) (1942) 20 Cal.2d 264, 266 [7 Cal.Comp.Cases 102, 103]; *Scott v. Industrial Acc. Com.*
19 (1956) 46 Cal.2d 76, 82-83 [21 Cal.Comp.Cases 55, 58].)⁸ If it attempts to exercise powers
20 beyond those granted to it by statute, it acts in excess of its authority and without jurisdiction.
21 (*Ogdon v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 192, 196 [39 Cal.Comp.Cases 297,
22 299].) Moreover, as stated long ago by our Supreme Court, “It is clear that, when the jurisdiction
23 of the cause depends upon [a] statute, the repeal of the statute takes away the jurisdiction.” (*People*
24 *v. Bank of San Luis Obispo* (1911) 159 Cal. 65, 70; see also *First National Bank v. Henderson*
25 (1894) 101 Cal. 307, 309.)

26 _____
27 ⁸ See also Lab. Code, § 111(a) (the WCAB “shall exercise all judicial powers vested in it *under this code*.” (emphasis added)); § 133 (the WCAB “shall have power and jurisdiction to do all things necessary or convenient in the exercise of any power or jurisdiction conferred upon it *under this code*” (emphasis added)).

1 The WCAB's jurisdiction is largely set out in sections 5300 and 5301.

2 As pertinent here, section 5301 provides, "The appeals board is vested with full
3 power, authority and jurisdiction to try and determine finally all the matters specified in Section
4 5300"

5 In turn, section 5300 provides, in relevant part: "All the following proceedings shall be
6 instituted before the appeals board and not elsewhere, except as otherwise provided in Division 4:
7 (a) For the recovery of compensation, or concerning any right or liability arising out of or
8 incidental thereto. ... (e) For obtaining any order which by Division 4 the appeals board is
9 authorized to make. [and] (f) For the determination of any other matter, jurisdiction over which is
10 vested by Division 4 in the Division of Workers' Compensation, including the administrative
11 director and the appeals board."

12 We conclude that, as of January 1, 2009, the WCAB lost all jurisdiction over pending and
13 non-final vocational rehabilitation claims, to the extent such jurisdiction might be predicated on
14 section 5300(a). This is because section 5300(a) only gives the WCAB jurisdiction over the
15 recovery of "compensation" or concerning any right or liability arising out of or incidental thereto.
16 Yet, when SB 899 repealed section 139.5 effective January 1, 2009, it also amended section 3207
17 to delete "vocational rehabilitation" from the statutory definition of "compensation." (Stats. 2004,
18 ch. 34, § 10.) Although this amendment to section 3207 was effective as of April 19, 2004, we
19 conclude that its former provisions defining "vocational rehabilitation" as "compensation" had a
20 "ghost statute" existence until the January 1, 2009 effective date of the repeal of former section
21 139.5, consistent with the discussion in Section V above. If "vocational rehabilitation" could not
22 have been awarded as "compensation" between April 19, 2004 and December 31, 2008, there
23 would have been no reason for the Legislature to have kept former section 139.5 in effect until
24 January 1, 2009.

25 Nevertheless, the WCAB still has jurisdiction over vocational rehabilitation, to the extent
26 provided by other statutes within Division 4 of the Labor Code. (Lab. Code, § 5300(e) & (f).)

27

1 There are three provisions within Division 4 of the Labor Code relating to vocational
2 rehabilitation that still exist, not having been repealed by SB 899 or by any earlier or subsequent
3 legislative enactment. They are sections 5502(b)(3), 5803, and 5410. We conclude that sections
4 5502(b)(3) and 5803 give the WCAB jurisdiction to conduct hearings and make determinations
5 regarding the enforcement or termination of vested vocational rehabilitation rights. Yet, although
6 the plain language of section 5410 allowed an injured employee to “institute proceedings” for
7 vocational rehabilitation within five years of his or her date of injury, section 5410 does not
8 provide that an injured employee could continue to maintain those proceedings if they had not
9 reached finality by the January 1, 2009 effective date of the repeal of section 139.5.

10 As to Section 5502(b)(3), it continues to provide, in relevant part, that “[a] hearing shall be
11 held and a determination as to the rights of the parties shall be made ... if the issues in dispute are
12 any of the following: ... (3) [t]he employee’s entitlement to *vocational rehabilitation services, or*
13 *the termination of an employer’s liability to provide these services to an employee.*” (Emphasis
14 added.) Consistent with our discussion above regarding the effect of a statutory repeal (i.e., it does
15 not affect vested rights), and harmonizing the repeal of section 139.5 with the continued existence
16 of section 5502(b)(3), we conclude that where an injured employee has vested vocational
17 rehabilitation rights, the WCAB may conduct a hearing to enforce or terminate those rights.

18 This interpretation is consistent with the language of section 5803, which still provides:
19 “The appeals board has *continuing jurisdiction* over all its orders, decisions, and awards made and
20 entered under the provisions of this division, *and the decisions and orders of the rehabilitation*
21 *unit established under Section 139.5.* ... This power includes the right to review, grant or regrant,
22 diminish, increase, or terminate, within the limits prescribed by this division, any compensation
23 awarded, upon the grounds that the disability of the person in whose favor the award was made has
24 either recurred, increased, diminished, or terminated.” (Emphasis added.)

25 This interpretation is also consistent with the WCAB’s continuing jurisdiction to enforce
26 all final awards. (*Barnes v. Workers’ Comp. Appeals Bd.* (2000) 23 Cal.4th 679, 687-688 [65
27 Cal.Comp.Cases 780, 786]; *United States Fidelity & Guaranty Co. v. Dept. of Industrial Relations*

1 (*Hardy*) (1929) 207 Cal. 144, 153 [16 IAC 69]; *Kauffman v. Workmen's Comp. Appeals Bd.*
2 (1969) 273 Cal.App.2d 829, 838-840 [34 Cal.Comp.Cases 373, 380-381]; *Llewellyn Iron Works v.*
3 *Industrial Acc. Com. (Cridler)* (1933) 129 Cal.App. 449, 453 [19 IAC 157]; *Santillan v. Kay Mart*
4 *Co.* (1971) 36 Cal.Comp.Cases 12, 13-14 (Appeals Board en banc.)

5 Turning to section 5410, it still reads:

6 “Nothing in this chapter shall bar the right of any injured worker *to institute*
7 *proceedings for the collection of compensation, including vocational*
8 *rehabilitation services*, within five years after the date of the injury upon the
9 ground that the original injury has caused new and further disability or that
10 the provision of vocational rehabilitation services has become feasible
11 because the employee’s medical condition has improved or because of other
factors not capable of determination at the time the employer’s liability for
vocational rehabilitation services otherwise terminated. The jurisdiction of
the appeals board in these cases shall be a continuing jurisdiction within this
period.” (Emphasis added.)

12 As pertinent here, section 5410 has been interpreted to mean that where an injured employee has
13 timely instituted proceedings for vocational rehabilitation benefits within five years from the date
14 of injury, the WCAB’s jurisdiction to determine the employee’s vocational rehabilitation request
15 extends beyond the five years. (*Martino v. Workers’ Comp. Appeals Bd.* (2002) 103 Cal.App.4th
16 485, 489-491 [67 Cal.Comp.Cases 1273, 1276-1277] (*Martino*)). Of course, *Martino* did not
17 consider the repeal of section 139.5, effective January 1, 2009. Therefore, *Martino* does *not*
18 establish that the WCAB has continuing jurisdiction to determine a timely filed section 5410
19 petition for vocational rehabilitation benefits, even after January 1, 2009. (*Chevron U.S.A., Inc. v.*
20 *Workers’ Comp. Appeals Bd. (Steele)* (1999) 19 Cal.4th 1182, 1195 [64 Cal.Comp.Cases 1, 28]
21 (“It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts
22 and issues before the court. An opinion is not authority for propositions not considered.”).)

23 For the reasons that follow, we conclude that as of the January 1, 2009 effective date of the
24 repeal of section 139.5, the WCAB has no jurisdiction to determine claims for non-vested
25 vocational rehabilitation benefits even if they were timely instituted under section 5410. That is,
26 the fact that injured employees could “institute proceedings” for vocational rehabilitation before
27

1 January 1, 2009 does not mean that they could continue to *maintain* those proceedings (absent
2 vested rights) as of the January 1, 2009 effective date of the repeal of section 139.5.

3 First, section 5410 is solely a *statute of limitations* for instituting proceedings to claim
4 vocational rehabilitation under former section 139.5. As observed by our Supreme Court, section
5 5410 is within Chapter 2 of Part 4 of Division 4 of the Labor Code, which Chapter is entitled
6 “Limitations of Proceedings,” and section 5410 relates to “the *time limitations* for initiating
7 proceedings” (emphasis added). (*Nickelsberg v. Workers’ Comp. Appeals Bd.* (1991) 54 Cal.3d
8 288, 298 & fn. 7 [56 Cal.Comp.Cases 476, 483 & fn. 7].)⁹ Because section 5410 is but a statute of
9 limitations, it does not create a separate and self-contained right to vocational rehabilitation
10 benefits and services, independent of repealed section 139.5. Moreover, as discussed above, the
11 Legislature may amend a statute so as to shorten the time within which a claim must be filed or
12 brought to trial, provided that “there must be a reasonable time permitted for the party affected to
13 avail himself of his remedy before the statute takes effect.” (*Rosefield Packing, supra*, 4 Cal.2d at
14 pp. 122-123; see also *Green, supra*, 127 Cal.App.4th at p. 1441 [70 Cal.Comp.Cases at p. 305];
15 *Abney, supra*, 69 Cal.Comp.Cases at pp. 1561-1562.) Here, when SB 899 declared on April 19,
16 2004 that section 139.5 would be repealed effective January 1, 2009, this gave employees who had
17 sustained injuries before January 1, 2004 (i.e., the only employees eligible for vocational
18 rehabilitation) a reasonable time to bring their vocational rehabilitation claims to trial and to then
19 obtain a final order to vest their rights.

20 Second, it would be inconsistent with the repeal of section 139.5 to conclude that an
21 injured employee who had timely “institute[d] proceedings” for vocational rehabilitation under
22 section 5410 could continue to maintain those proceedings even after January 1, 2009. That is,
23 when SB 899 was enacted, the Legislature expressly declared that “[t]his act is an urgency statute”
24 and that “it is necessary for this act to take effect immediately” to “provide relief to the state from

25 ⁹ The language of former section 5404.5 – which was enacted at the same time that section 5410 was amended
26 to include its “vocational rehabilitation” references – also supports the conclusion that section 5410 is a statute of
27 limitations. This is because former section 5404.5 stated, “*Except as otherwise provided in Section 5410, the period
within which an employee may request vocational rehabilitation benefits provided by Section 139.5 is one year from
the date of the last finding of permanent disability by the appeals board, or one year from the date the appeals board
approved a compromise and release of other issues*” (emphasis added).

1 the effects of the current workers' compensation crisis." (Stats. 2004, ch. 34, § 49.) As the
2 appellate courts have repeatedly made clear, this statement means that SB 899 was intended to
3 reduce the costs of the workers' compensation system. (See, e.g., *Brodie v. Workers' Comp.*
4 *Appeals Bd.* (2007) 40 Cal.4th 1313, 1329 [72 Cal.Comp.Cases 565, 578] (SB 899 was adopted as
5 "an urgency measure designed to alleviate a perceived crisis in skyrocketing workers'
6 compensation costs"); *Facundo-Guerrero v. Workers' Comp. Appeals Bd.* (2008) 163 Cal.App.4th
7 640, 655 [73 Cal.Comp.Cases 785, 796] (SB 899 represented "a major reform of the state's
8 workers' compensation system, a system perceived to be in dire financial straits at the time");
9 *Costco Wholesale Corp. v. Workers' Comp. Appeals Bd. (Chavez)* (2007) 151 Cal.App.4th 148,
10 155 [72 Cal.Comp.Cases 582, 587 ("the workers' compensation ... reforms [of SB 899] were
11 enacted as urgency legislation to drastically reduce the cost of workers' compensation insurance").
12 There is little question that vocational rehabilitation was one area of workers' compensation where
13 costs were a significant concern.

14 Thus, in sum, sections 5502(b)(3) and 5803 give the WCAB continuing jurisdiction to
15 conduct hearings and make determinations regarding the enforcement or termination of vested
16 vocational rehabilitation rights. But, even if an injured employee timely "institute[d] proceedings"
17 under section 5410, the employee lost the right to maintain those proceedings if no final order had
18 issued before the January 1, 2009 effective date of the repeal of section 139.5.

19 **VII. Jurisdiction Over Vocational Rehabilitation Issues Cannot Be Conferred By Waiver,**
20 **Estoppel, Stipulation, or Consent**

21 Applicant contends that he should not be denied retroactive VRMA at the TD rate because
22 defendant failed to pay those benefits without any reasonable basis before January 1, 2009 and
23 because the September 8, 2008 hearing before the WCJ on defendant's vocational rehabilitation
24 appeal was delayed due to defendant's counsel's request for a continuance. From these
25 contentions, we infer applicant is claiming that defendant is estopped from asserting the repeal of
26 section 139.5.
27

1 However, it is fundamental that subject matter jurisdiction cannot be conferred by waiver,
2 estoppel, stipulation or consent. (*Sullivan v. Delta Air Lines* (1997) 15 Cal.4th 288, 307, fn. 9;
3 *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 835.) Accordingly, even if we were to
4 assume that the elements necessary to establish estoppel are present, the WCJ still would not have
5 had jurisdiction to award VRMA to applicant.

6 Moreover, the trial in this matter took place on November 24, 2008, which was before the
7 January 1, 2009 effective date of the repeal of section 139.5. Therefore, it would have been
8 premature for defendant to raise the jurisdictional issue at the time of trial. Nevertheless, even if
9 we were to assume that defendant should have raised the jurisdictional issue, its failure to do so
10 could not vest the WCAB with jurisdiction to award VRMA after January 1, 2009. As just stated,
11 subject matter jurisdiction cannot be conferred by waiver. Further, the question of subject matter
12 jurisdiction can be raised at any time, including for the first time on appeal. (*People v. Williams*
13 (1999) 21 Cal. 4th 335, 340; *Cowan v. Superior Court* (1996) 14 Cal.4th 367, 372.) Here,
14 defendant properly and timely raised the issue of the WCAB's subject matter jurisdiction in its
15 petition for reconsideration.

16 **VIII. Conclusion**

17 Applicant's inchoate statutory right to recover retroactive VRMA at his TD rate had not
18 vested through the entry of a final order or award as of the January 1, 2009 effective date of the
19 repeal of section 139.5. Therefore, the repeal operated to extinguish his inchoate right.
20 Accordingly, we reverse the WCJ's January 13, 2009 decision awarding applicant retroactive
21 VRMA at his TD rate from June 13, 2003 through March 7, 2005 and we vacate the July 9, 2008
22 determination of the Rehabilitation Unit.

23 In light of our disposition, we need not reach defendant's alternative contention that, even
24 if the WCJ did have jurisdiction, his award of retroactive VRMA at the TD rate was erroneous.

25 For the foregoing reasons,

26 **IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation
27 Appeals Board (En Banc), that the Findings and Award issued by the workers' compensation

1 administrative law judge on January 13, 2009 is **RESCINDED** and that the following Findings
2 and Orders is **SUBSTITUTED** therefor:

3 **FINDINGS OF FACT**

4 1. Applicant, Lawrence Weiner, while employed as a checker by
5 Ralphs Grocery Company at Los Angeles, California, during the
6 period of 1967 through September 30, 2002, sustained injury arising
out of and occurring in the course of the employment to his right
hip, cervical spine and lumbar spine.

7 2. Because applicant's inchoate right to vocational rehabilitation
8 benefits and services had not vested by an order that had become
9 final before the January 1, 2009 effective date of the repeal of Labor
10 Code section 139.5, he is not entitled to retroactive vocational
rehabilitation maintenance allowance benefits at his stipulated
temporary disability indemnity rate for the period of June 13, 2003
to March 7, 2005.

11 **ORDERS**

12 **IT IS ORDERED** that defendant's vocational rehabilitation appeal,
13 filed July 29, 2008, is **GRANTED**.

14 **IT IS FURTHER ORDERED** that the Determination of the
Rehabilitation Unit, filed July 9, 2008, is **VACATED**.

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

1 **IT IS FURTHER ORDERED** that applicant is not entitled to any
2 further vocational rehabilitation benefits and services on account of
3 his industrial injury in this matter.

4 ***WORKERS' COMPENSATION APPEALS BOARD***

5 */s/ Joseph M. Miller*

JOSEPH M. MILLER, Chairman

6 */s/ James C. Cuneo*

JAMES C. CUNEO, Commissioner

7 */s/ Frank M. Brass*

FRANK M. BRASS, Commissioner

8 */s/ Ronnie G. Caplane*

RONNIE G. CAPLANE, Commissioner

9 */s/ Alfonso J. Moresi*

ALFONSO J. MORESI, Commissioner

10 */s/ Deidra E. Lowe*

DEIDRA E. LOWE, Commissioner

11 */s/ Gregory G. Aghazarian*

GREGORY G. AGHAZARIAN, Commissioner

12
13
14
15
16
17
18
19
20 ***DATED AND FILED AT SAN FRANCISCO, CALIFORNIA***

21 ***6/10/2009***

22
23 ***SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT
THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:***

24 ***Lawrence Weiner***

***Michael Sullivan & Associates, 6151 West Century Boulevard, Suite 700, Los Angeles, CA
90045***

25
26 ***Gordon, Edelstein, Krepack, Grant, Felton & Goldstein, 3580 Wilshire Boulevard, Suite 1800,
Los Angeles, CA 90010***

27 ***NPS/beat***