STATE OF VERMONT

DEPARTMENT OF LABOR & INDUSTRY

Julie A. Pease, Claimant, v. Ames Department Stores, Inc. Defendant	Opinion No.: 52S-04 WC By: J. Stephen Monahan Hearing Officer For: Laura Collins Commissioner State File No.: T-06827

Defendant's Motion For Partial Stay was mailed December 17 and received December 21, 2004.
Claimant's Response received December 28, 2004.

DECISION ON MOTION FOR PARTIAL STAY

APPEARANCES

William C. Dagger, Esq., Dagger Law Offices, for the defendant
Joseph O'Hara, Esq., Law Offices of Bloomberg & O'Hara, LLP, for the claimant

ISSUES:

1. Was defendant's motion for a partial stay timely filed?

2. Is a partial stay appropriate in this case?

DISCUSSION

1. After a contested workers' compensation hearing, the Commissioner awarded claimant some benefits for a work related injury. The Commissioner also awarded attorney fees, because the claimant had partially prevailed on her claim. See paragraph # 23, *Pease v. Ames Dept. Store Inc.*, Opinion No, 52-

04WC. In making this award, the Commissioner specifically noted that the case was difficult, and claimant's legal representation was necessary because of the initial allegations of fraud brought by the insurer. Because the claimant had only partially prevailed, the commissioner awarded fees for slightly less than one-half the submitted attorney hours. The Commissioner considered that defendant had made a settlement offer on the eve of trial, but declined to further reduce the award based on this offer. Claimant appealed the decision to Superior court, seeking a de novo jury trial.

2. Defendant now moves to stay the award of attorney fees, arguing that because of the settlement offer, claimant can not be considered to have prevailed. Defendant has not filed an appeal or cross-appeal, arguing that such an appeal could only be taken to the Supreme Court, and that Claimant's appeal to Superior Court would necessarily takes precedence over such an appeal. Claimant has opposed the motion for stay, arguing that it has not been timely filed.

CONCLUSIONS OF LAW

3. The first issue to be resolved is whether defendant's motion was timely filed. The statute directs that "any request for a stay shall be filed with the commissioner at the time of filing a notice of appeal." 21 V.S.A. §675(b). Claimant argues that unless defendant actually files an appeal or cross-appeal, it can not request a stay. This is an overly rigid interpretation of the statute. The department has generally read the statutory provision to mean that any request for a stay must be filed within the thirty day appeal period. In this case, the motion

for stay was mailed prior to the expiration of the appeal period, and the department will accept it as timely.

4. The second issue is whether it is appropriate to grant a partial stay. In a worker's compensation case, "[a]ny award or order of the Commissioner shall be of full effect from issuance unless stayed by the Commissioner, any appeal notwithstanding." 21 V.S.A. § 675. To prevail on a request in the defendant must demonstrate:

(1) A strong likelihood of success on the merits;

(2) Irreparable injury if the stay is not granted;

(3) A stay will not substantially harm the other party; and

(4) The stay will serve the best interests of the public.

Gilbert v. Gilbert, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation*, Opinion No. 62S-96WC (1996).

5. In this case defendant has failed to demonstrate that any of the criteria have been satisfied. It asserts that it is likely to succeed on the merits, but the evident basis for its assertion – its eleventh hour settlement offer – was squarely considered and rejected in the original decision. The Commissioner has considerable discretion in awarding attorney fees to prevailing claimants in

workers compensation cases. *See, Hodgeman v. Jard*, 157 VT 461, 599 A.2d 1371 (1991). In this case the Commissioner took into consideration that the claimant had only partially prevailed and accepted slightly less than one-half the attorney hours as reasonable. The Commissioner than applied the $90.00 per hour rate authorized by the workers Compensation rule. (A rate somewhat less than the prevailing hourly rate in that portion of the state.) Absent some demonstration, that the Commissioner abused discretion in making such an award, it most likely would withstand an appeal.

6. It asserts irreparable harm, but offers no explanation of what that harm might be. To the extent its claim is based on the belief that it will not be able to recoup the money, once paid, its claim is rejected. As explained in the initial decision, defendant had ample opportunity to offer a reasonable settlement at several early stages of the proceeding, but instead waited until the eve of trial, after considerable attorney time had been expended.

7. Defendant also asserts that the grant of a stay will not substantially harm the claimant or the public, but offers no explanation for this assertion. In this case the claimant clearly needed legal representation. Since she had no income, it is unlikely that she could have afforded to pay an attorney out of her own pocket. Further if law firms representing claimant's can not be paid in a timely manner, when they do prevail, they are less likely to provide representation in the future.

8. The burden of justifying a stay is on the party requesting it. To meet that burden, the party must offer more than bald assertions. Defendant has failed to meet that burden.

ORDER

9. Therefore, Defendant's Motion for Partial Stay is DENIED.

10. Defendant Travelers Insurance Company is ORDERED to promptly pay Claimant's attorney fees in the amount of 90 hours x $90.00/hour = $8,100.00

Dated at Montpelier, Vermont this 28th day of December 2004

Laura Collins
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672

STATE OF VERMONT

DEPARTMENT OF LABOR & INDUSTRY

Julie A. Pease, Claimant, v. Ames Department Stores, Inc. Defendant	Opinion No.: 52-04 WC By: J. Stephen Monahan Hearing Officer For: Michael Bertrand Commissioner State File No.: T-6827

Hearing held in Montpelier on March 24, 2004.
Record Closed on April 8,2004.

APPEARANCES

Joseph O'Hara, Esq., Law Offices of Bloomberg & O'Hara, LLP, for the claimant

William C. Dagger, Esq., Dagger Law Offices, for the defendant

ISSUES:

1. Did claimant suffer an injury by accident arising out of and in the course of her employment with Ames Department Stores on October 15, 2002?

2. If claimant was injured at work on October 15, 2002, what is the nature and extent of the injury?

3. If claimant was injured at work on October 15, 2002, to what workers' compensation benefits is she entitled?

4. In a workers' compensation claim is a claimant entitled to economic damages believed attributable to the insurer's claims handling in addition to the benefits specified by the statute?

FINDINGS OF FACT

1. Julie Pease worked at the Ames Department Store [hereinafter Ames] located in St. Albans Vermont on October 15 2002. She was employed as a store clerk, earning $8.25 / hour. Ms. Pease had worked for Ames since 1999

2. Ms Pease claims that on October 15, 2002 she injured her right arm and shoulder while pulling a rack of clothes.

3. Ames closed and ceased all retail operations on October 19 2002. All store employees, including Ms. Pease, knew that the store was closing well in advance of October 19, 2002.

4. As part of the closing, Ames was liquidating all of its merchandise. Merchandise was moved to the front of the store as stock was depleted.

5. At about 1:00 p.m. on October 15, 2002, claimant and a co-worker, Mary Robarge, were pulling a circular rack load with clothing to the front of the store. At the hearing both witnesses testified that the circular rack did not have wheels.

6. Claimant states that while pulling the rack, she heard a "snap" in her arm, and felt pain. Ms. Robarge testified that she also heard the "snap" and that claimant began crying.

7. Nonetheless, claimant continued to work until 1:30 p.m. when her shift ended. She did not report the event to any Ames supervisor at that time. She left work, picked up her children from daycare, and drove home to Alburg.

8. At approximately 5:30, claimant had her husband drive her to the Northwestern Medical Center Emergency Room. Medical staff evidently did not see her until 7:30p.m. She complained of pain and weakness in her right shoulder, elbow and wrist. According to the triage and nursing history taken at the emergency room, claimant complained of pain similar to that experienced 17 months ago when her child was born. Her right extremity pain was attributed to toxemia during pregnancy at that time. The Clinician note contains a similar report.

9. After being seen at the hospital on the evening of the 15th, claimant returned to Ames to report a work injury to the supervisor present at that time, Judy Morey. Ms. Morey was unwilling to file a first report of injury because the Work-related Discharge form claimant had brought from the hospital did not indicate the injury was work related. Ms. Morey told claimant she would have to come back in the morning and speak with the store trainer Lorraine Moye.

10. Claimant returned to the hospital and a corrected work discharge form indicating that the injury was work-related was provided. Evidently the initial form, a copy, was somewhat offset from the original, so that entries on the original did not appear on the appropriate lines on the copy. The original hospital form did indicate that the injury was work-related.

11. The following day claimant reported the injury to her immediate supervisor, Donna Otis, and provided her with the corrected hospital form. Ms. Moye filed a First Report of Injury on October 17th.

12. Claimant saw several physicians following the incident. She saw Dr. David Hobbs, her primary care physician, five times, (Oct. 18, 19, 2002; Dec. 27, 2002; Mar. 14, 2003; and Jan.16, 2004). Four of the visits involved her right upper extremity and one was for anxiety. Her initial complaints were of right arm pain, but over time the pain complaints mentioned her right wrist and hand. At the initial visit, Dr. Hobbs noted mild swelling in the right forearm.

13. Based on a referral from Dr. Hobbes, Claimant saw Dr. Archambault, an orthopedic specialist on Oct. 29, 2002, Jan. 20, 2003 and Feb. 11, 2003. Dr. Archambault initially diagnosed flexor tendonitis of the right forearm and right shoulder bursitis. In his opinion, those conditions had resolved with conservative treatment by the second visit. He then began treating for a second condition, carpal tunnel syndrome. This condition was a new and separate condition from the initial one.

14. Claimant also saw Dr. Johansson on Dec. 9, 2002. He diagnosed her condition as right forearm tendonitis (similar to Dr. Archambault). He did not find evidence of carpal tunnel at that time.

15. Based on the credible testimony of Dr. Archambault and Dr. Johansson, I find that the Claimant injured her right arm at work on October 15, 2002. The injury was flexor tendonitis of the right forearm.

16. I also find that this injury had medically resolved on or before Jan. 20, 2003, based on the credible testimony of Dr. Archambault.

17. Claimant has not established that her complaints of carpal tunnel syndrome or ulnar nerve damage are related to her work injury. The credible medical evidence suggests that these conditions either existed prior to her work injury (perhaps related to toxemia and gestational diabetes when her child was born) or were caused an aggravated by activities outside of work. Claimant has not demonstrated repetitive motions at work that might have caused carpal tunnel, and in any event, when work ceased one would have expected these symptoms to improve, not worsen. (Claimant has not even established that the symptoms of carpal tunnel were present on the date of the work injury. The medical evidence certainly suggests that they arose sometime after.)

18. Claimant argues that the record does not establish that the employer/insurer conducted a prompt, proper investigation of this claim. Although its investigation of the claim took longer than one might reasonably expect, I do not find, under the facts of this case that the insurer acted improperly. First, claims filed in close proximity to the known closing of a business are certainly worthy of close scrutiny. Second, employment of an investigator where fraud is suspected is appropriate. The fact that the investigator hired mistakenly thought claimant's sister was the claimant is not held against the insurer, since it withdrew that basis of opposition when the error was pointed out. Finally, although claimant had requested an expedited hearing, neither party was prepared to proceed when hearing dates were offered during the summer of 2003.

CONCLUSIONS OF LAW

19. In workers' compensation cases the Claimant has the burden of establishing all facts essential to the rights asserted. Claimant must establish by sufficient credible evidence the character and extent of the injury and disability as well as the causal connection between the injury and employment. *See, Goodwin v. Fairbanks, Morse &Co. et al.*, 123 Vt. 161 (1963); *Egbert v. The Book Press*, 144 Vt. 367 (1984). The evidence must establish in the mind of the trier of fact that the incidents complained of more probably than not caused the injury; mere possibility, suspicion or surmise is not enough. *See, Burton v. Holden & Martin Lumber Company*, 112 Vt. 17 (1941).

20. In this case, Claimant has only been able to establish that she more likely than not injured her right forearm on October 15th, 2002. She has failed to carry her burden of proof with regard to her additional claims of injury.

21. The forearm injury disabled claimant from work, at most, until January 20, 2003, when Dr. Archambault determined that the tendonitis problem had resolved. Therefore claimant would be entitled to temporary total disability benefits only from October 16, 2002 until January 20, 2003. Claimant would also be entitled to medical benefits for the diagnosis and treatment of her forearm pain during that period. A claimant is entitled to temporary total disability until the claimant has returned to work or the recovery process is ended. *See Orvis v. Hutchins*, 123 Vt. 18 (1962). If claimant was unable to return to work after January 20, 2003, it was because of medical conditions unrelated to her work injury.

22. Claimant has not offered any evidence of permanent impairment related to her work injury.

23. The carrier's allegations of fraud necessitated claimant's hiring an attorney. This was a difficult case and claimant's attorney expended 182 hours (see itemized attorney hours). However claimant has only partially prevailed on her claim, so some adjustment is necessary. I find that 90 hours is a reasonable number given the difficulty of the case and the limited recovery. Normally I also would consider whether a reasonable settlement offer had been made, but in this case the insurer made no offer until the eve of trial, after claimant's attorney had reasonably invested time and effort in the representation of his client, therefore no further downward adjustment is warranted based on the settlement offer.

24. The Claimant also claims damages in the form of economic losses, including repossession of personal property and foreclosure. She attributes these losses to the carrier's handling of the claim. Such damages are not available under Vermont's workers compensation act. The Act was intended to supplant common-law tort suits against employers, not supplement them. *See, Gerrish v. Savard*, 169 Vt. 468 (1999); *Kittel v. Vermont Weatherboard*, 138 Vt. 439 (1980).

25. Although the act is to be interpreted liberally, it nonetheless must be interpreted within the confines of the statute itself. The Act clearly delineates specific the benefits to which an injured work is entitled. The damages sought by claimant are not included in those benefits. *See e.g., Quinn v. Pate*, 124 Vt. 121 (1964); *Morrisseau v. Legac*, 123 Vt. 70 (1962). (Act provides employees with a remedy independent of proof of fault and employers with a limited and determinative liability).

26. Separate and apart from this workers compensation action, the Claimant is free to pursue claims for economic loss against the insurer in a bad faith claims handling action if she believes that the insurer adjusted her claim in bad faith. (Based on the evidence before the department, I believe such a claim unlikely.)

ORDER

Therefore, based on the foregoing findings and conclusions, the Travelers Insurance Company is ORDERED:

1. To pay claimant temporary total disability benefits for the period October 16, 2002, through January 20, 2003, plus interest at the legal rate for that period.

2. To pay all of Claimant's medical bills related to the diagnoses and treatment of her right forearm injury during this period.

3. To pay Claimant's attorney fees in the amount of 90 hours x $90.00/hour = $8,100.00

Claimant's claim for additional temporary total benefits and medical benefits is DENIED.

Claimant's claim for economic damages is DENIED.

Dated at Montpelier, Vermont this 19th day of November 2004

Michael Bertrand
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§ 670, 672