

Loren Ingalls v. Hearthstone Quality Home Heating Products Inc. (December 20, 2011)

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Loren Ingalls

Opinion No. 42-11WC

v.

By: Phyllis G. Phillips, Esq.  
Hearing Officer

Hearthstone Quality Home  
Heating Products, Inc.

For: Anne M. Noonan  
Commissioner

State File No. X-51064

**RULING ON DEFENDANT'S MOTION TO STAY INTERIM ORDER**

*Procedural Background*

Claimant suffered a work-related lower back injury on July 25, 2005. Defendant accepted the injury as compensable and paid workers' compensation benefits accordingly. Specifically, it paid temporary total disability benefits on account of a "lower back strain"<sup>1</sup> from July 25, 2005 to March 28, 2008. Claimant having reached an end medical result by that point, thereafter Defendant paid permanent partial disability benefits for a 12% whole person permanent impairment referable to a "herniated disk/low back."<sup>2</sup> The medical opinion upon which this permanency agreement was based specifically apportioned the ratable impairment to Claimant's lower back, totaling 22% whole person, between the 12% attributable to the compensable injury and 10% attributable to a pre-existing, non-work-related injury that Claimant had sustained in 1997.

On February 2, 2010 Claimant filed a Notice and Application for Hearing (Form 6) in which he claimed entitlement to permanent total disability benefits on account of his July 25, 2005 work injury. Subsequently, the parties entered into a Form 14 Settlement Agreement by the terms of which Defendant agreed to pay \$250,000.00 in full and final settlement of all claims (excluding those for medical benefits) arising out of that injury. The Department approved the settlement agreement on March 28, 2011.

On May 13, 2011 Claimant's treating physician corresponded with Defendant's adjuster, requesting preauthorization for permanent implantation of a spinal cord stimulator. In response, Defendant exercised its right, under 21 V.S.A. §640b(a)(3), to obtain a medical records review and opinion from its own expert, Dr. Backus, as to whether the proposed treatment was reasonable, necessary and causally related to Claimant's compensable injury.

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<sup>1</sup> Agreement for Temporary Total Disability Compensation (Form 21), approved November 1, 2005.

<sup>2</sup> Agreement for Permanent Partial Disability Compensation (Form 22), approved May 12, 2008.

From his review, Dr. Backus concluded that Claimant's current low back condition was not causally related to his July 25, 2005 work injury in any way:

The work [Claimant] did on 7/25/2005 is not judged to have led to an objective change or increase in the underlying well established intermittent and progressive chronic low back condition. Instead the pain at work that day was simply increased symptoms that would be expected if he tried to work during the acute exacerbation that was caused by cutting firewood over the [prior] weekend.

Because he found Claimant's current condition to be unrelated to his compensable injury, Dr. Backus also found the proposed permanent spinal cord stimulator implantation to be unrelated as well:

[This treatment] is not in this examiner's opinion necessary as related to [Claimant's] activities at work on 7/25/2005 as those activities constituted only a temporary symptom flare and not an aggravation . . . . The permanent placement of this spinal cord stimulator or any further treatment for his low back condition is not related to the alleged injury on 7/25/2005.

With Dr. Backus' opinion as support, on September 23, 2011 Defendant denied Claimant's request for preauthorization on the grounds that it was not causally related to the compensable injury.<sup>3</sup> Claimant appealed the denial, and submitted recent medical records in support. These records addressed the question whether the proposed procedure was medically reasonable and necessary, but did not discuss how it was causally related to the compensable injury.

Following an informal conference, on October 19, 2011 the Department's Workers' Compensation Specialist issued an interim order in which she required Defendant to preauthorize the proposed procedure. In doing so, she rejected Dr. Backus' opinion that the procedure was not causally related:

As this is an accepted claim, Dr. Backus should have started with the premise that there was a work injury and then offered his opinion addressing whether the requested permanent implantation of the spinal cord stimulator is reasonable, necessary and related treatment for the accepted work injury. Dr. Backus instead attacked causation, not the issue in dispute.

Defendant's Motion to Stay followed.

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<sup>3</sup> Defendant concedes that from a purely medical standpoint the treatment constitutes reasonable and necessary care.

## Discussion

To prevail on a request for a stay, the moving party must demonstrate *all* of the following:

1. That it is likely to succeed on the merits;
2. That it will suffer irreparable injury if a stay is not granted;
3. That issuing a stay will not substantially harm the other party; and
4. That the best interests of the public will be served by issuing a stay.

*In re Insurance Services Office, Inc.*, 148 Vt. 634, 635 (1987). As contemplated by the legislature, the granting of a stay must be the exception, not the rule. *Bodwell v. Webster Corp.*, Opinion No. 62S-96WC (December 10, 1996). Applying this stringent standard, I find that Defendant has failed to establish its right to a stay.

### (1) Likelihood of Success on the Merits.

Defendant argues that the medical evidence it intends to offer at formal hearing, including not only Dr. Backus' testimony but also that of Dr. Rogers, Claimant's treating physician, likely will establish that there no longer is a causal connection between the injury it accepted as compensable and Claimant's current symptoms. To the contrary, Defendant asserts, the evidence likely will establish that Claimant's current need for treatment is being driven by his chronic, underlying lower back condition, and not by the "temporary exacerbation" caused by his work activities on July 25, 2005.

Were I to agree that the injury Defendant accepted as compensable was nothing more than the "temporary symptom flare" that Dr. Backus described, I might find Defendant's predicted success on the merits to be more plausible. However, this characterization is patently inconsistent with the "herniated disc/low back" injury for which Defendant paid benefits in accordance with the parties' approved permanency agreement. It is even more at odds with Defendant's decision to pay \$250,000.00 to settle Claimant's subsequent claim for permanent total disability.

No matter how Defendant might try to construe it, the clear import of Dr. Backus' opinion is that whatever injury Claimant suffered at work on July 25, 2005 was both temporary and of little, if any, consequence. The Department having approved three prior compensation agreements indicating otherwise, the time has long since passed for Defendant to question the extent of Claimant's injury in this manner. *Coronis v. Granger Northern, Inc.*, Opinion No. 16-10WC (April 27, 2010). For this reason, I conclude that Defendant is unlikely to succeed on the merits at formal hearing.

(2) Irreparable Injury to Defendant if Stay is not Granted.

Defendant asserts irreparable financial injury if it is required to pay for Claimant's spinal cord stimulator pending a final determination as to whether the procedure is reasonable, necessary and causally related. When considering requests for stay pending the appeal of a formal hearing determination, the commissioner consistently has refused to accept this as an adequate basis for establishing irreparable harm. *See, e.g., Badger v. City of Burlington*, Opinion No. 05S-11WC (June 2, 2011) and cases cited therein.

I acknowledge that the current request for stay stands on somewhat different footing. No formal hearing has yet been held, and therefore there has been no opportunity either to develop the evidence fully or to weigh its credibility first-hand. Under these circumstances, the financial harm that will result from requiring an insurer to incur costs that likely will be unrecoverable should it prevail at formal hearing merits closer scrutiny.

The extent of the financial harm Defendant likely will suffer depends on the amount of money at stake, however. Without information as to the anticipated cost of the proposed procedure, I cannot fairly weigh this factor either for or against Defendant.

(3) Lack of Substantial Harm to Claimant if Stay is Granted.

Defendant's assertion that Claimant will not be substantially harmed if a stay is granted is belied by the medical records submitted to support his preauthorization request. These documents document severe chronic pain that has significantly affected his ability to function. Defendant's attempt to dismiss the consequences of further delay is unconvincing.

(4) Best Interests of Public.

Defendant's final argument begins with the premise that the Workers' Compensation Specialist was precluded under §640b from issuing an interim order so long as "a preponderance of the credible medical evidence specifically addressing the proposed treatment" supported Defendant's denial. 21 V.S.A. §640b(a)(2)(B). By going beyond that evidence and instead reviewing Claimant's entire medical record, Defendant asserts, the Specialist misinterpreted and misapplied the statute. The best interests of the public will be served, it argues, and the Specialist's error corrected, by staying the interim order.

I agree that Defendant has correctly identified the appropriate standard of review when a preauthorization request is denied. It is reasonable to assume that a certain immediacy attaches to many, if not most, preauthorization requests. With that in mind, the statute envisions that the parties to a preauthorization dispute will endeavor to focus both their analysis and their evidence on the specific issue at hand rather than merely referring to a voluminous medical record in support of their respective positions.

I disagree, however, that the statute requires the Department to review the evidence submitted in a vacuum. Context matters. Medical evidence that appears credible standing alone easily may become unpersuasive when viewed in light of a claim's medical and/or procedural history.

The current claim presents a striking example. Considered on its own, Dr. Backus' characterization of Claimant's July 25, 2005 work injury as a "temporary symptom flare" seems a credible enough description of what might have occurred, particularly given Claimant's prior medical history. It is, however, completely inconsistent with the injury Defendant accepted – a "herniated disc" for which it paid both temporary total and permanent partial disability benefits, and on account of which it later paid \$250,000.00 to settle Claimant's claim for permanent total disability benefits. Viewed in the appropriate procedural and medical context, Dr. Backus' characterization loses its persuasive character.

Whether at the informal dispute resolution level or at formal hearing, the best interests of the public are served when the commissioner, and her designees, are granted sufficient discretion to review the appropriate evidence so that they can arrive at the appropriate result. I see nothing in the plain language of the preauthorization statute that precluded the Specialist from considering the context of the claim as a whole at the same time that she reviewed the specific evidence Defendant had submitted. I cannot agree, therefore, that the best interests of the public will be served by staying her interim order.

**ORDER:**

Defendant having failed to meet the stringent standard required in order to justify a stay, its Motion to Stay Interim Order is hereby **DENIED**.

**DATED** at Montpelier, Vermont this 20<sup>th</sup> day of December 2011.

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Anne M. Noonan  
Commissioner