

R. C. v. Consolidated Memorials

(February 21, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

R. C.

Opinion No. 54S-06WC

v.

By: George K. Belcher
Hearing Officer

Consolidated Memorials, Inc.

For: Patricia Moutlon Powden
Commissioner

State File No. W-03620

APPEARANCES:

Heidi S. Groff, Esq., for the Claimant

Marion T. Ferguson, Esq., for the Defendant

**RULING ON DEFENDANT'S MOTION FOR STAY AND THE CLAIMANT'S
MOTION TO AMEND THE DECISION**

Defendant moves the Department to grant a stay pursuant to 21 V. S. A. Section 675 concerning the Department's decision dated January 2, 2007. The Claimant opposes the stay and asks that the decision be amended to include costs.

The basic decision in this case determined that the Claimant was entitled to Medical Benefits, TTD benefits, and PTD benefits for at least 330 weeks as a lump sum; the decision also awarded interest and attorneys fees. The Defendant seeks a stay arguing that the four criteria set forth in *In re Insurance Services Offices, Inc.*, 148 Vt. 634, 635 (1987) are met. Those criteria are (1) that the Defendant has a strong likelihood of success on appeal; (2) that there will be irreparable injury to the Defendant if the stay is not granted; (3) that a stay will not substantially harm the other party; and (4) that the stay will serve the best interests of the public. *Id.* The case was decided in favor of the Claimant, in large measure, because the expert opinions presented in favor of the Claimant were more credible than the opposing evidence. The Defendant argues, "Given the overall uncertainty of the record, the Claimant's (sic) likelihood of prevailing on appeal appears strong." (See Defendant's memorandum in support of stay.)

The Commissioner has ruled that the granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation*, Opinion No. 62S-96 WC (Dec. 10, 1996). A simple factual dispute is not a sufficient basis upon which to grant a stay. *Id.* Likewise, the defendant argues that it would suffer irreparable injury if it is forced to pay disability and medical benefits which might not be due if the appeal is successful. In the past the Department has not equated the payment by an insurance carrier on appeal with irreparable harm. *Durand v. Okemo Mountain*, Opinion No. 41S-98WC (September 1, 1998); *Fredericksen v. Georgia Pacific Corp.*, Opinion No. 62S-96WC (1996). Since the Defendant must meet all the criteria to justify a stay it is clear that, as to the benefits which are past due under the decision, the criteria to grant a stay are not met.

The decision in this case approved an award of lump sum benefits for payments which were both past due and which would become due in the future. In order to justify a lump sum payment under 21 V.S.A. Sec. 652(b), the Commissioner may order a lump sum if it is found to be in the best interests of the employee or the employee's dependants. Under Workers' Compensation Rule 19.5010, however, a lump sum payment shall not be approved if the "award is based upon a hearing decision for which an appeal has been filed and the employer or the insurer objects to the payment of the lump sum." In this case the Defendant has filed a notice of appeal with the Department and with the Washington Superior Court. By the rules of the Department, the lump sum award for benefits, which are not yet due, should be stayed because the Defendant has met the four criteria concerning benefits which are not yet due. The most important of the four criteria is whether the Claimant would suffer irreparable harm if the stay were granted *Kirby v. Vermont Telephone Co.*, Opinion No. 06S-04 WC (January 31, 2004). There has been no showing of irreparable harm to the Claimant if the stay were granted as to benefits which are not yet due. Imposing the stay as to benefits which are not yet due, is consistent with the application of Rule 19.5010. The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 VSA Sec. 675(b); *Austin v. Vermont Dowell and Square Co.*, Opinion No. 05S-97 WC (May 29, 1997).

The decision of the Commissioner found that the Claimant had proven litigation costs totaling \$5,762.54. See Finding No. 29. When the Claimant prevails, necessary costs of the proceeding are to be assessed against the Defendant. 21 VSA Sec. 678. *Morrisseau v. Legac*, 123 Vt. 70 (1962). The omission of these costs from the Commissioner's order was an oversight.

ORDER:

- (1) THEREFORE, based upon the above, the Order of the Commissioner in this matter dated January 2007 is amended to add a paragraph 6 to the existing order, to include costs in the amount of \$5,762.54.
- (2) The Motion for Stay is DENIED as to all benefits which have become due or which will come due as time passes during the appeal, and all interest and attorneys fees which were awarded. The Motion for Stay is GRANTED as to all disability benefits which are not yet due. It is intended that the Defendant shall continue to pay such benefits as they become due pending the appeal.

Dated at Montpelier, Vermont this 21st day of February 2007.

Patricia Moulton Powden
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. Sec. 670, 672.