STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Betty Owen	)	State File No. J-08408
	)	
v.	)	By: Margaret A. Mangan
	)	Hearing Officer
Bombardier Corporation	)	
	)	For: Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 21-00WC

RULING ON SCOPE OF REMAND

APPEARANCES:

Thomas C. Nuovo, Esquire for Claimant
Glenn S. Morgan, Esquire for Defendant

ISSUE:

Whether the scope of the remand, after the Supreme Court's reversal of summary judgment for the defendant, is de novo or limited to the issue of whether or not the claimant's workplace stressors were significantly greater in dimension than those encountered by all employees.

CONCLUSIONS OF LAW:

1. According to the claimant, the only issues remanded by the Supreme Court to the Department for determination are: 1) whether the claimant was subjected to unusual disciplinary procedures; 2) whether other employees had been given written warnings for similar conduct; and 3) whether these unusual procedures were significantly greater workplace stressors than the stressors experienced daily by all employees. The claimant asserts that the defendant is barred from raising any additional issues not preserved on the summary judgment appeal to the Supreme Court.

2. The defendant contends that the scope of the remand should entail a complete review of all the issues. The defendant asserts that the unusual stress issue was merely a threshold issue and that further issues still need to be resolved in order to determine whether or not the claimant suffered a compensable injury. The defendant also claims that a full evidentiary hearing should be held to comport with the due process requirements of notice and opportunity to be heard.

3. When an appellate court rules on an interlocutory appeal, the legal issue or issues ruled upon are binding upon subsequent proceedings regarding the same case.

> [T]he doctrine of the law of the case . . . is a rule of general application that a decision in a case . . . of last resort is the law of that case on the points presented throughout all the subsequent proceedings therein, and no question then necessarily involved and decided will be reconsidered by the Court in the same case on a state of facts not different in legal effect.
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> . . .[T]he result [of reversing former decisions in the same case] would be mischievous because if all such questions are to be regarded as still open for discussion and revision in the same cause, there would be no end to the litigation until the ability of the parties or the ingenuity of their counsel were exhausted.

Coty, et al. v. Ramsey Assoc., Inc., et al., 154 Vt. 168, 171, 573 A.2d 694 (1990) (quoting *Perkins v. Vermont Hydro-Electric Corp.*, 106 Vt. 367, 415-416, 177 A. 631, 653 (1934).

4. Applying this rule to the case at hand, the issues that are binding on the subsequent proceedings are only those that the Supreme Court addressed and ruled upon in *Owen v. Bombardier Corporation*, No. 99-101 (Vt. October 29, 1999). The Supreme Court's jurisdiction on appeal pursuant to 21 V.S.A. § 672 is limited to questions of law; therefore, the legal conclusions and rulings made by the court are binding on the Department. However, the Department on remand may make additional findings of fact, may also reverse its previous findings of fact, and may alter its own legal conclusions. See V. G. Lewter, Annotation, *Power of Trial Court, on Remand for Further Proceedings, to Change Prior Fact Findings as to Matters Not Passed upon by Appellate Court, Without Receiving Further Evidence*, A.L.R.3d 502 (1968); See also *Halpern v. Kantor*, 139 Vt. 365 (1981).

5. Consistent with the general practice in this Department, in the Ruling on Motions for Summary Judgment, the Commissioner specifically stated that the findings of fact were for purposes of those motions only, and by implication, not for any hearing that might follow. The defendant prevailed because the commissioner concluded that the stresses claimant experienced were objectively real, but not "significantly greater [in] dimension than the daily stresses encountered by all employees." *Owen v. Bombardier Corporation*, Opinion No. 01SJ-99WC (Jan. 4, 1999). On appeal the sole legal issue certified to the Supreme Court was "whether the undisputed facts show that the stresses claimant experienced were significant and objectively real, as well as of a significantly greater dimension than the daily stresses encountered by other employees." *Owen*, No. 99-101 (Vt. October 29, 1999) at 2. The court reversed the commissioner's decision on the grounds that material facts were in dispute, and that the defendant failed to meet its burden in showing that the stressors claimant experienced were not unusual or significantly greater than those experienced daily by all employees.

6. The scope of the remand should be a de novo hearing covering all the relevant issues in this case. The only issue raised on appeal was the nature of the stress claimant experienced, whether or not it was unusual or significantly greater in dimension than stress experienced by all employees. The court refused to answer the certified question holding that material facts were in dispute and the defendant, as the moving party, did not meet its summary judgment burden in showing that an essential element of the claimant's prima facie case is without evidence. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

7. The court's statement that "[t]here is no dispute that claimant suffered a mental injury as a result of the stress she experienced at work" cannot be interpreted as a legal and binding conclusion of the court. That issue was not part of the defendant or claimant's summary judgment motions. The defendant moved for summary judgment on the grounds that the claimant lacked evidence in proving a material element of her case. The defendant need not show in order to prevail on summary judgment that the claimant lacked evidence regarding all the elements of her prima facie case. The defendant is not barred from raising and disputing other material elements of the claimant's case as is proceeds and new evidence is offered into the record. Simply because issues were not raised on a previous summary judgment motion does not forever bar them from being later raised. To do so would be highly prejudicial. Pursuant to Rule 56, defendant is not required to disprove all elements of claimant's case on summary judgment. Taken in this light, the court's statement must be interpreted as a framing of the relevant issue on appeal: whether or not the workplace stressors were unusual or significantly greater in dimension than stressors experienced by all employees. The question of whether the claimant sustained a mental injury was never adjudicated, never stipulated, and never raised on either party's motion for summary judgment; therefore, it may be adjudicated on remand.

ORDER:

Based on the foregoing Conclusions of Law, the scope of the remand is de novo.

Dated at Montpelier, Vermont, this 12th day of July 2000.

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Tasha Wallis
Commissioner

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Betty Owen	)	State File No. J-8408
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
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	)	For: R. Tasha Wallis
Bombardier, Inc.	)	Commissioner
	)	
	)	Opinion No: 21A-00WC

RULING ON CLAIMANT'S REQUEST FOR AN INTERLOCUTORY APPEAL

On August 17, 2000 the claimant, by and through her attorney, Thomas C. Nuovo, Esq. of Bauer, Anderson & Gravel, filed a request for an Interlocutory Appeal to the Vermont Supreme Court. The attorney for the employer, Glenn S. Morgan, Esq. of Ryan Smith & Carbine, Ltd., opposes an appeal at this juncture.

The basis for the claimant's request for an appeal is this Department's July 12, 2000 order specifying that the hearing following the remand from the Vermont Supreme Court will be de novo. The claimant bases her request on reasons of judicial economy. If the Supreme Court rules in her favor, the hearing will be limited to the single issue whether the claimant experienced greater workplace stressors than the stressors experienced daily by all employees. As a result, the claimant argues, the scope and cost of the proceeding will be less than with a de novo hearing.

In response, the employer argues that an interlocutory appeal should not be allowed because it was not filed in time and because it would run counter to the general rule of finality in administrative proceedings.

Appeals from workers' compensation cases may be made to a superior court on questions of fact or mixed questions of law and fact under 21 V.S.A. § 670 and to the Supreme Court for a review of questions of law pursuant to § 672. Both appeals must be filed within thirty days after copies on an "award" have been mailed. 21 V.S.A. § 670; § 672; *Peabody v. Home Insurance Company* ___Vt. ___, 751 A2d 783 (1999). Use of the term "award" indicates final judgment. The workers compensation statute and rules are silent on the question of an interlocutory appeal.

Therefore, we look to the Rules of Appellate Procedure which "shall govern direct appeals to the Supreme Court from . . . administrative boards and agencies, so far as applicable." A motion for an interlocutory appeal must be made "within 10 days of the entry of the order or ruling appealed from…." V.R.A.P. 5(b)(1). Under *Peabody*, the date for the entry of the order or ruling from this Department is the date the order was mailed, which in the instant case was the same day it was signed, on July 12, 2000. Because the appeal was not filed within ten days of that date, this Department lacks the authority to permit the appeal under V.R.A.P. 5.

However, within 10 days of the date this order is mailed, the claimant may file her motion directly with the Supreme Court. *Id*.

Dated at Montpelier, Vermont, this 14th day of September 2000.

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R. Tasha Wallis
Commissioner