

J. B. v. Steven Betit

(September 26, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

J. B.

Opinion No. 32S-08WC

v.

By: Phyllis G. Phillips, Esq.
Hearing Officer

Steven Betit

For: Patricia Moulton Powden
Commissioner

State File No. Y-51024

RULING ON DEFENDANT'S MOTION FOR STAY

Defendant moves to stay the Commissioner's July 21, 2008 Order, as amended on August 7, 2008, in three respects. First, Defendant argues that the Commissioner's reliance on Dr. Gennaro's impairment rating rather than Dr. Boucher's was unsupported by the objective evidence. Second, Defendant argues that the Commissioner should not have awarded penalties and interest. Last, Defendant argues that the Commissioner should not have granted Claimant's request for payment of permanency benefits in a lump sum, and therefore should not have included the Social Security offset language required by 21 V.S.A. §652(c) in her amended Order.

According to 21 V.S.A. §675, an award or order issued after a formal hearing "shall be of full effect from issuance unless stayed by the commissioner, any appeal notwithstanding." 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 to Defendant's request for a stay of the award of permanency benefits in accordance with Dr. Gennaro's impairment rating, I find that it has failed to establish that it is likely to succeed on the merits in its appeal. Dr. Gennaro's expert testimony reflected a credible interpretation of the applicable sections of the *AMA Guides*, one that I must believe will be sustained on appeal. Defendant's request for a stay of this portion of the award is **DENIED**.

Defendant's request for a stay of the award of penalties and interest is more problematic. As the opinion in this matter reflects, in making this award the Commissioner took judicial notice of the forms and correspondence contained in the Department's file at the time of the hearing. Unfortunately, the hearing officer was not aware of additional correspondence between the parties that had been received prior to the record closing date but had not been incorporated into the Department's file. It appears from that correspondence that Defendant did in fact advance permanency benefits in accordance with Dr. Boucher's impairment rating as it was required to do under Workers' Compensation Rule 3.1200. If that is the case, then the award of penalties and interest may have been improper. With that in mind, I find that Defendant has met the requirements for a stay as to this portion of the award, and it is therefore **GRANTED**.

Last, Defendant requests a stay of the award of Claimant's permanency benefits in a lump sum. I find that a lump sum payment is in Claimant's best interests and that given the social security offset ramifications Claimant will be substantially harmed if this portion of the award is stayed. For that reason, Defendant's request for a stay of this portion of the award is **DENIED**.

DATED at Montpelier, Vermont this 26th day of September 2008.

Patricia Moulton Powden
Commissioner