

N. K. v. State of Vermont, Department of Health (October 8, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

N. K.

Opinion No. 36S-08WC

v.

By: Jane Gomez Dimotsis, Esq.
Hearing Officer

State of Vermont,
Department of Health

For: Patricia Moulton Powden
Commissioner

State File No. W-05732

APPEARANCES:

Chris McVeigh, Esq., for Claimant
Andrew Boxer, Esq., for Defendant

ISSUE:

Should the Commissioner's Order awarding 20% permanent partial disability to Claimant be adjusted to only 5% pending the appeal of this matter to the Vermont Supreme Court?

RULING ON DEFENDANT'S MOTION FOR PARTIAL STAY

Defendant has moved for a partial stay of the Commissioner's September 4, 2008 Order awarding Claimant 20% permanent partial disability benefits. Defendant requests that the Commissioner issue an order limiting Claimant's award to 5% permanency benefits pending the outcome of its appeal to the Vermont Supreme Court.

Any 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(b). In order to prevail on a request for a stay, Defendant must demonstrate (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable harm if the stay were not granted; (3) that a stay would not substantially harm the other party; and (4) that the best interests of the public would be served by the stay. *See In re Insurance Services Offices, Inc.*, 148 Vt. 634, 635 (1987). Implicit in the case cited is the fact that the Commissioner has the discretionary power to grant, deny, or modify a request for a stay.

Although granting a stay is the exception, the criteria cannot be interpreted in such a way as to make it a legal impossibility. As this Department implied in *Dubuque v. Grand Union Company*, Opinion No. 34S-02WC (2002), the most important of the four criteria in the workers' compensation context is the third, whether the claimant would suffer irreparable harm if the stay were granted. In this case, Defendant has argued persuasively that with the underlying award of attorney's fees and the partial award of permanent partial disability benefits, a further delay to Claimant will not substantially harm her. Claimant continues to work and thus receives wages regularly. And, should she prevail, she will be entitled to interest pursuant to 21 V.S.A. §664.

Defendant also has met the remaining three criteria. Whether it is likely to prevail on appeal is dependent on the Supreme Court's interpretation of the extent to which 21 V.S.A. §648(d) allows the Commissioner to exercise her discretion as to apportionment. Arguably, Defendant will suffer more harm if the decision is not stayed than Claimant, given that the amount of the award Defendant would not be able to recoup is much greater than the amount it argues should be awarded. And finally, in this particular case there is a legitimate dispute over the statutory interpretation of the Workers' Compensation Act that will be of public benefit to resolve speedily. *See Paul Graby v. Vermont Telephone Company*, Opinion No. 06S-04WC (January 31, 2004).

Therefore, due primarily to the fact that Claimant will not suffer irreparable harm if the decision is stayed and that all of the other criteria are met, Defendant's request for a partial stay of the award is granted.

ORDER:

Defendant's Request for Partial Stay of Award limiting the permanency award to 5% pending appeal is GRANTED.

DATED at Montpelier, Vermont this 8th day of October 2008.

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. §§ 670, 672.