

M. M. v. Comet Confectionery

(January 4, 2008)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

M. M.

Opinion No. 32R-07WC

v.

Phyllis Phillips, Esq.,
Contract Hearing Officer

Comet Confectionery

Patricia Moulton Powden
Commissioner

State File No. K-09632

RULING ON DEFENDANT'S MOTION TO RECONSIDER AND STAY

Defendant moves for reconsideration of the Commissioner's Opinion and Order in the above matter on the grounds that it was based on "manifest errors of law and fact." Essentially, Defendant argues that the Commissioner erred by presuming facts not in evidence. Defendant contends that once these facts are removed from consideration the applicable law requires that the Commissioner's decision be reversed and Claimant's claim for temporary disability benefits be denied.

The factual finding to which Defendant objects is Finding of Fact #19, which states:

The record does not reflect the extent to which Claimant sought work within Dr. Beattie's May 2006 restrictions between the time when he released her to do so and her September 2006 surgery. It appears that her temporary disability benefits continued unabated during this period, however. *Presumably Gallagher Bassett determined that the combination of her work search efforts, if any and her medical condition merited that these benefits not be stopped.* (Emphasis added).

Defendant argues that in this finding the Commissioner impermissibly presumed either that (1) Claimant tried to find a job within her work restrictions, but could not; or (2) despite her work release Claimant's medical condition actually was too poor to allow her to work. In fact, however, what truly was inferred in this finding was that the workers' compensation carrier responsible for Claimant's shoulder injury was paying temporary disability benefits in accordance with the statute and had no legitimate basis for discontinuing them. In other words, the finding infers that the carrier was adjusting Claimant's claim appropriately. This is a reasonable and appropriate inference.

Even if this was not an appropriate inference from the undisputed facts, Defendant's reliance on Claimant's work capacity from May until September 2006 as dispositive in the claim is misplaced. Defendant argues that because this was the last time that Claimant had a work capacity, and because she failed to return to work nevertheless, somehow this disqualifies her from receiving temporary disability benefits in March 2007. The critical period, however, is the twelve weeks preceding Claimant's March 2007 disability and therefore the critical inquiry is

whether Claimant had a work capacity during that timeframe, not some 9 months previously. Defendant concedes that she did not.

At its heart, the decision in this claim sets forth the legal conclusion that it is unfair to penalize a claimant for having earned no wages in the twelve weeks prior to a period of disability where the failure to do so results from another disabling work-related medical condition rather than a voluntary decision not to work. *Conclusion of Law #14*. That Defendant disagrees with this conclusion is understandable, and its ongoing attempt to contest it is laudable, but I can find no manifest error in law or fact that so undermines it as to require reversal.

As for Defendant's request that the order awarding benefits be stayed pending appeal, such a stay can be granted only if all of the following four factors are met: (1) that the party seeking the stay is likely to succeed on the merits; (2) that the party seeking the stay will suffer irreparable harm if the stay is not granted; (3) that the stay would not substantially harm the other party; and (4) that the best interest of the public would be served by issuing the stay. *Searles v. Price Chopper/Golub*, Opinion No. 68S-98WC (Jan. 19, 1999). The Commissioner has discretionary power to grant, deny or modify a request for a stay, 21 V.S.A. §675. Granting a stay should be the exception, not the rule. *Bodwell v. Webster Corp.*, Opinion No. 62-96WC (Dec. 10, 1996).

I am mindful of the fact that even if Defendant ultimately prevails on appeal it may not be able to recoup the temporary disability benefits paid to Claimant in the meantime, and in that sense it will be irreparably harmed. Granting the stay, however, will eliminate a source of income for a claimant who is at this point totally disabled from working. I cannot ignore the substantial harm that likely will occur as a result. I find, therefore, that Defendant has failed to meet the stringent test set forth in *Searles* and is not entitled to a stay of the award pending appeal.

ORDER:

Defendant's Motion for Reconsideration is **DENIED**.

Defendant's Motion for Stay is **DENIED**.

Claimant having prevailed, Defendant is ordered to pay costs totaling \$3.97 and attorney's fees totaling \$279.00, for a total of \$282.97.

DATED at Montpelier, Vermont this 4th day of January 2008.

Patricia Moulton Powden
Commissioner