

M. B. v. Safety-Kleen

(October 22, 2007)

**STATE OF VERMONT
DEPARTMENT OF LABOR**

M. B.

Opinion No. 28-07WC

v.

By: George K. Belcher
Hearing Officer

Safety-Kleen

For: Patricia Moulton Powden
Commissioner

State File No. T-19416

APPEARANCES:

Christopher McVeigh, Esq., for the Claimant
J. Christopher Callahan, Esq., for the Defendant

**RULING ON DEFENDANT'S MOTION FOR PERMISSION TO TAKE
INTERLOCUTORY APPEAL**

Defendant seeks to take an interlocutory appeal from the Department's denial of Defendant's Motion for Summary Judgment. By order dated August 27, 2007 the Department denied Defendant's Motion for Summary Judgment, ruling that the legal issues of claim preclusion and prohibitions against advisory opinions were not dispositive of this claim. The Department determined that a hearing was required.

Under V.R.A.P. 5(b)(1), "[u]pon motion of any party ... the Presiding Judge ... shall permit an appeal to be taken from an interlocutory order or ruling if the judge finds that the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation." An interlocutory appeal is the exception to normal appellate jurisdiction. The policy against piecemeal review of any matter is strong and consistent. *In re Hill*, 149 Vt. 86 (1987). Appeals, which occur after establishment of the facts by an evidentiary hearing and a final judgment, allow the appellate court to review a complete record. In contrast, an interlocutory appeal creates piecemeal litigation, delay and expense. *In Re Pyramid Co.*, 141 294, 300 (1982). Permission for such appeal is reserved for a narrow class of cases such as *Dodge v. Precision Construction Products*, Opinion No. 38A-01 (October 30, 2001) (where controlling issue was whether a claim survived the death of the employee) or *Austin v. Central Vermont Home Health and Hospice*, Opinion No. 32-02 WC (July 25, 2002) (concerning the burden of proof and the legal standard in workers' compensation claims of employee suicide).

Three criteria must be satisfied before permission to proceed with an interlocutory appeal will be granted: (1) the issue must involve a controlling question of law; (2) there must be substantial grounds for difference of opinions as to the correctness of the order; and (3) and an interlocutory appeal should materially advance the termination of litigation. *In re Pyramid Co.*, *supra.*, at 301; *K.T. v. Specialty Paperboard*, Opinion No. 33A-05 (August 18, 2005).

The Defendant has most clearly failed to satisfy the second and third criteria. The Defendant cited no cases as authority from Vermont or from any other jurisdiction in the workers' compensation context to support its arguments of claim preclusion or advisory opinions. Existing authority on this issue was heavily weighted in favor of the Claimant's legal position that the common law doctrine of *res judicata* did not bar a workers' compensation claimant from pursuing claims as they ripened. Likewise, there was no authority cited by the Defendant which would equate Workers Compensation Rule 40 (prohibiting ordered pre-payment of medical bills before the treatment is rendered) to a prohibition against legal determinations of compensability.

The third criteria concerns finality. In this case there are many facts which require clarity before the trier of fact can apply the law. For example, it is unclear whether the Claimant can establish causation and whether he needs treatment. Even if he does not need medical treatment, he might still be disabled, totally or partially. Without the facts being established, a legal determination will be difficult. More importantly, a legal determination on speculative facts will not be final, since other facts might generate other claims. It is unlikely in this case at this time that an interlocutory appeal will materially advance the termination of litigation.

ORDER:

Based on the foregoing, the Defendant's Motion for Permission to File Interlocutory Appeal is DENIED.

Dated at Montpelier, Vermont this 22nd day of October 2007.

Patricia Moulton Powden
Commissioner