

**STATE OF VERMONT  
DEPARTMENT OF LABOR AND INDUSTRY**

Frederick Lapan	)	State File No: H-21524
	)	
v.	)	By: Amy Reichard
	)	Staff Attorney
	)	
Pepin Granite	)	For: Steve Janson
	)	Commissioner
	)	
	)	Opinion No. 14-99WC

**RULING ON THE MOTIONS TO QUASH DEFENDANT’S SUBPOENA**

**APPEARANCES:**

Scott Skinner, Esquire for Claimant Frederick Lapan, III  
Christopher J. McVeigh, Esquire for Defendant Pepin Granite  
Marie J. Salem, Assistant Attorney General for Department of Corrections

**PROCEDURAL HISTORY:**

In the instant workers’ compensation case, claimant has asserted a claim for permanent total disability benefits based upon an injury he sustained to his back. While in the course of evaluating and appraising this claim, defendant requested the Department, on January 21, 1999, to issue a subpoena to the Department of Corrections (“DOC”) at their Newport facility, where claimant presently resides. The subpoena specifically requested the following information:

[A]ny and all documents in your possession which relate to Mr. Frederick S. Lapan, III, date of birth 4/12/44, including but not limited to any and all medical records regarding any treatment of Frederick S. Lapan, III. This request also includes any and all records of any kind you have concerning Mr. Lapan’s stay at any facility since January 1, 1998, at the Vermont Department of Corrections, including but not limited to the Northern State Correctional Facility located in Newport, Vermont. Also included within this request, is a demand for copies of any and all video tapes or other recordings devices showing Mr. Lapan at any activity, in any therapy, or undergoing any medical treatment. This request also includes copies of any and all correspondence to and from Mr. Lapan from any source whatsoever, except material protected by the attorney/client privilege, and also includes a demand for any and all records, including any and all of Mr. Lapan’s activities while in custody with the Vermont Department of Corrections.

In response to this subpoena request, claimant filed an objection with the Department on January 25, 1999. Relying on numerous arguments, claimant requested that the Department decline to issue the subpoena. First, claimant asserted that the subpoena request was premature, maintaining that the requested materials were not necessary to the Commissioner’s determination. In addition, claimant averred that the subpoena was overbroad, as well as a

“gigantic fishing expedition.” Finally, since claimant was cooperating with defendant’s attempts to secure medical information, claimant argued that the subpoena tarnished the informal approach of the workers’ compensation system. As such, claimant insisted that the subpoena request be denied.

After evaluating the contents of the subject subpoena and the parties’ respective arguments, the Department, on January 26, 1999, issued its decision denying the subpoena request. Since the Department understood that a medical release was already provided to defendant, it rationalized that the subpoena request was duplicative and therefore, not necessary. In addition, in support of its denial, the Department explained that the requested video and surveillance footage of claimant was neither available to claimant, his counselor nor the department. Finally, and in an overall summary, the Department maintained that the subpoena would not be issued unless and until the defendant explained and justified the requested materials’ function in the workers’ compensation process. Accordingly, the Department refused to issue the subpoena.<sup>1</sup>

Following this denial, defendant, on January 29, 1999, offered numerous challenges to the Department’s decision. One particular argument raised by defendant in this correspondence related to a novel interpretation of 21 V.S.A. §603, Workers’ Compensation Rule 7(a) and V.R.C.P. 45. In summary, defendant asserted that these provisions confer upon an attorney, practicing within the workers’ compensation system, the independent power to issue a subpoena to a third party for the production of documents. As such, on February 8, 1999, acting on this belief, defendant, by and through its counsel, directly and independently issued the same subpoena to the Superintendent of the DOC.

After receiving and reviewing this subpoena, the DOC, on February 11, 1999, filed a Motion to Quash with this Department. Relying upon 28 V.S.A. §601(10) and Directive Numbers 254.01 and 254.02, pertaining to access to an inmate’s records, the DOC claimed that the issuance of a subpoena by an attorney does not overcome the legal provisions and mandates which protect an inmate’s confidentiality.

In addition, on February 11, 1999, claimant also filed a Motion to Quash the Defendant’s Subpoena. In his motion, claimant raised two legal issues. First, he maintained that the subpoena required the disclosure of privileged materials which were protected by law, specifically 28 V.S.A. §601(10) and V.R.C.P. 45(C) (3) (A) (iii). Second, relying upon the Workers’ Compensation Rules, the claimant questioned the validity of defense counsel’s independent power to issue a subpoena upon the DOC. As such, he requested that his Motion to Quash be granted.

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<sup>1</sup> Based upon this refusal, defendant, on February 11, 1999, filed an amended version of the subpoena with the Department for its review, deleting any reference to video tape or surveillance material. Since this modified rendition is not the subpoena at issue in this matter, the Department’s decision relative to the issuance of the revised version will be decided upon in a separate proceeding, consistent with the procedure of the workers’ compensation system.

Subsequently, on February 22, 1999, in its Opposition to the Motions to Quash, defendant argued several points. Initially, defendant maintained that the subpoena was proper because it requested information relevant to the determination of a permanent total disability claim. Moreover, defendant insisted that the requested material is not protected by the confidentiality provisions and mandates asserted by the other parties. Finally, defendant argued that nothing exists in the pertinent and applicable workers' compensation rules and statutes to vanquish the subpoena power conferred to attorneys by V.R.C.P. 45. Therefore, defendant requested that the Motions to Quash be denied.

**ISSUES:**

1. Whether an attorney, practicing within the workers' compensation system, has the independent power to issue a subpoena.
2. Assuming arguendo that the independent subpoena issued by defense counsel in this case is a valid exercise of authority, whether it should still be quashed by this Department.

**RULING:**

A. INDEPENDENT SUBPOENA POWER OF AN ATTORNEY:

By independently and directly issuing a subpoena to a third party in a workers' compensation case, the defendant in this case has challenged the long-standing and established subpoena procedure of this Department. This challenge, however, is without merit. After conducting a comprehensive analysis of the pertinent statutes and rules, including the Vermont Administrative Procedure Act, the Workers' Compensation Act and the Workers' Compensation Rules, it is apparent that, within the workers' compensation system, the Department is the sole party authorized with the power to issue subpoenas. Therefore, since defendant's independent issuance of a subpoena was an invalid exercise of authority and in complete violation of the workers' compensation process, the subpoena must be quashed.

1. Vermont Administrative Procedure Act:

Since the Department of Labor and Industry is a state agency within the meaning of 3 V.S.A. §801, it is subject to the requirements of the Vermont Administrative Procedure Act. Accordingly, in evaluating the subpoena power in the workers' compensation system, the APA must be consulted. Specifically, the provision relating to contested cases in the administrative setting, codified as 3 V.S.A. §809, provides both insight and guidance on the issuance of subpoenas. Within this statute, subsection (h), which was added to the statute via a 1987 amendment, authorizes representatives of an agency, as well as any licensed attorney representing a party before the agency, to compel by subpoena the attendance and testimony of witnesses and the production of books and records. However, the subsection further states, explicitly, that the subpoena power rule shall apply to the Human Services Board, the Labor Relations Board and the Employment Security Board. It is obvious that this delineation does not include the Department of Labor and Industry. In fact, pursuant to 3 V.S.A. §816(3), the Department, when administering the workers' compensation system, is expressly exempted from the subpoena power provision of 809(h). Specifically, the statute provides:

Sections 809-813 of this title shall not apply to acts, decisions, findings or determinations by the department of labor and industry or the commissioner of labor and industry or his, its or their duly authorized agents as to any and all procedures or hearings before and by said department or commissioner or his or their said agents, arising out of or with respect to chapters 9 and 11 of Title 21. 3 V.S.A. §816(a)(3).

Based upon the foregoing statutory provisions, the intent of the legislature is clear. The independent subpoena power was not to be extended to a private attorney in the setting of the workers' compensation system. On the contrary, the sole authority rests with the Department of Labor and Industry. Consequently, in the instant matter, when defense counsel independently issued a subpoena to the DOC, he acted in direct contravention of the Vermont APA. Accordingly, the Motions to Quash must be granted.

## 2. Workers' Compensation System:

Similarly, the statutory language contained within the Workers' Compensation Act, codified as 21 V.S.A. §§ 601-710, as well as the Workers' Compensation Rules promulgated by the Department, accord the Department of Labor and Industry with the exclusive authority to issue subpoenas in the workers' compensation arena. Specifically, after reviewing 21 V.S.A. §§ 602-604, as well as Workers' Compensation Rule 7(e), it is evident that a private attorney does not possess the right to independently subpoena third parties involved in workers' compensation cases.

In part, 21 V.S.A. §602 provides that the Commissioner of the Department shall make rules not inconsistent with the provisions of the Workers' Compensation Act for the purpose of carrying out the Act. A thorough and comprehensive review of the Workers' Compensation Rules failed to reveal the grant of any authority or power upon private attorneys to subpoena either witnesses or documents. Rather, Rule 7(e) only affords the Department with the authority to issue subpoenas, and only upon the timely written request of a party. Since the Commissioner was granted, by the legislature, the discretion to devise the rules utilized in the workers' compensation system and because he unequivocally declined to grant an attorney the independent power to subpoena, it is clear that the subpoena power is left within the sole province of the Department.

Comparably, the language of 21 V.S.A. §603 also delineates the legislature's intention to confer subpoena power solely upon the Department. This provision explicitly accords the Commissioner with the ability to subpoena witnesses and demand the production of documents. Conspicuously absent from this provision is the grant of an independent subpoena authority upon private attorneys. Defendant argues that this silence equates with an implicit grant of independent subpoena power, based upon V.R.C.P. 45. This is an inaccurate interpretation and analysis of the administrative procedures in Vermont. Rather, when a statute is silent as to a specific issue, the courts defer to an agency's interpretation, provided that it is based on a permissible construction of the statute. *Dutton v. Department of Social Welfare*, Vermont Supreme Court No. 97-222 (September 11, 1998) (citing *St. Amour v. Department of Social Welfare*, 158 Vt. 77 (1992); see also 21 V.S.A. §606 (directing that questions arising under the Act shall be determined by the Commissioner.) In this instance, the Department has interpreted section 603 of the Act and determined that it alone possesses the authority to issue subpoenas in

the workers' compensation system.

Furthermore, a reading of 21 V.S.A. §604 further supports the conclusion that the Department, in workers' compensation cases, has the sole authority to issue subpoenas. Specifically, section 604 provides that the Department is not bound by the technical or formal rules of procedure. Therefore, defendant's argument, that V.R.C.P. 45 mandates its counsel's independent subpoena power, is clearly ineffectual within the workers' compensation system.

Finally, public policy also favors affording the Department with the exclusive authority to issue subpoenas in workers' compensation cases. By precluding an attorney from independently issuing a subpoena, the Department is also protecting a *pro se* claimant who would not otherwise be aware of his ability to question, challenge or formally object to an improper and inappropriate request. As such, the Department's exclusive subpoena power is essential to the preservation and perpetuation of a claimant's legal rights.

In summation, it is unequivocally evident that, within the workers' compensation system, the Department of Labor and Industry has the exclusive authority to issue subpoenas. By serving an independent subpoena upon the DOC in this case, the defendant has explicitly violated the Workers' Compensation Statutes and Rules. Hence, the claimant and the DOC's Motions to Quash must be granted.

**B. RULING ON MOTIONS TO QUASH SUBPOENA:**

Assuming *arguendo* that defendant's invocation of an independent authority to subpoena within the workers' compensation system was a legitimate exercise of power, the subpoena issued to the DOC in this case would still be held invalid due to the overbroad and all encompassing nature of the request. Specifically, the defendant solicited, in part, any and all records of any kind concerning claimant's stay at the facility, any and all video tapes or other recordings devices showing claimant involved in any activity, and any and all correspondence to and from claimant from any source whatsoever. It is apparent that this subpoena has an unreasonable scope, containing a sweeping and indiscriminate request. In addition, such an expansive demand is both burdensome and oppressive to the DOC, who is not even party to the present workers' compensation case. Accordingly, since the subpoena is entirely overbroad and immense, it must be quashed.

**ORDER:**

It is therefore ordered that:

- (1) Defendant, by and through its attorney, improperly issued an independent subpoena upon a third party, namely the Department of Corrections, in violation of the mandates of the workers' compensation system.
- (2) The Motions to Quash, filed by both claimant and the Department of Corrections, are GRANTED.

DATED at Montpelier, Vermont, this 15th day of March 1999.

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Steve Janson  
Commissioner