N. B. v. Verizon (July 30, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

N. B. Opinion No. 24S-08WC

By: George K. Belcher
v. Hearing Officer

Verizon For: Patricia Moutlon Powden
Commissioner

State File No. J-13315

APPEARANCES:

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

RULING ON DEFENDANT'S MOTION FOR STAY

Defendant moves the Department to grant a stay pursuant to 21 V.S.A. Section 675 concerning the Department's decision dated June 12, 2008. The Claimant opposes the requested stay.

The Defendant seeks a stay arguing that the four criteria set forth in *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) are met. Those criteria are: (1) that the Defendant has a strong likelihood of success on appeal; (2) that there will be irreparable injury to the Defendant if the stay is not granted; (3) that a stay will not substantially harm the other party; and (4) that the stay will serve the best interests of the public. Id.

The Commissioner has ruled that the granting of a stay should be the exception, not the rule. *Bodwell v. Webster Corporation*, Opinion No. 62S-96 WC (Dec. 10, 1996). A simple factual dispute is not a sufficient basis upon which to grant a stay. Id. The issue in this case is the reasonableness and necessity of a particular operation on the Claimant's back. The Defendant argues that it will prevail on appeal because a single disc replacement would be sufficient treatment rather than the multi-level disc surgery, which was approved in the decision. Dr. Delamarter's testimony at the hearing was quite clear and persuasive that the Claimant has multi-level disc problems and that a comprehensive, multi-disc replacement surgery is the better approach. While the defendant may disagree with the evidence or the conclusion of the Department, this does not equate to a strong likelihood of success on appeal.

Next, the Defendant argues that the Commissioner's decision is advisory, premature, and unripe. In appropriate cases, the Department has made rulings concerning the reasonableness of proposed treatments. See Conclusion of Law No. 4 in the basic decision. Such decisions are not precluded as being advisory or "unripe" under the Workers' Compensation Statute, particularly where an employer has refused in advance to pay for a treatment which is recommended by a treating physician. See *Bebon v. Safety-Kleen/Sedgwick*, State File No. T-19416, Denial of Motion for Summary Judgment, August 21, 2007 and *Bebon v. Safety-Kleen/Sedgwick, CMS*, Chittenden Superior Court Docket No. 1286-05, Entry Order Dated January 9, 2007. Since this argument has not prevailed previously at either the Department or the Superior Court level, the likelihood of success is weak rather than strong.

The Defendant argues that it will suffer irreparable harm if the stay is not granted since it will have been denied its ability to contest the medical bills generated by the surgery. This argument is spurious since the issues involved in this case were the reasonableness and necessity of the surgery. The charges for the surgery were not litigated and have not been acted upon. Thus, if there is an issue concerning unreasonable charges for the surgery, those issues may still be litigated. On the other hand, irreparable harm would likely arise to the Claimant if the stay were granted. The Claimant was scheduled to have the proposed surgery in January of 2008. The surgery did not happen at that time in order for the Defendant's medical expert to examine and evaluate the Claimant. The Claimant participated in this exercise, but disagreed with the conclusion of this expert. The matter was then submitted for decision to the Department. We are now some seven months after the Claimant would have had his surgery but for the consideration of the Defendant's evidence and arguments. The Claimant has pursued conservative treatment for back pain for many years before pursuing this surgery. A stay would cause irreparable harm to the Claimant in the form of a delay of a reasonable and necessary treatment.

Finally, the Defendant argues that the public interest requires that "the judiciary heed its own rules regarding the impropriety of advisory opinions" and that employers should not be "forced to pay for surgery that, while recommended, never in fact occurs." The order in this case only ordered the Defendant to pay for the surgery if it were performed. The ability of employers and claimants to determine the necessity and reasonableness of a particular treatment *in an appropriate case* is consistent with the requirement that Workers' Compensation process and procedure be "as summary and simple as reasonably may be," particularly where an Employer is refusing to pay for a procedure in advance of it being done. 21 V.S.A. 602. A stay of the decision in this case would not be in the public interest.

ORDER:

(1) The Motion for Stay is DENIED.

Dated at Montpelier, Vermont this 30th day of July 2008.

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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. Sec. 670, 672.