Merchant v. A & C Enercom (August 25, 2004)

STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Dan Merchant	)	Opinion No. 27S-04WC
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
	)	For: Michael S. Bertrand
A & C Enercom	)	Commissioner
	)	
	)	State File No. L-00926

RULINGS ON CLAIMANT'S MOTION FOR FEES
AND
DEFENDANT'S MOTION FOR A STAY

Fees

Claimant, who prevailed in the underlying dispute, moves for an award of attorney fees of $3,249.00 for 36.1 hours of work. In support of this claim, counsel submitted a copy of the attorney-client fee agreement and statement with hours worked.

Section 678(a) of 21 V.S.A. and WC Rule 10.10000 provide for an award of reasonable attorney fees to a prevailing claimant. Clearly, claimant would not have prevailed in this dispute were it not for the efforts of his attorney and an award of fees for work performed on this dispute is appropriate. However, defendant persuasively shows that 7.4 of the hours claimed were on issues not subject to the current dispute. Those hours, therefore, are not subject to an award and are subtracted from the claim

The total award therefore is $2,583.00 for 28.7 hours.

Stay

Next, defendant moves for a stay of the July 20, 2004 award to pay the claimant permanency benefits, interest and fees.

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).

To prevail on its request in the instant matter, Defendant must demonstrate: "(1) a strong likelihood of success on the merits; (2) irreparable injury if the stay is not granted; (3) a stay will not substantially harm the other party; and (4) the stay will serve the best interests of the public." *Gilbert v. Gilbert*, 163 Vt. 549, 560 (1995) citing *In re Insurance Services Offices, Inc*., 148 Vt. 634, 635 (1987) (mem); *In re Allied Power & Light Co*., 132 Vt. 554 (1974). The Commissioner has the discretionary power to grant, deny or modify a request for a stay. 21 V.S.A.§ 675(b); *Austin v. Vermont Dowell & Square Co*., Opinion No. 05S-97WC (1997) (citing *Newell v. Moffatt*, Opinion No. 2A-88 (1988)). The granting of a stay should be the exception, not the rule. *Bodwell v.Webster Corporation*, Opinion No. 62S-96WC (1996).

Novel legal issues and questions of jurisdiction make the likelihood of success on appeal greater than what would be typical in a worker's compensation case. Because claimant has received recovery from a personal injury action, it is not clear if he would suffer substantial harm if the order were not stayed. Nor is it clear that the defendant would suffer irreparable harm if the claim were not stayed, although such likelihood would be proportional to benefits ordered. Finally, a fair balance of competing interests in this case would best serve the best interests of the public. A partial stay, therefore, is in order.

Specifically, the part of the motion to stay the permanency and attorney fee award is DENIED, but the motion to stay the award of interest is GRANTED.

SO ORDERED

Dated at Montpelier, Vermont this 25th day of August 2004.

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Michael S. Bertrand
Commissioner

Merchant v. A & C Enercom (July 20, 2004)

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v.	)	Hearing Officer
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	)	Commissioner
	)	
	)	State File No. L-00926

Submitted on the record without hearing

APPEARANCES:

Gary W. Lange, Esq., for the Claimant
David R. McLean, Esq., for the Defendant

ISSUES:

1. Must an employer begin permanent partial disability payments while there is pending litigation in superior court over the insurance carrier's subrogation rights?

2. Should Daniel Merchant's motion for administrative citations and penalties against A & C Enercom be granted?

Claimant sustained a work-related injury in an automobile accident on July 7, 1997. He reached medical end result on October 29, 2001, according to Dr. Charles McLean who assessed his permanent impairment at five percent whole person. On November 5, 2001, claimant completed a Form 22 for permanent partial disability benefits based on the five percent rating, a form the employer has never signed. As a result of an independent medical examination, defendant contends that the rating is three percent.

Claimant received a settlement from the driver of the other vehicle and from his underinsured motorist policy. From those settlements, the workers' compensation carrier has been paid certain amounts, but its lien remains incompletely satisfied. A subrogation action is now pending in superior court but that action has been stayed while the Vermont Supreme Court considers the same issue in a different case. Because of the pendency of the subrogation action and because the degree of permanency is disputed, defendant has refused to pay the claimant any permanency benefits.

Defendant argues it is under no obligation to make any permanent partial disability (PPD) payments while a subrogation action is pending in the courts. Claimant argues that such a position is contrary to applicable statutes and rules and that such a violation subjects defendant to administrative penalties.

Under 21 V.S.A. § 648, an employer is required to pay PPD benefits to a claimant with a work-related impairment. "If the employer determines that compensation is due it shall enter into a Compensation Agreement (Forms 21, 22, 23 and/or 24) with the claimant, to be approved by the Director, and shall commence paying compensation immediately." WC Rule 3.1000. In this case, since defendant concedes that claimant has at least a three percent rating, it must make that payment immediately. Should claimant seek a higher rating, a hearing can be held on that limited issue.

This Department has jurisdiction over workers' compensation benefits, not over subrogation actions, which the courts control. See e.g. *Davis v. Liberty Mutual*, 267 F. 3rd (2001).

Whether defendant is subject to administrative fines and penalties is an issue the Director of Workers' Compensation may address if he deems an investigation appropriate. This case will be referred to him for review pursuant to 21 V.S.A. § 688.

The employer's obligation to pay permanency began on November 5, 2001, when it was clear that claimant had incurred a permanent partial disability from his work related accident. Interest shall be computed from that date. 21 V.S.A. § 664.

ORDER:

Defendant is ORDERED to pay claimant permanency benefits immediately, with interest from November 5, 2001.

Dated at Montpelier, Vermont this 20th day of July 2004.

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Michael S. Bertrand
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.