T. B. v. University of Vermont (February 12, 2008)

STATE OF VERMONT
DEPARTMENT OF LABOR

T. B.

v.

The University of Vermont

Opinion No. 06-08WC

By: Phyllis Phillips, Esq.,
Hearing Officer

For: Patricia Moulton Powden,
Commissioner

State File No. X-05627

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Todd Schlossberg, Esq., for Claimant
Stephen Ellis, Esq., for Defendant

ISSUE PRESENTED:

Whether as a matter of law Department of Labor officials violated Defendant's constitutional rights to due process and equal protection by rescinding the Department's prior approval of Defendant's Notice of Intention to Discontinue Payments and ordering it to pay benefits without a hearing.

FINDINGS OF FACT:

Based on the parties' respective statements of uncontested material facts, viewed in the light most favorable to Claimant as the non-moving party, and taking judicial notice of the forms and related correspondence in the Department's file, I find the following facts:

1. Claimant began working as a custodian for Defendant in October 2001.

2. Claimant is a Bosnian immigrant who speaks and understands little English.

3. On March 6, 2006 Claimant injured her right shoulder, right upper back and right arm while lifting containers of salt at work. Claimant reported this injury to her supervisor, who completed a First Report of Injury on March 8, 2006. The First Report of Injury identified the body part injured as "right shoulder."

4. On March 28 and 31, 2006 Claimant and Defendant entered into an Agreement for Temporary Total Disability Compensation (Form 21) documenting that Claimant had sustained a "right shoulder strain," as a result of which she was temporarily disabled from working beginning on March 13, 2006. The Form 21 was reviewed and approved by the Department on May 11, 2006.

5. Claimant began treating for her injury on March 14, 2006. The medical records reflect that even early treatment focused not simply on a right shoulder strain, but noted in addition thoracic, cervical spine and upper arm muscle strains, all allegedly related to the initial March 6, 2006 work injury. As treatment progressed, Claimant's problem list expanded further, to include moderate right carpal tunnel syndrome, right lateral epicondylitis, right cubital tunnel syndrome, right trapezius and rhomboid muscle strains and generalized right upper extremity pain. Again, Claimant's treatment providers related all of these injuries to the March 6, 2006 lifting episode.

6. The medical records reflect that many of Claimant's treatment providers observed that she had limited English language skills. This language barrier complicated Claimant's ability both to convey an accurate history of her injury and her symptoms and to understand medical and treatment instructions. As a result, frequently Claimant brought a friend or family member who was more conversant in English with her to her medical appointments, so that they could act as her interpreter. At other times Claimant's treatment providers used the "language line interpreter" to assist in translating.

7. At Defendant's request, on August 10, 2006 Claimant underwent an independent medical evaluation (IME) with Verne Backus, M.D., a board certified occupational medicine physician. Dr. Backus described Claimant as a "fair historian." Because she was not very descriptive, he gleaned her clinical chronology from reviewing her medical records. In addition, Dr. Backus conducted a physical and neurological examination of Claimant's upper extremities. Last, Dr. Backus asked Claimant to complete various questionnaires as to her symptoms, pain levels and functional restrictions. Claimant's husband, who had accompanied her to the appointment, assisted her in filling out these questionnaires. Even with this assistance, however, on some of the questionnaires Claimant either skipped questions or did not respond completely.

8. Dr. Backus' primary diagnosis was cervicobrachial pain syndrome, a musculoskeletal dysfunction at the neck and shoulder girdle region that often causes referred pain into the upper extremity. In Dr. Backus' opinion, this diagnosis was not causally related to Claimant's March 6, 2006 work injury. Rather, Dr. Backus believed that Claimant's symptoms were more likely related to body/spine posture changes, ligament strains and chronic changes caused by a prior motor vehicle accident, and/or severe vitamin D deficiency.

9. Specifically as to the March 6, 2006 work injury, Dr. Backus stated:

> There is insufficient documentation that there was any injury from lifting boxes or bags of salt on the reported date of injury and this was not the way she described her injury to this examiner. She had managed chronic pain prior to this time as she states always in the left side. Once she noted similar symptoms for the first time on the right side, she became alarmed and thought it was from the lifting prior to this. In this examiner's opinion, a casual [sic] relationship is not established to these prior activities but instead she was experiencing more of the myofacial pain and cervicobrachial musculoskeletal dysfunction at the neck and shoulder girdle region leading to referred pain to the right upper extremity this time.

10. In a January 28, 2007 addendum to his report Dr. Backus stated that in light of his opinion that Claimant's current symptoms were not causally related to the March 6, 2006 work injury, she had reached an end medical result, "for there is no treatment that is expected to improve her that is also causally related to her work activities."

11. On January 31, 2007 Defendant filed a Notice of Intention to Discontinue Payments (Form 27). Citing Dr. Backus' report and addendum as support, Defendant sought to discontinue both indemnity and medical benefits on the grounds that Claimant had reached an end medical result and that any medical treatment was unrelated to the March 6, 2006 injury.

12. By letter dated February 6, 2007 Claimant's attorney objected to the proposed discontinuance. In support of his objection, Claimant's attorney provided medical records from Claimant's treating physicians documenting that in their opinion Claimant's symptoms in fact were causally related to her March 6, 2006 work injury. In addition, Claimant's attorney sought to discredit Dr. Backus' opinions because he had conducted his medical examination without an interpreter. Claimant's attorney argued that this omission necessarily must have impeded Dr. Backus' ability to understand Claimant's description of her injury and symptoms and thus led him to reach faulty conclusions. Last, Claimant's attorney noted that Claimant was continuing to undergo treatment that her treating physicians related causally to her work injury, thus undermining any determination that she had reached end medical result.

13. On February 9, 2007 the Department's Workers' Compensation Specialist rejected Defendant's proposed discontinuance. Noting that Dr. Backus had arrived at his conclusions "with no interpreter to assist with communications," the Specialist concluded, "I do not believe Dr. Backus could have conducted a thorough complete examination considering the claimant's language barrier. Therefore, [Defendant's] request to discontinue benefits is rejected."

14. On April 13, 2007 Defendant filed a second Form 27. As with the first Form 27, Defendant relied on Dr. Backus' January 28, 2007 IME report as support for its proposed discontinuance. Defendant also provided an e-mail communication from Dr. Backus that specifically addressed the Department's concern that Claimant's language barrier had precluded him from conducting a thorough evaluation.

15. As to Claimant's ability to communicate with him, Dr. Backus' email stated:

> I recall that [Claimant] could converse with me fairly easily as long as we took the extra time to make sure we both understood each other, something I do regularly as a physician who treats patients of various English speaking skills.

16. As to the questionnaires Claimant completed, Dr. Backus stated:

> Some of the comments on the questionnaire that are written in less legible handwriting are my own, a witness that I reviewed this history on this questionnaire in detail with [Claimant]. Interestingly I called Pam at Dr. Fenton's office this am to ask if she remembers Ms. Bajrovic and she does. She recalls her husband was in the waiting room helping her to fill out the questionnaire but that he did not come into the exam room which is consistent with my not including her [sic] was there in the report.

17. In conclusion, Dr. Backus stated:

> I would not have proceeded with this IME if I had judged [Claimant] was not an adequate enough historian for the purpose and it is my opinion that the questionnaire, medical records, and her ability to understand me was sufficient for the purpose of the exam. I sometimes need to provide medical care or opinions on patients or examinees who's [sic] mental capacity is more limiting than the language limitations of Ms. Bajrovic.

18. On April 20, 2007 the same Workers' Compensation Specialist who had rejected the prior Form 27 reviewed and approved the second Form 27 on the grounds that "the evidence appears to reasonably support the discontinuance proposed."

19. On May 21, 2007 Claimant's attorney wrote to the Specialist and requested that she reconsider and withdraw her approval of the second Form 27. In support of his request, Claimant's attorney provided additional medical records from Claimant's treatment providers purporting to show: (1) that Dr. Backus' claim that he could "converse fairly easily" with Claimant without an interpreter's assistance was not reasonably supported by the evidence as a whole; (2) that Dr. Backus' end medical result determination was not reasonably supported by the evidence as a whole; and (3) that all of Claimant's cervical, thoracic and right upper extremity complaints were causally related to her March 6, 2006 work injury. Most of these medical records had not been provided previously to the Department and therefore had not been available for the Specialist's review at the time she approved the second Form 27.

20. On May 30, 2007 the Specialist granted Claimant's request to reconsider the Department's prior approval of the second Form 27, rescinded the approval and ordered Defendant to reinstate both indemnity and medical benefits retroactive to the date of their discontinuance. As support for her decision the Specialist cited the additional medical records submitted by Claimant's attorney, which in her opinion documented not only Claimant's need for "ongoing necessary treatment" but also her "language barrier and its continued interference with . . . treatment." The Specialist noted that she was "again bewildered" at Dr. Backus' claimed ability to perform a thorough IME despite the "obvious language barrier that has impeded" Claimant's other treatment providers from communicating with her.

21. On June 14, 2007 Defendant's attorney wrote to the Specialist and requested an expedited hearing as to whether the Department's issuance of an interim order "on this record at this juncture" constituted an abuse of administrative discretion in violation of Defendant's fundamental due process rights. Defendant's attorney vehemently objected to the quality and character of the evidence adduced by Claimant's attorney in his May 21, 2007 correspondence and strongly defended Dr. Backus' ability to overcome Claimant's supposed "language barrier." Last, notwithstanding his faith in Dr. Backus' opinion, Defendant's attorney indicated that Defendant had scheduled Claimant for another IME with a different examiner, Dr. Richard Levy, and had arranged for a professional interpreter to be present.

22. On June 26, 2007 the Specialist responded to Defendant's attorney's June 14, 2007 request for expedited hearing by advising him to direct "a request pursuant to Rule 7.4 to the hearing officer." Defendant's attorney responded by letter dated June 27, 2007 in which he reminded the Specialist that according to Rule 7.4 a request for expedited hearing must be directed to her (as the Workers' Compensation and Safety Division Director's designee) rather than to the hearing officer. Defendant's attorney also noted that the rule precluded him from qualifying for an expedited hearing until the Specialist held an informal conference, and with that in mind he requested that the Specialist schedule one. The Specialist complied, and scheduled an informal conference for August 1, 2007.

23. Also on June 27, 2007 Defendant's attorney filed a motion to reconsider and/or stay the Department's interim order. The Workers' Compensation and Safety Division ("Division") Staff Attorney reviewed the motion and denied it on July 27, 2007.

24. In denying Defendant's motion the Staff Attorney, like the Specialist, discredited Dr. Backus' IME findings, but on different grounds. The Staff Attorney did not mention the claimed language barrier as a basis for undermining Dr. Backus' opinion. Rather, the Staff Attorney interpreted Dr. Backus' opinion as having been based on his conclusion, as she read his report, that Claimant had not suffered any injury from lifting boxes or bags of salt on March 6, 2006. Given, however, the legal reality accorded that injury by virtue of the signed and approved Form 21, the Staff Attorney concluded that this "fundamental premise" had failed. Consequently, she found that Dr. Backus' opinion carried insufficient weight to provide "reasonable support" for the discontinuance of benefits.

25. On August 7, 2007 Claimant attended the scheduled IME with Dr. Richard Levy, a board certified neurologist. Dr. Levy reviewed Claimant's medical records and conducted a physical examination in the presence of both an interpreter and a videographer. He concluded that Claimant suffered from "subjective chronic pain without objective correlate," and that he could not "identify any pathoanatomic basis for [her] chronic pain." Dr. Levy found "abundant symptom magnification" and suspected that there were "issues of secondary gain driving the patient's chronic pain disorder." Dr. Levy stated that he could not define the cause of Claimant's chronic symptoms, but that "it would not be likely that her claimed injury led to this chronic pain disorder." In light of this conclusion, Dr. Levy stated that issues of maximum medical improvement and permanent impairment were moot. Last, as to work capacity, Dr. Levy noted, "In the absence of anything objective other than symptom magnification, [Claimant] has a full work capacity."

26. With Dr. Levy's IME report as support, Defendant filed a third Form 27 on August 15, 2007 on the grounds that Claimant had reached an end medical result from the March 6, 2006 injury. Defendant supplemented this Form 27 a few days later with an addendum from Dr. Levy dated August 14, 2007. In that addendum, Dr. Levy stated:

> Let me please clarify my prior report concerning [Claimant]. It is my opinion, to a reasonable degree of medical certainty, that whatever injuries she sustained at work have long since dissipated. She has reached her MMI as it pertains to any work injury and there is no permanent impairment that is applicable to this case.

27. On August 30, 2007 the Specialist rejected Defendant's third Form 27, stating:

> Ms. Bajrovic's [sic] has provided a medical opinion which clearly states she has not reached medical end from her work injury. Dr. Levy's initial report suggests there was no injury then he clarifies his opinion by stating "whatever injuries she sustained at work have long since dissipated." These are clearly opposing medical opinions. A Form 21 was signed by the carrier and accepted by the Department on 3/21/06. Therefore, [Defendant's] request to discontinue benefits is rejected.

28. On September 5, 2007 Defendant's attorney wrote to the Specialist to request "clarification and reconsideration" of her decision to reject the third Form 27. Defendant's attorney argued that the import of Dr. Levy's opinion was that an employer who "initially accepts a sprain/strain claim as compensable" ought to be able to dispute whether "subjective pain complaints well over a year later are related to that compensable claim." Defendant's attorney questioned the Specialist's qualifications to "override a competent medical expert opinion," accused her of "making up facts and law" and chastised her for "this latest abuse of administrative discretion."

29. On September 12, 2007 the Division Director responded to Defendant's attorney's September 5, 2007 correspondence to the Specialist. The Director reiterated the established law as to the impact of a signed Form 21, presumably to support the basis for the Specialist's rejection of the third Form 27. The Director also noted his objection to Defendant's attorney's "attempt to berate and belittle the specialists, rather than engage in civil discourse." Last, the Director asked that all future correspondence in the claim be directed to the assigned hearing officer.

30. On September 14, 2007 Defendant's attorney forwarded to the Specialist a second supplemental report from Dr. Levy, which stated:

> I have reviewed the correspondence of [the Specialist], dated August 30, 2007, concerning [Claimant's] case. I cannot believe the way she misconstrued the wording of my report. I wasn't questioning whether an injury occurred. I simply pointed out that whatever her injury was to the right shoulder region, it dissipated and was not likely the cause of her current subjective symptoms. I cannot make myself any clearer than that. I hope this supplemental report clarifies things for [the Specialist].

31. Also on September 14, 2007 Defendant's attorney wrote another letter to the Specialist, in which he acknowledged the receipt of the Director's September 12, 2007 letter. Defendant's attorney stated that the Director's "assumption that the employer is seeking to overturn a signed Form 21 Agreement" was "simply incorrect." Defendant's attorney asserted that "the employer does not take the position that claimant did not sustain the injury upon which the Form 21 was based." Rather, Defendant's attorney stated, "[t]he employer seeks only to discontinue the benefits payable under the Form 21 because claimant is at MMI for her work injury, and claimant's *current* complaints are not referable to that initial injury." [Emphasis in original]. With that in mind, Defendant's attorney asked once again that the Specialist approve the third Form 27 "without further delay."

32. On September 19, 2007 Claimant's attorney wrote to both the Director and the Specialist, reiterating Claimant's position that the medical evidence, viewed as a whole, did not reasonably support the discontinuance of benefits.

33. Neither the Specialist nor the Director responded to Defendant's attorney's renewed request that the third Form 27 be approved. Instead, the matter was referred to a Contract Hearing Officer for formal hearing. With the Hearing Officer's approval, Defendant agreed to submit the question whether the Department violated its constitutional rights by rejecting the Form 27s and issuing an interim order for ongoing benefits by way of a motion for summary judgment. Separate and apart from that question, a formal hearing was scheduled on the underlying merits of the claim, specifically whether Claimant's current symptoms, disability and need for treatment are causally related to the March 6, 2006 work injury. That hearing has yet to be held.

34. The medical records produced by Claimant's attorney establish that Claimant has continued to treat throughout the period encompassed by the above discussion. Claimant's treatment providers believe her current symptoms are causally related to her March 6, 2006 work injury and that she remains totally disabled from working. They have made ongoing treatment recommendations, including most recently a recommendation that Claimant undergo a multidisciplinary functional restoration program. None of these treatment providers has addressed directly either Dr. Backus' theory that Claimant's current symptoms arise from cervicobrachial pain syndrome or Dr. Levy's findings as to the absence of any anatomical basis for her chronic pain. In that respect, Claimant's and Defendant's medical experts stand in direct opposition to one another as to the causative bases for Claimant's current symptoms, disability and need for ongoing treatment.

DISCUSSION:

1. In its Motion for Summary Judgment Defendant raises a number of constitutional challenges to the process by which the Commissioner (or her designee) issues interim orders for payment of benefits pending a formal hearing. Some of these challenges are addressed to the constitutional validity of the statutes by which the Commissioner is empowered to issue interim orders. Others attack the manner in which the Commissioner's designees applied these statutes in the current claim as constitutionally deficient. It is important in the first instance to discern which challenges are which. The Commissioner has primary jurisdiction over the latter, but lacks any authority to decide the former.

2. An administrative agency has no power to determine the constitutional validity of a statute. *Alexander v. Town of Barton*, 152 Vt. 148, 151 (1989), citing *Westover v. Village of Barton Electric Dept.*, 149 Vt. 356 (1988). Only the courts have the authority to do so. *Id.*, citing 3 K. Davis, *Administrative Law Treatise* §20.04 at 74 (1958). With that principle in mind, when a party to an administrative proceeding challenges whether a particular law is valid, "it is undoubtedly judicial economy and wisdom to decide the issue by declaratory judgment before the administrative channel has been invoked or exhausted." *Flanders Lumber & Building Supply Co. v. Town of Milton*, 128 Vt. 38, 44 (1969), quoted in *C.V. Landfill Inc. v. Environmental Board*, 158 Vt. 386, 392 (1992).

3. In the current claim, Defendant has raised the following challenges to the constitutional validity of Vermont's Workers' Compensation Act:

   (a) That the provisions of the statute[1] governing the circumstances under which an interim order can be issued lack sufficiently objective standards to guide the Commissioner's discretion[2] and thus violate both federal and state constitutional equal protection and due process safeguards[3]; and

   (b) That the statute violates Defendant's constitutional right to procedural and substantive due process because it does not guarantee a right to recoup benefits paid pursuant to an interim order that later are determined not to have been owed.

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[1] Although Defendant refers to 21 V.S.A. §662(b) as the offending statute, actually the interim order issued against it in this claim arose out of the operation of 21 V.S.A. §643a instead. Section 662(b) authorizes the Commissioner to issue an interim order when a claim has been denied, while §643a authorizes an interim order in the context of a proposed discontinuance of benefits in a previously accepted claim, as was the case here. Both statutes use the same standard for determining whether an interim order should issue, however, and therefore Defendant's mistake does not affect its argument.

[2] Defendant argues that the "reasonable support" standard enumerated as the basis for issuing an interim order is not sufficiently clear or objective to withstand constitutional scrutiny, even notwithstanding the definition of that term in 21 V.S.A. §601(24).

[3] Specifically, Defendant's federal due process and equal protection challenges arise under the Fourteenth Amendment to the United States Constitution. Its state due process challenge arises under Chapter I, Article 10 of the Vermont Constitution, and its state equal protection challenge arises under the Common Benefits Clause (Chapter I, Article 7) of the Vermont Constitution.

4. As both of these challenges squarely attack the constitutionality of the legislature's "expressed will," 3 K. Davis, *Administrative Law Treatise, supra*, the appropriate means by which Defendant should seek relief is in a declaratory judgment action. *Travelers Indemnity Co. v. Wallis*, 176 Vt. 167, ¶19 (2003); C*.V. Landfill, supra*. The Commissioner lacks any authority to address them here.

5. In contrast to its attack on the constitutional *validity* of various provisions of the Workers' Compensation Act, Defendant's constitutional challenges to the manner in which the Commissioner's designees have *applied* these provisions to the circumstances of the current claim rest squarely within the Commissioner's primary jurisdiction. *Travelers Indemnity Co. v. Wallis, supra*; *C.V. Landfill, supra*; *Guyette v. Errecart*, 165 Vt. 1 (1996); *Williams v. State*, 156 Vt. 42 (1990); *Alexander v. Town of Barton, supra*. In exercising that jurisdiction, the Commissioner must construe her statutory authority within the appropriate boundaries imposed by overriding constitutional limitations. *Travelers Indemnity v. Wallis, supra*; *Alexander, supra.*

6. It is appropriate in that context to review the statutory framework within which the Commissioner's authority to issue interim orders exists. The Workers' Compensation Act requires that the Commissioner make the claims adjudication process as "summary and simple as reasonably may be," 21 V.S.A. §602; *Travelers Indemnity v. Wallis, supra*. The statute authorizes her to "make such investigation or inquiry or conduct such hearing or trial in such manner as to ascertain the substantial rights of the parties." 21 V.S.A. §604; *Id*.

7. When a dispute arises as to the compensability of an injured worker's claim for benefits, the statute provides for a formal dispute resolution process. 21 V.S.A. §663. It also empowers the Commissioner to act in the meantime, however, by issuing an interim order that benefits be paid until such time as a formal hearing is held and a decision rendered. 21 V.S.A. §662(b). In similar fashion, when an employer seeks to discontinue benefits in a claim that previously has been accepted, the statute authorizes the Commissioner to order that benefits be continued, again until such time as a formal hearing is held and a decision rendered. 21 V.S.A. §643a.

8. Whether an interim order is called for in the context of a claim denial under §662(b) or a discontinuance of benefits under §643a, the standard of review is the same. In both cases, the statute authorizes the issuance of an interim order for benefits if, "upon review, the commissioner finds that the evidence does not reasonably support" the denial or discontinuance. 21 V.S.A. §§643a, 662(b).

9. The statute gives further guidance by defining the "reasonable support" standard. 21 V.S.A. §601(24) states:

> "Evidence that reasonably supports an action" means, for the purposes of section 643a and . . . 662(b) of this title, relevant evidence that a reasonable mind might accept as adequate to support a conclusion that must be based on the record as a whole, and take into account whatever in the record fairly detracts from its weight.

10. As so defined, the "reasonable support" standard is identical to the "substantial evidence" standard that has been endorsed by the United States Supreme Court as the appropriate gauge for reviewing administrative agency determinations. *See, e.g., Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951); *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197 (1938). A substantial body of case law exists, therefore, to further delineate the standard's proper use and application.

11. It is in the context of this statutory setting governing the circumstances under which the Commissioner is empowered to issue interim orders that Defendant's claim that its constitutional rights were violated must be considered. Defendant has alleged six such violations at the hands of the Commissioner's designees, specifically:

    (a) That the Workers' Compensation Specialist abused her discretion by reconsidering and revoking her prior approval of the second Form 27 based on what Defendant characterizes as uncorroborated speculation as to Dr. Backus' ability to perform an IME without an interpreter;

    (b) That the Specialist abused her discretion by failing to schedule an informal conference in a timely manner following Defendant's request for an expedited hearing;

    (c) That the Division's Staff Attorney abused her discretion by denying Defendant's motion for reconsideration based on what Defendant alleges was a misinterpretation of Dr. Backus' IME report;

    (d) That the Specialist abused her discretion by failing to approve the third Form 27, which Defendant alleges was reasonably supported by Dr. Levy's IME report;

    (e) That the Director abused his discretion by endorsing the actions of his staff based on what Defendant alleges was an erroneous interpretation of Defendant's posture in the claim; and

    (f) That the Specialist abused her discretion by failing to respond to Defendant's renewed request that the third Form 27 be approved.

12. Defendant does not specify the particular constitutional rights that it claims were violated by each of the abuses alleged above. Presumably, the second one listed above calls into question Defendant's right to procedural due process, while the other five raise substantive due process issues.[4]

[4] Although Defendant claims that the Department's actions violated its constitutional equal protection rights, it has not alleged any facts that would bring that principle into play here. The Equal Protection Clause (or in Vermont, the Common Benefits Clause), protects against governmental action that "treats similar persons differently for arbitrary and capricious reasons." *M.T. Associates v. Town of Randolph*, 2005 Vt. 112 (2005). Defendant has not alleged any facts tending to show that the Department has treated it differently than it has other employers in similar situations and therefore there is no basis for any claimed equal protection violation.

13. Procedural due process "is concerned with the process used to deprive a person of a protected interest." *Mellin v. Flood Brook Union School District,* 173 Vt. 202, 216 (2001), citing *Conrad v. County of Onondaga Examining Board for Plumbers*, 758 F. Supp. 824, 828 (N.D.N.Y. 1991). It guarantees a party the constitutional right to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). Determining what process is due in a particular situation requires that a number of factors be balanced, including the nature of the public and private interests involved, the risk of erroneous deprivation and the probable benefit of demanding additional procedural safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Thus, procedural due process does not necessarily require that a person be afforded a hearing prior to being deprived of a protected interest. Rather, depending on the circumstances, the availability of prompt post-deprivation review may be sufficient. *Mathews, supra; Hegarty v. Addison County Humane Society,* 176 Vt. 405, ¶18 (2004).

14. While procedural due process is concerned with the manner in which the government may deprive a person of a protected interest, substantive due process relates to the deprivation itself. It protects against arbitrary government action. *Mellin, supra,* citing *Conrad, supra.* But there is a threshold. Not every alleged legal error by an agent of the state gives rise to a claim of unconstitutional deprivation without due process. *Harlen Assocs. v. The Village of Mineola*, 273 F.3d. 494 (2d Cir. 2001); *Natale v. Town of Ridgefield,* 170 F.3d 258 (2d Cir. 1999). Rather, substantive due process standards are violated "only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority," for example, that which is "tainted with racial animus or fundamental procedural irregularity." *Harlen Assocs., supra,* citing *Natale, supra* (conduct must be something warranting the labels "arbitrary" and "outrageous"); *Cine Sk8 v. Town of Henrietta,* ___ F.3d ___, 110807 FED2, 06-1718 (conduct must amount to an "arbitrary or irrational infringement on property rights"); *Ford Motor Credit Co. v. New York City Police Department*, ___ F.3d ___, 092407 FED2, 06-4600 (state action must rise to a "conscience-shocking" level).

15. None of the actions taken by the Commissioner's designees in the current claim represent such an arbitrary, irrational or conscience-shocking misapplication of the statute that they rise to an unconstitutional level. The Commissioner's designees may have made unwarranted assumptions, misinterpreted evidence or arrived at improper conclusions. Even if they did, however, they did not violate Defendant's constitutional due process rights.

16. I cannot conclude, for example, that the Workers' Compensation Specialist violated Defendant's constitutional due process rights by revoking her prior approval of the second Form 27 upon receipt of further medical information from Claimant's attorney. The fact is that the "reasonable support" standard enunciated in §643a and further defined in §601(24) required her to review Defendant's proposed discontinuance in light of the record as a whole. That once she did so she reached a result contrary to what Defendant would have liked signifies only that she weighed the evidence differently than Defendant would have, not that she acted in an unconstitutionally arbitrary and outrageous manner.

17. The same can be said as to Defendant's allegation that the Division Staff Attorney unconstitutionally misapplied the statute in denying its motion for reconsideration, and again as to its allegation that the Specialist acted arbitrarily in rejecting the third Form 27. Did the Commissioner's designees misapply the "reasonable support" standard in taking these actions? It certainly is possible that they did. Even so, were their actions so conscience shocking, so devoid of any evidentiary support whatsoever, so outrageously arbitrary as to be unconstitutional? Certainly not.

18. It is important to remember in this context that the statute as written places responsibility on the Commissioner's designees to review evidence against the "reasonable support" standard even though they have had no opportunity to hear testimony, view witnesses' demeanor or otherwise weigh their credibility. This is a difficult task, so difficult that Defendant would argue that the process is constitutionally invalid as a result. But as noted above, that argument is unavailing in this forum. In this forum, the statute as written is presumed to be valid. *Alexander, supra.* In this forum, therefore, Defendant's remedy is to proceed to a formal hearing, where it can present and cross-examine witnesses in the hopes of obtaining a final resolution that is favorable to its cause.[5]

19. Defendant's other allegations of constitutional violations are equally unavailing. That there was a six-week delay between the time when Defendant requested an informal conference in conjunction with his demand for an expedited hearing and the time when the informal conference occurred simply does not rise to a level of constitutional proportions. That the Division Director wrote a letter defending his staff and propounding a legal theory based on a misapprehension of Defendant's position is of no constitutional significance. Last, that the Commissioner's designees failed to respond to Defendant's request that the third Form 27 be approved at a point in the proceedings when the claim already had been referred to the formal hearing docket is neither arbitrary nor outrageous, but rather entirely appropriate and indeed, understandable.

20. Defendant has failed to establish, therefore, that the Commissioner's designees so misapplied the statutory requirements as to interim orders that they violated Defendant's constitutional rights as a result. Their actions were not so arbitrary and outrageous as to implicate Defendant's substantive due process guarantees, nor did they act in such a way as to deprive Defendant of procedural due process. Defendant can right any errors in judgment, any misinterpretation of evidence or misunderstanding of its legal position in the context of the upcoming formal hearing on the merits of Claimant's claim for ongoing benefits. At this point in the proceedings, its constitutional rights have been protected sufficiently.

[5] In this respect, in the context of a workers' compensation claim the formal hearing affords the type of judicial review that is a central factor in any substantive due process analysis. *Harlen, supra; Amsden v. Moran*, 904 F.2d 748, 755 (1st Cir. 1990). Particularly if they are correctable upon further judicial review, erroneous decisions by administrative agencies do not "transgress the 'outer limits' of legitimate governmental action" and therefore do not give rise to a substantive due process claim. *Harlen, supra*, quoting *Natale, supra*.

ORDER:

Defendant's Motion for Summary Judgment is **DENIED**.

DATED at Montpelier, Vermont this 12th day of February 2008.

_____
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. §§670, 672.