STATE OF VERMONT
DEPARTMENT OF LABOR

John West

v.

North Branch Fire District #1

Opinion No. 10A-19WC

By: Beth A. DeBernardi, Esq.
Administrative Law Judge

For: Lindsay H. Kurrle
Commissioner

State File No. EE-61277

RULING ON CLAIMANT'S MOTION FOR PERMISSION TO TAKE INTERLOCUTORY APPEAL

Claimant contends that he sustained a work-related head injury on March 14, 2013 that has rendered him permanently and totally disabled under the version of 21 V.S.A. § 644(a)(6) that the Legislature adopted effective July 1, 2014. Defendant contends that the applicable version of the statute is the one in effect at the time of Claimant's injury, prior to legislative amendment.

On January 23, 2019, Defendant sought summary judgment on Claimant's claim for permanent total disability benefits. On June 11, 2019, the Department ruled that the pre-amendment version of the statute governs, but genuine issues of material fact prevented the granting of summary judgment.

On June 19, 2019, Claimant filed a notice of appeal of the Department's ruling pursuant to V.R.A.P. 3. Defense counsel immediately raised a question with Claimant's counsel as to whether permission to take an interlocutory appeal was required. Without withdrawing his notice of appeal, on June 20, 2019, Claimant filed a request for permission to take an interlocutory appeal under V.R.A.P. 5(b)(1). On July 2, 2019, Defendant filed a response to Claimant's request. Although Defendant agrees that the interlocutory appeal process is the appropriate route, it opposes an interlocutory appeal at this juncture.

Claimant's Appeal under V.R.A.P. 3

Claimant first contends in his motion that the Vermont Administrative Procedure Act authorizes the notice of appeal that he filed on June 19, 2019. The Act provides in relevant part:

> A person who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in any contested case may appeal that decision to the Supreme Court, unless some other court is expressly provided by law. However, a preliminary, procedural, or intermediate agency action or ruling is immediately appealable under those rules[1] if review of the

[1] The annotation to 3 V.S.A. § 815 explains that the reference to "those rules" probably means the Vermont Rules of Appellate Procedure.

> final decision would not provide an adequate remedy, and the filing of the appeal does not itself stay enforcement of the agency decision. The agency may grant, or the reviewing court may order, a stay upon appropriate terms.
>
> *3 V.S.A. § 815(a).*

Thus, the statute addresses the appeal of both final decisions and intermediate decisions.

Applying the statute to the Department's June 11, 2019 ruling on Defendant's summary judgment motion, I first find that Claimant has not exhausted all administrative remedies and that he is not aggrieved by a "final decision." He cites *Hathaway v. S.T. Griswold & Co.*, Opinion No. 04F-14WC (June 11, 2014) as supporting his position, but his reliance on *Hathaway* is misplaced.

In *Hathaway*, the Commissioner granted summary judgment on two of three disputed claims. The Commissioner then granted the claimant's subsequent motion for entry of final judgment on those two claims because her ruling in the defendant's favor finally disposed of both of those claims. Entry of final judgment allowed the claimant to appeal those two claims in a timely fashion. The Commissioner denied the request to enter final judgment on the third claim, however, because the denial of summary judgment on that claim meant that no determination had yet been made as to the claimant's entitlement to that benefit. Thus, the claimant had not exhausted his administrative remedies on that claim and certification of a final judgment for appeal on that claim was not available. *See also Dodge v. Precision Construction Products*, Opinion No. 38-01WC (December 5, 2001) (the ruling at issue is not a final judgment as no determination of what benefits may be due has yet been made).

Here, as with the third claim at issue in *Hathaway*, the Department denied Defendant's motion for summary judgment. Accordingly, no determination has been made as to Claimant's entitlement to permanent total disability benefits, and there is no "final decision" that may be appealed under 3 V.S.A. § 815(a).

As noted above, the Administrative Procedure Act also provides that an intermediate agency ruling may be immediately appealable "if review of the final decision would not provide an adequate remedy *and* the filing of the appeal does not itself *stay enforcement of the agency decision.*" 3 V.S.A. § 815(a) (emphasis added). This provision contemplates an intermediate agency ruling that can be "enforced," presumably to the detriment of the appealing party. The Department's June 11, 2019 ruling in this matter is not a decision subject to "enforcement." Rather, it is a ruling denying summary judgment. Accordingly, I conclude that the appeal rights for intermediate rulings set forth in 3 V.S.A. § 815(a) do not apply here, either.

Claimant's Motion for Permission to File an Interlocutory Appeal under V.R.A.P. 5(b)

In the alternative, Claimant has moved for permission to file an interlocutory appeal on the question of which version of 21 V.S.A. § 644(a)(6) applies to his claim for permanent total disability benefits. As set forth above, the Department found that his claim is governed

by the statute in effect at the time of his injury, rather than the amended statute enacted by the Legislature the following year.

The Vermont Rules of Appellate Procedure govern appeals to the Supreme Court from administrative boards and agencies. More specifically, V.R.A.P. 5(b) governs appeals of interlocutory orders. Under the rule, upon motion of any party, an appeal must be permitted from an interlocutory order or ruling if the court finds that:

> (A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and
>
> (B) an immediate appeal may materially advance the termination of the litigation.

V.R.A.P. 5(b)(1). *See, e.g., Dodge v. Precision Construction Products,* Opinion No. 38-01WC (December 5, 2001) (applying V.R.A.P. 5(b)(1) to a request to appeal a ruling of the Department that does not constitute a final judgment in a workers' compensation claim).

The Supreme Court has stated that "interlocutory appeals are an exception to the normal restriction of appellate jurisdiction to the review of final judgments." *In re Pyramid Co. of Burlington*, 141 Vt. 294, 300 (1982). Thus, there must be a finding that all three criteria set forth in the rule have been satisfied before permission for such an appeal will be granted. As enumerated in the *Pyramid* case, those criteria are: 1) the appeal order must involve a controlling question of law; 2) there must be substantial ground for difference of opinion as to the correctness of that order; and 3) an interlocutory appeal should materially advance the termination of the litigation. *Id.* at 301.

It is the responsibility of the trial court or administrative agency to consider the three criteria and determine whether they have been met. The decision whether to grant or deny permission to take an interlocutory appeal thus rests in the sound discretion of the trial court. *Clayton v. J.C. Penney Corp.*, Opinion No. 13S-16WC (October 13, 2016), citing *State v. McCann*, 149 Vt. 147, 151 (1987). I now consider the three criteria in turn.

First, the legal issue presented here is whether the legislative amendment to 21 V.S.A. § 644(a)(6), effective July 1, 2014, applies retroactively to injuries sustained before the effective date of the amendment. This is a controlling question of law, the answer to which will have a substantial impact on the litigation by saving time and narrowing the issues for hearing. *See In re Pyramid Co. of Burlington,* 141 Vt. at 303. I thus conclude that the first criterion has been met.

Second, as to whether there are substantial grounds for difference of opinion concerning the correctness of the Department's ruling, I note that the stated legislative purpose of the statutory amendment at issue was not to alter the substance or effect of existing law, but only to remove outdated and offensive terminology. However, the plain language of the amendment constitutes a substantive change from the pre-amendment version of the statute. This contradiction provides substantial grounds for a difference of opinion, in satisfaction of the second criterion.

Third, an interlocutory appeal has the potential to materially advance the termination of this litigation. If the Court determines which version of the statute applies here, the parties will have a clearer picture of the relative merits of their positions, which may promote settlement. Even if settlement does not occur, they will be able to present expert testimony and other evidence relevant to the applicable standard at the formal hearing the first time around, greatly reducing the likelihood of a subsequent appeal and remand for a second hearing with new evidence. Thus, I conclude that the third criterion has been met as well.

Based on the foregoing, I conclude that the criteria for granting permission for an interlocutory appeal have been met. Therefore, Claimant's motion for permission to take an interlocutory appeal is **GRANTED**.

Dated at Montpelier, Vermont this 3 day of July 2019.

Lindsay H. Kurrle
Commissioner