

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Patricia Alexander

Opinion No. 08S-10WC

v.

By: Sal Spinosa, Esq.
Hearing Officer

General Electric

For: Patricia Moulton Powden
Commissioner

State File No. Z-53175

RULING ON DEFENDANT'S MOTION FOR STAY

Pursuant to 21 V.S.A. §675, Defendant moves to stay the Commissioner's February 19, 2010 Order on the grounds that it has met the requirements for granting a stay as established by the Vermont Supreme Court in *In re Insurance Services Office, Inc.*, 148 Vt. 634, 635 (1987).

According to 21 V.S.A. §675, an award or order issued after a formal hearing "shall be of full effect from issuance unless stayed by the commissioner, any appeal notwithstanding." To prevail on a request for a stay, the moving party must demonstrate *all* of the following:

1. That it is likely to succeed on the merits;
2. That it will suffer irreparable injury if a stay is not granted;
3. That issuing a stay will not substantially harm the other party; and
4. That the best interests of the public will be served by issuing a stay.

In re Insurance Services Office, Inc., 148 Vt. 634, 635 (1987).

As contemplated by the legislature, the granting of a stay must be the exception, not the rule. *Bodwell v. Webster Corp.*, Opinion No. 62S-96WC (December 10, 1996). Applying this stringent standard, I find that Defendant has failed to establish its right to a stay.

Defendant's assertion that it is likely to succeed on the merits is unconvincing. While Defendant correctly identifies the expert medical testimony as the most salient feature in this case, its motion offers nothing beyond what was presented at hearing. Defendant's expert testimony is as unconvincing now as it was at hearing.

Dr. Rosenberg, Defendant's principal expert, has considerable experience in the field of pulmonary disorders, including chronic beryllium disease (CBD). While Dr. Rosenberg did not support a diagnosis of CBD, he also could not rule it out. Dr. Rosenberg's testimony was further weakened by his support of numerous medical journal articles that Claimant's expert, Dr. Redlich, effectively distinguished.

In testifying for Defendant, Dr. Smith initially found Claimant's condition to be consistent with the symptoms of CBD but later diagnosed sarcoidosis instead. In doing so he relied on a study that again, Dr. Redlich convincingly distinguished. Dr. Smith admitted that he had no expertise in CBD. He testified that he used the *AMA Guides* to determine Claimant's permanent impairment, but admitted that in doing so he did not follow the standard protocols. In whole, Dr. Smith did not credibly advance Defendant's interests in this case.

Claimant's principal medical expert, Dr. Redlich, was particularly convincing. She has well established credentials in the field of immune mediated lung diseases, with a unique concentration on CBD. She was able to distinguish the medical literature upon which Defendant's experts relied. Her diagnosis of CBD was supported by two of Claimant's other providers. Last, as a periodic reviewer of the pulmonary provisions of the *AMA Guides*, she was well-equipped to apply them appropriately in determining Claimant's permanency rating.

Given this evidentiary analysis, I find that Defendant has not shown that it is likely to succeed on the merits in its appeal. Having failed to satisfy even the first element of the *Insurance Services* test, it is not necessary to consider the other factors. Defendant's Motion for Stay is **DENIED**.

DATED at Montpelier, Vermont this 30th day of March 2010.

Patricia Moulton Powden
Commissioner