STATE OF VERMONT
DEPARTMENT OF LABOR

Casey Arman	Opinion No. 03A-23WC
v.	By: Stephen W. Brown Administrative Law Judge
Vermont Mutual Insurance	For: Michael A. Harrington Commissioner
	State File No. MM-50689

ORDER DENYING PERMISSION TO TAKE INTERLOCUTORY APPEAL

APPEARANCES:

Craig A. Jarvis, Esq., for Claimant
Jennifer Meagher, Esq., for Defendant

This case is scheduled for a formal hearing on August 1, 2023 on the issues of whether Claimant's ulnar nerve subluxations arose out of and in the course of his employment, and if so, to what benefits he is entitled. While this case was pending at the informal level, a dispute arose concerning the computation of any indemnity benefits that may be due because the parties disagreed as to the proper formula for computing Claimant's average weekly wage ("AWW"). Claimant filed a Motion for Partial Summary Judgment on the legal issue of how his AWW should be calculated, and Defendant filed a cross-motion on the same issue. The Department issued a ruling on those cross motions on February 7, 2023, concluding that the formula advocated by Defendant was the correct one.

Claimant filed a Notice of Appeal to the Vermont Supreme Court on February 17, 2023, after which the administrative law judge requested a status conference with the parties to assess whether an interlocutory appeal was appropriate in this case. That status conference took place on February 24, 2023.

The Order Appealed From is Not a Final Order

With respect to appeals of administrative agency decisions to the Supreme Court, the Administrative Procedure Act provides in relevant part as follows:

> 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. The Vermont Supreme Court has held that the test of whether a decision is "final" is "whether it makes a final disposition of the subject matter before the Court." *Morissette v. Morissette*, 143 Vt. 52, 58 (1983) (quoting *Woodard v. Porter Hospital, Inc.*, 125 Vt. 264, 265 (1965)). To be "final," an order must therefore "dispose[] of all matters that should or could properly be settled at the time and in the proceeding then before the court." *In re Webster's Estate*, 117 Vt. 550, 552 (1953).

The Department's February 7, 2023 ruling on the parties' cross-motions here does not meet this standard because it does not determine what benefits Claimant is actually entitled to receive. Instead, it only resolves a legal question about how to compute any benefits to which he may be entitled. *See also Dodge v. Precision Construction Products*, Opinion No. 38A-01WC (December 5, 2001) ("The ruling at issue is not a final judgment as no determination of what benefits may be due was ever made.").

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). This provision contemplates an intermediate agency ruling that can be "enforced" to the detriment of the appealing party. However, the ruling at issue here is not subject to "enforcement," because it did not order the payment or discontinuance of any benefits but rather resolves a discrete legal issue. Accordingly, the appeal rights for intermediate rulings set forth in 3 V.S.A. § 815(a) do not apply here.

An Interlocutory Appeal under V.R.A.P. 5(b) is Not Appropriate in this Case

This does not end the analysis, however. The Department may grant Claimant permission to file an interlocutory appeal on the question how to calculate his AWW. 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).

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: (1) the appealed 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).

During the status conference on February 24, 2023, counsel for the parties expressed disagreement as to the first two *Pyramid* criteria, but they both agreed that the third criterion was not satisfied in this case. Specifically, Claimant stated that he did not wish to postpone the August 1, 2023 formal hearing in this case concerning the compensability of the alleged ulnar nerve subluxation in order to pursue a Supreme Court appeal, although he wished to preserve the legal issue of AWW computation for a potential appeal after the disposition of that formal hearing. Defendant, for its part, expressed doubt as to whether a resolution of the AWW question from the Supreme Court would increase the likelihood of the parties settling this case. Based on the parties' statements at this conference, I do not find that interlocutory review would materially advance the termination of this litigation. *Cf.* V.R.A.P. 5(b)(1); *Pyramid*, *supra.* Because all three criteria must be met, and the third is not, I need not consider the first two.

For all of these reasons, the criteria for granting permission for an interlocutory appeal are not satisfied, and thus Claimant's request for permission to take an interlocutory appeal is **DENIED**. Nothing in this order shall be construed to limit Claimant's right to appeal any question relating to the computation of his AWW following the formal hearing in this case.

Dated at Montpelier, Vermont this 28th day of February 2023.

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Michael A. Harrington
Commissioner