STATE OF VERMONT
DEPARTMENT OF LABOR

Tyler Martin

v.

The Sugarman of Vermont, LLC

Opinion No. 08A-23WC

By: Beth A. DeBernardi
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. RR-51404

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

APPEARANCES:

Robert D. Mabey, Esq., for Claimant
Erin J. Gilmore, Esq., for Defendant

BACKGROUND:

This case is pending on the formal hearing docket on the issue of whether Claimant is entitled to temporary disability benefits beginning on the date when his new employer was unable to accommodate his work restrictions and ongoing thereafter. Prior to any hearing, Claimant sought summary judgment on this issue. On March 22, 2023, the Commissioner held that Claimant may be entitled to temporary disability benefits from that date forward but that the record before the Department was insufficient to determine his entitlement to such benefits as a matter of law. *Martin v. The Sugarman of Vermont, LLC*, Opinion No. 08-23WC (March 22, 2023) ("*Martin I*"). Claimant timely moved for reconsideration, and that motion was denied. *Martin v. The Sugarman of Vermont, LLC*, Opinion No. 08R-23WC (June 13, 2023) ("*Martin II*").

On June 26, 2023, Claimant filed the instant Motion for Permission to Take Interlocutory Appeal to the Vermont Supreme Court. Defendant has not filed a response.

DISCUSSION:

Claimant's Motion for Permission to File an Interlocutory Appeal

Claimant has moved for permission to file an interlocutory appeal on the issue of whether he is entitled to temporary disability benefits from June 6, 2022 forward as a matter of law. Specifically, he contends that the Department should not have applied the criteria set forth in *Andrew v. Johnson Controls*, Opinion No. 03-93WC (June 13, 1993), in determining his entitlement to temporary disability benefits.

Generally, when an injured worker's employment ends for reasons unrelated to a work injury, the injury is not the cause of the earnings loss and the worker is not entitled to

temporary disability benefits. However, the Commissioner has recognized an exception to this rule, providing that temporary disability benefits are payable if the claimant can show that the work-related disability is the cause of his or her inability to find or hold new employment. To fit within this exception, a claimant has the burden of demonstrating (a) a work injury; (b) a reasonably diligent attempt to return to the work force; and (c) that the inability to return to the work force, or a return at a reduced wage, is related to the work injury and not to other factors. *See Andrew v. Johnson Controls*, *supra.*

Here, Claimant separated from employment with Defendant in December 2021 for reasons that Defendant contends are unrelated to the work injury. Accordingly, for the purposes of summary judgment, the Commissioner applied the *Johnson Controls* exception to his claim for temporary disability benefits.[1]

After review of Claimant's summary judgment motion, the Commissioner found that his statement of undisputed material facts was insufficient to determine his entitlement to temporary disability benefits as a matter of law. Although there is no dispute that Claimant sustained an injury related to his employment for Defendant, the record is devoid of evidence relevant to his attempts to return to the workforce beyond his four-week stint at Darn Tough in May 2022. The record on summary judgment includes no undisputed facts concerning Claimant's efforts at finding new employment nor Defendant's communications to him, if any, of any work search requirements. *See generally Martin I*, *supra*.

Claimant contends that his four-week employment with Darn Tough negates his burden to establish the factors set forth in *Johnson Controls*. However, he does not allege an injury at Darn Tough; his work injury was sustained during his employment with Defendant, from whose employ he separated for reasons unrelated to the work injury in December 2021. Based on these facts, which were undisputed for the purpose of summary judgment, the Department applied the criteria set forth in *Johnson Controls* and denied Claimant's motion.

Vermont Rule of Appellate Procedure 5(b)

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 by permission. Under V.R.A.P. 5(b)(1), 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.

[1] In his summary judgment motion, Claimant stated that his employment with Defendant ended for reasons "allegedly" unrelated to the work injury. *See Martin I*, at Finding of Fact No. 5. If this claim goes to a formal hearing, Claimant may contest that his separation was for reasons unrelated to his work injury, and if he prevails, then the *Johnson Controls* exception will not be relevant.

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.

Analysis of the Three Criteria

The first criterion is whether the appeal involves a controlling question of law. The legal issue presented here is whether *Andrew v. Johnson Controls* applies to Claimant's claim for temporary disability benefits, considering his subsequent employment with Darn Tough. As discussed above, *Johnson Controls* applies when an injured worker separates from employment for reasons unrelated to the work injury. Claimant contends that his subsequent employment with Darn Tough for four weeks negates his burden to establish the *Johnson Controls* factors relevant to his claim for workers' compensation benefits.

This would be a controlling question of law if Claimant did in fact separate from employment with Defendant for reasons unrelated to the work injury. By stating that his separation was "allegedly" for reasons unrelated to the work injury, however, Claimant appears to dispute the reason for his separation from employment with Defendant. It is presently unknown whether this case will go to formal hearing, and if so, what the finding will be as to the reason for his separation from Defendant's employment. Accordingly, I conclude that the applicability of *Johnson Controls* is *potentially* a controlling question of law, depending on the evidence presented at formal hearing concerning the reason for Claimant's separation from employment, but the evidence on that question is not yet sufficiently developed to support such a finding.

The second criterion is whether there are substantial grounds for difference of opinion concerning the correctness of the Department's ruling. My review of this motion did not find any statutory support or line of cases supporting an alternative interpretation of the applicability of the *Johnson Controls* criteria after subsequent employment, nor any other basis that would constitute "substantial grounds" for a difference of opinion. While there always remains the possibility that the Supreme Court may view the analysis differently, I am not aware of any *specific grounds* that would support a difference of opinion on this issue.

Thus, I conclude that this motion does not meet the second criterion for permission for interlocutory appeal.

Third, I must consider whether an interlocutory appeal has the potential to materially advance the termination of this litigation. In this case, even if an interlocutory appeal reversed the Department's application of *Johnson Controls*, the parties still might require a formal hearing. Claimant had a work capacity in June 2022, subject to a ten-pound lifting restriction on his left hand and no repetitive gripping with his left hand. There is no evidence that his treating provider took him out of work entirely. Accordingly, even without applying *Johnson Controls*, it may still be relevant whether Defendant notified Claimant of an obligation to perform a reasonable work search after he left Darn Tough and whether Claimant performed such a search. Accordingly, an interlocutory appeal is unlikely to materially advance the termination of this litigation, and I therefore conclude that the third criterion for interlocutory appeal has not been met, either.

RULING:

Based on the foregoing, I conclude that the criteria for granting permission for an interlocutory appeal have not been met. Therefore, Claimant's motion for permission to take an interlocutory appeal is **DENIED**.

Dated at Montpelier, Vermont this 14th day of July 2023.

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Michael A. Harrington
Commissioner