

of this provision or the method of payment upon good cause shown. The Board also authorizes the Attorney General to establish a procedure whereby insurance carriers may submit additional claims for restoration of monies paid to Dr. Amabile for claims arising from CPT code 92100 (serial tonometry) within the same period but which were not part of the original complaint. Upon review of said claims, the Attorney General or his designee may submit valid claims to the Board for supplemental orders directing restoration of such claims paid, and Dr. Amabile shall have the opportunity to be heard prior to the entry of any supplemental orders.

By Notice of Motion dated May 27, 1999, the Attorney General moved for a Supplemental Order directing additional restitution be paid by Dr. Amabile in the amount of \$76,579.09 and costs in the amount of \$759.25. Attached to the Notice of Motion was a Certification by Mary C. Kinniery, paralegal, attesting to the costs, as well as the method by which the specific amount for restitution had been derived, and indicating the names of the insurance companies and public payors contacted and the amounts and dates of the serial tonometry claims. Subsequently, by Notice of Motion dated June 15, 1999, Dr. Amabile sought to stay the hearing on the Attorney General's motion, pending resolution of the appeal of the Board's Final Order dated October 1, 1998 in the Appellate Division.

Argument was held before the Board on September 15, 1999. Attorney Michael E. Wilbert, Esq. appeared together with Dr. Amabile. Deputy Attorney General Douglas J. Harper appeared on behalf of the Attorney General. First, Dr. Amabile's motion for a stay was argued and denied, along with Dr. Amabile's request for a 72-hour grace period to enter an appeal if the stay

were denied.

Pursuant to R. 2:9-5(a), a stay of a judgment or order in a civil action pursuant to R. 2:9-7 is an extraordinary measure. See also Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989). The standard for granting such extraordinary relief is governed by equitable principles wherein the movant bears the burden of persuasion. See Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 800 (3d Cir. 1989) (describing burden on moving party seeking preliminary injunction); Morton v. Beyer, 822 F.2d 364, 371 (3d Cir. 1987) (noting burden which must be sustained); Zoning Board of Adjustment of Township of Sparta v. Service Electric Cable Television of New Jersey, Inc., 198 N.J. Super. 370, 379 (App. Div. 1985) (listing four conditions which plaintiff must demonstrate). The movant, to prevail, must establish inter alia the likelihood of success on the merits and irreparable harm. See Campbell Soup Co. v. Conagra, Inc., 977 F.2d 86, 91 (3d Cir. 1992) (noting conditions necessary to support preliminary injunction, denial of which is discretionary with tribunal); Morton v. Beyer, supra, 822 F.2d at 371 (failure to establish likelihood of success on the merits or irreparable injury must result in denial of preliminary injunction); Pitcher v. Laird, 415 F.2d 743, 744 (5th Cir. 1969) (listing four conditions for granting stay pending appeal); Crowe v. DeGioia, 90 N.J. 126, 132 (1982) (fundamental principle in granting preliminary relief is that injunction "should not issue except when necessary to

prevent irreparable harm"); Zoning Board of Adjustment of Township of Sparta, supra, 198 N.J. Super. at 379.

Dr. Amabile did not demonstrate to the Board the likelihood of success on the merits in his appeal, nor did he make any persuasive showing of irreparable harm through denial of the stay. Moreover, Dr. Amabile is at liberty to go to the Appellate Division and seek an emergent appeal at any time, with or without any grace period. Therefore, the Board denied Dr. Amabile's motion.

Following the denial of this motion, argument was heard on the Attorney General's motion for a supplemental order of restitution. The Board then found that the Attorney General's motion for a supplemental order granting additional restitution for serial tonometry claims not included in the original complaint was contemplated within and authorized by the Board's Final Decision and Order of October 1, 1998. That October 1 Order incorporated within it, and was based upon the Findings of Fact and Conclusions of Law reached in the Board's July 6, 1998 Decision and Order granting partial summary judgment to the Attorney General. These same Findings of Fact and Conclusions of Law also serve to support the present motion for a supplemental order.

The Certification of Mary C. Kinniery offered by the Attorney General, documenting the additional restitution of \$76,579.09 for thirty insurance companies, which sums were paid to Dr. John Amabile for serial tonometry claims made during the

period of March of 1993 to August of 1997, and documenting costs of \$759.25, was not specifically contested in any particular. Dr. Amabile's counsel did not make any showing to the Board as to any error made in the Certification, or any rightful claim which had been wrongfully included in the Certification. Moreover, Dr. Amabile's counsel did not challenge the existence of business records which the Certification indicated supported all of the claims presented by the Attorney General, nor did he demand that they be produced before the Board.

Therefore, for all of the foregoing reasons and for good cause shown,

IT IS ON THIS *30th* DAY OF SEPTEMBER, 1999,

ORDERED:

1. The motion by Dr. Amabile for a stay pending appeal is denied.
2. Dr. Amabile's request, indicated in argument before the Board, for a 72-hour grace period subsequent to any denial of the motion for a stay is denied.
3. Dr. Amabile shall restore all monies received for claims arising from CPT code 92100 (serial tonometry) from the insurance carriers specified in the Certification of Mary C. Kinniery, attached to this Order, said claims to include the total sum of \$76,579.09 as specified in Exhibit B of that Certification. Said restitution shall be made by certified check or money order made payable to each insurance carrier and

submitted to the Board within 30 days of the entry of the within Order. Dr. Amabile is also to pay costs of \$759.25 to the Board in the form of a certified check or money order made payable to Treasurer, State of New Jersey, and forwarded to the Board. Dr. Amabile may apply to the Board for relief from the time frames of this provision or the method of payment upon good cause shown.

STATE BOARD OF OPTOMETRISTS

By: Barry Schneider, D.O.
Barry Schneider
President 