

**STATE OF VERMONT  
DEPARTMENT OF LABOR**

Leslie Richardson

Opinion No. 04-11WC

v.

By: Phyllis Phillips, Esq.  
Hearing Officer

Regular Veteran's Association  
Post #514

For: Anne M. Noonan  
Commissioner

State File No. G-14847

**RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT**

**ATTORNEYS:**

Thomas Nuovo, Esq., for Claimant  
Jennifer Moore, Esq., for Defendant

**ISSUE PRESENTED:**

Do Claimant's claims for permanent partial disability benefits referable to her left leg, lumbar spine and/or left hip survive her death with no dependents and for reasons unrelated to her work injury?

**FINDINGS OF FACT:**

The following facts are undisputed:

1. On October 8, 1993 Claimant injured her left ankle when she slipped and fell while at work for Defendant. Defendant accepted the injury as compensable and began paying workers' compensation benefits accordingly.
2. Although initially the injury was thought to be relatively minor, Claimant suffered severe complications, including deep vein thrombosis in her left calf and recurrent bone infections in her tibia. Over the course of several years she underwent numerous surgeries in an attempt to address these issues. Claimant ambulated with crutches during much of this time.
3. As a consequence of her leg injury and its resulting complications, Claimant developed lower back pain. In January 2004 she underwent L4-5 fusion surgery. Defendant accepted both the lower back condition and the surgery as causally related to the original injury and therefore compensable.

4. In 2005 Claimant was diagnosed with avascular necrosis in her left hip. As treatment, she underwent a left total hip replacement in 2006. Defendant disputed its responsibility for this condition, but the Commissioner ruled that it was causally related to the original 1993 injury and therefore compensable. *Richardson v. Regular Veteran's Association Post No. 514*, Opinion No. 31-06WC (July 24, 2006). On appeal, both the Chittenden Superior Court and the Vermont Supreme Court affirmed. *Richardson v. Regular Veteran's Ass'n Post No. 514*, 987 A.2d 336 (Vt. 2009).
5. On June 25, 2007 Defendant's independent medical evaluator, Dr. Johansson, determined that Claimant had reached an end medical result for her left leg, lower back and left hip injuries. Dr. Johansson rated Claimant with a 14% whole person permanent impairment referable to her leg. Subsequently, on March 20, 2008 Dr. Johansson assessed Claimant with an additional 25% whole person permanent impairment referable to her lumbar spine. Dr. Johansson did not rate the permanent impairment referable to Claimant's left hip injury.
6. On August 7, 2008 Defendant's second independent medical evaluator, Dr. Gennaro, rated Claimant with a 10% permanent impairment referable to her left hip.
7. In January 2009 Claimant underwent a second lumbar fusion surgery to address significant disc degeneration at L3-4, the level adjacent to her prior fusion in 2004. Defendant accepted the compensability of this condition as causally related to the original 1993 injury.
8. Claimant died on December 23, 2009 from causes unrelated to her work injury. At the time of her death she had not yet reached an end medical result following her January 2009 fusion surgery. Claimant left no surviving dependents.
9. Defendant paid Claimant weekly temporary total disability benefits from October 24, 1993 through October 19, 2007. On that date, the Department approved its discontinuance on the grounds that Claimant had reached an end medical result as determined by Dr. Johansson. Subsequently, from October 21, 2007 until January 11, 2009 (a total of 64 weeks), Defendant paid permanent partial disability benefits. Following Claimant's second fusion surgery, beginning on January 11, 2009 Defendant reinstated weekly temporary total disability payments. These continued until the time of Claimant's death.
10. Almost a year after Defendant began paying permanency benefits, in July 2008 Claimant filed a Notice and Application for Hearing in which she disputed Defendant's end medical result determination as to her lower back condition. Claimant requested that all permanency benefits paid from October 21, 2007 forward be re-characterized as temporary total disability benefits instead. This issue remained unresolved at the time of Claimant's death.
11. Claimant never requested, and the Department never approved, payment of any portion of her permanency compensation in a lump sum, as permitted by 21 V.S.A. §652(b).

## DISCUSSION:

1. In order to prevail on a motion for summary judgment, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to a judgment in its favor as a matter of law. *Samplid Enterprises, Inc v. First Vermont Bank*, 165 Vt. 22, 25 (1996). In ruling on such a motion, the non-moving party is entitled to the benefit of all reasonable doubts and inferences. *State v. Delaney*, 157 Vt. 247, 252 (1991); *Toys, Inc. v. F.M. Burlington Co.*, 155 Vt. 44 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed or unrefuted. *State v. Realty of Vermont*, 137 Vt. 425 (1979).
2. At issue here is the proper application of Vermont's workers' compensation survival statute, 21 V.S.A. §639. Claimant's estate claims entitlement to permanent partial disability benefits, in amounts to be determined,<sup>1</sup> for all of the injuries Claimant sustained as a result of her 1993 work-related accident. Defendant argues that at the time of her death Claimant had been paid all of the benefits that had accrued during her lifetime. Having already paid the funeral expenses mandated by §639, Defendant asserts that it owes nothing more to her estate.
3. Section 639 reads as follows:

In cases of the death of a person from any cause other than the accident during the period of payments for disability or for the permanent injury, the remaining payments for disability then due or for the permanent injury shall be made to the person's dependents according to the provisions of sections 635 and 636 of this title, or if there are none, the remaining amount due, but not exceeding \$5,500.00 for burial and funeral expenses . . . , shall be paid in a lump sum to the proper person.
4. The Vermont Supreme Court has specifically interpreted this statute. In *Dodge v. Precision Construction Products, Inc.*, 2003 VT 11, the Court considered a claim for workers' compensation benefits made by the estate of a claimant who, as is the case here, died without dependents and for reasons unrelated to his work injury. Unlike the situation here, however, the claimant in *Dodge* had never received any benefits – his claim had been disputed and the Department had not yet adjudicated its compensability at the time of his death. The employer argued that absent such a determination, there were neither any “payments” nor any “remaining amount due” on the day the claimant died, and thus §639 did not apply.

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<sup>1</sup> Claimant has reserved her right to challenge both Dr. Johansson's and Dr. Gennaro's permanent impairment ratings, as well as the compensation rate for any permanency benefits paid to date, if the pending cross motions for summary judgment are decided in her favor.

5. The Court held otherwise. With reference to Vermont's general survival statute, 14 V.S.A. §1451, it determined that even in death the claimant had a right to have his claim adjudicated. If his claim was found compensable, the Court ruled, his administrators would be entitled to whatever benefit payments he would have received "from the date of eligibility until the date of his death, as well as payments under 21 V.S.A. §639." *Id.* at ¶26. In reaching this result, the Court thus distinguished between benefits that already had accrued while the claimant was living and those that he would have received in the future had he not died. The former constitute "an asset of the estate, like any other debt," *Id.* at ¶21, quoting 4 *Larson's Workers' Compensation Law* §89.02, and thus exist outside of §639. If the claimant dies without dependents, the latter are capped by the statute's reference to funeral and burial expenses. *Id.* at ¶15.
6. Applying the Court's determination in *Dodge* to the present case, the challenge is to determine which, if any, of the permanency benefits referable to Claimant's various injuries already had accrued while she was still living. The answer lies in recognizing the point at which an injured worker's entitlement to such benefits arises.
7. While it is true that an injured worker's right to compensation is acquired at the time he or she suffers a work-related injury, *Sanz v. Douglas Collins Construction*, 2006 VT 102, the right to specific benefits may not accrue until some time thereafter. *Id.*; *Kraby v. Vermont Telephone Co.*, 2004 VT 120. This distinction is particularly germane to permanency benefits. Not every compensable injury causes permanent impairment. Until the medical recovery process concludes there is no way to know whether the injury might fully resolve, and therefore no basis for determining whether the injured worker will even be entitled to permanency compensation. With that in mind, a cause of action for permanency benefits does not accrue until the injured worker reaches an end medical result. *Kraby, id.* at ¶6; *Longe v. Boise Cascade Corp.*, 171 Vt. 214, 222 (2000); *Hoisington v. Ingersoll Electric*, Opinion No. 52-09WC (December 28, 2009).
8. Here, the undisputed evidence establishes that Claimant reached an end medical result, at least as to her compensable leg and hip injuries, on June 25, 2007. Her entitlement to permanency benefits for those conditions accrued and became payable as of that date. They therefore survive as an asset of her estate and are not limited in any way by §639.
9. The permanency benefits referable to Claimant's lower back injury stand on a different footing, however. Although she had been determined, at least according to Defendant's medical expert, to be at end medical result with a ratable permanency following her first lumbar fusion surgery in 2004, even Defendant acknowledged that her status changed when she underwent her second fusion surgery in January 2009. At that point, Defendant appropriately reinstated weekly temporary disability benefits, and these continued until Claimant's death eleven months later. Claimant never again reached an end medical result, and the additional permanency, if any, attributable to her second fusion was never rated.

10. These circumstances give rise to two separate determinations as whether the permanency benefits referable to Claimant's lumbar spine injury survive her death. The first relates to whether any permanency benefits accrued after Claimant's first fusion surgery. The second relates to whether any additional benefits accrued after her second surgery.
11. The facts relating to the second question are undisputed, and therefore that issue is appropriate for resolution by way of summary judgment. Because Claimant never reached an end medical result following her second fusion surgery, her entitlement to whatever permanency benefits might have been attributable to her lumbar spine injury as it existed after January 2009 never accrued. Assuming that the evidence now available can establish that Claimant would have received those benefits had she lived, they will survive her death only to the extent provided by §639.
12. The facts relevant to determining the first question, however, are not as clear and therefore I cannot assume that they are undisputed. Resolving the issue of whether the permanency attributable to Claimant's lumbar spine following her first fusion surgery survives her death requires a determination whether she did or did not reach an end medical result at any point prior to her second surgery.
13. "End medical result" is defined as "the point at which a person has reached a substantial plateau in the medical recovery process, such that significant further improvement is not expected, regardless of treatment." Workers' Compensation Rule 2.1200.
14. In most cases an injured worker only attains the point of end medical result once – he or she reaches a plateau following treatment and does not treat or become disabled again. Occasionally, however, after initially reaching a plateau a claimant's condition may worsen to the point where further treatment becomes necessary and additional permanent impairment results. Rather than negating the original determination of end medical result, the renewed treatment in such cases culminates in a second, separate end medical result determination. *See* 21 V.S.A. §650(c) (providing for temporary disability compensation to be paid for separate intervals of disability) and 21 V.S.A. §668 (providing for compensation to be increased "upon the ground of a change in the conditions" since the time of a previous award).
15. Applying these concepts to the circumstances here, one possible factual scenario is that Claimant reached an end medical result following her first fusion surgery in June 2007 and incurred a ratable permanent impairment referable to her lumbar spine at that time. Then, at some later point she suffered a worsening of her condition, following which she required further surgery and incurred additional disability. If the evidence establishes this to be the case, then Claimant's entitlement to the permanency caused by her first surgery already would have accrued and become payable prior to her second surgery, and therefore will have survived her death.

16. Alternatively, if the evidence establishes that Claimant never truly reached a plateau in her recovery process following her first fusion surgery, such that it was inappropriate for Defendant's expert either to have declared her to be at end medical result for her lower back injury or to have rated the permanency referable to her lumbar spine, then her entitlement to these benefits never accrued and does not now survive.
17. Considering these competing scenarios, I conclude that the question whether Claimant reached an end medical result for her lower back condition at any time between her first and second fusion surgeries involves material facts that are not yet so clear as to be undisputed. Without further evidence, it is impossible to discern whether Claimant's entitlement to permanency benefits attributable to her first surgery ever accrued, and therefore whether they now survive her death. Summary judgment on that issue is not appropriate.
18. Defendant correctly notes that Claimant never requested, and the Department never approved, payment of any portion of her permanency compensation in a lump sum. With that in mind, it asserts that because Claimant received weekly disability benefits, whether temporary or permanent, continuously from the time of her injury until the time of her death, no further benefits could possibly have become payable. Thus, Defendant argues, the timing of any end medical result determination for Claimant's various injuries is irrelevant to the question whether it owes additional permanency now.
19. Claimant's right to accrued permanency compensation cannot be undone by a payment schedule, however. The Supreme Court specifically has admonished against construing §639 so narrowly. *Dodge, supra* at ¶8. Particularly where, as here, the fact that a subsequent period of temporary disability may have caused ongoing payments for permanency compensation to be suspended should not mean that those benefits are no longer owed.
20. In sum, as the undisputed facts establish that the permanency benefits referable to Claimant's leg and hip injuries had accrued prior to her death I conclude that they survive without limitation. I conclude that the permanency benefits, if any, attributable to Claimant's second fusion surgery in January 2009 had not yet accrued at the time of her death, and therefore survive, if at all, only to the extent provided by 21 V.S.A. §639. Last, I conclude that questions of material fact prevent me from determining whether the permanency benefits referable to Claimant's lumbar spine injury following her first fusion surgery had accrued by the time of her death.

**ORDER:**

Claimant's Motion for Summary Judgment is **GRANTED** as to the survival of permanency benefits referable to her left leg and left hip injuries, and **DENIED** as to the survival of permanency benefits referable to her lumbar spine injury. Defendant's Motion for Summary Judgment is **GRANTED** as to the failure of any permanency benefits referable to Claimant's January 2009 fusion surgery to survive, and **DENIED** in all other respects.

**DATED** at Montpelier, Vermont this \_\_\_\_ day of February 2011.

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Anne M. Noonan  
Commissioner

Appeal:

Within 30 days after copies of this opinion have been mailed, either party may appeal questions of fact or mixed questions of law and fact to a superior court or questions of law to the Vermont Supreme Court. 21 V.S.A. §§670, 672.