

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Jeffrey Siner

Opinion No. 04-23WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Poulin Lumber

For: Michael A. Harrington
Commissioner

State File No. PP-56824

**RULING ON CROSS MOTIONS FOR SUMMARY JUDGMENT AND
DEFENDANT'S MOTION IN LIMINE**

APPEARANCES:

Ronald A. Fox, Esq., for Claimant

Jennifer K. Moore, Esq., for Defendant

ISSUES PRESENTED:

1. May the Department consider an expert medical opinion obtained after Claimant's death to determine whether he had reached an end medical result for his work injuries prior to his death?
2. If so, must the expert's medical opinion nevertheless be rejected as impermissibly premised on conjecture and speculation as a matter of law?
3. Is Defendant entitled to judgment in its favor that Claimant had not reached end medical result prior to his death, such that his claim for permanent partial disability benefits did not accrue as a matter of law?
4. Conversely, is Claimant entitled to judgment in his favor that he reached end medical result prior to his death, such that his claim for permanent partial disability benefits accrued as a matter of law?
5. Are Claimant's dependents entitled to permanent partial disability benefits based on the treating physician's 14 percent whole person impairment rating as a matter of law?

EXHIBITS:

Defendant's Exhibit A:	Agreement for Temporary Compensation (Form 32)
Defendant's Exhibit B:	December 29, 2021 medical record of Austin Sumner, MD
Defendant's Exhibit C:	January 29, 2022 Death Certificate
Defendant's Exhibit D:	Dr. Sumner's undated permanent impairment rating
Defendant's Exhibit E:	Dr. Sumner's May 6, 2022 end medical result opinion

Claimant's Exhibit 1: Dr. Sumner's November 22, 2022 affidavit
Claimant's Exhibit 2: Claimant's indemnity payment history¹

FINDINGS OF FACT:

There is no genuine issue as to the following material facts:

1. Claimant injured his right quadricep at work on January 13, 2021. Defendant accepted his workers' compensation claim and paid some benefits accordingly. *Defendant's Statement of Undisputed Material Facts* ("Defendant's Statement"), ¶ 1; *Defendant's Exhibit A*; *Claimant's Statement of Undisputed Material Facts* ("Claimant's Statement"), ¶ 1.
2. On December 29, 2021, board certified occupational medicine physician Austin Sumner, MD, released Claimant to return to work and noted that he would likely be "approaching maximum medical improvement" at an anticipated follow up visit in about five weeks. *Defendant's Statement*, ¶ 2; *Defendant's Exhibit B*. Dr. Sumner is the Medical Director for Occupational Medicine at the University of Vermont Health Network in Berlin, Vermont. *Claimant's Statement*, ¶ 2; *Claimant's Exhibit 1*, ¶¶ 1-3.
3. Claimant became Dr. Sumner's patient in August 2021 when he was referred to a work conditioning program by orthopedic surgeon John Begly, MD, who performed Claimant's quadricep repair in March 2021. *Claimant's Statement*, ¶ 3; *Claimant's Exhibit 1*, ¶¶ 4-8. Between August 10, 2021 and December 29, 2021, Dr. Sumner examined Claimant eight times. *Claimant's Statement*, ¶ 4; *Claimant's Exhibit 1*, ¶¶ 7-8.
4. On December 29, 2021, Dr. Sumner ended Claimant's participation in the work conditioning program, noted that he was working full time and full duty, and completed a Work Capabilities Form (Form 20) releasing him to return to work with no restrictions, subject only to self-pacing. *Claimant's Statement*, ¶ 5; *Defendant's Exhibit B*.
5. Also on December 29, 2021, Dr. Sumner indicated that he wanted to see Claimant again in about five weeks, after Claimant's next appointment with his surgeon, Dr. Begly. *Claimant's Statement*, ¶ 6; *Defendant's Exhibit B*. The follow up appointment with Dr. Sumner was scheduled for February 9, 2022. *Defendant's Exhibit B*, Work Capabilities Form (Form 20); *Claimant's Exhibit 1*, at ¶ 11.
6. Claimant died on January 29, 2022 for reasons unrelated to the work injury.² *Defendant's Statement*, ¶ 3; *Claimant's Statement*, ¶ 7; *Defendant's Exhibit C*.

¹ Claimant submitted this additional exhibit to the Department by email on January 18, 2023.

² Claimant Jeffrey Siner filed this workers' compensation claim. As used in this opinion, the term "Claimant" refers to both Mr. Siner and his estate.

7. Following Claimant's death, at the request of his estate's attorney, Dr. Sumner assessed a 14 percent whole person permanent impairment for Claimant's work-related injuries. Dr. Sumner's assessment was based on the reported quadricep weakness and persistent post-DVT swelling that he noted on December 29, 2021, prior to Claimant's death. *Defendant's Statement*, ¶ 4; *Defendant's Exhibit D*. Dr. Sumner also based his assessment on his knowledge of Claimant as a patient, a review of Claimant's medical records from the work conditioning program, and Dr. Begly's medical records. *Claimant's Statement*, ¶ 8; *Claimant's Exhibit 1*, ¶¶ 12-14 and Exhibit A attached to *Claimant's Exhibit 1*.
8. After providing his report on Claimant's permanent impairment, Dr. Sumner learned that Defendant rejected his permanent impairment rating because Claimant was not placed at end medical result when he was last evaluated on December 29, 2021. *Claimant's Statement*, ¶ 9; *Claimant's Exhibit 1*, ¶ 15; *Defendant's Exhibit E*.
9. Thereafter, Dr. Sumner spoke with Dr. Begly. According to Dr. Sumner, Dr. Begly said that he planned to discharge Claimant from his care after his next appointment, which was scheduled for some time after December 29, 2021. Further, Dr. Sumner himself had no plans to change or add to Claimant's care. *Claimant's Statement*, ¶ 10; *Claimant's Exhibit 1*, ¶ 16.
10. On May 6, 2022, Dr. Sumner offered his opinion to a purported reasonable degree of medical certainty that Claimant reached an end medical result on December 29, 2021, the date of his last office visit. *Defendant's Statement*, ¶ 5; *Defendant's Exhibit E*.
11. In Dr. Sumner's opinion, as of December 29, 2021, Claimant "had reached a substantial plateau in the medical recovery process, such that significant further improvement was not expected, regardless of treatment." The only missing piece in Dr. Sumner's analysis on December 29, 2021 was verifying that Dr. Begly had no further treatment plans for Claimant, which Dr. Sumner did after learning of Claimant's death. *Claimant's Statement*, ¶ 11; *Claimant's Exhibit 1*, ¶ 17.

CONCLUSIONS OF LAW:

1. Defendant seeks the exclusion of Dr. Sumner's May 6, 2022 end medical result opinion on the grounds that it was obtained after Claimant's death or, in the alternative, on the grounds that it is speculative. Defendant seeks summary judgment in its favor that Claimant did not reach end medical result for his work injury prior to his death, such that no claim for permanent partial disability benefits accrued and his dependents are not entitled to receive any such benefits.
2. Claimant seeks summary judgment in its favor that Dr. Sumner's May 6, 2022 end medical result opinion establishes the accrual of the claim for permanent partial disability benefits prior to Claimant's death. Claimant further seeks payment of those benefits based on Dr. Sumner's posthumous 14 percent permanent impairment rating as a matter of law.

Permanent Partial Disability Benefits After an Injured Worker's Death

3. This case presents an injured worker who died from medical causes unrelated to his work injury. In such cases, the Workers' Compensation Act, 21 V.S.A. § 639, provides in relevant part 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 more than the actual burial and funeral expenses not to exceed \$10,000.00 . . . shall be paid in a lump sum to the proper person.

4. As set forth in the statute, therefore, a claim for workers' compensation benefits may survive the injured worker's death from a cause unrelated to the work injury. See *Dodge v. Precision Const. Products, Inc.*, 2003 VT 11 (injured worker's estate entitled to the payments the worker would have received from date of eligibility to date of death, as well as payments under § 639). The *Dodge* Court wrote: "[A] claim for compensation benefits which accrued but were not paid at the time of the workman's death is a vested right which he has earned, and therefore it becomes an asset of his estate." 2003 VT 11, ¶ 22, quoting *Cureton v. Joma Plumbing & Heating Co.*, 38 N.J. 326, 184 A.2d 644, 647-48 (1962).
5. The Commissioner subsequently addressed an estate's right to permanent impairment benefits in *Richardson v. Regular Veterans Association, Post #514*, Opinion No. 04-11WC (February 16, 2011). The Commissioner noted that while the right to compensation is acquired at the time of injury under *Sanz v. Douglas Collins Const.*, 2006 VT 102, the "right to specific benefits may not accrue until some time thereafter." *Richardson*, at Discussion ¶ 7 (internal citations omitted). With regard to permanent disability benefits, the Commissioner held:

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.**

Richardson, at Discussion ¶ 7 (emphasis added).

Motion in Limine: Admissibility of Dr. Sumner's End Medical Result Opinion

6. The parties here agree that the compensability of Claimant's claim for permanent partial disability benefits depends on whether he reached an end medical result for his

work injuries prior to his death on January 29, 2022. They disagree about whether Dr. Sumner's posthumous end medical result opinion is admissible evidence.

7. In his December 29, 2021 treatment note, Dr. Sumner wrote that he anticipated that Claimant would be "approaching maximum medical improvement" in about five weeks. *Defendant's Exhibit B*. Thus, Dr. Sumner's opinion prior to Claimant's death was that he had not yet reached end medical result. On May 6, 2022, several months after Claimant's death, Dr. Sumner changed his mind and offered his opinion that Claimant was at end medical result on December 29, 2021. *Defendant's Exhibit E*.
8. Defendant contends that the Department may not consider Dr. Sumner's end medical result opinion because it was rendered after Claimant's death. It contends that the question of whether a right has accrued may only be answered with the evidence existing contemporaneously with the proposed accrual date. Claimant counters that a medical fact can exist at a specific point in time regardless of whether the fact is noted at that time.
9. The Commissioner addressed retrospective end medical result determinations in *Smiley v. State*, Opinion No. 15-13WC (June 3, 2013), *aff'd on other grounds*, 2015 VT 42. The claimant in *Smiley* sustained a compensable work injury in January 1996. He received medical treatment until July 1996. At that time, his treating physician advised that his lingering symptoms would likely continue to improve over time and that he should return for treatment "only as needed." *Smiley*, Opinion No. 15-13WC, at Finding of Fact No. 2. Fourteen years later, the claimant sought permanent partial disability benefits. He attended a permanency evaluation in January 2011, and the medical examiner, Verne Backus, MD, reviewed the claimant's medical records to determine end medical result. In Dr. Backus' opinion, the claimant probably reached end medical result "back in 1996." *Smiley, supra*, at Finding of Fact Nos. 5-6. The Commissioner accepted Dr. Backus' end medical result opinion and concluded that the claimant reached end medical result on or about July 8, 1996. The Commissioner wrote:

What expert evidence there is also establishes July 1996 as the most likely end medical result date. With no record of any subsequent treatment, Dr. Backus' conclusion that Claimant probably had reached the point of maximum medical improvement "back in 1996" likely refers to that timeframe. That his opinion necessarily was retrospective in nature does not in any way disqualify it. *See, e.g., Kraby [v. Vermont Telephone Co., 2004 VT 120]* (treating surgeon's retrospective declaration of end medical result accepted as determinative).

Smiley, supra, at Conclusion of Law No. 7.

10. Although Claimant here died before the end medical result opinion was offered, I conclude that the opinion in this case stands on similar footing as the *Smiley* opinion. In each case, the doctor offered a retrospective end medical result opinion based primarily on the injured worker's medical records. Whether the opinion here is

persuasive is yet to be determined, but given the permissive nature of the Rules of Evidence, I find no basis to exclude the opinion. *See, e.g.*, Vermont Rule of Evidence 401 (definition of “relevant evidence”); Vermont Rule of Evidence 402 (relevant evidence admissible except as limited by constitutional requirements or as otherwise provided by statute or rules prescribed by the Supreme Court). Further, allowing the opinion into evidence is in keeping with the informal nature of workers’ compensation proceedings under Workers’ Compensation Rule 17.1100.

11. Accordingly, I conclude that the retrospective and posthumous nature of Dr. Sumner’s end medical result opinion here is not a basis for excluding the opinion from consideration.

Motion in Limine: Alleged Speculative Nature of Dr. Sumner’s Opinion

12. Defendant next contends that, if Dr. Sumner’s opinion is not excluded on the basis of its posthumous nature, it should nevertheless be excluded because it is speculative as a matter of law. Defendant contends that Dr. Sumner’s opinion ignores the possibility that Claimant’s condition might have changed for the better or the worse from the time Dr. Sumner said he was not at end medical result on December 29, 2021 and the date of his death on January 29, 2022.
13. The Department assesses a medical expert’s credibility and determines the persuasiveness of his or her opinion in the context of all the evidence offered at hearing. *Meau v. The Howard Center, Inc.*, Opinion No. 18-21WC (September 14, 2021), citing *Merling v. Barrows Coal Co.*, Opinion No. 25SJ-98WC (April 30, 1998) (the issue is generally not whether the medical opinion is admissible but whether it is “credible and convincing after evaluation of all the evidence”). Thus, the Department broadly allows relevant medical testimony into evidence and considers the persuasiveness of such testimony at the hearing.
14. More recently, the Department considered two motions in limine to exclude expert medical testimony in *Bushey v. Adecco*, Opinion No. 07F-22WC (March 4, 2022). The claimant in *Bushey* sought to exclude the defendant’s first medical expert from offering his opinion on permanent impairment on the grounds that the expert did not correctly apply the *AMA Guides to the Evaluation of Permanent Impairment*. The claimant then moved to exclude testimony from the defendant’s second medical expert on the grounds that his testimony would be immaterial and prejudicial. In denying both motions, the Commissioner explained that the purpose of the hearing was to evaluate and weigh the evidence. Accordingly, it was unnecessary to consider the medical experts’ relevant opinions prior to the hearing; rather, the persuasiveness of the opinions was a question of fact for the hearing. *Bushey, supra*, at 3. Further, the Department in *Bushey* stated that proceedings should be conducted in accordance with the Rules of Civil Procedure and Rules of Evidence, but only insofar as they do not defeat the informal nature of the proceeding. 21 V.S.A. §§ 602, 604; Workers’ Compensation Rule 17.1100. Evaluating the expert’s relevant opinion prior to the hearing would defeat the informal nature of the proceeding. *See Bushey, supra*, at 3.

15. Dr. Sumner's opinion here sets forth a relevant conclusion about Claimant's end medical result status. Applying the considerations articulated in *Merling* and *Bushey*, I find no basis for excluding it from consideration. Rather, whether Dr. Sumner's opinion is persuasive or speculative is a question of fact to be determined when the Department considers all the evidence at the formal hearing.

Summary Judgment Standard

16. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment in its favor as a matter of law. *Samplid Enterprises, Inc. v. First Vermont Bank*, 165 Vt. 22, 25 (1996). 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, 48 (1990).
17. Where the parties have filed cross motions for summary judgment, each party is entitled to the benefit of all reasonable doubts and inferences when the opposing party's motion is being judged. *Toys, Inc., supra*, at 48.

The Parties' Cross Motions on End Medical Result and Accrual of the Claim for Permanent Partial Disability Benefits

18. The parties agree that the claim for permanent partial disability benefits turns on whether Claimant reached an end medical result before he died. If he did, then his claim for those benefits accrued, and any such benefits would be payable to his dependents under 21 V.S.A. § 639. If he did not reach end medical result, then the claim never accrued. *See Conclusion of Law No. 5 supra*.
19. The parties have filed cross motions for summary judgment as to whether Claimant reached an end medical result for his work injury prior to his death. Claimant relies on Dr. Sumner's May 6, 2022 opinion that he reached end medical result. Defendant's motion presupposes the exclusion of that opinion, but that opinion was not excluded.
20. Even though Dr. Sumner's opinion has not been excluded, the persuasiveness of the opinion remains to be determined. If a medical opinion is not persuasive, the Department can decline to accept it, even if the opposing party does not offer a more persuasive opinion. *Meau v. The Howard Center, Inc.*, Opinion No. 01-14WC (January 24, 2014) ("merely stating a conclusion to a reasonable degree of medical certainty does not necessarily make it so, even if no more credible opinion is offered.")
21. Based on the foregoing, there are genuine issues of material fact that preclude summary judgment in either party's favor as to whether Claimant reached an end medical result prior to his death.

Claimant's Summary Judgment Motion on Dr. Sumner's Permanent Impairment Rating

22. Finally, Claimant seeks summary judgment that permanent partial disability benefits are due to his dependents under § 639 based on Dr. Sumner's assessment of a 14 percent permanent impairment for his work-related injury. This request fails for two reasons.
23. First, it is not appropriate to assess an injured worker's permanent impairment under the *AMA Guides to the Evaluation of Permanent Impairment* until the worker has reached an end medical result for the injury. *AMA Guides*, § 2.4; *see also* Workers' Compensation Rule 10.1200. Here, Claimant's end medical result status is in dispute. Accordingly, until that issue is resolved, it is premature to accept any permanent impairment rating for Claimant's injury.
24. Second, even if the Department found that Claimant had reached an end medical result prior to his death, the persuasiveness of Dr. Sumner's permanent impairment rating presents a question of fact for determination at formal hearing. Further, Defendant may wish to offer an impairment rating from an expert of its choosing.³
25. Based on the foregoing, I conclude that Claimant is not entitled to judgment on Dr. Sumner's 14 percent permanent impairment rating as a matter of law.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Defendant's Motion in Limine to exclude Dr. Sumner's May 6, 2022 end medical result opinion is hereby **DENIED**. Further, both parties' summary judgment motions are hereby **DENIED**.

DATED at Montpelier, Vermont, this 23rd day of February 2023.

Michael A. Harrington
Commissioner

³ When Defendant filed its summary judgment motion on October 31, 2022, the final disclosure deadline was February 1, 2023 and the scheduled formal hearing date was March 1, 2023. Those deadlines were extended in January 2023. Accordingly, Defendant still has time to offer an impairment rating, should it choose to do so.