

**STATE OF VERMONT
DEPARTMENT OF LABOR**

John Greene

Opinion No. 11-23WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Bellavance Trucking, Inc.

For: Michael A. Harrington
Commissioner

State File No. PP-55454

RULING ON CLAIMANT'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Heidi S. Groff, Esq., for Claimant
James M. O'Sullivan, Esq., for Defendant

ISSUES PRESENTED:

1. Has Defendant accepted Claimant's claim for workers' compensation benefits as compensable for an injury rising out of and in the course of his employment on December 8, 2020?
2. Has Defendant waived its right to object to its own expert's permanent impairment rating after relying on that expert's report to support its discontinuance of Claimant's temporary disability benefits and issuing weekly advancements of permanent partial disability benefits from the effective date of the approved discontinuance to the present date?

EXHIBITS:

| | |
|------------------------|---|
| Claimant's Exhibit 1: | March 19, 2021 Interim Order of Benefits |
| Claimant's Exhibit 2: | Defendant's Pre-Trial Statement filed May 4, 2021 |
| Claimant's Exhibit 3: | May 4, 2021 Scheduling Order |
| Claimant's Exhibit 4: | October 20, 2021 Mediation Scheduling Notice |
| Claimant's Exhibit 5: | October 20, 2021 Mediation Scheduling Notice |
| Claimant's Exhibit 6: | November 16, 2021 email from Defendant's Counsel to Claimant's Counsel about claim acceptance and cancellation of mediation |
| Claimant's Exhibit 7: | January 6, 2022 Independent Medical Evaluation Report of George White, MD |
| Claimant's Exhibit 8: | January 21, 2022 Approved Discontinuance of Wage Replacement Benefits Based on End Medical Result (Form 27) |
| Claimant's Exhibit 9: | June 8, 2022 Notice and Application for Hearing (Form 6) |
| Claimant's Exhibit 10: | Attorney O'Sullivan's June 23, 2022 Entry of Appearance on behalf of Defendant |

| | |
|------------------------|---|
| Claimant's Exhibit 11: | Claimant's email to the Department's specialist, the specialist's response, and Defendant's reply, all dated June 27, 2022 |
| Claimant's Exhibit 12: | Defendant's July 22, 2022 Objection to Claimant's Request for a Lump Sum |
| Claimant's Exhibit 13: | Claimant's August 3, 2022 email to the Department's specialist |
| Claimant's Exhibit 14: | December 15, 2021 email from Defendant's counsel concerning claim acceptance and cancellation of hearing on the issue of the claim's compensability |
| Claimant's Exhibit 15: | August 30, 2022 Formal Hearing Docket Referral |
| Claimant's Exhibit 16: | Indemnity Payment Report created on December 15, 2022 |
| Defendant's Exhibit 1: | March 19, 2021 Interim Order of Benefits |
| Defendant's Exhibit 2: | Defendant's Pretrial Statement filed May 4, 2021 |
| Defendant's Exhibit 3: | December 15, 2021 email from Defendant's counsel concerning claim acceptance and cancellation of hearing on the issue of the claim's compensability |
| Defendant's Exhibit 4: | January 21, 2022 Approved Discontinuance of Wage Replacement Benefits Based on End Medical Result (Form 27) |
| Defendant's Exhibit 5: | January 6, 2022 Independent Medical Evaluation Report of George White, MD |
| Defendant's Exhibit 6: | May 10, 2022 medical records review report of Ali Reza, MD |

FINDINGS OF FACT:

Considering the evidence in the light most favorable to Defendant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), and taking judicial notice of all relevant forms contained in the Department's file, there is no genuine issue as to the following material facts:

1. On March 19, 2021, the Department's specialist issued an Interim Order of Benefits in this claim, finding that Claimant's injury was compensable and ordering Defendant to pay certain benefits accordingly, including medical and temporary disability benefits. *Claimant's Statement of Undisputed Material Facts* ("Claimant's Statement"), ¶ 1; *Claimant's Exhibit 1*; *Defendant's Exhibit 1*.
2. Defendant appealed the Interim Order of Benefits. It identified the issues for hearing as "(A) whether Claimant suffered a work-related injury. (B) if so, to what benefits is Claimant entitled." *Claimant's Statement*, ¶ 2; *Claimant's Exhibit 2*; *Defendant's Exhibit 2*.
3. The parties scheduled mediation with Attorney Phyllis Phillips for November 4, 2021. *Claimant's Statement*, ¶ 4; *Claimant's Exhibit 4*.¹

¹ Claimant's Exhibits 4 and 5 are identical. Both are notices that mediation will take place on November 22, 2021. Claimant apparently meant to attach a different notice as Exhibit 4 – one setting mediation for November 4, 2021, as set forth in *Claimant's Statement*, ¶ 4. In response to ¶ 4, Defendant wrote that it could "neither admit nor deny the factual assertion claimed in this numbered paragraph." Defendant did not state that the initial mediation date was other than November 4, 2021, nor did it attach any evidence of a different date. Accordingly, I find that mediation was initially scheduled for November 4, 2021.

4. The November 4, 2021 mediation was cancelled at Defendant's request and rescheduled for November 22, 2021. *Claimant's Statement*, ¶ 5; *Claimant's Exhibit 5*.
5. On November 16, 2021, Defendant informed Claimant that "the carrier has decided we are going to withdraw our denial/appeal to the formal hearing docket and accept [Claimant's] claim." *Claimant's Exhibit 6*. Based on this representation, the November 22, 2021 mediation was cancelled. *Claimant's Statement*, ¶ 6; *Claimant's Exhibit 6*. Defendant disputes this statement only "insofar as it suggests that prior defense counsel intended this statement to mean the insurer would not dispute any aspect of this claim going forward." *Defendant's Response to Claimant's Statement ("Defendant's Response")*, ¶ 6.
6. On December 15, 2021, Defendant advised the administrative law judge that "the carrier will be accepting this claim and therefore no need for a formal hearing on compensability." *Claimant's Statement*, ¶ 7; *Claimant's Exhibit 14*; *Defendant's Exhibit 3*. Defendant disputes Claimant's characterization of this email only "insofar as it suggests that prior defense counsel intended this statement to mean the insurer would not dispute any aspect of this claim going forward." *Defendant's Response*, ¶ 7.
7. On January 6, 2022, Claimant underwent an independent medical examination with board-certified occupational medicine physician George White, MD, at Defendant's request. *Claimant's Statement*, ¶ 8; *Claimant's Exhibit 7*; *Defendant's Exhibit 5*.
8. Dr. White placed Claimant at end medical result and assessed a 51 percent whole person impairment for his work-related injuries. *Claimant's Statement*, ¶ 9; *Claimant's Exhibit 7*, at 10-11; *Defendant's Exhibit 5*, at 10-11. Dr. White assessed a 45 percent permanent impairment for Claimant's coronary heart disease; he then assessed an additional 10 percent impairment for Claimant's use of blood thinners. Dr. White wrote:

Though I guess it is debatable, the Guides seems to imply that an impairment up to 10% whole person can be applied for individuals using warfarin and similar anticoagulants. If this is correct, then I think an additional 10% whole person is reasonable. Combining (not adding) the contributing values yields a total of 51% whole person impairment.

Claimant's Exhibit 7, at 11; *Defendant's Exhibit 5*, at 11.

9. Defendant filed a Notice of Intention to Discontinue Payments (Form 27) on January 20, 2022, seeking to discontinue Claimant's temporary disability benefits based on Dr. White's end medical result opinion. Claimant agreed with the end medical result determination, and the specialist approved the discontinuance. Effective January 27, 2022, Claimant's temporary disability benefits ceased, and Defendant began advancing his permanent partial disability benefits. *Claimant's Statement*, ¶ 10; *Claimant's Exhibit 8*; *Defendant's Exhibit 4*. Defendant responded that this statement does not demonstrate the absence of a material dispute, as Defendant's acceptance of

end medical result does not equate to an acceptance of the permanency evaluation. *Defendant's Response*, ¶ 10.

10. Since January 27, 2022, Defendant has been advancing weekly permanent partial disability benefits based on the permanent impairment rating of its own expert, Dr. White. *Claimant's Statement*, ¶ 11; *Claimant's Exhibit 16*. Defendant responded that this statement does not demonstrate the absence of a material dispute, nor does the record demonstrate Defendant's acceptance of the entirety of Dr. White's permanent impairment rating. *Defendant's Response*, ¶ 11.
11. On June 8, 2022, Claimant filed a Notice and Application for Hearing (Form 6) requesting a lump sum payment of permanent partial disability benefits based on Dr. White's assessment of 51 percent whole person impairment. *Claimant's Statement*, ¶ 12; *Claimant's Exhibit 9*. Claimant's Form 6 stated the following:

Claimant is seeking payment of PPD based on the 51% PIR assigned by Dr. White in his 1/6/22 IME report requested by the carrier. Pursuant to 21 V.S.A. § 652(c), Claimant is requesting payment of this PPD in a lump sum amount, prorated for the purpose of SSDI (Claimant has applied for SSDI benefits). Claimant also saw Dr. Spina for an IME, which was done on 11/3/21. Dr. Spina assigned PIR at a range of 50-100%. Please note that we are not waiving the right to request additional PPD benefits based on Dr. Spina's rating, nor are we waiving the right to file for PTD benefits.

Claimant's Exhibit 9.

12. On June 23, 2022, Attorney O'Sullivan entered his appearance on behalf of Defendant, replacing prior counsel, Attorney Perettine. *Claimant's Statement*, ¶ 13; *Claimant's Exhibit 10*.
13. On June 27, 2022, new defense counsel emailed Claimant's counsel that "My understanding [is that the carrier] will not pay in lump sum." *Claimant's Statement*, ¶ 14; *Claimant's Exhibit 11*.
14. On July 22, 2022, Defendant filed its Rule 14 response to Claimant's Form 6, contesting the 10 percent permanent impairment assessed by Dr. White for Claimant's use of blood thinners, as well as Dr. White's conclusion that *all* of Claimant's cardiac issues are work-related. *Claimant's Statement*, ¶ 15; *Claimant's Exhibit 12*. Defendant submitted a report from cardiologist Ali Reza, MD, in support of its position. *Defendant's Exhibit 6*.
15. On August 30, 2022, the Department's specialist referred this claim to the formal hearing docket on the following issues:

Whether this is an accepted claim;

Whether defendant legally waived its right to object to Dr. White's IME and permanent partial impairment rating (PPD) after relying on that report in support of its Form 27 and issuing weekly advancements of PPD from the effective date of the Form 27 to the present date; and

. . . [another issue that is not a subject of the present motion].

Claimant's Statement, ¶ 17; *Claimant's Exhibit 15*.

CONCLUSIONS OF LAW:

Summary Judgment Standard

1. 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).
2. Claimant here seeks a summary judgment determination that Defendant has accepted his claim as compensable. He further seeks a determination that Defendant has waived its right to contest Dr. White's permanent impairment rating.

Compensability of Claimant's Claim for Workers' Compensation Benefits

3. Claimant filed a workers' compensation claim for injuries stemming from a December 8, 2020 workplace accident. *See Claimant's Exhibit 1; Defendant's Exhibit 1*. Defendant denied the entire claim on the grounds that Claimant did not sustain an injury arising out of and in the course of his employment, after which the Department's specialist issued an interim order of benefits on March 19, 2021.
4. At Defendant's request, the disputed claim was referred to the formal docket and scheduled for hearing on the issue of whether the claimant sustained an injury arising out of and in the course of his employment. However, on December 15, 2021, Defendant accepted the claim as compensable, and the hearing was cancelled.²
5. Defendant now contends that it may contest the compensability of the claim because the interim order specifically stated that payments made pursuant to the order "shall not be deemed an admission of liability by the employer" or its insurer. *Defendant's Memorandum in Opposition to Summary Judgment*, at 3, quoting *Defendant's Exhibit 1*, at 5. Further, Defendant contends that the interim order "lapsed" when the Department approved the discontinuance of Claimant's temporary disability benefits. *Defendant's Memorandum*, at 3. However, it is not the interim order that established the compensability of this claim. It is Defendant's acceptance of the claim as compensable, made through counsel on December 15, 2021, that establishes the

² Defendant's counsel's email to the Department stated: "The carrier will be accepting this claim and therefore no need for a formal hearing on compensability." *Claimant's Exhibit 14; Defendant's Exhibit 3*.

claim's compensability. Having accepted the claim, Defendant may not now assert that Claimant did not sustain an injury arising out of and in the course of his employment on December 8, 2020.

Defendant's Right to Contest the Permanent Impairment Rating

6. Claimant contends that Defendant has waived its right to dispute Dr. White's 51 percent permanent impairment rating and that he is entitled to permanent partial disability benefits in at least this amount as a matter of law. Defendant contends that it never accepted Dr. White's permanent impairment rating, nor did it waive its right to dispute that rating.
7. As set forth in Finding of Fact No. 9 *supra*, Defendant sought to discontinue Claimant's temporary disability benefits based on Dr. White's end medical result determination. Claimant did not object, and the Department approved the discontinuance on January 21, 2022. On or about January 27, 2022, Defendant began advancing permanent partial disability benefits on a weekly basis.
8. On June 8, 2022, Claimant asked the Department to approve payment of permanent partial disability benefits based on Dr. White's 51 percent impairment rating in a lump sum. In response, Defendant expressly disputed Dr. White's impairment rating and submitted a report from Dr. Reza to support its position. *See* Finding of Fact No. 14 *supra*. Claimant contends that Defendant has waived its right to dispute Dr. White's impairment rating.
9. A waiver is the voluntary relinquishment of a known right. To establish it, "there must be shown an act or an omission on the part of the one charged with the waiver fairly evidencing an intention permanently to surrender the right in question." *Holden & Martin Lumber Co. v. Stuart*, 118 Vt. 286, 289 (1954). A waiver may be express or implied, but if it is the latter, "caution must be exercised both in proof and application. The facts and circumstances relied upon must be unequivocal in character." *Id.*; *see also Wirasnik v. WED Precast*, Opinion No. 17-13WC (June 21, 2013); *Smiley v. State of Vermont*, Opinion No. 12-12WC (April 15, 2012), (both applying the *Holden & Martin* waiver standard in the workers' compensation context).
10. The record before me does not reveal any express waiver of the right to dispute Dr. White's impairment rating by Defendant. The parties did not enter into any Agreement for Permanent Partial Disability Benefits (Form 22), nor does the record contain any letters, emails or other documentation of Defendant's acceptance of the 51 percent impairment rating. Rather, when Claimant raised the issue of Dr. White's impairment rating on June 8, 2022, Defendant responded by expressly contesting the rating.
11. Thus, I must consider whether an implied waiver prevents Defendant from disputing Dr. White's impairment rating. In the case of an implied waiver, I must exercise caution, and the facts and circumstances upon which I rely to find an implied waiver must be unequivocal in character. *See Holden & Martin Lumber Co., supra*.

12. The facts and circumstances here are that Dr. White placed Claimant at end medical result and assessed a 51 percent permanent impairment. Based on the parties' express agreement with the end medical result determination, the specialist approved the discontinuance of temporary disability benefits, and Defendant began advancing permanent partial disability benefits. However, there is no indication that Defendant agreed to pay those benefits based on a 51 percent permanent impairment rating, nor is there any indication that Claimant agreed with the 51 percent rating. Rather, Defendant just began advancing the benefits, and the parties appear not to have discussed the matter until Claimant sought a lump sum five months later.
13. In *Hastings v. Green Mountain Log Homes*, Opinion No. 03-09WC (January 21, 2009), the claimant sought payment for a total knee replacement, the need for which she attributed to her accepted knee injury. She contended that because the insurer accepted her knee injury as compensable and paid for a knee brace, it waived its right to contest liability for a total knee replacement. The Commissioner wrote that the law of waiver was "neither as broad nor as heavy-handed as Claimant would have it applied in this claim." The Commissioner concluded that by accepting the claimant's knee injury and paying some medical bills related to her knee, the insurer did not waive its right to contest the extent of her work-related knee condition. Similarly, in this case, although Defendant began advancing Claimant's permanent partial disability benefits, its doing so did not constitute an implied waiver of its right to contest the impairment rating under the circumstances presented here.
14. Finally, the Department has occasionally found that failure to assert a right promptly may be construed as an implied waiver of that right. For example, in *J.C. v. Richburg Builders*, Opinion No. 37-06WC (August 15, 2006), the insurer did not contest causation for nine years. Although it never entered into an Agreement for Temporary Disability Benefits (Form 21) with the claimant, the Commissioner nevertheless concluded that the insurer had impliedly waived its right to contest causation by failing to do so for nine years. While allowing a claimant to proceed for nine years under the impression that the claim was uncontested would render a sudden change in course unfair, I find that the six-month delay in this case is not of a comparable order of magnitude. Therefore, I conclude that Defendant's failure to challenge the impairment rating for six months, by itself, does not constitute the voluntary relinquishment of a known right.
15. Accordingly, although Defendant may not now contest its acceptance of this claim as compensable, it has not waived its right to contest the degree of permanent impairment sustained by Claimant as a consequence of his work-related injury.

ORDER:

Claimant's Motion for Summary Judgment is hereby **GRANTED IN PART** and **DENIED IN PART**. Claimant has a compensable injury that arose out of and in the course of his employment with Defendant on December 8, 2020. However, Defendant has not waived its right to contest the degree of Claimant's permanent partial impairment

DATED at Montpelier, Vermont, this 18th day of April 2023.

Michael A. Harrington
Commissioner