CASE NO. 6545 CRB-5-24-6 CLAIM NO. 100153667	:	COMPENSATION REVIEW BOARD
MARK E. FIORAVANTI CLAIMANT-APPELLANT	:	WORKERS' COMPENSATION COMMISSION
v.	:	MAY 27, 2025
NCR CORPORATION EMPLOYER		
and		
ESIS NORTHEAST WC CLAIMS INSURER RESPONDENTS-APPELLEES		

APPEARANCES:

The executrix of the claimant's estate was represented by Alfred F. Morrocco, Jr., Esq., Law Office of Alfred F. Morrocco, Jr., 200 Summer Street, P.O. Box 1660, Bristol, CT 06011-1660.

The respondents were represented by James L. Pomeranz, Esq., McGann, Bartlett & Brown, L.L.C., 111 Founders Plaza, Suite 1201, East Hartford, CT 06108.

This Petition for Review from the May 29, 2024 Finding and Dismissal of William J. Watson III, Administrative Law Judge acting for the First District, was heard January 31, 2025 before a Compensation Review Board panel consisting of Chief Administrative Law Judge Stephen M. Morelli and Administrative Law Judges Peter C. Mlynarczyk and Daniel E. Dilzer.[1]

[1] We note that a motion for continuance was granted during the pendency of this appeal.

OPINION

STEPHEN M. MORELLI, CHIEF ADMINISTRATIVE LAW JUDGE. Eloise Fioravanti, the executrix of the deceased claimant,[2] has appealed from a decision by Administrative Law Judge William J. Watson III that permanent partial disability benefits sought by her pursuant to General Statutes § 31-308 (b) cannot be awarded because her spouse, Mark Fioravanti, the claimant, died prior to obtaining maximum medical improvement.[3] She argued that the administrative law judge erred by not relying upon the posthumous permanency rating provided by the treating physician. The respondents argued that precedent required that maximum medical improvement be established during a claimant's lifetime in order to have permanent partial disability benefits awarded to their estate. We agree with the respondents and, therefore, affirm the administrative law judge's decision.

The administrative law judge reached the following factual findings at the conclusion of the formal hearing, and as the claimant did not file a motion to correct, we may give these findings conclusive effect. See Crochiere v. Enfield Board of Education, 227 Conn. 333, 347 (1993) and Stevens v. Raymark Industries, Inc., 5215 CRB-4-07-4 (March 26, 2008), *appeal dismissed*, A.C. 29795 (June 26, 2008). He found the original

[2] The claimant's widow, Eloise Fioravanti, was named executrix of his estate on May 22, 2022. See Findings, ¶ 10.

[3] General Statutes § 31-308 (b) states in relevant part: "With respect to the following injuries, the compensation, in addition to the usual compensation for total incapacity but in lieu of all other payments for compensation, shall be seventy-five per cent of the average weekly earnings of the injured employee, calculated pursuant to section 31-310 … but in no case more than one hundred per cent, raised to the next even dollar, of the average weekly earnings of production and related workers in manufacturing in the state, aas determined in accordance with the provisions of section 31-309, or less than fifty dollars weekly. All of the following injuries include the loss of the member or organ and the complete and permanent loss of use of the member or organ referred to …."

claimant, Mark Fioravanti, was employed by the respondent NCR on February 7, 2005,[4] when he sustained a left knee injury. The respondents accepted that claim and paid the claimant a specific award equal to a 7.5 percent permanency rating with a maximum improvement date of April 9, 2013. On March 19, 2019, the claimant underwent a total knee replacement, authorized by the respondent, which was performed by his treating physician, John C. Grady-Benson. On October 30, 2019, the claimant had a post-operative examination with Grady-Benson, who determined the claimant was experiencing pain and "irritation in the region of the iliotibial band near Gerdy's tubercle on the lateral aspect of the knee implant." Findings, ¶ 4. Grady-Benson opined that further exercises were needed to effectuate a full recovery which would take one year to eighteen months from the date of the procedure. The claimant was scheduled to be seen by Grady-Benson on March 18, 2020, but that appointment was cancelled due to the covid pandemic. However, on March 12, 2020, the claimant completed an online survey regarding the surgery and recovery. Grady-Benson, after reviewing that survey, noted, in relevant part, that "the patient is having mild pain pivoting and twisting on his knee, mild pain going up and down stairs, and moderate stiffness of the knee in the morning." Findings, ¶ 5 *citing* Respondent's Exhibit 2. Maximum medical improvement was not established by Grady-Benson and no permanent impairment was assigned. See id.

On October 20, 2020, Mark Fioravanti unexpectedly died. Subsequent to his death, Grady-Benson prepared a physician's permanent impairment evaluation form 42 on February 25, 2021. In doing so, he opined that the claimant had a permanent impairment rating of 40 percent to his left knee, but did not provide a date of maximum

[4] The date of injury cited in the Finding and Dismissal was inaccurate. This is a harmless scrivener's error, see Hernandez v. American Truck Rental, 5083 CRB-7-06-4 (April 19, 2007). In this opinion, we have cited the correct date of injury.

medical improvement. He also noted that the patient was deceased. See Findings, ¶ 7. Thereafter, Grady-Benson issued a medical report dated February 28, 2021, in which he again assessed a 40 percent impairment rating to the claimant's left knee. He based his assessment on the claimant's October 30, 2019 appointment and the March 12, 2020 online survey. No maximum medical improvement date was provided. Grady-Benson was deposed on March 2, 2022, and during the course of the deposition, he agreed that the rating he gave the claimant was speculative because he was limited to the records available due to the lack of a physical examination prior to the claimant's death.

Based on these facts, the administrative law judge reached the following conclusions.

> D. I find Dr. Grady-Benson's testimony credible and persuasive that Maximum Medical Improvement was not established prior to the Claimant's death and that the rating assigned was speculative based on the records available at the time of the Claimant's death and without physical examination.
>
> E. I find the medical reports of Dr. Grady-Benson persuasive that Maximum Medical Improvement was not established prior to the Claimant's death.
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> F. I find that Claimant, through the Executrix of his estate, has not met the burden of proof that Maximum Medical Improvement of the left knee had been established prior to his death.

As a result, he denied the claim for unpaid permanent partial disability benefits. The executrix did not file a motion to correct but appealed this decision. She argued that the form 42 prepared by Grady-Benson should have been credited by the administrative law judge as there was no requirement that an in-person medical examination be performed prior to issuing this form. She further argued that the covid pandemic and

responsive regulations issued in 2020 prevented the claimant from being examined prior to his untimely and unexpected death. Under these circumstances, she argued it was error not to award permanent partial disability benefits. The respondents argued that, notwithstanding the equitable concerns raised by the executrix, any award of permanent partial disability benefits based on a posthumous disability rating would be incompatible with precedent in Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185 (2010). After reviewing the precedent governing the award of permanent partial disability benefits, we concur with the respondents.

In considering this appeal, we note that the evidence presented is uncontroverted and that this case is based solely on the administrative law judge's application of the law. As a result, the general deference to fact-finding promulgated in Fair v. People's Savings Bank, 207 Conn. 535 (1988), does not apply. Nonetheless, we still extend great deference to the findings of an administrative law judge. "As with any discretionary action of the trial court, appellate review requires every reasonable presumption in favor of the action, and the ultimate issue for us is whether the trial court could have reasonably concluded as it did." Daniels v. Alander, 268 Conn. 320, 330 (2004), *quoting* Burton v. Mottolese, 267 Conn. 1, 54 (2003). We may only reverse a decision under these circumstances if it is contrary to law. See Neville v. Baran Institute of Technology, 5383 CRB-8-08-10 (September 24, 2009) and Christensen v. H & L Plastics Co., Inc., 5171 CRB-3-06-12 (November 19, 2007).

In order to properly consider this appeal, we believe we need to look to the history of case law defining maximum medical improvement and when a claimant's right to such

benefits vests. The initial decision on this issue was rendered by our Supreme Court over a century ago in Wrenn v. Connecticut Brass Co., 96 Conn. 35 (1921).

> The complete and permanent loss of the use of the arm occurs when no reasonable prognosis for complete or partial cure and no improvement in the physical condition or appearance of the arm can be reasonably made. Until such time the specific compensation for the loss of the arm, or for the complete and permanent loss of its use, cannot be made.

Id., 38.

In 1993, this issue was revisited in two decisions rendered by our Supreme Court clarifying the right of a claimant's dependents to obtain unpaid permanent partial disability benefits that were not paid during the lifetime of the decedent. In McCurdy v. State, 227 Conn. 261 (1993), the court held that "[t]he principal issue in this workers' compensation case is whether the estate of a deceased worker is entitled to an award of permanent partial disability benefits if the worker, who was totally disabled, reached maximum medical improvement before his death, but died without an award having been made." Id., 262. The court pointed out that "[w]e have long held that an injured worker has a right to a permanent partial disability award once he or she reaches maximum medical improvement" id., 268 and "[w]here, as here, there are no dependents, we hold that a permanent partial disability award that became due to the decedent before his death is payable to the estate." Id., 270. In Cappellino v. Cheshire, 226 Conn. 569 (1993), the claimant died of unrelated causes prior to exhausting his permanent partial disability award and the court determined that the claimant reached maximum medical improvement prior to his demise. See id., 573. Therefore, "the balance of permanent partial disability award passes to an employee's dependents if the employee dies of unrelated causes before the award is paid in full." Id., 577.

In 2010, our Supreme Court further addressed this issue in Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. 185 (2010), where in the absence of any formal demand for payment of permanency benefits it was determined that once a claimant reached maximum medical improvement during their lifetime his dependents or estate could make a posthumous request for those unpaid benefits. See id., 192-93. The issue of when permanency benefits vested was then considered in Brennan v. Waterbury, 331 Conn. 672 (2019), where the court reviewed an appeal brought by the executrix for the estate of her deceased spouse seeking unpaid permanent partial disability benefits in association with a heart and hypertension claim. The court reiterated "that our case law reflects that permanent disability benefits vest, or become due, when the claimant reaches maximum medical improvement." Id., 695. The court determined that a remand was necessary because, although the trier of fact concluded the decedent had reached maximum medical improvement during his lifetime, the parties were still disputing the level of permanency at the time of his death.

Last year, our Supreme Court in Esposito v. Stamford, 350 Conn. 209 (2024), again restated the necessity of a claimant attaining maximum medical improvement during their lifetime in order for permanent partial disability benefits to be paid.

> It is well settled that, pursuant to General Statutes § 31-295 (c), a claimant's entitlement to permanency benefits under § 31-308 (b) vests once the claimant has reached maximum medical improvement. See, e.g., Brennan v. Waterbury, 331 Conn. [672] 696 [2019]; Gardner v. Dept. of Mental Health & Addiction Services, 223 Conn. App. [221] 237-38 [cert. granted, 348 Conn. 954 (2024)]; see also McCurdy v. State, 227 Conn. 261, 268 (1993) [and] Osterlund v. State, 129 Conn. 591, 598 (1943). The right to permanency benefits automatically vests once maximum medical improvement is reached, even if the claimant has not affirmatively requested those benefits. Churchville v. Bruce R. Daly Mechanical Contractor, 299 Conn. [185], 191 [(2010)]. A

> finding of maximum medical improvement requires a determination of the specific date that a claimant has reached maximum medical improvement; that date is significant for two reasons. First, the date of maximum medical improvement is when "the *right* to permanent disability benefits . . . is established . . . ." (Emphasis in original.) Brennan v. Waterbury, supra, 695. Second, that date establishes the point at which "the *degree* of permanent impairment (loss of, or loss of use of a body part) can be assessed, which will determine the employer's payment obligations . . . ." (Emphasis in original.) Id., 696.
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> Although permanency benefits may be awarded posthumously, such an award requires the existence of a supporting record containing a finding of maximum medical improvement by permanent partial disability ratings or separate reports or medical evaluations expressly stating that the claimant has reached maximum medical improvement. See Churchville v. Bruce R. Daly Mechanical Contractor, supra, 299 Conn. 188–90 (record established that claimant underwent multiple medical evaluations to determine extent of his disability, and multiple physicians found that he had reached some percentage of maximum medical improvement); McCurdy v. State, supra, 227 Conn. 263–64 (claimant was assigned permanent partial disability rating of 70 percent, and separate report stated that he had reached maximum medical improvement prior to his death).

Esposito, supra, 219-20.

Citing Brennan, supra, the court examined whether the claimant in Esposito reached maximum medical improvement prior to his demise. After reviewing the record, the court concluded that no treaters had opined the claimant had reached maximum medical improvement and there had been no agreement between the parties establishing maximum medical improvement. The court further noted that, while the claimant had been receiving total disability benefits pursuant to General Statutes § 31-307 (c) for many years, the medical evidence suggested that "there could well have been room for the improvement of his condition." Id., 223. In determining the claimant failed to reach maximum medical improvement while alive and, therefore, failed to have a permanency

award vest, the court contrasted the situation to McCurdy, supra, and Churchville, supra, where "there was no dispute as to whether the decedent had reached maximum medical improvement." Id.

In recent years this tribunal has also opined on issues related to the payment of posthumous permanent partial disability awards. In Fusco v. New Haven-Board of Education, 6119 CRB-3-16-7 (October 13, 2017), we affirmed the decision of the administrative law judge who credited the opinion of the claimant's treating physician that maximum medical improvement had been reached prior to the claimant's demise. We noted in Fusco that the respondents had filed a form 36 reliant upon the treater's opinion seeking to change claimant's benefits from temporary partial/temporary total to permanent partial disability benefits while the claimant was alive. This board determined that Churchville, supra, stood for the position that, under these facts, a permanent partial disability award had vested during the claimant's life and remanded the matter to ascertain the amount of unpaid benefits. Conversely, in Mattera v. State/Department of Children and Families, 6505 CRB-8-23-6 (March 1, 2024), we affirmed the denial of posthumous permanent partial disability benefits by the administrative law judge when the record did not clearly establish that the claimant had reached maximum medical improvement prior to his demise. Contrasting the record in Mattera with McCurdy, supra, and Churchville, supra, we noted "in the instant appeal, the administrative law judge, having examined [the treating physician's] permanency report, found it neither credible nor persuasive when viewed against the backdrop of the evidentiary record in its entirety." We note that in Mattera, the administrative law judge found that an opinion that the claimant achieved maximum medical improvement was unreliable when it was

rendered by a treating physician subsequent to a claimant's death. On appeal, our tribunal reviewed the expert opinion and the circumstances that caused it to be issued and determined that the administrative law judge could reasonably have discounted this opinion, and we upheld his decision that the claimant failed to attain maximum medical improvement prior to his demise. We further note that the claimant in the present case is also reliant upon the same sort of posthumous medical opinion as the claimant presented in Mattera.

Therefore, our precedent is unequivocal: a claimant must attain maximum medical improvement prior to his or her demise as a condition precedent for a posthumous award of permanent partial disability benefits. The administrative law judge was not persuaded that this occurred in this case and, after reviewing the record, we find this determination was reasonable.

Grady-Benson's first opinion letter postmortem did not specifically state the claimant attained maximum medical improvement during his lifetime, although it did state the claimant had a 40 percent permanent partial disability rating for his left knee at the time of his death. See Respondent's Exhibit 2. The treater was deposed on March 2, 2022, and testified that the claimant experienced a "slower than average" recovery from surgery and confirmed he had not attained maximum medical improvement at the time of his last physical examination on October 30, 2019. Respondent's Exhibit 4, pp. 7-8. Grady-Benson discussed the post-surgical complication as "irritation in the region of the iliotibial band." Id., p. 8. When asked if this type of tendonitis would go away over time the treater said, "[t]ypically it would, but we can't know for sure." Id., p. 9. Since in-person examinations had been halted during the pandemic, the claimant had a

telephone interview with Grady-Benson and filled out an online survey. See id., p. 10. When asked as to the progress of the claimant's iliotibial tendonitis after his last physical examination, Grady-Benson testified as follows.

> Q: And you don't know what happened with this iliotibial band situation between 10/30/19 and 2/28/21 when you wrote your report with respect to a rating.
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> A: I do not know that, correct.

Id., p. 13.

Subsequent to that testimony, Grady-Benson said that "[t]he circumstances forced some speculation that was highly unusual and not customary." Id., pp. 13-14. Grady-Benson did issue a subsequent opinion letter on October 26, 2022, expressing certainty that the claimant's knee would have had a minimum permanent partial disability rating of 40 percent one year after the surgery. See Respondent's Exhibit 3. We note, however, that Respondent's Exhibit 3 does not represent that the claimant's recovery from his surgery had concluded one year after it had been performed.

We believe that the treater's opinions herein were sufficiently equivocal that the administrative law judge was not obligated to credit them for the executrix' position that the decedent reached maximum medical improvement prior to his death. Nonetheless, the executrix argued that, due to the covid restrictions in March 2020 preventing a timely physical examination of her husband, the concept of "frustration of purpose" should cause us to determine that a timely physical examination would have confirmed maximum medical improvement had been attained. We decline to do so as the medical evidence suggests the claimant's recovery was not as rapid as originally anticipated. We would need to look at this record and conclude that the anticipated March 2020 physical

examination would have been essentially a ministerial act documenting a fait accompli that the claimant's recovery had fully occurred. We cannot reach that conclusion from the record presented herein.

There was sufficient evidence in the record supporting the administrative law judge's conclusions and his decision is fully consistent with recent precedent in Esposito, supra, and Mattera, supra.

As there is no error, the May 29, 2024 Finding and Dismissal of William J. Watson III, Administrative Law Judge acting for the First District, is affirmed.

Administrative Law Judges Peter C. Mlynarczyk and Daniel E. Dilzer concur in this opinion.