

**STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY**

)	State File No. R-07400
)	
Harold Dodge)	By: Margaret A. Mangan
)	Hearing Officer
v.)	
)	For: R. Tasha Wallis
Precision Construction)	Commissioner
Products, Inc.)	
)	Opinion No. 38A-01WC

**RULING GRANTING DEFENDANT’S MOTION FOR PERMISSION TO TAKE
AN INTERLOCUTORY APPEAL**

On October 30, 2001 this Department issued an order denying the defense motion to dismiss and granting the claimant’s motion to substitute co-administrators as parties.

On November 8, 2001 the defendant filed a direct notice of appeal to the Vermont Supreme Court and, in the alternative, has asked this Department for Permission to take an Interlocutory Appeal. The ruling at issue is not a final judgment as no determination of what benefits may be due was ever made.

Under V.R.A.P.5 (b)(1), “[u]pon motion of any party...the Presiding judge...shall permit an appeal to be taken from an interlocutory order or ruling if the judge finds that the order or ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of litigation.”

Three criteria must be satisfied before permission to proceed with an interlocutory appeal will be granted: 1) the issue must involve a controlling question of law; 2) there must be substantial ground for difference of opinion as to the correctness of the order; and 3) an interlocutory appeal should materially advance the termination of litigation.” *In re Pyramid Co.*, 141 Vt. 294, 301 (1982).

The question at issue here is clearly a controlling issue of law, whether a workers compensation action survives the death of a claimant who had no dependents and whose death was unrelated to work. There are substantial grounds for difference of opinion as to the correctness of the order, not the least of which relates to the significance of the omission of a worker’s compensation action from a list of those actions surviving a party’s death in the survival statute. Finally, if the Supreme Court reverses the order, the litigation will end. If it affirms the decision, settlement is likely. In either case, the appeal will materially advance the termination of litigation.

THEREFORE, the defendant's motion to take an interlocutory appeal is GRANTED.

Dated at Montpelier, Vermont this 5th day of December 2001.

R. Tasha Wallis
Commissioner

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Precision Construction Products)	
)	Opinion No. 38-01WC

**RULING ON THE DEFENDANT’S MOTION TO DISMISS and
CLAIMANT’S MOTION TO SUBSTITUTE PARTIES**

Defendant, by and through its attorney Eric Johnson of McCormick, Fitzpatrick, Kasper & Burchard, P.C. moves to dismiss this worker’s compensation claim that it alleges does not survive the claimant’s death. The Co-Administrators of the claimant’s estate, by and through attorney Karl C. Anderson of Anderson and Eaton, P.C., oppose the motion.

Harold C. Dodge, Jr. and Janis Bartlett, Co-Administrators of the claimant’s estate, moved that they be substituted as plaintiffs in this case in the place of Harold C. Dodge, Jr. The defense opposes that motion.

The forms filed in this case indicate that Precision Construction Products, Inc. (Precision) hired the claimant Harold Dodge on April 4, 1995. Mr. Dodge filed this worker’s compensation claim in October 2000 for an injury on or before September 1, 2000. On a Form 5 he alleged that as vice president in charge of operations, he suffered “numbness and tingling in hands and arms, related to or manifestations of extreme mental stress at work.” The Hartford, Precision’s workers’ compensation insurer, denied the claim on the basis that the claimant had not alleged any injury when he was fired for performance issues on September 19, 2000.

Because his request for an Interim Order of benefits was denied, the claimant requested a hearing, which was pending at the time of his death on April 29, 2001. Claimant has offered no evidence to refute the defense position that the cause of death was pneumonia, unrelated to work. Mr. Dodge was not married and had no children or other dependents.

Defendant argues that a worker's compensation action is not an action that survives the death of a party under 14 V.S.A. §§ 1451, 1452 and that the Vermont Workers' Compensation Act does not provide the survival of this claim. Among actions enumerated by the survival provisions are those for the "recovery of damages for a bodily hurt or injury, occasioned to the plaintiff by the act or default of the defendant or defendants," 14 V.S.A. § 1452, actions to recover possession of land and those that survive by common law, § 1451. Workers' compensation actions are not specifically identified.

The claimant argues that when given the liberal construction required under *Adm'n of Whitcomb v. Cook*, 38 Vt. 477, 481 (1866), the Vermont Survival Statutes are broad enough to encompass this action, for injuries this claimant allegedly suffered before his death.

The survival statutes were passed to abolish the harsh common law doctrine, which provided that an action died with the person. Therefore, "in this state hardly any cause of action for damage to either person or property, is allowed to be defeated by the death of either the party injured or the party liable." *Adm'r of Whitcomb* 38 Vt. at 481. As an action sounding in contract, see, e.g. *Hartman v. Ouellette Plumbing & Heating*, 146 Vt. 443, 445 (1985), a worker's compensation action survives the claimant.

Furthermore, the language and intent of the Vermont Workers' Compensation Act, 21 V.S.A. § 601 et. Seq. ("Act") supports the claimant's position. Although there is a general prohibition against the assignability of claims under § 681, other provisions carve out exceptions to that rule. Section 622, the exclusivity provision of the Act, provides that the right to workers' compensation "shall exclude all other rights and remedies of such personal employee, his personal representatives, dependents or next of kin, at common law or otherwise on account of such injury." (emphasis added). Reference to one's "personal representative" would be surplusage were that representative not able to pursue an action after a claimant's death. And dependents are clearly entitled to benefits after the death of a claimant under 21 V.S.A. § 632, to § 639.

In addition, the Act addresses the issue directly by considering benefits due in those cases in which 1) the claimant died from the work-related injury, § 632; and 2) whether he died from any other cause, § 639. This is specific recognition that a worker's compensation claim survives the claimant, albeit with limited benefits. Section 632 refers to death resulting from an injury and § 639 considers "remaining payments." This latter reference to remaining payments must be read in the context of the complete section, which reads:

In cases of 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 to exceed \$5,500.00 for burial and funeral expenses and expenses for out-of-state transportation of the decedent to the place of burial not to exceed \$1,000....

21 V.S.A. § 639.

The Act does not specifically consider the case where a claim is pending and no benefits have yet been paid. Consequently the defense argues that this claimant's action had not yet accrued and therefore was extinguished with the claimant's death. Such a conclusion, however, is at odds with the liberal construction that must be given to this remedial act. Consider a case where a worker lost his leg on the job, but died before the carrier accepted the claim or was ordered to pay. To accept the defense position and deny such a claim would contravene the clear mandate in 21 V.S.A. § 618 that an employer "shall pay compensation" to an injured employee. This case is no different. The Co-Administrators of the claimant's estate have the right to pursue the benefits to which Harold Dodge may have been entitled prior to his death.

THEREFORE, the defense motion to dismiss is DENIED. The claimant's Motion to substitute the Co-Administrators as Parties is GRANTED.

Dated at Montpelier this 30th day of October 2001.

R. Tasha Wallis
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.