STATE OF VERMONT
DEPARTMENT OF LABOR

Keith Lorman

v.

City of Rutland

Opinion No. 15-22WC

By: Stephen W. Brown
Administrative Law Judge

For: Michael A. Harrington
Commissioner

State File No. FF-63225

RULING ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT OR DECLARATORY RULING

APPEARANCES:

Robert D. Mabey, Esq., for Claimant
Wesley M. Lawrence, Esq., for Defendant

ISSUES PRESENTED:

1. Does the Department have the authority to determine that an intervening, non-industrial event may, at least temporarily, relieve an employer from liability for a workplace injury claim?

2. If so, should the Department exercise that authority to import the "flare-up" doctrine from the successive workplace injury context to the non-industrial intervening cause context?

3. If not, did Claimant's 2020 non-industrial brush hogging incident sever the causal chain between his accepted 2014 workplace injury and his subsequent disability and need for medical care?

EXHIBITS:

Defendant's Statement of Undisputed Facts ("DSUF")

Defendant's Exhibit A:	Medical Records from Rutland Regional Medical Center, dated August 2-4, 2020
Defendant's Exhibit B:	Vermont Orthopedic Clinic Work Injury Tracking Form, dated August 7, 2020
Defendant's Exhibit C:	Claimant's Deposition Transcript
Defendant's Exhibit D:	Independent Medical Examination Report of Douglas P. Kirkpatrick, MD, dated December 24, 2020

Claimant's Statement of Undisputed Facts ("CSUF")
Claimant's Supplemental Statement of Undisputed Facts ("CSSUF")

Claimant's Exhibit A:	Medical Records Binder
Claimant's Exhibit 1:	Letter dated September 29, 2020 from Brian A. Kilcullen to Claimant

BACKGROUND:

Considering the evidence in the light most favorable to Claimant as the non-moving party, *State v. Delaney*, 157 Vt. 247, 252 (1991), there is no genuine issue as to following material facts:

Claimant's 2014 Workplace Injury

1. On April 24, 2014, Claimant injured his left knee in the course of his employment with Defendant. Defendant accepted liability for his claim arising out of that injury. (CSUF 1-3).

2. On May 9, 2014, William Lighthart, MD, of the Vermont Orthopedic Clinic, saw Claimant for his knee injury and released him to work with restrictions against "heavy lifting, pushing, cutting (athletic cutting) on that knee." Defendant accommodated those restrictions, and Claimant did not miss any work at that time. (CSSUF 1-2).

3. Dr. Lighthart continued to treat Claimant's knee injury throughout 2014 and 2015 with conservative treatments including cortisone injections, viscosupplementation, and bracing. Claimant also underwent multiple magnetic resonance imaging (MRI) studies during this time. (*See* CSUF 4-5; CSSUF 3-6).[1]

4. In 2016, Claimant reached end medical result and received permanent partial disability benefits on an approved Form 22. He continued to treat his left knee conservatively with Dr. Lighthart and other providers. (CSUF 5-6; CSSUF 4-7; DSUF 1).

Claimant's 2020 Non-Occupational Brush Hogging Injury and Subsequent Treatment

5. Claimant and his family own a large parcel of land in Tinmouth, Vermont, comprising approximately 100 wooded acres and a one-quarter acre clearing with an old sugar house that the family mainly uses as a camp. (CSUF 7).

6. On August 1, 2020, Claimant rented a self-propelled brush hog to mow over a small patch of burdock growing in the area that the family uses as a camp.[2] He spent

[1] Claimant's filings present a lengthy medical chronology which would certainly be relevant to the ultimate issue of causation at a formal hearing, but which ultimately is not material to the disputed legal issue in the present motion. Accordingly, this opinion presents in summary form much of the chronology that Claimant articulated.

[2] The parties dispute the evenness of the terrain in the area where Claimant was bush hogging the burdock: Claimant describes the area as "fairly level with no hills," *see* CSUF 10, while Defendant notes that at least one

approximately 30 to 45 minutes cutting the burdock with the brush hog and did not experience significant difficulty while doing so. However, after he finished, he experienced worsening left knee pain. He presented to the Rutland Regional Medical Center Emergency Room the next day. He denied any new injury but explained that he started having sharp and stabbing pain in the medial aspect of his knee after his brush hogging. (CSUF 8-9, 11-12; DSUF 2).

7. The next week, Claimant saw Jennifer Hopkins, PA in Dr. Lighthart's office. Her initial impression was that Claimant's left knee pain resulted from an adductor tendon/hip injury from mowing the lawn and that this adductor tendon/hip injury was unrelated to the 2014 work related knee injury. Dr. Lighthart initially agreed with that impression. PA Hopkins took Claimant out of work at that time due to his knee condition. Claimant then sought Temporary Total Disability (TTD) benefits for the first time in this case. (*See* CSUF 13-14; CSSUF 9; DSUF 3, 6).

8. Approximately three weeks later, Claimant again saw Dr. Lighthart, who noted as follows:

> When we last saw Keith, we felt he had hurt his knee due to a hamstring and pes tendon strain. He states today that the knee is hurting more globally over the entire medial side and now even more specifically along the joint line.

Based on these symptoms, Dr. Lighthart ordered an MRI to examine the integrity of Claimant's meniscus and kept Claimant out of work in the meantime. (CSUF 15; CSSUF 10).

9. Claimant underwent a non-contrast MRI of his left knee on September 8, 2020. After reviewing the MRI results, Dr. Lighthart noted as follows:

> Keith first injured himself at work on 4/24/2014 and I have treated him off and on through the years for this work-related injury. I think that this current injury is an extension of that, as he had some chondral damage at the time that I do not think will ever resolve. It will likely cause him lifelong problems with this left knee. His pain is in a different area in this knee, although ***I think it is definitely related to his underlying problem from his original injury in 2014.***
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> (CSUF 16-17; CSSUF 11; Defendant's Exhibit A) (emphasis added).

10. Dr. Lighthart administered a steroid injection the next day and released Claimant to light duty desk work. Unlike in 2014, however, Defendant did not initially

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medical record describes the terrain as "quite uneven." (*See* Defendant's Response to same). I do not find this dispute material for the purposes of the present motion and therefore need not resolve it.

accommodate these restrictions, and Claimant remained completely out of work. (CSSUF 12-13).

11. Later in September 2020, Claimant returned to Dr. Lighthart, reporting good but temporary relief from the earlier steroid injection. Dr. Lighthart then recommended a series of three viscosupplementation injections. (CSUF 16-18).

12. Later that month, Defendant offered Claimant accommodated work and directed him to report for work on October 2, 2020. Claimant complied with that directive. (CSSUF 14-15).

13. In October 2020, Defendant denied Claimant's preauthorization request for the viscosupplementation that Dr. Lighthart recommended as well as indemnity benefits based largely on PA Hopkins's August 2020 note, in which she suspected an adductor/hip injury as the cause of the left knee pain rather than the original work injury. (CSUF 19).

14. Despite Defendant's denial, Claimant proceeded with the series of injections and found them helpful. He returned to full-duty work on December 22, 2020. (CSUF 20; CSSUF 16-18).

15. On December 24, 2020, at Claimant's request, Douglas Kirkpatrick, MD performed an independent medical examination (IME) of Claimant. In Dr. Kirkpatrick's opinion, Claimant's left knee condition in the fall of 2020 was related to the original 2014 work injury. In his view, the original injury resulted in degenerative changes in the knee that have worsened over time and became temporarily symptomatic while brush hogging in August 2020. This episode, however, did not ultimately change the outcome of the progressive and degenerative condition relative to the 2014 workplace injury in Dr. Kirkpatrick's opinion. (CSUF 21; DSUF 4).

16. On January 21, 2021, at Defendant's request, Leonard Rudolf, MD performed an IME of Claimant. In Dr. Rudolf's opinion, Claimant suffered an aggravation of his left knee injury in the August 2020 brush hogging incident, and his current condition is unrelated to the 2014 workplace injury. (CSUF 22).

17. On February 4, 2021, the Department's Specialist accepted Defendant's denial of medical and indemnity benefits arising out of the August 2020 brush hogging incident, reasoning in material part as follows:

> … the [2020 brush hogging] incident produced a "Flare-up" of symptoms and the 2020 MRI confirmed the underlying accepted condition was NOT worsened.
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> Therefore, the Form 2 denial for medical and indemnity benefits related to the 8/2020 flare-up of symptoms remains reasonably supported at this time **until [Claimant] returns to baseline**.

(emphasis in original).

(DSUF 5).

18. On November 17, 2021, Claimant returned to PA Hopkins for a follow-up concerning his left knee. He did not report any new symptoms but described a continuation of his ongoing knee pain. He received another injection and was advised that he may eventually need a total knee replacement. PA Hopkins released him to work "as tolerated" with advice to avoid high impact activities such as running, jumping, squatting, or kneeling. (CSSUF 21).

19. Despite ongoing treatment, Claimant has no longer been experiencing the same relief from corticosteroids after the brush hog injury that he did prior to the brush hog injury. (DSUF 7).

ANALYSIS:

1. Defendant seeks "partial summary judgment, or a declaratory ruling, on the Department's authority to determine that an intervening, non-industrial event may, at least temporarily relieve an employer from liability for a workplace injury claim." (Defendant's Motion, p. 1). Specifically, it seeks a ruling that the Department's Specialist's February 2021 application of the "flare-up" doctrine to relieve Defendant from liability following Claimant's brush hogging incident until his eventual return to baseline was a valid exercise of the Department's power, even though, as discussed *infra*, the Workers' Compensation Rules refer to the "flare-up" doctrine as applying to injuries arising out of successive workplace injuries.

2. To prevail on a summary judgment motion, the moving party must show that there exist no genuine issues of material fact, such that it is entitled to 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, 48 (1990). Summary judgment is appropriate only when the facts in question are clear, undisputed, or unrefuted. *State v. Heritage Realty of Vermont*, 137 Vt. 425, 428 (1979). It is unwarranted where the evidence is subject to conflicting interpretations, regardless of the comparative plausibility of the facts offered by either party or the likelihood that one party or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.

3. In addition to resolving legal disputes via summary judgment, the Department has authority under the Administrative Procedure Act, 3 V.S.A. § 808, to issue declaratory rulings on questions arising under the Workers' Compensation Act, subject to constitutional "case or controversy" limitations. *See White v. Town of Hartford and Town of Hartland*, Opinion No. 14-19WC (July 25, 2019).

The Department's Broad Interpretative Authority

4. The Workers' Compensation Act delegates to the Department broad authority to interpret the Act:

> Questions arising under the [Workers' Compensation Act], if not settled by agreement of the parties interested therein with the approval of the Commissioner, shall be determined, except as otherwise provided, by the Commissioner.
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> 21 V.S.A. § 606.

5. The Vermont Supreme Court has rejected the notion that the Department must limit its analysis to strict pre-existing conceptual molds that do not fit the facts at hand. *See Cehic v. Mack Molding, Inc.*, 2006 VT 12 (holding that the Department was not limited to the "traditional aggravation-or-recurrence analysis," but could apply "temporary flare-up" doctrine, which was not incorporated into the Department's rules at that time,[3] where that doctrine "rationally serve[d] the Commissioner's obligation to determine, if possible, the relative liability of multiple employers for different and distinct injuries to a worker."); *see also Pacher v. Fairdale Farms*, 166 Vt. 626 (1997) (affirming Department's authority to apportion liability between employers even though nothing in the then-applicable workers' compensation statute expressly conferred such authority).

6. From these Supreme Court decisions, I conclude that the answer to Defendant's most basic question about the Department's authority is "yes;" the Department has *authority* to determine whether an intervening, non-industrial event may temporarily relieve an employer from liability for a workplace injury claim.

7. However, the existence of that authority does not necessarily mean that the Department should decide the issue in the way Defendant advocates. Importantly, unlike *Cehic* and *Pacher*, *supra*, this case does not present a fact pattern that evades existing legal precepts.

Existing Analytical Framework for Successive Injuries

8. As Claimant accurately notes in his response to Defendant's motion, Vermont's workers' compensation jurisprudence recognizes two distinct and well-developed legal frameworks for addressing successive injuries, depending on whether the second injury is work-related or not:

[3] *See generally* Workers' Compensation Rules effective July 1, 2000 (no mention of "flare up" doctrine).

(a) **Successive *workplace* injuries** involving different employers or insurers, under the Department's current rules, may constitute aggravations,[4] flare-ups,[5] or recurrences.[6] Regardless of which of these three categories describes a second workplace injury, however, the worker who suffers successive compensable workplace injuries receives workers' compensation benefits for both injuries. The principal difference lies with which employer or insurer must pay for which benefits.[7]

(b) An **intervening *non-industrial* event** will terminate an employer's liability for a previous compensable injury if the evidence shows that the intervening event severs the causal chain between the original workplace injury and the subsequent disability or need for medical care.[8] For instance, injuries resulting from "activities of daily living" such as lifting groceries, climbing stairs, or getting out of a chair, generally do not sever the causal chain because everyone, injured or not, must perform such activities; an injury arising from such an activity is thus a "natural consequence of the primary injury."[9] However, an employer will only be responsible for injuries resulting from

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[4] "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Workers' Compensation Rule 2.1200.

[5] "Flare-up" means a temporary worsening of a pre-existing condition caused by a new injury ***for which a new employer or insurance carrier is responsible***, but only until the condition returns to baseline and not thereafter. Workers' Compensation Rule 2.2300 (emphasis added).

[6] "Recurrence" means the return of symptoms following a temporary remission. Workers' Compensation Rule 2.3900. For the facts traditionally used in distinguishing between an aggravation and a recurrence, see Workers' Compensation Rule 2.1210—2.1215.

[7] For a more detailed discussion of the dual liability mechanics, see *Cehic*, *supra*, 2006 VT 12, ¶ 8-9 ("…[W]here a dispute concerns a compensation claim involving successive employers and successive injuries, liability will remain with the first employer if the second injury is a recurrence of the first. If, however, the second incident aggravated, accelerated, or combined with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an 'aggravation,' and the second employer becomes solely responsible for the entire disability at that point…. [A]t least a third option exists where an incident is neither an aggravation nor a recurrence but causes a new injury distinct from claimant's prior injuries…. ***'Flare-up' most appropriately connotes a temporary worsening of a preexisting disability caused by a new trauma for which the new employer is responsible for paying compensation benefits*** until the worker's condition returns to the baseline, and not thereafter.") (emphasis added, citations omitted).

[8] *Fleury v. Legion Insurance as Insurer for the City of Montpelier*, Opinion No. 43-02WC (November 15, 2002) ("…[T]he progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause.").

[9] *See, e.g.*, *Lushima v. Cathedral Square Corporation*, Opinion No. 38-09WC (September 29, 2009) ("Not all intervening events are sufficient to fall within the exception and thus sever the link between the work injury and any ongoing disability or need for treatment. It is to be expected, for example, that even injured workers will continue to engage in activities of daily living, and therefore injuries sustained during such activities are considered to be a natural consequence of the primary injury.") (citing *Church v. Springfield Hospital*, Opinion No. 40-08WC (October 8, 2008) (climbing steps at home); *Signorini v. Northeast Cooperatives*, Opinion No. 36-04WC (September 1, 2004) (getting up from chair); and *Verchereau v. Meals on Wheels*, Opinion No. 20-88WC (January 25, 1991) (lifting groceries)).

activities of daily living that occur within a "reasonable time" after the primary work injury or treatment therefor.[10] Even for activities that do not constitute "activities of daily living," however, not all intervening events will sever this causal link. It is only where the claimant, knowing of certain weaknesses arising from the primary injury, "rashly undertakes activities likely to produce harmful results" that the causal connection disintegrates.[11]

9. Because Claimant's 2014 injury was an accepted workplace injury and the 2020 brush hogging incident undisputedly arose out of a personal endeavor, the Department's existing case law would place this case squarely in category "(b)" above.

10. In his response to Defendant's motion, Claimant argues that because Vermont law concerning non-industrial intervening events is settled and analytically sound, there is no need to borrow the flare-up doctrine from the successive workplace injury context. He also accurately notes that in a successive workplace injury context, a finding that a second injury is a flare-up would result in the injured worker receiving benefits until returning to baseline, just not from the original employer or insurer.[12] However, applying the flare-up concept to the intervening non-industrial context, as Defendant requests, would mean the injured worker would receive no benefits until returning to baseline. This result, in Claimant's view, would contravene an essential mandate of workers' compensation law, that when a primary injury is compensable, "all of the medical consequences and sequelae that flow from it are deemed compensable as well." *Saffold v. Palmieri Roofing*, Opinion, No. 15-11WC (June 21, 2011).

11. In reply, Defendant argues that applying the flare-up doctrine to cases involving non-industrial intervening events would actually be more "humane" to injured workers than the "all-or-nothing" approach under the intervening non-industrial event case law. An employer's responsibility under a flare-up analysis would only temporarily cease until the claimant returned to a previously stable baseline; a finding that a subsequent event severed the causal chain, by contrast, would terminate Defendant's liability forever thereafter.

12. While both parties' proffered policy rationales have some intuitive appeal, they would be more germane to the present analysis had the Department not already adopted a definition of "flare-up" that specifically entails a second employer bearing responsibility for the temporary worsening:

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[10] *Signorini*, *supra* (holding that although rising from a chair was a normal activity of daily living, it would be unfair to apply a "relaxed activity of daily living standard of causation" where it occurred nine years after the work-related injury and four years after the compensable surgery).

[11] *Bower v. Mount Mansfield*, Opinion No. 03-12WC (January 18, 2012) (holding that picking an apple just beyond the claimant's grasp resulted from momentary thoughtlessness, not negligence, and thus did not sever the causal relationship).

[12] *See* Workers' Compensation Rule 2.233, *supra*; *Cehic*, *supra*, 2006 VT 12, ¶ 8-9.

> "Flare-up" means a temporary worsening of a pre-existing condition caused by a new injury ***for which a new employer or insurance carrier is responsible***, but only until the condition returns to baseline and not thereafter.

Workers' Compensation Rule 2.2300 (emphasis added).[13]

13. Unlike the situation in 2004, when the Department's Rules did not mention "flare-up" but the Department nonetheless applied the concept in *Cehic*,[14] the "flare-up" doctrine now finds crisp definitional edges in the definition above. The facts of this case simply do not fit within that definition. By adopting the definition above, against an already extant body of decisional authority concerning intervening non-industrial events, the Department made a considered policy choice not to extend the "flare-up" doctrine to the non-industrial context.

14. Just as the Department need not be "a slavish adherent to the principle of *stare decisis,*" *see Mazza v. Mount Anthony Housing Corp.*, 12-19WC (July 2, 2019), it need not limit its analysis of novel fact patterns to preconceived conceptual molds, *see White*, *supra*. However, it should also "not deviate from policies essential to certainty, stability, and predictability in the law absent plain justification supported by our community's ever-evolving circumstances and experiences." *Id.*

15. This case presents an intervening non-industrial event and a question of whether that event severed the causal chain between Claimant's accepted 2014 workplace injury and his new disability and need for medical care beginning in 2020. Existing law provides an adequate framework for assessing this claim, and I conclude that the principles of certainty, stability, and predictability in the law weigh strongly in favor of leaving that overarching framework intact. *See Mazza*, *supra*. I will therefore analyze this case under the well-established principles outlined in Analysis, ¶ 8(b), *supra*.

Genuine Issues of Material Fact as to Causation Preclude Summary Judgment

16. Defendant argues that if the Department continues its existing analytical framework, then Claimant should receive no further benefits because the 2020 brush hogging incident was a non-occupational event that was not an activity of daily living. In his sur-reply brief, Claimant argues that the better inquiry is whether he acted reasonably in his performance of that brush hogging, and that if he did, then Defendant should

[13] It is noteworthy that unlike the definition of "flare-up," the Department's Rules defining "aggravation" and "recurrence" do not expressly mention a second employer. Thus, the fact that some cases in the non-industrial event context use the language of "aggravation" and "recurrence," *e.g.*, *Pellerin v. Mel Hauenstein General Contractor*, Opinion No. 6-92 (May 11, 1992), does not support the extension of the "flare-up" doctrine into the law of non-industrial intervening events.

[14] *Cehic v. Mack Molding, Inc.*, Opinion No. 16-04WC (April 29, 2004), *aff'd* 2006 VT 12.

continue to be liable for all medical and indemnity benefits that are causally related to his accepted 2014 workplace injury.

17. In support of its contention that brush hogging is not an activity of daily living, Defendant cites two cases involving non-industrial lawn mowing: *Hempstead v. Hammond Electric*, Opinion No. 31-03WC (July 9, 2003) and *Pellerin v. Mel Hauenstein General Contractor*, Opinion No. 6-92WC (May 11, 1992).

18. In *Hempstead*, the claimant suffered a work-related knee injury that remained "quiescent" for approximately two years, after which it worsened to such a degree that he needed surgery. The reasons for this worsening were "not known precisely," but the evidence showed that either lawn mowing or travel activities "could have produced requisite twisting mechanism." *Id.*, Conclusion of Law No. 4. Irrespective of the causal mechanism, however, the Department held that the temporal gap between the workplace injury and need for surgery combined with his active lifestyle and probable degenerative changes all combined to undercut the causal chain. Contrary to Defendant's contention, *Hempstead* did not address whether lawn mowing was an activity of daily living.

19. *Pellerin*, however, implicitly did so, at least as applied to its specific facts. In *Pellerin*, the claimant injured his back while performing carpentry work for his employer, after which he underwent surgery and received permanent partial disability benefits. Two years later, he mowed his hillside lawn and thereafter experienced the same kind of back pain that he experienced following his workplace injury. The Department held that his lawn mowing constituted a second intervening cause attributable to his own intentional conduct. It distinguished *Verchereau*, *supra*, which had held that lifting a bag of groceries was a routine activity of daily living, as follows:

> In *Verchereau*, the claimant was at home shortly after her work-related surgery, recovering, and the exertion was less than that necessary to push a lawn mower over sloping, uneven ground. In this case the intervening event occurred more than two years after the original injury and the claimant had completely recovered and returned to work during the period between injuries.
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> Claimant has not sustained his burden of proof.

Id., Conclusions of Law Nos. 6-7.

20. Although the Department's decision in *Pellerin* never used the phrase, "activity of daily living," its analysis in distinguishing *Verchereau* only makes sense as a rejection of the notion that the claimant's hillside lawn mowing in that case more than two years after his workplace injury from which he had completely recovered constituted an activity of daily living.

21. Importantly, however, neither *Hempstead* nor *Pellerin* was decided on summary judgment. In both cases, the Department considered the nature of the intervening

activity, the time since the workplace injury, and potential causal mechanisms into account after a formal hearing before determining that the claimants in those cases failed to carry their respective burdens of proof.

22. Moreover, I remain open to an argument following a formal hearing on the merits of this case that our "community's ever-evolving circumstances and experiences," *see Mazza*, *supra*, have changed since the Department's 1992 decision in *Pellerin*, and that such changes may justify revisiting the scope of what activities constitute activities of daily living. I decline to rule out the possibility on summary judgment that Claimant's brush hogging activities constituted an activity of daily living.

23. Even if his 2020 brush hogging was not an activity of daily living, however, that does not end the causation analysis. It simply refocuses the analysis to Claimant's mental state at the time of his brush hogging. *See* Analysis, ¶ 8(b), *supra.* As the Department summarized in *Lushima*, *supra*,

> Where the intervening event does not arise in any way from the employment relationship, the chain of causation is deemed broken by either intentional or negligent claimant misconduct. Even here, however, exceptions exist. Thus, in defining what constitutes negligent conduct, Professor Larson distinguishes spontaneous acts that may well be "impulsive and momentarily thoughtless," but which because of the circumstances are better characterized as instinctive rather than negligent. The claimant's conduct in such cases does not rise to the level of negligence necessary to break the causal link back to the original injury.
>
> The link is severed, however, if a claimant, knowing of certain weaknesses arising from the primary injury, rashly undertakes activities likely to produce harmful results.

Id., Conclusions of Law Nos. 11-12 (citations omitted).

24. There is no basis in the record before me to conclude that Claimant was negligent as a matter of law in his brush hogging activities or that he knew of continuing weakness from his 2014 injury that would make him susceptible to exacerbating his underlying knee condition. Claimant has identified at least two medical experts, Drs. Lighthart and Kirkpatrick, who believe that his post-2020 symptoms ultimately stem from his 2014 workplace injury. Their opinions, combined with the totality of other circumstances, including the open question concerning Claimant's mental state on August 1, 2020, are sufficient to create a genuine issue of material fact as to the continuity of the causal chain linking Claimant's accepted 2014 workplace injury to his disability and need for medical care beginning in August 2020.

ORDER:

For the reasons stated above, Defendant's Motion for Summary Judgment or Declaratory Ruling is **GRANTED IN PART** and **DENIED IN PART,** as follows:

The Department has the authority to determine whether an intervening, non-industrial event may temporarily relieve an employer from liability for a workplace injury claim. However, I decline to exercise that authority in the manner Defendant requests because it would effectuate a needless sea change in causation jurisprudence and thereby undermine stability in the law. The Department's existing decisions concerning intervening non-industrial events comprise a longstanding, well-reasoned, and analytically sound framework for assessing the ultimate merits of this case. That is the overarching framework I will use to determine what, if any, benefits Claimant is entitled to receive following his August 2020 brush hogging incident.

Although the interests of stability in the law justify leaving the overarching framework for analyzing intervening non-industrial events intact, that does not mean that every past application of that framework's "activities of daily living" principles to a particular set of facts must establish a categorical holding that binds the causation analysis of every future case. In particular, the precise scope of what activities constitute activities of daily living is somewhat amorphous and subject to evolving community standards. I decline to hold as a matter of law that Claimant's 2020 brush hogging was not an activity of daily living.

Even if Claimant's 2020 brush hogging was not an activity of daily living, Claimant may still establish a causal relationship between his 2014 workplace injury and post-brush-hogging symptoms if the medical evidence he adduces is compelling and his brush hogging was not rash or negligent under the standards discussed *supra*.

Thus, the relevant questions that remain unresolved after this opinion include, at a minimum:

1) Whether Claimant's brush hogging was an activity of daily living;

2) If so, whether Claimant's brush hogging occurred within a reasonable time after his accepted workplace injury, considering all relevant circumstances;

3) Whether Claimant was rash or negligent in his brush hogging; and

4) Whether the medical evidence convincingly establishes a causal connection between his 2020 worsening and his accepted 2014 workplace injury.

Those questions preclude partial summary judgment in Defendant's favor.

DATED at Montpelier, Vermont this 18th day of July 2022.

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Michael A. Harrington
Commissioner