STATE OF VERMONT
DEPARTMENT OF LABOR

Kevin Joyce	Opinion No. 19-22WC
v.	By: Stephen W. Brown Administrative Law Judge
North Branch Fire District # 1	For: Michael A. Harrington
and	Commissioner
Mount Mansfield Company	State File Nos. MM-62770 and G-13132

RULING ON DEFENDANT MOUNT MANSFIELD COMPANY'S MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Spencer Crispe, Esq., for Claimant
Elijah LaChance, Esq., for Defendant Mount Mansfield Company ("Mansfield")
William J. Blake, Esq., for Defendant North Branch Fire District #1 ("North Branch")

ISSUES PRESENTED:

1. Does the statute of limitations bar Claimant from recovering against Defendant Mansfield as a matter of law?

2. To the extent that any of Claimant's denied claims for benefits are compensable, is Defendant North Branch solely responsible for them as a matter of law?

EXHIBITS:

Mansfield's Statement of Undisputed Material Facts

Mansfield's Exhibit A:	Transcript of Elizabeth McLarney, MD's May 11, 2022 Deposition ("McLarney Depo.")

North Branch's Response to Mansfield's Statement of Undisputed Material Facts

North Branch's Exhibit A:	Medical Records (558 pages) with highlights and annotations ("Medical Records")
North Branch's Exhibit 1:	Letter dated September 15, 2012 from Dr. McLarney to Claimant's Attorney
North Branch's Exhibit 2:	Brattleboro Memorial Hospital Medical Record Reflecting Dr. McLarney's May 29, 2020 Surgery on Claimant

North Branch's Exhibit 3: Brattleboro Memorial Hospital Perioperative Report Concerning Dr. McLarney's May 29, 2020 Surgery on Claimant

North Branch's Exhibit 4: Brattleboro Memorial Hospital Surgical Documentation Concerning Dr. McLarney's May 29, 2020 Surgery on Claimant

North Branch's Exhibit 5: Transcript of Dr. McLarney's Deposition (same as Mansfield's Exhibit A)

Claimant's Response to Mansfield's Statement of Undisputed Material Facts

Claimant's Statement of Undisputed Material Facts

Claimant's Statement of Disputed Material Facts

Claimant's Exhibit A: Affidavit of Kevin Joyce

Claimant's Exhibit B: Notice of Hearing Request and Scheduling of Informal Telephone Conference, dated March 24, 2021

Claimant's Exhibit C: Email Correspondence between Counsel for the Parties and the Department's Specialist

Claimant's Exhibit D: Claimant's Medical Records for Multiple Procedures Between January and May of 1994

BACKGROUND:

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

Claimant's 1993 Injury While Working for Defendant Mansfield

1. As of December 30, 1993, Claimant was working as an employee of Defendant Mansfield. On that date, he attempted to push a car out of a snowbank and injured his left knee. Mansfield acknowledges that it "apparently" accepted that injury as work-related. (*See* Mansfield's Statement of Undisputed Material Facts 3-4; Mansfield's Motion for Summary Judgment, p. 5).

2. The parties have been unable to locate records of the workers' compensation proceedings associated with Claimant's 1993 workplace injury. However, Claimant has produced medical records for his treatment following that injury, which show that he underwent at least three left knee surgeries in 1994. (*See generally* Claimant's Exhibit D). There are references in later medical records to Claimant having undergone as many as five surgeries for that knee (*e.g.*, Medical

Records, p. 497), although the parties currently have no original records of any additional surgeries.

Claimant's 2020 Injury While Working for Defendant North Branch; Subsequent Treatment and Evaluation

3. As of May 18, 2020, Claimant was an employee of Defendant North Branch.[1] On that date, while in the course of his employment with North Branch, he entered a truck and twisted his left knee. As a result, he sustained a new work-related injury to the same knee he had injured in 1993. North Branch accepted the 2020 left knee injury as compensable, at least as it relates to a meniscus tear, and has paid some benefits accordingly.[2]

4. On May 29, 2020, board-certified orthopedic surgeon Elizabeth McLarney, M.D. performed surgery on Claimant's left knee, which she described in her medical records as "left knee arthroscopy, partial medial meniscectomy, chondroplasty of the patella, trochlear groove and medial femoral condyle." (Medical Records, p. 142, 152).

5. Dr. McLarney testified via deposition that as part of that surgery, she removed cartilage from the lateral compartment of Claimant's patellofemoral joint and that such removal may affect that joint by increasing pain. She also removed cartilage from around Claimant's trochlear groove, which also affects that joint, although in a "nonmechanical" way. Dr. McLarney testified that "[t]he only reason th[at] surgery was pursued" was Claimant's May 1, 2020 work injury. (McLarney depo., pp. 29-31; *accord id.*, 33-36). That surgery, in her opinion, left Claimant with approximately fifty percent of his posterior horn medial meniscus, which increases his risk of arthritis in that knee. Having only fifty percent of the posterior horn of the medial meniscus, in her opinion, would contribute to Claimant eventually needing a total knee replacement. (*Id.*, p. 36).

6. She also removed cartilage from Claimant's medial compartment, which in her view contributed to an increased risk of arthritis. She testified that having less articular cartilage will lead to needing a knee replacement. Based on her July 2020 evaluation of Claimant after his May 2020 surgery, she concluded that he needed a total knee arthroplasty. (*Id.*, p. 42).

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[1] In addition to the two work-related claims against Mansfield and North Branch, Mansfield asserts that during an informal conference, the specialist assigned to this claim advised that Claimant appeared to have filed another workers' compensation claim against Mount Snow, Ltd., and that he may have had surgery at Tufts Medical Center in connection with that case. To date, however, the parties have not discovered any official documents relating to that claim. Claimant does not dispute Mansfield's assertions concerning the specialist's statements, but Defendant North Branch states that it does not recall precisely what the specialist said during the informal conference except that she was unable to locate prior state file records. In any event, Mount Snow, Ltd. is not currently a party to this proceeding, and I do not find it material to the issues before me whether Claimant may have asserted an additional claim against it in the past.

[2] Defendant North Branch states that it has accepted liability for Claimant's 2020 injury as it relates to a meniscus tear but denies that it accepted any injury requiring a knee arthroplasty.

7. In Dr. McLarney's opinion, Claimant's medial femoral condyle articular cartilage injury was due to his May 1, 2020 workplace injury, which was an acute injury. (*Id.*, pp. 38-39). In her view, Claimant's May 1, 2020 injury changed the condition of his left knee and that injury contributed to his condition at the time of that surgery. (*Id.*, pp. 44, 76). That said, she also testified that it was possible that Claimant's other surgeries besides those that he underwent in 1994 could lead to post-traumatic arthritis in the left knee, (*id.*, p. 75), and that Claimant's 1993 injury "caused the patella femoral post-traumatic arthritis, which [she] believe[s] is necessitating the need for a total knee arthroplasty." (*Id.*, p. 65).

Independent Medical Examinations; June 2021 Knee Replacement Surgery

8. After his May 2020 surgery, Claimant underwent two independent medical examinations ("IMEs"): one with George White, M.D. at Mansfield's request on November 23, 2020 (Medical Records, pp. 493 *et seq.*) and another with Leonard M. Rudolf, M.D. at North Branch's request on March 24, 2021 (Medical Records, pp. 540 *et seq.*). Dr. White found it unclear whether Claimant had reached end medical result and found that it would not be unreasonable for Claimant to pursue surgical intervention. (*Id.*, p. 498).

9. Dr. Rudolf found that Claimant had reached end medical result for the meniscus tear that he suffered in May 2020 and which Dr. McLarney had treated arthroscopically. In his opinion, any ongoing issues with his left knee were related to a combination of preexisting degenerative arthritis and his documented chondrocalcinosis. Although Dr. Rudolf noted that Claimant had not received any treatment for his left knee between approximately 1997 and 2020, his report is silent on the question of when, if at all, Claimant reached end medical result for his 1993 injury. (*See* Medical Records, p. 543). Additionally, North Branch accurately notes that Dr. McLarney's records reflect that Claimant told her on May 26, 2020 that "for the past 23 years his left knee has hurt." (*See* North Branch's Response to Mansfield's Statement of Undisputed Material Fact No. 12; Medical Records, p. 131).

10. Dr. Rudolf noted that the arthroscopic findings from Claimant's May 2020 surgery confirmed preexisting degenerative changes that in his opinion fell outside the scope of his 2020 workplace injury and that further treatment of his left knee degenerative arthritis would not be causally related to that work event. However, in his opinion, it would not be unreasonable for Claimant to pursue surgery if his left knee condition was materially interfering with his activities of daily living and more conservative treatments remained unsuccessful. (Medical Records, p. 543).

11. Claimant underwent a left total knee replacement surgery on June 8, 2021.

Notice to Defendant Mansfield; Denial and Motion for Summary Judgment

12. Mansfield received notice on or about March 24, 2021 that it would be named as a Defendant in this case. (*See* Claimant's Exhibit B). It has denied liability for this claim and asked the specialist at the informal level to dismiss it from this case on statute of limitations grounds. (*See* Claimant's Exhibit C). Mansfield now moves for summary judgment on two grounds:

    a. Mansfield contends that Claimant is barred from recovering against it, despite its admitted acceptance of his left knee claim in 1993, because according to Dr. Rudolf's IME, Claimant reached end medical result for his 1993 injury by 1997 and did not seek indemnity benefits within the limitations period following that date; and

    b. Claimant's 2020 injury constitutes an aggravation of a pre-existing condition for which North Branch is responsible as a matter of law.

ANALYSIS:

Summary Judgment Standard

1. 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). The non-moving parties are 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 of the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15. In determining whether there is a genuine issue as to any material fact, the Department must accept as true "the allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material." *Gauthier v. Keurig Green Mountain, Inc.*, 2015 VT 108, ¶ 14.

The Statute of Limitations Does Not Bar Claimant from Recovering Against Mansfield

2. Because the injury that Claimant sustained while working for Mansfield occurred in 1993, the law in effect at that time governs Claimant's entire claim for relief against Mansfield arising out of that injury, including any claims for specific benefits that might not accrue until years later. *See Sanz v. Douglas Collins Const.*, 2006 VT 102, ¶¶ 9-11. However, because a defendant's right to bar an action on limitations grounds does not vest until the time limit has lapsed, it is the statute of limitations in effect at the time of the limitations period's expiration that governs the defendant's right to assert it. *Id.* (citing *inter alia Murray v. Luzenac Corp.*, 2003 VT 37 (holding that an

amendment lengthening the limitations period could apply to injuries occurring before the amendment so long as the previous limitations had not lapsed)).

3. The statutory limitations period for Vermont workers' compensation claims in 1993 was six years, running from the date by which the claimant's injury and its relationship to employment become reasonably discoverable and apparent. *Hartman v. Ouellette Plumbing & Heating Corp*., 146 Vt. 443, 446 (1985); *Dunroe v. Monro Muffler Brake, Inc.*, Opinion No. 17-15WC (July 23, 2015). Vermont's statute of limitations for workers' compensation claims was amended in 2004 to reduce the limitations period from six years to three.[3] However, Mansfield has not shown that any aspect of Claimant's claim against it is untimely under either potentially applicable statute of limitations. Thus, I need not assess whether the three- or six-year period applies.

4. The limitations period for the claim as a whole does not necessarily apply to each potential benefit to which Claimant might be entitled. For instance, Claimant's right to receive permanent partial disability benefits from Mansfield only accrued, if at all, when he reached end medical result for his 1993 injury. Thus, the limitations period applicable to such benefits did not begin running, if at all, until Claimant reached end medical result for his 1993 workplace injury. *See Longe v. Boise Cascade Corp.*, 171 Vt. 214 (2000).

5. In this case, Mansfield's motion is less than clear as to precisely what benefits it contends are barred by the statute of limitations. On page 5 of its motion, for instance, it contends that "[t]he 1993 claim against Mt. Mansfield is clearly time-barred under the six-year statute of limitations." However, the heading on that same page appears to limit the scope of Mansfield's limitations defense to indemnity benefits. *See id.* ("… at least as to indemnity benefits…"). Additionally, the analysis on the following two pages focuses almost solely on the effect of end medical result on the accrual of a claim for permanent partial disability benefits and provides no analysis of other indemnity benefits or of medical benefits.

6. Importantly, Mansfield admits that it accepted liability for Claimant's 1993 claim. *See* Background, ¶ 1, *supra.* As such, any argument that the statute of limitations bars Claimant's entire claim against it lacks merit.

7. To the extent that Mansfield asserts the limitations defense only against claims for benefits that accrued after Claimant reached end medical result, such as claims for permanent partial disability benefits, it must demonstrate, as a matter of law, the date on which Claimant reached end medical result for the injury Mansfield accepted. It has not done so.

8. In support of its contention that Claimant reached end medical result more than six years before Mansfield received notice of this claim, Mansfield relies upon Dr. Rudolf's IME report, which notes that although Claimant appeared to have undergone

[3] *See* 2004 Vermont Laws P.A. 132 (H. 632) (approved May 26, 2004); 21 V.S.A. § 660.

multiple knee surgeries between 1994 and 1997, he had not undergone medical treatment for that knee between approximately 1997 and 2020. However, Dr. Rudolf did not affirmatively opine in that report that Claimant had reached end medical result for the 1993 injury by 1997. That is an inference that Mansfield implicitly asks me to draw in ruling on its summary judgment motion, which would not be appropriate on summary judgment.

9. Moreover, even if Dr. Rudolf had specifically opined that Claimant reached end medical result for the 1993 injury by 1997—which, again, he did not—that would not entitle Mansfield to summary judgment on any issue. The persuasiveness of an expert opinion, even an uncontradicted one, is always a question of fact. *See Meau v. The Howard Center*, Opinion No. 01-14WC (January 24, 2014), Conclusions of Law Nos. 3-5; *Kibbie v. Killington, Ltd.*, Opinion No. 04-19WC (March 1, 2019), Conclusions of Law Nos. 10-12; *Pasic v. University of Vermont Medical Center*, Opinion No. 15-20WC (September 15, 2020), Conclusions of Law Nos. 3-5.

10. Finally, to the extent that Mansfield asserts that Claimant's claim against it for any medical treatment following his 2020 surgery is barred by the statute of limitations, such argument also lacks merit because Mansfield received notice of such treatment within the applicable limitations period. Fewer than three years—and certainly fewer than six years—have elapsed since Claimant's 2020 injury. All the medical treatments currently at issue were recommended and/or occurred since that time. Additionally, Mansfield has been on notice of this claim for more than one year. *See* Background, ¶¶ 4, 8-12.

11. Therefore, Mansfield is not entitled to summary judgment on limitations grounds.

Fact Issues Preclude Summary Adjudication of Whether This Case Presents an Aggravation or Recurrence

12. Mansfield argues that even if the statute of limitations does not bar Claimant's claim against it, Claimant's 2020 injury that he sustained while working for North Branch constituted an aggravation of a preexisting condition and that North Branch therefore bears full responsibility for this claim as a matter of law.

13. Under Vermont law, successive workplace injuries involving different employers or insurers may constitute either aggravations, flare-ups, or recurrences. *See generally Lorman v. City of Rutland*, Opinion No. 15-22WC (July 18, 2022). If the second injury is a recurrence of the first, then liability remains with the first employer. However, if the second incident "aggravated, accelerated, or combined with a preexisting impairment or injury," then the second incident constitutes an "aggravation," and the second employer becomes solely responsible for the entire disability at that point. *Id.*; *see also Cehic v. Mack Molding, Inc.*, 2006 VT 12, ¶¶ 8-9; *Pacher v. Fairdale Farms*, 166 Vt. 626 (1997). Additionally, a condition may constitute a "flare-up," meaning 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." *See id.*; Workers'

Compensation Rule 2.2300. Under any of these scenarios, the claimant receives benefits; the difference lies in who pays for them. *See Lorman*, *supra.*[4]

14. The determination whether a condition is a recurrence or an aggravation depends upon the weighing of the following five factors:

    (1) whether a subsequent incident or work condition destabilized a previously stable condition;

    (2) whether the worker had stopped treating medically;

    (3) whether the injured worker had successfully returned to work;

    (4) whether the worker had reached medical end result; and

    (5) whether the subsequent work contributed independently to the final disability.

    Workers' Compensation Rules 2.1200, 2.2300 and 2.3900; *Pacher*, *supra*, 166 Vt. 626 (1997); *Trask v. Richburg Builders*, Opinion No. 51-98 (August 25, 1998); *Nelson v. Federal Express Freight*, Opinion No. 19-16WC (November 1, 2016).

15. Balancing these factors is intrinsically fact-sensitive and involves the exercise of discretion; no single factor controls. By its nature, this analysis does not lend itself well to summary adjudication.

16. Here, there is competent evidence on both sides of at least three factors. I cannot conclude as a matter of law whether Claimant has ever reached end medical result for his 1993 injury. That is in part because it is not clear how stable Claimant's left knee condition was before 2020, given Dr. McLarney's reference to Claimant's statement that he had been experiencing knee pain for 23 years. This uncertainty goes to both the first and fourth factors. Moreover, Dr. McLarney has acknowledged some potential causal relation between Claimant's medical status following his 1993 injury and his post-2020 need for treatment. (*See* Background, ¶ 7, *supra*). Therefore, I cannot conclude as a matter of law that Claimant's 2020 workplace injury "contributed independently" to his final disability—*i.e.*, the fifth factor—without engaging in the sort of fact-finding and credibility assessment that would be antithetical to the concept of summary judgment.

17. Mansfield is therefore not entitled to summary judgment based on its contention that Claimant's 2020 injury constituted an aggravation for which North Branch is solely responsible as a matter of law.

[4] In some circumstances, such as where the foregoing categories do not neatly fit the facts of a particular case, the Department may also apportion liability between employers. *See, e.g.*, *White v. Town of Hartford and Town of Hartland*, Opinion No. 14-19WC (July 25, 2019).

Section 662(c) Does Not Relieve Mansfield of any Liability as a Matter of Law

18. Finally, Mansfield contends that 21 V.S.A. § 662(c) requires that it be released from this case because North Branch is the latest employer on the risk and has not proven a causal connection between Claimant's 1993 injury and his post-2020 knee condition.

19. Section 662(c) provides as follows:

> Whenever payment of a compensable claim is refused, on the basis that another employer or insurer is liable, the Commissioner, after notice to interested parties and a review of the claim, but in no event later than 30 days, shall order that payments be made by one employer or insurer until a hearing is held and a decision is rendered. For the purposes of this review, the employer or insurer at the time of the most recent personal injury for which the employee claims benefits shall be presumed to be the liable employer or insurer and shall have the burden of proving another employer's or insurer's liability. Payments pursuant to this subsection shall not be deemed an admission or conclusive finding of an employer's or insurer's liability nor shall payments preclude subsequent agreement under subsection (a) of this section or prejudice the rights of either party to a hearing or appeal under this chapter.

21 V.S.A. § 662(c).

20. Mansfield argues that under this section, North Branch bears the burden to produce documentation of Claimant's earlier claim against Mansfield, and that North Branch has "failed to show how the 1993 injury is related to the Claimant's knee condition." (Mansfield's Motion, p. 9).

21. I find Mansfield's contention that North Branch bears the burden to produce documentation of Claimant's 1993 claim difficult to understand. As an initial matter, to the extent that any party would be in a position to produce documents relating to a claim that Mansfield accepted, it is Mansfield. More fundamentally, Mansfield has acknowledged in its initial filings that it "apparently" accepted Claimant's 1993 injury as compensable. (*See* Mansfield's Statement of Undisputed Material Fact Nos. 3-4; Mansfield's Motion for Summary Judgment, p. 5). There is no evidence or contention that the accepted 1993 claim ever settled or that Mansfield's liability was otherwise extinguished. Thus, to the extent that Claimant continues to suffer any ongoing medical sequelae of that injury, Mansfield remains liable for them, with or without North Branch or anyone else producing any records relating to that claim. As such, Mansfield's argument concerning North Branch's putative burden of production lacks merit.

22. Finally, nothing in Section 662(c) purports to resolve the ultimate merits of any multi-employer liability dispute, much less on summary judgment. That section merely provides a stopgap measure for payments to continue when there is no dispute that *some* employer owes benefits but the employers dispute which one. The ultimate

merits of multi-employer or multi-insurer disputes are subject to resolution through either arbitration or the formal hearing process.[5]

23. In this case, a formal hearing is scheduled to determine the extent to which Claimant's denied post-2020 left knee conditions and related treatments are compensable, and if they are, who is financially responsible for any associated benefits. Nothing in Section 662, however, relieves Mansfield of liability as a matter of law before that hearing takes place.

ORDER:

For all of these reasons, Defendant Mansfield's Motion for Summary Judgment is **DENIED**.

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

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Michael A. Harrington
Commissioner

[5] Section 662(e) authorizes, but does not require, arbitration of certain insurance-related disputes that may arise under Sections 662(c) and (d). Where such disputes are not subject to arbitration, they are resolved through the Department's formal hearing process. *See id.*; Workers' Compensation Rule 19.0000 *et seq*.