STATE OF VERMONT
DEPARTMENT OF LABOR

Mark Pelletier	Opinion No. 23-22WC
v.	By: Stephen W. Brown Administrative Law Judge
Pelletier Plumbing & Heating, P.C.	For: Michael A. Harrington Commissioner
	State File Nos. PP-61235 (Acadia Insurance Company) and RR-325 (Merchants Insurance Company)

RULING ON DEFENDANT'S MOTIONS[1] FOR SUMMARY JUDGMENT

APPEARANCES:

Robert D. Mabey, Esq., for Claimant
William J. Blake, Esq., for Defendant and Acadia Insurance Company ("Acadia")
Elijah T. LaChance, Esq., for Defendant and Merchants Insurance Company ("Merchants")

ISSUES PRESENTED:

1. Is Claimant's claim against Defendant barred by the statute of limitations and/or laches as a matter of law?

2. If not, has Merchants established that Acadia is solely responsible for all benefits relating to this claim as a matter of law?

EXHIBITS:

Acadia's Amended Statement of Undisputed Material Facts ("Acadia SUF")

Acadia's Exhibit A:	Medical Records, as amended
Acadia's Exhibit B:	Deposition of Mark R. Pelletier ("Claimant's Depo.")

Merchants's Statement of Undisputed Facts (Merchants's SUF")

Merchants's Exhibit 1:	Deposition of Mark R. Pelletier ("Claimant's Depo.")
Merchants's Exhibit 2:	Independent Medical Evaluation ("IME") Report by Leonard Rudolf, M.D.
Merchants's Exhibit 3:	IME Report by Douglas Kirkpatrick, M.D.

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[1] At various times relevant to this case, Defendant was insured against workers' compensation claims through Acadia Insurance Company and Merchants Insurance Company. Each insurance carrier filed a separate Motion for Summary Judgment.

Claimant's Statement of Undisputed Facts in Opposition to Acadia's Motion for Summary Judgment

BACKGROUND:

There is no genuine issue as the following material facts:

1. Claimant is a 64-year-old man who has worked as a plumber since he was in the tenth grade. He formed Defendant as a Vermont professional corporation on January 11, 1988, and served as its owner and president until June 2021, when he stopped working. (Acadia SUF 3; Merchants SUF 3-5).

2. Claimant was Defendant's employee at all relevant times. He seeks workers' compensation benefits for a work-related knee injury for which he intends to undergo knee replacement surgery.

3. Defendant contends that Claimant's claim is time barred because he received extensive medical treatment for work-related knee pain at multiple points over two decades before ever filing a workers' compensation claim.

Claimant's Symptoms and Treatment for Work-Related Knee Pain Before Filing this Claim

4. The earliest known record of Claimant reporting left knee pain to a medical provider was on November 3, 1998. The medical record for that visit references a swollen knee related to his work as a plumber. (Merchants SUF 14; Acadia SUF 4; Acadia's Exhibit A, pp. 1-4).

5. On March 16, 2001, Claimant underwent left knee arthroscopic surgery for a complex tear of his left medial meniscus. (Acadia SUF 5; Exhibit A, pp. 9-11, 12-32).

6. Claimant testified by deposition that he did not recall the treatment visit in 1998, but he did recall his 2001 knee surgery. When asked whether that surgery was due to his work as a plumber, he replied, "yes." (Acadia SUF 24-25; Acadia's Exhibit B, pp. 21-22).

7. Claimant underwent left knee surgery again on May 23, 2005 at Rutland Regional Medical Center, for a complex tear of his medial meniscus. (Acadia's Exhibit A, pp. 32.2-32.4).

8. Claimant also underwent knee surgery, either to his right knee or bilaterally, in or around 2010 at Rutland Regional Medical Center. The parties have not located medical records for this surgery, and the exact date has not been determined. (Merchants's SUF 16). Although certain treatment records for that surgery refer to bilateral knee surgery, Claimant believes that the surgery at that time was only to his right knee. (*See id.*; Acadia's Exhibit B, p. 23).

9. On October 9, 2015, Claimant visited his primary care physicians, Drs. Peter and Lisa Hogenkamp, and reported "water on knee," related to his work as a plumber. He stated that he had developed left knee swelling within the last month and for two weeks had been experiencing lower leg swelling. He also stated at that time that he had been working more hours and was on his knees more. Claimant received treatment for his swollen knee but continued to work. (Acadia SUF 6, 29; Exhibit A, pp. 31, 33-34; *see also* Merchants SUF 17- 18; Claimant's Depo., p. 62).

10. At his deposition, Claimant did not dispute his physicians' 2015 note indicating his knee complaints at that time. Specifically, Claimant testified, "I guess I would have to go with that. That's what the doctor wrote." (Acadia SUF 28; Exhibit B, 25-26). With respect to statements in that same record that he had been "recently working more hours and on knees more," Claimant testified that he did not have a specific memory of the situation but confirmed, "I was working more." (Acadia SUF 29; Exhibit B, p. 31).

11. On September 1, 2020, Claimant presented to the Rutland Vermont Orthopedic Clinic for bilateral knee pain. He was diagnosed with osteoarthritis in both knees, left greater than right. There was a discussion of knee arthroplasty but because Claimant was actively working as a plumber, he wished to hold off surgery as long as possible. (Acadia SUF 7; Acadia's Exhibit A, pp. 45-54; Merchants SUF 19; Merchants' Exhibit 2).

12. On September 1, 2020, x-rays showed wear and tear degenerative changes, left worse than right. Claimant's providers noted "bone on bone" in his left knee and administered a lidocaine injection. (Acadia SUF 8; Exhibit A, p. 54).

13. On March 25, 2021, Claimant saw Drs. Peter and Lisa Hogenkamp for worsening bilateral knee pain and requested a referral to see orthopedic surgeon Michael B. Sparks, M.D., at Dartmouth Hitchcock Memorial Hospital about a possible knee replacement surgery. The visit note states that Claimant worked as a plumber and was experiencing increasing difficulty with work demands with a clicking on his left knee and his right knee "giving out." The record also noted that Claimant had a history of patellar effusions and aspiration of fluid in the past and had had "bilateral arthroscopy to both knees." (Acadia SUF 9; Exhibit A, p. 58).

14. Claimant saw Dr. Sparks at Dartmouth Hitchcock on April 21, 2021 for an evaluation of both knees. Dr. Sparks noted that Claimant had worked hard as a plumber all his life and was experiencing pain and limitation in both knees because of arthritis. Dr. Sparks also noted prior surgeries to both knees in or around 2010. X-ray images showed osteoarthritis in both knees, left worse than right. (Acadia SUF 10-11; Acadia's Exhibit A, pp. 66, 69-73).

Claimant's Reporting of Injury and Filing of this Workers' Compensation Claim

15. Claimant first reported a workers' compensation claim to Acadia on October 20, 2020; this claim was filed with the Department on May 3, 2021, with October 22, 2020

identified as the date of injury. (Merchants SUF 20-21; Claimant's Depo., p. 33; Employee's Claim and Employer First Report of Injury (Form 1)). Claimant testified that his pain at that time was the worst he had experienced except immediately after his surgeries and that this was the first time his pain was so great that he could not hike, hunt, fish, or walk around his house. (Merchants SUF 22-26; Claimant's Depo., pp. 40, 46-49).

16. Claimant asserts that he experienced a significant increase in work volume after the beginning of the pandemic, around the time he became Defendant's sole employee, and that this increase in volume caused an aggravation of his knee conditions. In particular, he notes that Defendant's number of employees has varied over the years. For most of its operation, it had four employees, although at one point it had as many as eight. Beginning in 2016, Defendant gradually had fewer and fewer employees, and immediately before the beginning of the Covid-19 pandemic, it had only two in addition to Claimant. After the pandemic emergency orders in early 2020, Claimant limited Defendant's employees to only himself. As a result of this reduced workforce, Claimant performed more squatting, kneeling, and bending than he had done previously because he no longer had other employees to assist him with tasks such as installing water heaters. (Merchants SUF 6-11; Claimant Depo., pp. 11, 38, 48-49, 54, 64-66).

17. When asked at his deposition why he did not file a workers' compensation claim earlier, Claimant testified as follows:

> I guess the only reason I could come up with is maybe I was a little naïve. I went to the doctor's, I had pain, I wanted to go back to work, they did what they did, and I went back to work, and I did it on my insurance, and that was just – just me being naïve, I would say.

(Acadia SUF 32; Claimant's Depo., pp. 33-34).

Continued Treatment, Evaluation, and Care After Filing this Claim

18. On June 8, 2021, Dr. Peter Hogenkamp issued a letter relating Claimant's knee problems to his "many years working as a plumber, and in particular his continued work as a plumber over the last decade." In his opinion, Claimant's condition had reached the point of requiring a total left knee arthroplasty. Dr. Peter Hogenkamp noted that Claimant had previously undergone surgery in 2010 but stated that his continued plumbing work since that time had significantly accelerated the pace of the degeneration in his knees and has causally contributed to his current need for surgery. (Acadia SUF 12; Acadia's Exhibit A, p. 75).

19. Claimant stopped working in June 2021 because of kidney surgery unrelated to his work. He testified that he did not return to work because of the pain in his knees. (Merchants SUF 27-78; Claimant's Depo., p. 15).

20. On December 8, 2021, Claimant underwent an IME with orthopedic surgeon Leonard Rudolf, M.D., at Acadia's request. In his IME Report, Dr. Rudolf noted that Claimant attributed his plumbing work to his progressive degenerative changes involving both knees. Dr. Rudolf assessed Claimant with bilateral knee arthritis, left more advanced than right, and confirmed advanced arthritis with a bone-on-bone configuration in the left knee. He also diagnosed Claimant with left knee chronic prepatellar bursitis. He causally related all these conditions to Claimant's work as a plumber and the repetitive kneeling, crawling, and crouching in that role. In his opinion, a knee replacement surgery was appropriate. (Acadia SUF 13-14; Acadia Exhibit A, pp. 76-80; Merchants SUF 33; Merchants's Exhibit 2).

21. On March 11, 2022, Claimant saw orthopedic surgeon Douglas Kirkpatrick, M.D., for an IME arranged by his attorney. Dr. Kirkpatrick also related Claimant's knee problems to his work as a plumber and referenced an October 22, 2020 work injury. Specifically, Dr. Kirkpatrick recorded his impressions in relevant part as follows:

> Advancing medial and patellofemoral osteoarthritis, left greater than right knee, for which the claimant's work duties, which involve significant kneeling, stooping and bending are a clear source for acceleration of osteoarthritis. ***<u>This is in the form of a permanent aggravation, causally related to the work injury of 10/22/2020.</u>*** Without these work duties, the claimant would not be at the advanced level of osteoarthritis that he is. He also indicated to me that in 2020, with COVID, he lost the majority of his helpers over the COVID issues, causing him to do much of the work on his own. This gave him less of an opportunity to pass off the difficult kneeling or squatting tasks to his helpers, and in this position, the claimant's increasing pain around that time related directly to his occupation as well.

(Acadia SUF 15; Acadia Exhibit A, p. 84; Merchants's SUF 34-35; Merchants's Exhibit B) (emphasis added).

22. Claimant did not experience any specific traumatic accident, injury, or event on October 22, 2020. (Acadia SUF 16). In fact, Claimant denied ever having any specific traumatic incident to either of his knees. (Acadia SUF 27; Exhibit B, pp. 24-25). October 22, 2020 was simply the date on which Claimant reported his injury to Acadia and the date of injury identified on the form that initiated this case. *See* Background, ¶ 13, *supra*.

23. Claimant confirmed at his deposition that he had not had any other accidents or injuries giving rise to knee problems except for his plumbing work, going all the way back to 2001 when he had his first surgery. (Acadia SUF 33; Claimant's Depo., p. 63).

<u>*Procedural History*</u>

24. On May 10, 2021, Acadia, as Defendant's insurer, filed a Denial of Benefits (Form 2) with the Department on the ground that there was no record of an October 22, 2020

injury or accident, and that Claimant's claim was untimely because he had known about his bilateral knee pain since at least 2010, which was beyond the three-year limitations period. In a subsequent filing on July 6, 2021, Acadia's attorney advised the Department of a gap in Acadia's coverage to Defendant between October 15, 2011 and October 15, 2016, and asked that Merchants, the carrier on the risk during that period, be notified of this claim. (Acadia SUF 17-20). Merchants subsequently joined this litigation and filed its own denial. (Acadia SUF 21).

25. Acadia and Merchants are represented by separate counsel, and each filed its own Motion for Summary Judgment. Both insurers move for summary judgment on statute of limitations grounds. Merchants also argues that if this case was timely filed, then Acadia should bear sole responsibility for this claim under 21 V.S.A. § 662(c). For the reasons below, I conclude the statute of limitations resolves this entire case. As such, I need not address Merchants' secondary argument.

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 Bars Claimant from Recovering Against Defendant

2. 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. *See Sanz v. Douglas Collins Const.*, 2006 VT 102, ¶¶ 9-11; (citing *inter alia Murray v. Luzenac Corp.*, 2003 VT 37).

3. The statutory limitations period for Vermont workers' compensation claims at the time of Claimant's first knee-related medical visit in 1998 and first surgery in 2001 was six

years. The statute of limitations for workers' compensation claims was amended in 2004 to reduce the limitations period from six years to three.[2]

4. The "date of injury" for the purpose of the statute of limitations is "the point in time when an injury becomes reasonably discoverable and apparent." *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 447 (1985). A litigant "need not have an airtight case before the limitations period begins to run," but merely "should have obtained information sufficient to put a reasonable person on notice that a particular defendant may have been liable" for his or her injuries. *Rodrigue v. Valco Enterprises*, 169 Vt. 539, 540-41 (1999); *Stoddard v. Northeast Rebuilders*, Opinion No. 30SJ-03WC (July 8, 2003). Moreover, actual knowledge of a claim's accrual is not necessary for a limitations period to begin; inquiry notice is sufficient. *See Jadallah v. Town of Fairfax*, 2018 VT 34, ¶ 17. Such notice exists once the claimant knows of the "facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery." *Id.*

5. Generally, the date by which an injury has become reasonably discoverable and apparent is a question of fact, but it may be determined as a matter of law when the evidence is sufficiently clear. *See Smiley v. State of Vermont*, Opinion No. 15-13WC (June 3, 2013), *aff'd* 2015 VT 42 (citing *Kraby v. Vermont Telephone Co.*, 2004 VT 120 and *Lillicrap v. Martin*, 156 Vt. 165 (1989)).

6. In this case, it is undisputed that Claimant was experiencing knee pain as early as 2001 and that he attributed that pain to his work as a plumber at that time. *See* Background, ¶¶ 5-6. There is no evidence that he ever had any doubt as to the work-relatedness of his knee pain at that time. Nor is there any evidence of any other hypothesis as to the reasons for his knee complaints. Moreover, Claimant testified that the reason he did not pursue a claim for workers' compensation benefits until nearly two decades later was because he was "a little naïve." *Id.*, ¶ 15.

7. Claimant argues that those facts do not preclude his recovery in this case because he experienced an "aggravation" of his knee condition, and therefore a new injury, after a change in job duties following the onset of the Covid-19 pandemic. He also expressly disavows any claim for benefits that might have accrued before October 2020.

8. Claimant is correct that an "aggravation" of an underlying condition constitutes a new injury. *Whitney v. Porter Medical Center, Inc.*, Opinion No. 10-21WC (May 5, 2021). An "aggravation" in this sense is a defined legal term in the Department's Workers' Compensation Rules, meaning an "acceleration or exacerbation of a pre-existing condition caused by some intervening event or events." Workers' Compensation Rule 2.1200. Importantly, the Department has expressly rejected a "continuous aggravation" theory as a method of evading the statute of limitations. *See Dunroe v. Monro Muffler Brake, Inc.*, Opinion No. 17-15WC (July 23, 2015).

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

9. In *Dunroe*, the claimant argued that because his respiratory condition was continuously aggravated by work-related fumes and other irritants, that therefore every day he worked gave rise to a new claim for benefits with a new limitations period, analogizing to workplace sexual harassment cases. In rejecting this argument, the Department noted that Vermont's statute of limitations establishes a

> … single event – the moment when both the injury and its relationship to employment are reasonably discoverable and apparent – as the trigger date for the applicable notice and limitations periods. And unlike a claim for sexual harassment, in which an employer's actionable conduct can begin anew each day, logically the moment when an injured worker realizes that his injury or condition is in fact work-related can only occur once.

Id., Conclusions of Law Nos. 10-11.[3]

10. Moreover, the Vermont Supreme Court has rejected the notion that every incremental deterioration of a progressive condition constitutes a new injury:

> When considering a progressively degenerative disease such as osteoarthritis, where the disease, if left to itself, and apart from any injury, would, in time, have inevitably caused a complete disability, the causation test becomes whether, due to a work injury or the work environment, the disability came upon the claimant earlier than otherwise would have occurred. Mere continuation or even exacerbation of symptoms, without a worsening of the underlying disability, does not meet the causation requirement.

Stannard v. Stannard Co., 2003 VT 52, ¶ 11 (cits. & punct. omitted).

11. In this case, Claimant argues that the worsening of his knee condition following an increased workload in 2020 constituted an "aggravation" of a preexisting knee condition rather than a "mere continuation" of his chronic knee problems. He argues that because he is not seeking any benefits for conditions predating the Covid-19 pandemic, it makes no difference whether his knee conditions before that time were work-related or not.

12. A thoroughgoing adoption of this reasoning would effectively eviscerate the statute of limitations for any work-related progressive condition by allowing claimants to select

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[3] Similarly, a physician's date of diagnosis of a particular condition does not establish the date by which a claimant could reasonably discover an injury and its relationship to work. *See Holmes v. James Gold, D.D.S.*, Opinion No. 31-00WC (October 2, 2000) (holding that where claimant sought treatment in 1994 for a hand and wrist condition related to work, but her physician testified that he had no basis to diagnose her with carpal tunnel syndrome at that time, "her injury was reasonably discoverable and apparent" in 1994, regardless of the precise diagnosis).

any convenient date along the course of their condition's worsening and disclaim liability before that moment. Allowing a claimant to choose his own accrual date by disclaiming any claim for prior benefits would be fundamentally inconsistent with the principle that there can only be one moment when a claimant's condition and its relationship to work becomes reasonably discoverable and apparent. *See Dunroe*, *supra*.

13. Equally unpersuasive is Claimant's contention that whether his pre-pandemic knee conditions were work-related or not is irrelevant. Far from being irrelevant, that is at the heart of this case. If Claimant had a non-work-related knee condition before 2020 and then activities at work in 2020 made that condition worse, the compensability of this claim would be uncontroversial. Those are not the facts of this case, though. Here, Claimant experienced knee problems from the physical demands of plumbing over approximately two decades, received treatment along the way without filing a workers' compensation claim, and then filed a claim for benefits once those problems progressed to the point where he needed a total knee replacement.

14. Nor does Dr. Kirkpatrick's characterization of Claimant's medical progression as a "permanent aggravation, causally related to the work injury of 10/22/2020" change the outcome. Again, nothing specific happened to Claimant's knees on October 22, 2020; that was simply the date Claimant reported his injury and the date of injury listed on the First Report of Injury (Form 1). More significantly, whether a set of facts constitutes an "aggravation" as that term appears in the Workers' Compensation Rules is a legal conclusion. Where the facts cited in support of that conclusion, even if fully credited as true, would not legally constitute an "aggravation," an expert's choice to use that word cannot inject life into a moribund legal theory.

15. The activities that Dr. Kirkpatrick cites as the cause of this putative aggravation—kneeling, stooping, squatting, and bending—were not new in 2020. They are the essential physical activities of plumbing work, work that Claimant had been performing since the tenth grade. The only difference between Claimant's engagement in those activities before and after 2020 was the frequency and volume. However, fluctuations in work volume were not new either. Claimant's workload had increased in the past, such as in 2015, when he acknowledged he was "working more" and sought medical care for the knee problems that corresponded with that increase.

16. Dr. Kirkpatrick's assessment that "[w]ithout these work duties, the claimant would not be at the advanced level of osteoarthritis that he is" appears imminently plausible on its face. However, that only goes to the question of whether Claimant's injury arose out of his work. It did, and no one questions that. However, that does not mean that his injury arose out of his work *in 2020*. I see no evidence that this case presents anything other than a fluctuation of work volume that comes with any profession, with an upswing in volume corresponding to an increase in the severity of a chronic progressive condition. As a theory of legal causation, I find this functionally indistinguishable from the continuous aggravation theory that the Department rejected in *Dunroe*.

Conclusion

17. It is undisputed that Claimant engaged in physical work activities that placed pressure on his knees throughout his career and had developed knee problems as a result more than six years, and certainly more than three years, before he filed this claim. Even if the precise diagnoses that Claimant received for his earlier work-related knee problems were not the same, Claimant's knee conditions and their relationship to work were reasonably discoverable and apparent by 2001, or at the very latest, by 2015. He sought treatment for his knee conditions at those times, acknowledged the relationship between his work and his need for treatment, and there is no evidence of a legally sufficient intervening event after that time to create a new injury.

18. Whether Claimant's claim accrued in 2001 or 2015, it was untimely when he filed it in 2020. Accordingly, this claim must be dismissed. Because the statute of limitations resolves the entirety of this claim, all other legal issues raised by the parties are moot.

ORDER:

For all these reasons, Acadia's and Merchants's Motions for Summary Judgment are **GRANTED**.

DATED at Montpelier, Vermont this 17th day of November 2022.

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Michael A. Harrington
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.