

**STATE OF VERMONT
DEPARTMENT OF LABOR**

Pamela Delphia

Opinion No. 01-24WC

v.

By: Beth A. DeBernardi
Administrative Law Judge

Green Mountain Transit

For: Michael A. Harrington
Commissioner

State File No. PP-50045

OPINION AND ORDER

Hearing held via Microsoft Teams on September 27, 2023
Record closed on November 30, 2023

APPEARANCES:

Christopher McVeigh, Esq., for Claimant
Jennifer K. Moore, Esq., for Defendant

ISSUES PRESENTED:

1. Is Claimant's claim for workers' compensation benefits for her 2018 right ankle replacement surgery barred by the statute of limitations?
2. If not, did Claimant's right ankle condition arise out of and in the course of her employment for Defendant; and if so, to what benefits is she entitled?
3. If not, did Claimant's work for Defendant as a bus driver in December 2019 and January 2020 aggravate her right ankle condition; and if so, to what benefits is she entitled?

EXHIBITS:

Joint Exhibit I:	Joint Medical Exhibit ("JME")
Defendant's Exhibit A:	<i>Curriculum vitae</i> of Douglas Kirkpatrick, MD
Defendant's Exhibit B:	Employer First Report of Injury (Form 1) filed July 1, 2020
Defendant's Exhibit C:	Notice and Application for Hearing (Form 6) filed March 28, 2022
Defendant's Exhibit F:	GMT Driver Timesheets

CLAIM:

Temporary disability benefits pursuant to 21 V.S.A. §§ 642 and 646
Permanent partial disability benefits pursuant to 21 V.S.A. § 648
Medical benefits pursuant to 21 V.S.A. § 640
Vocational rehabilitation benefits pursuant to 21 V.S.A. § 641
Costs and attorney fees pursuant to 21 V.S.A. § 678

FINDINGS OF FACT:

Claimant's Employment with Defendant

1. Claimant is a 58-year-old woman who now lives in Florida. Defendant is a regional public transit system based in Burlington, Vermont. Claimant began working for Defendant in November 2004 as a city bus driver and occasional dispatcher.
2. Claimant's work as a bus driver included performing a pre-trip inspection every morning, checking the brakes, lights and other operations of the bus.
3. Driving a bus requires using the right foot and ankle to operate the gas and brake pedals. Claimant is between five feet three inches and five feet four inches tall. Sometimes she had difficulty adjusting her seat to fully reach the pedals. At times, she drove with her right foot in a plantarflexed position, with only the ball and toes of her foot on the pedals.
4. Claimant was out of work for significant periods of time due to various health conditions unrelated to her right ankle between October 2014 and June 2018. She was out of work for two right ankle surgeries from December 2018 through August 2020, with the exception of a total of five weeks. She last worked for Defendant in September 2020.

Claimant's Right Ankle Condition Prior to December 2018

5. In 1987, Claimant jumped off the back of a pickup truck and suffered a serious right ankle sprain. She has had chronic right ankle pain ever since that accident, becoming more severe over time. (JME 316). According to Claimant's testimony, the severe ankle sprain healed in two weeks and did not impact her employment as a bartender and hairdresser. However, on cross examination, she acknowledged that her ankle continued to hurt and swell after the 1987 accident, with symptoms waxing and waning over time.
6. On June 10, 2003, Claimant went to the Emergency Department reporting that she twisted her right ankle and heard a "loud pop." (JME at 1-3.10). An x-ray identified an ankle fracture, some bone fragments, and a widening of the mortis. (JME at 3). Claimant testified that she does not remember this incident, but she acknowledged that the medical record would be accurate.
7. On March 6, 2007, Claimant was seen at Champlain Valley Urgent Care reporting left knee and right ankle pain after a fall the day before. (JME 6, 12). The medical provider suspected a broken right ankle and referred her for x-rays. *Id.* Claimant testified that she does not recall this incident, either, although she acknowledged that the medical record would be accurate.
8. In October 2008, at an independent medical examination, orthopedic surgeon John Chard, MD, identified arthritis in Claimant's right ankle. (JME 12).

9. On October 31, 2009, Claimant went to the Emergency Department complaining of left knee and right ankle pain after a fall. Hospital staff diagnosed her with a sprained right ankle and severe degenerative arthrosis. (JME 38, 40-41.12).
10. In November 2014, Claimant saw providers at UVM Medical Center for plantar fasciitis in her right foot. (JME 63). This condition is not located in the ankle. However, on December 4, 2014, she complained to her physical therapist about throbbing pain in both ankles. (JME 070).
11. Claimant underwent physical therapy for knee pain, plantar fasciitis, and left-sided Achilles bursitis from December 4, 2014 through April 1, 2015. (JME 70-142). On February 10, 2015, the physical therapist noted that Claimant had pain in her right ankle “due to returning to work this week and having to push her right foot onto the break [sic] while driving the bus at work.” (JME 110). The physical therapist recommended custom orthotics and noted that Claimant would benefit from training “on how to use the gas and break [sic] with a neutral foot position as she is currently pushing on the break [sic] in an inverted ankle position.” (JME 110). The therapist also recommended installing a lift on the gas pedal and using a brace to decrease pressure on her ankle while driving. (JME 110, 112). Despite the physical therapist’s advice concerning the impact of driving on her right ankle on February 10, 2015, Claimant did not seek workers’ compensation benefits for her ankle condition at that time. Claimant’s physical therapy records mention her right ankle and driving again on February 13, 2015. (JME 112).
12. In January 2016, Claimant sought treatment with podiatrist Stephen Merena, DPM, for increasing right ankle pain that made it difficult to operate the gas and brake pedals on the bus. An x-ray showed bone on bone contact in her ankle joint and other findings indicative of significant right ankle osteoarthritis. (JME 237).
13. In June 2016, Defendant arranged for Claimant to undergo an Independent Ergonomic Assessment by Steven Myers to assess her driving position on the bus and make recommendations for any changes. (JME 244). The assessment was prompted by her complaints of back and hip pain. For the assessment, Claimant situated herself in the driver’s seat in her usual position; Mr. Myers observed that she hyperextended her right foot to reach the pedals. (JME 246). Mr. Myers showed Claimant how to adjust the seat so that her feet reached the pedals comfortably (JME 245), and Claimant acknowledged that she was able to drive more comfortably after the assessment. Nevertheless, not all buses are the same, and Claimant was not always able to find a comfortable driving position.
14. Claimant continued to have right ankle pain over the next few years. (JME 306-312). In September 2018, she returned to Dr. Merena. He diagnosed her with end stage osteoarthritis and referred her to orthopedic surgeon Mark Charlson, MD. (JME 313).
15. Claimant saw Dr. Charlson on October 4, 2018. He recommended total ankle replacement surgery, and Claimant agreed to undergo the procedure. (JME 317).

16. Sometime after October 4, 2018, when Dr. Charlson recommended surgery, and before December 21, 2018, when he performed the surgery, Claimant told Defendant that she would be out of work to undergo ankle replacement surgery. According to her testimony, she told Defendant's human resources coordinator, Patsy Redileau, that she wanted to file a workers' compensation claim for her ankle, but Ms. Redileau told her that ankle conditions were not covered by workers' compensation. Claimant testified that Ms. Redileau was a person in authority and that she had to respect that authority. Accordingly, she contends that she was dissuaded from filing a workers' compensation claim by Ms. Redileau. No one witnessed the conversation between Claimant and Ms. Redileau, neither party called Mr. Redileau to testify. I do not find Claimant's account of this conversation to be credible.¹

December 2018 Ankle Replacement and Subsequent Medical Course

17. Claimant underwent right ankle replacement surgery on December 21, 2018. (JME 325-327). She then underwent a course of physical therapy from February 14, 2019 through November 27, 2019. (JME 339-493).
18. The physical therapy records document that Claimant continued to have soreness, swelling and pain with activities of daily living throughout her recovery period. (JME 418, 432, 464, 473-474, 476, 478, 484, 492). On October 1, 2019, Claimant told her physical therapist that there was "no rhyme or reason" for her right ankle flare ups. (JME 480). On October 28, 2019, she had increased pain and swelling "without a notable change in her activity." (JME 486).
19. On December 10, 2019, Claimant returned to Dr. Charlson for a one-year post-surgical follow up. She was still wearing an ankle brace, and she reported ongoing soreness and swelling. (JME 495). Dr. Charlson identified her posterior tibial tendon as the source of her pain and swelling, and he recommended continued use of her ankle brace. *Id.* According to his office note, Claimant "needs to get back to work driving a bus." He therefore released her to return to bus driving 15 to 20 hours per week, about 3 hours per day, effective December 12, 2019. (JME 495).
20. Claimant testified that she returned to work full time in December 2019 and that her right ankle was doing well at that time. However, her medical records and timesheets document that she returned to work only part time and that she still had significant ankle pain and swelling when she returned to work.

December 2019 Return to Work Driving a Bus

21. Claimant returned to work part time on Friday, December 13, 2019. As a returning driver, she was required to undergo a new training period. She worked 20 hours of

¹ Claimant provided inaccurate testimony on many issues at the hearing. Also, she was familiar with the process of filing workers' compensation claims, having filed multiple claims prior to December 2018. Finally, she led a petition drive for the replacement of driver's seats on the buses, which suggests that she was not afraid to disagree with persons in authority. *See* Finding of Fact Nos. 36-42 *infra*.

training during the week ending December 20, 2019. *Defendant's Exhibit F*. Her training included performing a brake test procedure as part of the pre-trip inspection every morning.

22. Defendant's buses have braking systems that use compressed air, rather than hydraulic fluid. At the start of a brake test, the compressed air tank is full. During the test, the driver pumps the brake pedal to drain air out of the tank; when the tank is empty, the safety brake pops up. The driver then makes sure that the air compressor comes on and refills the tank with air.
23. Defendant offered testimony from its urban operations manager, James Johnson, concerning the nature of the brake test. Mr. Johnson credibly explained that performing the brake test requires the same motion and pressure as stopping the bus while driving. In his experience, the compressed air tank will be empty after stepping on the brake about eight to twelve times. It takes Mr. Johnson about 90 seconds to perform the brake test each morning, although he acknowledged that the test might take someone else up to three minutes. He credibly explained that the design of the braking system has a "mechanical advantage" that stops the bus when the driver applies steady and even pressure on the brake pedal; applying excessive force to the brake pedal is not necessary, nor would it push air through the lines any faster.
24. Claimant testified that the brake test required a significant degree of force and that her ankle hurt when she performed the test. Although Mr. Johnson explained that the test was not forceful, I find it credible that Claimant experienced ankle pain while performing the test. This is not unexpected, as she was still experiencing ankle pain with walking, standing, and other daily activities in December 2019, prior to her return to work.
25. Claimant drove a bus for two weeks after her one-week training period. For the week ending December 27, 2019, she worked four days, with a four-hour shift each day, for a total of 15.75 hours. For the week ending January 3, 2020, she worked four days, with a four-hour shift each day, for a total of 13.76 hours. She averaged just under 15 hours of driving per week over those two weeks. *Defendant's Exhibit D*. She last worked on January 3, 2020.
26. A few days after January 3, 2020, Claimant told Dr. Charlson's office that her ankle hurt, and he took her out of work again, effective January 6, 2020. (JME 498).

Claimant's Medical Course After January 2020, Including her June 2020 Surgery

27. Claimant continued with physical therapy, and she saw Dr. Charlson on January 14, 2020. (JME 503). Dr. Charlson found that her ankle replacement was functioning well and that the cause of her symptoms was irritation of her posterior tibial tendon. (JME 504). Posterior tibial tendon irritation was the same issue that Dr. Charlson had identified as the source of Claimant's ankle pain and swelling on December 10, 2019, right before she returned to work. (JME 495).

28. Claimant saw Dr. Charlson again on March 10, 2020. He noted that her ankle was well aligned, with less swelling. She was engaging in physical therapy, walking up to a mile, and doing circuit training at a gym. (JME 509-510).
29. Claimant returned to Dr. Charlson on June 11, 2020, reporting significant ankle pain. Dr. Charlson identified osteophytes (bony growths) in her right ankle that were causing impingement, and he recommended decompression surgery to remove them. (JME 513). Claimant testified that Dr. Charlson recommended this surgery in January 2020 and that it was delayed until June 2020 due to the Covid-19 pandemic. She further testified that she did not undergo any ankle treatment in the spring of 2020 because she was waiting for surgery. All this testimony is contradicted by Claimant's medical records: she underwent physical therapy in the spring of 2020, and Dr. Charlson did not recommend the surgery until June, at which time it was promptly scheduled.
30. Dr. Charlson performed the decompression surgery on June 25, 2020. (JME 522).
31. A few days later, Claimant notified Defendant of an alleged work injury, attributing her need for the June 2020 decompression surgery to her return to work in December 2019 and the performance of the brake test. Defendant filed the First Report of Injury (Form 1) on July 1, 2020. The First Report identifies the injury as ankle inflammation and specifies the date of injury as January 6, 2020. It further states: "[Injured worker] had a [sic] ankle replacement a year before returning to work – an [sic] pre trip brake pump was incorporated in job description to start work; [injured worker] claims to get weaker as the week progresses over time . . ."
32. On July 9, 2020, Claimant reported to Dr. Charlson that she was happy with her ankle condition. (JME 527). Dr. Charlson released her to return to work full time on August 26, 2020, with no restrictions. (JME 528).

Subsequent Attempt to Return to Bus Driving and Request for a Hearing

33. Claimant returned to driving a bus for Defendant on or about August 26, 2020.
34. On September 8, 2020, Claimant notified Defendant that on September 5, 2020, she drove with her right foot in a plantarflexed position and began to experience hip and ankle pain. *Defendant's Exhibit F*. Claimant stopped working for Defendant on September 8, 2020 and has never returned to her employment as a bus driver.
35. On March 28, 2022, Claimant's attorney filed a Notice and Application for Hearing (Form 6), asserting a claim for workers' compensation benefits for Claimant's underlying right ankle condition, including her need for the December 2018 ankle replacement surgery, as well as a claim for an aggravation of her ankle condition in December 2019 and/or January 2020. *See Notice and Application for Hearing Filed March 28, 2022.*

Accuracy of Claimant's Testimony

Medical History

36. Claimant is a poor medical historian. For example, she has no recollection of breaking her right ankle in 2003, nor of seeking emergency treatment for another serious right ankle injury in 2007. *See Finding of Fact Nos. 6-7 supra.*
37. Claimant inaccurately testified that Dr. Charlson recommended ankle decompression surgery in January 2020, but that the surgery was delayed until June 2020 due to the Covid-19 pandemic. *See Finding of Fact No. 29 supra.*
38. As another example, Claimant testified that she had no right ankle symptoms when she returned to work full time in December 2019. However, she did have ankle symptoms, and she returned to work only 15 hours per week. *See Finding of Fact No. 20 supra.*
39. As Claimant is a poor historian, I rely mainly on her medical records for her medical history, rather than on her testimony.

Reporting of Claimant's Claim for Workers' Compensation Benefits

40. Claimant testified that she tried to file a workers' compensation claim prior to her December 21, 2018 ankle replacement surgery, but Ms. Redileau dissuaded her from doing so. She further testified that she had to accept what Ms. Redileau said because Ms. Redileau was a person in authority. *See Finding of Fact No. 16 supra.* However, I do not accept Claimant's testimony about this conversation for several reasons.
41. First, given Claimant's inaccurate testimony on other issues, I hesitate to rely on her testimony about this conversation. Second, she filed multiple workers' compensation claims for other medical conditions prior to December 2018 and appealed denials in some of those claims. Given this history, I find that she is familiar with the claims filing process and is unlikely to be dissuaded from filing a claim. Third, in 2015, Claimant spearheaded a successful petition campaign among Defendant's drivers for the replacement of worn seats on the bus fleet. Her willingness to take the lead on this campaign undercuts her testimony that she was dissuaded from filing a workers' compensation claim because she was unwilling to stand up to a person in authority.
42. I therefore find that Claimant filed her claim for workers' compensation benefits for her right ankle condition, for which she underwent the December 2018 ankle replacement surgery, on March 28, 2022, when her attorney filed a Notice and Application for Hearing (Form 6) with the Department.

Medical Opinions Concerning Claimant's Right Ankle

43. Claimant presented expert testimony from Verne Backus, MD, and Defendant presented expert testimony from Douglas Kirkpatrick, MD.

A. Verne Backus, MD

44. Verne Backus, MD, is a board-certified occupational medicine physician. He graduated from Dartmouth Medical School and completed his occupational and environmental medicine residency at the Harvard School of Public Health. Dr. Backus has substantial experience with workplace injuries, including orthopedic injuries. He is also an experienced independent medical examiner.
45. On August 24, 2020, Dr. Backus performed an independent medical examination requested by Claimant to consider the relationship between her right ankle condition and her job duties as a bus driver. (JME 531-547). Dr. Backus' examination process included interviewing Claimant, performing a physical examination, and reviewing her medical records. Dr. Backus might have reviewed Claimant's physical therapy records too, but if he did, he did not focus on them.

Relationship between Claimant's bus driving and her end stage right ankle arthritis

46. Dr. Backus offered his opinion that bus driving contributed to the advancement of Claimant's pre-existing right ankle osteoarthritis, leading to her December 2018 ankle replacement surgery. He explained that ankles do not typically develop advanced osteoarthritis unless the ankle suffered from a prior significant trauma, but in this case, Claimant's ankle did suffer from prior trauma. Thereafter, Claimant's driving a bus with her foot in a plantarflexed position contributed to the development of her end stage osteoarthritis. As the medical literature does not include studies about the relationship between work and ankle osteoarthritis, Dr. Backus extrapolated from studies on the relationship between work and hip or knee arthritis in reaching this conclusion.
47. Dr. Backus acknowledged that Claimant had other risk factors for the acceleration of osteoarthritis in her ankle joint, including her age, her previous ankle injuries, and her significant body weight. In his opinion, these factors likely played a role in the development of her ankle osteoarthritis, too. He explained that it is hard to quantify how much each of these factors contributed to her ankle condition, but in any event, work was one of those factors due to the awkward angle of her foot while driving.
48. In evaluating Dr. Backus' opinion, I have taken into consideration the independent medical examination that he performed on her at Defendant's request on June 17, 2016. (JME 292-305). At that time, he considered whether there was a causal connection between Claimant's bus driving and her bilateral knee osteoarthritis. In his 2016 opinion, bus driving did not play any causal role in her bilateral knee osteoarthritis; that condition was just degenerative. In Dr. Backus' opinion, Claimant simply experienced knee pain while driving due to her non-work-related osteoarthritis. (JME 304).
49. As previously noted, Dr. Backus extrapolated from the medical literature on hips and knees to conclude that bus driving contributed to the advancement of Claimant's ankle osteoarthritis. However, with regard specifically to Claimant, Dr. Backus had already concluded that there was no causal connection between driving and her knee arthritis. Without a further explanation of why driving did not impact Claimant's knee arthritis, but

that studies finding such a connection support his causal opinion for her ankle condition, there is a gap in Dr. Backus' analysis.

50. Further, Dr. Backus' opinion was based on his understanding that Claimant generally drove with her right foot in a plantarflexed position. His opinion did not address that she was out of work for substantial periods of time between 2014 and 2018, when her ankle osteoarthritis worsened, nor did he focus on the improvement in her driving position after the 2016 ergonomic assessment. To the extent that Dr. Backus did not address the variability of Claimant's work history and the improvement in her driving position, his opinion is incomplete.

Relationship between Claimant's return to work in December 2019 and her right ankle condition, including the decompression surgery in June 2020

51. Dr. Backus also offered his opinion that Claimant's return to work, including the brake test, aggravated her ankle condition and causally contributed to her need for ankle decompression surgery in June 2020.
52. Dr. Backus explained that Claimant developed osteophytes (bony growths) after her ankle replacement surgery; the development of osteophytes is a known complication of ankle replacement surgery. In Claimant's case, the osteophytes caused impingement in her ankle joint, resulting in pain. In Dr. Backus' opinion, Claimant tolerated the pain when she was not working, but she could not tolerate it when she returned to work. Therefore, in Dr. Backus' opinion, work aggravated her ankle condition. Dr. Backus acknowledged that Claimant's return to work did not *cause* the osteophytes. Rather, his opinion was that that she experienced pain from the osteophyte-related impingement when she returned to driving and performed the daily brake test.
53. Dr. Backus did not offer any mechanism of injury for how Claimant's part-time return to work for three weeks actually worsened her underlying ankle condition, rather than just causing an increase in her pain. This omission substantially weakens his opinion.
54. Dr. Backus' opinion was also based in part on Claimant's description that the daily brake test required "forceful stomping on the brake." (JME 540-541). Based on the credible testimony of Mr. Johnson, the brake test did not require forceful stomping on the brake. Rather, the motion was the same steady pressure that drivers use to stop the bus while driving. This inaccuracy further affects Dr. Backus' opinion.

End medical result and permanent impairment

55. On August 24, 2020, Dr. Backus offered his opinion that Claimant had likely reached an end medical result for her right ankle condition with a 20 percent whole person impairment referable to that condition. (JME 545-546).

B. Douglas Kirkpatrick, MD

56. Douglas Kirkpatrick, MD, is a practicing orthopedic surgeon and a fellow of the American Board of Orthopedic Surgery. He graduated from New York Medical College in 1990 and did a five-year residency in orthopedic surgery. He also completed a sports medicine fellowship in 1996. Dr. Kirkpatrick has practiced orthopedic medicine in the Queensbury, New York area since 1996. He has performed numerous ankle surgeries and is also experienced in performing independent medical examinations.
57. At Defendant's request, Dr. Kirkpatrick performed an independent medical examination of Claimant on February 8, 2022. His evaluation focused on her low back, left hip and right ankle conditions. (JME 661-691). Dr. Kirkpatrick's examination process included interviewing Claimant, performing a physical examination, and reviewing her medical records, including radiology films and physical therapy records.

Relationship between Claimant's bus driving and her end stage right ankle arthritis

58. In Dr. Kirkpatrick's opinion, Claimant's activities as a bus driver did not cause or contribute to her right ankle osteoarthritis and her need for ankle replacement surgery in December 2018.
59. Dr. Kirkpatrick explained that end stage ankle osteoarthritis is generally caused by trauma, not repetitive activity. He and Dr. Backus agree on that. Claimant here has a history of ankle trauma that explains her development of the condition, dating back to her 2003 ankle fracture. X-rays taken at that time also showed a widening of the mortis, which is the space between the ankle bones. A wider mortis contributes to the disruption of the ankle joint. In Dr. Kirkpatrick's opinion, Claimant's ankle osteoarthritis was caused by her 2003 traumatic ankle injury, not her work activities.²
60. Dr. Kirkpatrick also assigned a contributory role to Claimant's history of obesity. In his opinion, obesity breaks down a patient's weight-bearing joints. He explained that the force of Claimant's weight while she was standing or walking on her already thinning ankle cartilage was too much for the joint to bear. In his opinion, the forces placed on Claimant's ankle from bus driving were insignificant relative to the force of her weight and had no causal role in her development of end stage ankle osteoarthritis.
61. Dr. Kirkpatrick acknowledged that the medical literature focuses on knee conditions, not ankle conditions. Accordingly, like Dr. Backus, Dr. Kirkpatrick relied on medical studies on the causes of knee osteoarthritis in forming his opinion. He testified that the medical literature supports a causal relationship between prior joint trauma and the development of osteoarthritis; it also supports a causal relationship between excess weight and osteoarthritis. Dr. Kirkpatrick frequently observes these causal relationships in his own orthopedic medical practice as well. However, neither the medical literature nor his own experience as an orthopedic physician provides support for a conclusion that bus driving would cause or contribute to the development of ankle osteoarthritis. Thus,

² Dr. Kirkpatrick was aware that Claimant injured her ankle in 1987, when she fell off a pickup truck, but he did not draw any conclusions from that incident due to the lack of related medical records.

Dr. Kirkpatrick cannot find such a relationship to a reasonable degree of medical certainty.

62. I find Dr. Kirkpatrick's opinion to be clear, thorough, and well-supported by his training and experience as an orthopedic physician and surgeon.

Relationship between Claimant's return to work in December 2019 and her right ankle condition, including the decompression surgery in June 2020

63. In Dr. Kirkpatrick's opinion, Claimant's return to work in December 2019 did not aggravate her right ankle condition, nor did it contribute to her need for decompression surgery in June 2020.
64. Dr. Kirkpatrick explained that Claimant underwent decompression surgery in June 2020 because she had developed ossification in her right ankle joint. Development of ossification is a known complication of ankle replacement surgery.
65. Dr. Kirkpatrick considered that when Claimant returned to bus driving for three weeks in December 2019, her work duties included driving the bus and performing a daily brake test. In his opinion, neither of these activities would cause the development of ossification in her ankle joint. Further, in his opinion, Claimant did not work enough hours at that time for her work to have *any* effect on her ankle, other than the likelihood that she experienced ankle pain while performing her work activities.
66. Dr. Kirkpatrick noted that Dr. Charlson had diagnosed Claimant with tibial tendonitis before she returned to return to work in December 2019, and it was this same condition that led Dr. Charlson to take her back out of work on January 6, 2020. Further, comparing x-rays before and after her return to work did not find objective evidence of any changed or worsened condition.
67. In Dr. Kirkpatrick's opinion, therefore, Claimant developed bony growths in her ankle as a complication of her ankle replacement surgery. Those growths irritated her tibial tendon before she returned to work in December 2019 and continued to irritate the tendon after she returned to work. Accordingly, her ankle felt symptomatic both prior to her return to work and while she was working. However, her bus driving activities did not worsen her ankle condition.
68. Finally, Dr. Kirkpatrick offered his opinion that Claimant's return to work in December 2019, including her bus driving and brake testing activities, did not aggravate the condition of her tibial tendon itself. He explained that the tibial tendon is associated with ankle movement inward, not with the plantarflexion motion involved in applying pressure to the bus pedals.
69. I find Dr. Kirkpatrick's opinion to be clear, thorough, and well-supported by his training and experience as an orthopedic physician and surgeon.

CONCLUSIONS OF LAW:

Statute of Limitations for Claimant's Right Ankle Claim

1. Claimant seeks workers' compensation benefits for the right ankle condition for which she underwent ankle replacement surgery on December 21, 2018. Defendant contends that the statute of limitations bars this claim as untimely.
2. The statute of limitations for initiating a claim for a work-related injury is three years from the date on which the injury and its relationship to employment were reasonably discoverable and apparent. 21 V.S.A. § 660(a). *See, e.g., Dunroe v. Monro Muffler Brake, Inc.*, Opinion 17-15WC (July 23, 2015); *Reis v. Ben & Jerry's Homemade, Inc.*, Opinion No. 10-17WC (June 13, 2017). The statute of limitations does not require actual knowledge before a claim accrues. Rather, a claim accrues when a claimant knows of "facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery." *Jadallah v. Town of Fairfax*, 2018 VT 34, ¶ 17, citing *Agency of Natural Resources v. Towns*, 168 Vt. 449, 452 (1998).
3. Claimant's claim here is based on an alleged relationship between her activities as a bus driver and her end stage right ankle osteoarthritis. To determine when her claim accrued, it is necessary to identify when her right ankle condition and its relationship to bus driving were reasonably discoverable and apparent.
4. Claimant's medical records show that her right ankle condition and its relationship to her employment as a bus driver were reasonably discoverable and apparent by February 10, 2015. *See* Finding of Fact No. 11 *supra*. Thus, her claim for workers' compensation benefits accrued on that date. Applying the three-year statute of limitations, I conclude that Claimant had until February 10, 2018 to initiate a proceeding for workers' compensation benefits relating to the right ankle condition for which she underwent surgery in December 2018.
5. Claimant did not initiate a claim for workers' compensation benefits for her right ankle condition until March 28, 2022. *See* Finding of Fact No. 35 *supra*. I therefore conclude that her claim for workers' compensation benefits for that condition is time-barred by the statute of limitations.³
6. As Claimant's claim for benefits for the right ankle condition for which she underwent ankle replacement surgery in December 2018 is barred by the statute of limitations, I reach no conclusion about whether that claim arose out of and in the course of her employment with Defendant.

³ Claimant testified that she wanted to file her claim in the fall of 2018 but was dissuaded from doing so by Defendant. Even if Claimant had *filed* her claim in the fall of 2018, her claim would already have been barred by the three-year statute of limitations.

Claimant's Return to Work in December 2019 and its Relationship to her Right Ankle Condition

7. In workers' compensation cases, the claimant has the burden of establishing all facts essential to the rights asserted. *King v. Snide*, 144 Vt. 395, 399 (1984). He or she must establish by sufficient credible evidence the character and extent of the injury, *see, e.g., Burton v. Holden & Martin Lumber Co.*, 112 Vt. 17 (1941), as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).
8. Where the causal connection between employment and injury is obscure, and a layperson could have no well-grounded opinion as to causation, expert medical testimony is necessary. *Lapan v. Berno's Inc.*, 137 Vt. 393, 395-96 (1979). For a claim to be compensable, the work contribution to the injury need not be the sole causal factor; it is sufficient if the work injury is one of several contributing factors. *McNall v. Town of Westford*, Opinion No. 08-19WC (May 10, 2019).
9. Claimant here returned to work for Defendant part time on December 13, 2019 and worked through January 3, 2020 before her doctor took her out of work again. On July 1, 2020, Defendant filed a First Report of Injury (Form 1), stating that Claimant alleged that her right ankle got weaker over time after she returned to work and performed the brake test procedure. On March 28, 2022, Claimant filed a Notice and Application for Hearing (Form 6), alleging that her return to work aggravated her right ankle. Defendant has denied a causal relationship between Claimant's return to work in December 2019 and her right ankle condition.
10. Under Vermont's Workers' Compensation Act, a workplace injury is compensable if it "accelerates the progression of a pre-existing condition, or disrupts its stability such that an individual's ability to work and function is disabled[.]" *S. B. v. Homebound Mortgage*, Opinion No. 29-07WC (November 6, 2007). Thus, in the context of progressively degenerative conditions, the standard for causation is "whether, due to a work injury or the work environment, the disability came upon the claimant earlier than otherwise would have occurred." *Stannard v. Stannard Co., Inc.*, 2003 VT 52, ¶ 11 (cits. & punct. omitted). Importantly, the "[m]ere continuation or **even exacerbation of symptoms**, without a worsening of the underlying disability, does not meet the causation requirement." *Id.* (emphasis added); *see also Goodwin-Abare v. State of Vermont Agency of Human Services*, Opinion No. 41-11WC (December 14, 2011) ("Nor is it enough that Claimant's job aggravated her symptoms. To be compensable, there must be proof that her work either caused or accelerated the underlying condition itself.").
11. The parties presented conflicting expert medical testimony on the causal relationship between Claimant's return to work and the alleged aggravation of her right ankle condition. In such cases, the Commissioner traditionally uses a five-part test to determine which expert's opinion is the most persuasive: (1) the nature of treatment and the length of time there has been a patient-provider relationship; (2) whether the expert examined all pertinent records; (3) the clarity, thoroughness and objective support underlying the opinion; (4) the comprehensiveness of the evaluation; and (5) the

qualifications of the experts, including training and experience. *Geiger v. Hawk Mountain Inn*, Opinion No. 37-03WC (September 17, 2003).

12. With particular reliance on the third *Geiger* factor, I conclude that the opinion of Defendant's expert is more persuasive than that of Claimant's expert. Both experts identified the development of ossification as a known complication of ankle replacement surgery, and neither attributed Claimant's ossification to her work activities from December 13, 2019 to January 3, 2020. Dr. Kirkpatrick credibly explained that the pain Claimant was experiencing during those three weeks of work was due to the ossification irritating her tibial tendon; this is the same condition that Claimant's treating physician identified on December 10, 2019, three days before she returned to work. Accordingly, Dr. Kirkpatrick's opinion that Claimant's return to work did not cause a worsening of her ankle condition beyond possibly an exacerbation of her symptoms is clear, well-supported by her medical records, and persuasive.
13. In contrast, the evidence that Dr. Backus relied upon in forming his opinion is insufficient to establish a causal relationship between Claimant's return to work and her right ankle condition. In particular, he did not account for Claimant's tibial tendon being in the same irritated condition before and after her return to work. Further, he did not explain how bus driving and brake testing would have caused an actual worsening of her underlying ankle condition, rather than just an increase in her symptoms. For these reasons, I conclude that Dr. Kirkpatrick's causation opinion is more persuasive than Dr. Backus' opinion.
14. Claimant has the burden of proof on causation. It is not sufficient that her return to work might have aggravated her symptoms. To be compensable, there must be proof that her return to work either caused or accelerated the underlying condition itself. *Stannard v. Stannard Co., Inc.*, 175 Vt. 549, 552 (2003). That proof was lacking here.
15. I therefore conclude that Claimant has failed to sustain her burden of proving that her return to work in December 2019 aggravated her right ankle condition or led to her decompression surgery in June 2020.

Conclusion

16. As Claimant has failed to meet her burden of establishing any work-related right ankle condition that is not barred by the statute of limitations, she is not entitled to workers' compensation benefits for her right ankle condition.

ORDER:

Based on the foregoing findings of fact and conclusions of law, Claimant's claims for workers' compensation benefits for her right ankle condition are hereby **DENIED**.

DATED at Montpelier, Vermont this 6th day of February 2024.

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.