

**STATE OF VERMONT
DEPARTMENT OF LABOR**

James Corrette

Opinion No. 10-25WC

v.

By: Stephen W. Brown
Administrative Law Judge

H.P. Cummings Construction Co.
and its Insurers: Liberty Mutual Insurance
Company (“Liberty Mutual”), Acadia
Insurance Company (“Acadia”), and
Travelers Indemnity Company of
Connecticut (“Travelers”)

For: Kendal M. Smith
Interim Commissioner

State File Nos. GG-57370 (Liberty Mutual),
SS-59432 (Acadia), and YY-00292
(Travelers)

**RULING ON DEFENDANTS’
MOTIONS FOR SUMMARY JUDGMENT**

APPEARANCES:

David A. Berman, Esq., for Claimant
William J. Blake, Esq., for Defendant and Acadia
Krystn M. Perettine, Esq., for Defendant and Liberty Mutual
James M. O’Sullivan, Esq., for Defendant and Travelers

ISSUE PRESENTED:

Is Claimant’s claim against Defendant and its insurers barred by the statute of limitations
and/or laches as a matter of law?

EXHIBITS:

Acadia’s Statement of Undisputed Material Facts (“ASUMF”)

Acadia’s Exhibit A: Medical Records
Acadia’s Exhibit B: Claimant’s Deposition

Liberty Mutual’s Statement of Undisputed Material Facts (“LMSUMF”)

Liberty Mutual’s Exhibit A: Medical Records
Liberty Mutual’s Exhibit B: Claimant’s Deposition

Travelers’ Statement of Undisputed Material Facts (“TSUMF”)

Travelers’ Exhibit A: Claimant’s Written Statement, dated March 6, 2023
Travelers’ Exhibit B: Claimant’s Deposition
Travelers’ Exhibit C: Medical Record, dated December 15, 2014
Travelers’ Exhibit D: Medical Record, dated July 20, 2015
Travelers’ Exhibit E: Functional Capacity Exam, dated October 19, 2015
Travelers’ Exhibit F: Medical Record, dated December 14, 2015
Travelers’ Exhibit G: Independent Medical Evaluation Report, dated November 8, 2023
Travelers’ Exhibit H: Independent Medical Evaluation Report, dated August 4, 2023

BACKGROUND:

There is no genuine issue as the following material facts:

1. As of December 2014, and continuing to at least August 2024, Claimant was Defendant's employee. (TSUMF 1, LMSUFM 1).
2. Three separate insurers are presently involved in this claim: Liberty Mutual, Travelers, and Acadia. These insurers covered Defendant's risk at various times relevant to the history of this case; all of them deny liability for Claimant's right shoulder injury. (ASUMF 3-4, LMSUMF 19).
3. Liberty Mutual asserts that it insured Defendant from April 1, 2014, until April 1, 2017. (LMSUMF 2). Travelers asserts that it insured Defendant from April 1, 2018, to November 1, 2020. (TSUMF 2). Acadia asserts that it insured Defendant from approximately November 1, 2020, onward.¹

Claimant's Accepted 2014 Workplace Injury to His Left Shoulder

4. On December 15, 2014, Claimant, in the course of his employment with Defendant, was working on a twelve-foot ladder with a crowbar in his left hand and a sledgehammer in his right. While pulling on a piece of decking with the crowbar, he felt a pop in his left shoulder. He was diagnosed with a rotator cuff tear for which he underwent surgery on January 12, 2015. Liberty Mutual, as Defendant's workers' compensation insurer at the time, accepted liability for this claim and paid benefits accordingly, including surgery. (ASUMF 1-2, 9-11; TSUMF 3-6; LMSUMF 3-7, Traveler's Exhibits A and B). Claimant was found to have reached end medical result for his left shoulder as of December 14, 2015. (LMSUMF 8, Acadia Exhibit B, p. 15).

Claimant's Complaints of Right Shoulder Pain From 2014 Onward, Which He Attributed to his Accepted Left Shoulder Injury

5. Claimant testified via deposition that shortly after the left shoulder injury, he also experienced pain in his right shoulder, which he attributed to the accident. (ASUMF 12, Acadia Exhibit B). Claimant is presently asserting a claim for a right shoulder injury. (ASUMF 2).
6. Claimant also testified that the first time he noticed right shoulder pain after the accident was before he saw his treating surgeon; he acknowledged pain "probably within a week or two" after the accident while throwing a football with his son. (ASUMF 13, TSUMF 6, Acadia Exhibit B, p. 20). He also testified as follows:

¹ Claimant states that he is unable to admit or deny these coverage dates. I accept them as true for the purposes of this motion, as there is no countervailing evidence of alternate dates of coverage.

Q: So it's your belief that when you were up there on the ladder, you think that you did something to the right shoulder as well?"

A: Yes.

Q: All right.

A: That is what I believe.

Q: All right. And is that a belief or a perception that you had formulated back at that time?

A: That I had what?

Q: Had you formulated that belief back then in 2015 as you were experiencing the right shoulder pain?

A: Yes.

(ASUMF 14, TSUMF 8, Acadia Exhibit B, p. 24).

7. Claimant testified that he discussed his right shoulder complaints with his medical providers but testified he could not recall whether he ever discussed his right shoulder with the Liberty Mutual adjuster. (ASUMF 15, Acadia Exhibit B, p. 27).
8. Claimant's physical therapy records from July 2015 record his right shoulder complaints as follows:

James states that his L shoulder is progressing well. Is holding up well with his activities at work as a construction laborer. Has complaints more so for the R shoulder now which he thinks may be because he relied on it so heavily as he was transitioning back to work.

...

Does have some signs and symptoms of impingement on the R.

(ASUMF 16, TSUMF 9, Acadia Exhibit A).

9. In a functional capacity evaluation (FCE) dated October 19, 2015, his evaluator noted that Claimant's "right shoulder is also impaired, which gives him limited capacity to compensate for the left shoulder when reaching and lifting above the waist." (ASUMF 17, TSUMF 10, Acadia Exhibit A).
10. An independent medical examination (IME) report dated December 14, 2015, noted that Claimant was at that time "having some pain in his right shoulder, but I am not evaluating his right shoulder as a part of this injury as it is not clear that this has been comp claim that has been filed." (ASUMF 18, TSUMF 11, Acadia Exhibit A [sic]).

11. Claimant has testified that after that IME, he stopped physical therapy but had not returned to his pre-injury baseline for either his right or left shoulder. (ASUMF 19, Acadia Exhibit B, pp. 28-29).

Claimant's 2023 Complaints of Worsened Right Shoulder Pain and Subsequent Treatment

12. In May 2023, Claimant presented to his primary care provider, Dr. Sullivan, with complaints of right shoulder pain, (LMSUMF 13), and later presented to his treating surgeon for right shoulder treatment because he “couldn’t take it anymore.” He testified that there was not a new accident but that this was something that had happened gradually over the years. (ASUMF 20, Acadia Exhibit B, p. 29-31; LMSUMF 15).
13. Claimant, in his deposition, confirmed the accuracy of the following statements in his medical treatment record dated May 18, 2023:

He complains of right shoulder pain. He had repair of the rotator cuff on the left side approximately eight years ago and said at that time his right shoulder began to bother him as well.

...

He’s tolerated it for all this time, but now it’s to the point where he has restricted movement and is struggling to work.

...

He has not tried anything for the pain. He would rather not take any medication. Denies recallable injury but is sure it has arisen from work.”

(Acadia Exhibit B, p. 30).

14. Claimant affirmed the accuracy of a June 27, 2023 note from his treating surgeon, which stated, “the patient is status post left shoulder rotator cuff repair eight years ago following a work-related injury in which he states he injured his right shoulder as well.” [*sic*] (ASUMF 24, Acadia Exhibit B, p. 32).
15. Claimant confirmed at his deposition that his right shoulder complaints have “absolutely” gotten worse every year. (ASUMF 28, Acadia Exhibit B, p. 35). Claimant has asserted further that his right shoulder has been constantly worsening and painful since the December 2014 injury. (TSUMF 12, Acadia Exhibit B, pp. 39-40).
16. In a written statement dated March 6, 2023, Claimant identified a second incident “shortly after December 15, 2014,” when he was carrying cinder blocks. He states that his pain has been “getting worse every year since. Now it’s effecting [*sic*] my job performance.” (TSUMF 14, Travelers’ Exhibit A).
17. In August 2023, Claimant saw Leonard Rudolf, MD, for an IME at the request of Liberty Mutual. Dr. Rudolf concluded that it was unlikely that there was any direct injury to Claimant’s right shoulder in 2014, but that the right shoulder rotator cuff tear may be associated with work injuries over time; however, this was difficult to confirm. (ASUMF 30, TSUMF 16, Travelers Exhibit G).

18. Claimant underwent right shoulder surgery on September 25, 2023, with the same surgeon who had operated on his left shoulder in 2015. (LMSUMF 14). The first time he was specifically taken out of work for his right shoulder was in September 2023. (LMSUMF 15).
19. On November 8, 2023, Claimant saw Victor Gennaro, DO, at his attorney's request. Dr. Gennaro noted that Claimant "believes he injured the right shoulder at the time of his original injury but admits he did not report an injury." (Acadia Exhibit A). Dr. Gennaro opined that Claimant did not sustain a specific injury to the right shoulder in 2014, but acknowledged that Claimant voiced right shoulder complaints during his 2014 FCE and 2015 IME." (*Id.*). Dr. Gennaro also noted that Claimant's "assertion that his right shoulder symptoms gradually progressed over the ensuing years is very credible and consistent with his clinical condition." He concluded that Claimant likely had degenerative disease of the right rotator cuff at the time of his December 2014 workplace incident and that "more likely than not, as a result of his continued work activity, his rotator cuff finally failed resulting in severe symptoms and the patient's seeking treatment." In Dr. Gennaro's opinion, the final right rotator cuff failure likely happened sometime around 2019 or 2020. (ASUMF 31, TSUMF 17, LMSUMF 18, Acadia Exhibit B, Travelers Exhibit H).
20. Claimant acknowledged at his deposition that, prior to 2023, he did not recall telling anyone from Liberty Mutual about his inability to work because of his right shoulder. (LMSUMF 16).
21. Claimant filed this claim against Defendant and Acadia in 2023; Acadia then requested to place Liberty Mutual and Travelers on notice of potential liability. (*See* Claimant's Brief in Opposition to Acadia's Motion for Summary Judgment, p. 3).

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 or the other might prevail at trial. *Provost v. Fletcher Allen Health Care, Inc.*, 2005 VT 115, ¶ 15.

Statute of Limitations

2. The statute of limitations for a Vermont workers' compensation claim is three years from the date of injury. 21 V.S.A. § 660(a). However, this limitation does not "limit subsequent claims for benefits stemming from a timely filed work-related injury claim." *Id.*
3. Claims for specific benefits arising from a timely filed workers' compensation claim must be filed within six years of the date on which they accrue. Workers' Compensation Rule 3.1700.

The Statute of Limitations Bars Claimant from Recovering for His Right Shoulder Complaints Against Acadia or Travelers

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. All of that notwithstanding, an "aggravation" of an existing 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. Because an aggravation of a previous condition constitutes a new injury, accrual for limitations purposes begins on the date of the aggravation and does not relate back to the inception of the previous condition being aggravated.
7. The Department has repeatedly rejected, however, the notion of "continuous aggravation" as a method of evading the statute of limitations in cases involving progressive conditions. *See Dunroe v. Monro Muffler Brake, Inc.*, Opinion No. 17-15WC (July 23, 2015); *Pelletier v. Pelletier Plumbing & Heating, P.C.*, Opinion No. 23-22WC (November 17, 2022).

8. 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.

Dunroe, supra, Conclusions of Law Nos. 10-11; *accord Pelletier, supra*.

9. 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).

10. In this case, Claimant disclaims any effort to assert a continuing aggravation theory that the Department rejected in *Dunroe* and *Pelletier*. Instead, Claimant argues that he suffered an aggravation in 2023, when his right shoulder symptoms became disabling. He notes that after his left shoulder surgery in January 2015, he was able to return to work within weeks and continued working for Defendant for almost nine years. Although Claimant acknowledges that his right shoulder bothered him in 2014, he tolerated it for years, and it was not until 2023 that, because of his ongoing work activities, he simply "couldn't take it anymore." (*See Background, supra*, at 12). It was then that, according to Dr. Sullivan, Claimant reached "the point where he ha[d] restricted movement and [wa]s struggling to do his work. (*See Background, supra*, at 13). Thus, Claimant contends that his ability to tolerate his symptoms for nine years until 2023 demonstrates that his worsened status in 2023 constitutes a new injury for limitations purposes.

11. In support of this argument, Claimant cites *Trask v. Richburg Builders*, Opinion No. 51-98WC (August 25, 1998), which set forth five factors for differentiating between aggravations and recurrences for the purpose of determining which of two insurers is responsible for an injured worker's worsened condition:

- (1) Whether there is a subsequent work incident or work condition which destabilized a previously stable condition;
- (2) Whether the claimant had stopped treating medically;

- (3) Whether the claimant had successfully returned to work;
- (4) Whether the claimant had reached end medical result; and
- (5) Whether the subsequent work contributed independently to the final disability.

Id., Conclusion of Law No. 3.

12. The *Trask* framework, which was developed in the context of determining which of multiple insurers bears liability for an undisputedly compensable injury, is less than ideal as a framework for assessing the date of injury for limitations purposes. Nonetheless, the first clause of the first factor bears particular weight in this case: “whether there is a *subsequent* work incident or work condition.” *See id.*
13. Claimant emphasizes that his right shoulder condition was stable for approximately nine years following his 2014 workplace injury. However, he has not pointed to anything specific that happened between 2014 and 2023 except for the cumulative stress of performing his usual work duties through the pain that had persisted in his right shoulder since 2014 or 2015. Indeed, Claimant’s own testimony demonstrates that he attributes all his right shoulder symptoms that he began experiencing in 2023 to events that happened in 2014 or 2015. (*See Background, supra*, at 6).
14. It is true that the record might support favorable inferences regarding the second through fifth *Trask* factors: Claimant had not treated medically for his right shoulder for nine years; he had successfully returned to work; he had reached end medical result, at least for his accepted left shoulder; and the existing evidentiary record would at least support a finding that his continued work activities contributed to the progressive worsening of his right shoulder condition between 2014 and 2023. However, without any evidence of a specific event or material change in work activities after 2014 or 2015 that constituted a “subsequent work incident or work condition” as described in the first factor, all the other *Trask* factors are inapposite as to the question of when Claimant’s claim accrued for limitations purposes. Without evidence of anything new happening to Claimant’s right shoulder after 2014 other than its gradual and continual worsening, I cannot distinguish Claimant’s allegation that his previously stable condition became destabilized and thereby constituted a new injury from an allegation that a progressive condition continuously deteriorated over time.
15. Claimant complained to his providers of right shoulder pain in 2014 and 2015, and he has testified that those symptoms got worse every year until 2023. He presently attributes the right shoulder conditions for which he now seeks benefits to events that happened at those times. Although he makes no assertions of his medical expertise and does not intend to offer medical causation testimony, he has not provided any evidentiary basis that would support a finding of any accrual date after 2015 at the latest. His argument that the date his admittedly progressive condition became disabling should constitute the date on which his claim for that condition accrued for limitations purposes is precisely the

argument that the Department rejected in *Dunroe* and *Pelletier*. I must reject it again here.

16. Therefore, to the extent that Claimant seeks any relief by filing a new claim in 2023 for an injury that he attributes to events that took place in 2014 and became symptomatic no later than 2015, such claim is untimely as a matter of law. Claimant first asserted claims against Acadia, and by extension Travelers, in 2023. (Background, *supra*, at 21). The statute of limitations bars Claimant's claims for relief against these insurers.
17. Because the statute of limitations resolves Claimant's claims against these insurers, I need not address their alternative defense of laches.

A Genuine Issue of Material Fact as to Whether Liberty Mutual's Acceptance of Claimant's 2014 Left Shoulder Claim Also Covers His Present Right Shoulder Claim Precludes Summary Judgment in its Favor.

18. The foregoing accrual analysis does not resolve Claimant's claim against Liberty Mutual, however.
19. Unlike Acadia and Travelers, Liberty Mutual *did* insure Defendant's risk at the time of the event giving rise to this case. Claimant timely filed a claim in 2014, thereby giving notice to Defendant and Liberty Mutual of the event itself. Liberty Mutual accepted responsibility for this claim at that time, and paid benefits accordingly. (Background, *supra*, 3-4). Liberty Mutual already had notice of the facts and circumstances giving rise to Claimant's claim, and its acceptance of liability for that injury constituted an acceptance of all its natural sequelae. *M. S. v. State of Vermont*, Opinion No. 10-09WC, (Apr. 1, 2009) ("It is well accepted that when a compensable work-related injury occurs, all of the medical consequences and sequelae that flow from it are compensable as well.").
20. Claimant complained about his right shoulder to his medical providers in the months following the incident, but he did not seek treatment for his right shoulder until 2023, and his right shoulder was not disabling until that time. It is not clear that he had any reason to request any benefits related to his right shoulder at that time. If he did not *need* treatment for his right shoulder and his right shoulder symptoms did not prevent him from working any more than his left shoulder already did, then there would have been no relief for him to request. A limitations period "can only begin to run when there is in fact something to claim." *Hartman v. Ouellette Plumbing & Heating Corp.*, 146 Vt. 443, 446, 507 A.2d 952, 953 (1985)
21. Claimant also asserts in response to Liberty Mutual's Motion for Summary Judgment that in 2015, Liberty Mutual had the medical records reflecting right shoulder complaints. While there is no specific evidentiary citation to support this, it would be a reasonable inference, which I must draw in Claimant's favor as the nonmovant, from the fact of Liberty Mutual's acceptance of this claim in 2014 that it would have received all of Claimant's medical records related to his shoulder injury in real time or after short delay.

22. Accordingly, I find that there is a genuine issue of material fact as to whether Claimant's 2014 claim, combined with his recorded right shoulder complaints in his medical records, constituted a claim against Liberty Mutual for any benefits that may be subsequently recoverable for his right shoulder, so long as Claimant is able to establish that such right shoulder complaints are causally related to the 2014 incident for which Liberty Mutual accepted liability.
23. It is true that in December 2015, an IME indicated that Claimant's right shoulder was impaired but that the evaluator was not assigning a rating to the right shoulder at that time because it was not clear that Claimant had asserted a claim for his right shoulder. This fact may put Claimant on notice that he would need to take action to preserve any rights to permanent partial disability benefits related to his right shoulder if he contended that his right shoulder impairment was work-related. However, Claimant does not appear to be seeking whatever right-shoulder-related permanent impairment benefits might have been recoverable in 2015.² Instead, he is seeking benefits related to his 2023 surgery and disability related to his right shoulder symptoms which he contends to have persisted since 2014 or 2015 and which he attributes to same 2014 event for which Liberty Mutual has accepted responsibility. His claim for those benefits did not accrue until 2023, and he requested them in 2023.
24. Thus, Claimant is entitled to a formal hearing on the question of whether his claim for benefits related to his right shoulder in 2023 is causally related to his 2014 injury that Liberty Mutual accepted, and whether his actions, combined with his contemporaneous medical records, provided adequate notice to Liberty Mutual that his claim included benefits for his right shoulder.

Laches Does Not Bar Claimant's Claim Against Liberty Mutual as a Matter of Law

25. Laches refers to a party's "failure to assert a right for an unreasonable and unexplained period of time when the delay has been prejudicial to the adverse party, rendering it inequitable to enforce the right. Laches does not arise from delay alone, but from delay that works disadvantage to another." *Stamato v. Quazzo*, 139 Vt. 155, 157 (1980) (internal cits. omitted).
26. Viewing the evidence in the light most favorable to Claimant, Claimant first had the need for right shoulder treatment and time away from work in 2023.³ He sought workers' compensation benefits related to those needs in 2023. That does not constitute an unreasonable delay in seeking those benefits, so long as he sought them in relation to a timely filed workers' compensation claim.

² To the extent that Claimant *is* seeking such benefits, they are time barred because more than six years have elapsed since that IME. *See* Workers' Compensation Rule 3.1700.

³ Liberty Mutual may still assert an affirmative defense of laches at the formal hearing if discovery reveals that Claimant *did* receive ongoing medical treatment for his right shoulder or that it caused him to miss work in the years between 2014 and 2023.

27. Claimant must still prove the relation of those benefits to the 2014 claim that Liberty Mutual accepted, and he must still prove that Liberty Mutual had fair notice in 2014 of its potential responsibility for Claimant's right shoulder complaints should they rise to the level of requiring medical treatment or time away from work. However, to the extent that Claimant can establish these elements, he maintains a plausible legal path to recovery against Liberty Mutual for his claims related to his right shoulder.

ORDER:

For all these reasons, Acadia's and Travelers' Motions for Summary Judgment are **GRANTED**, and Liberty Mutual's Motion for Summary Judgment is **DENIED**.

DATED at Montpelier, Vermont this 9 day of July 2025.

Kendal M. Smith
Interim 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.