STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. S-07617 and S-13088
	)	
Steven Hough	)	By: Margaret A. Mangan
	)	Hearing Officer
v.	)	
	)	For: Michael S. Bertrand
Northeast Service Center and	)	Commissioner
Gates Salvage	)	
	)	Opinion No. 09SJ-03WC

RULING ON MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Heidi Groff, Esq. for the Claimant
David R. McLean, Esq. for Transportation/CNA, insurer for Gates Salvage
John W. Valente, Esq. and Christina DeGraff-Murphy for Guard Insurance, insurer for Northeast Service Center

ISSUE:

Should Gates be dismissed as a party in this action?

BACKGROUND AND FACTS:

Under the Workers' Compensation Act, "employer" includes its insurer. 21 V.S.A.§ 601(3). In this opinion, Northeast Service Center and Guard Insurance, its workers' compensation insurer, are called "Northeast." Gates Salvage Yard and Transportation/CNA, its workers' compensation insurer, are called "Gates."

Gates, by and through its attorney, David R. McLean, moves for summary judgment in its favor, arguing that there is insufficient evidence to support a recurrence and, therefore, no legal basis to sustain a claim against it. When the motion was initially filed as one to dismiss, Northeast, by and through its attorney, Christina DeGraff-Murphy, opposed it, arguing, with the support of a witness statement, deposition testimony and medical records, that there is ample evidence of a recurrence to warrant denying the motion by Gates. That motion, now captioned one for summary judgment, and the Northeast opposition to the motion to dismiss and its recent submission of a record review by Dr. Leon Ensalada, include ample evidence for a legal determination. See, *Doe v. Doe*, 172 Vt. 533 (2001) (mem) and cases cited therein.

The record, including medical records, Claimant's recorded statement and deposition, official department forms and co-worker statement elucidates the following facts when viewed in the light most favorable to Northeast.

Claimant worked for Gates from June 1999 to October 1999. In August of 1999 he had an episode of work-related back pain diagnosed as muscle strain and spasm that kept him out of work for a short time. On August 20, 1999 he received medical permission to return to work on light duty. The assessment for that visit states, "Back pain improving. There is no objective finding of disc herniation at this time."

Claimant sought no treatment for a low back condition between August 1999 and January 2001.

In August of 2000, Claimant began working at Northeast. It is possible that he had back pain at that time.

On January 20, 2001 Claimant slipped on the floor at Northeast and twisted his back. He reported discomfort down his right leg that felt "like jelly." This is the first indication of pain radiating down his leg. On January 22, 2001 Claimant slipped on steps at home.

An April 13, 2001 medical record refers to recurrent episodes of back pain over three years.

In May of that year, Claimant was diagnosed with a disc herniation. Then, on October 22, 2001 Northeast filed a First Report of Injury for an October 15, 2001 injury to the claimant's low back. Claimant has not worked since October 15, 2001.

DISCUSSION:

Summary judgment is appropriate when the moving party has demonstrated that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. V.R.C.P. 56(c*); Kelly v. Town of Barnard*, 155 Vt. 296, 299, (1990). In determining whether a material fact exists, the opposing party is entitled to all reasonable doubts and "all properly supported allegations presented by the opposing party [are regarded] as true." *Hodgdon v. Mt. Mansfield*, 160 Vt. 150 at 158-59 (1992).

Under the oft-cited aggravation-recurrence analysis, Gates is the responsible employer if the Claimant's back condition is a recurrence. Northeast is the responsible employer if it is an aggravation. Recurrence means the return of symptoms following a temporary remission. WC Rule 14.9242 "Aggravation" means an acceleration or exacerbation of a pre-existing condition caused by some intervening event or events. Rule 2.1110. Therefore, Gates is liable if the subsequent incidents "did not causally contribute to the claimant's disability". *Pacher v. Fairdale Farms*, 166 Vt. 626, 627 (1997) (mem.). "If, however, the second incident aggravated, accelerated, or combined with a preexisting impairment or injury to produce a disability greater than would have resulted from the second injury alone, the second incident is an 'aggravation,' and the second employer [Northeast] becomes solely responsible for the entire disability at that point." Id. (citations omitted).

To assist in the analysis, this Department has considered five questions, which if answered in the affirmative support a conclusion of aggravation: 1) Did a subsequent incident or work condition destabilize a previously stable condition? 2) Did the Claimant reach a medical end result before moving to the second employer? 3) Had the Claimant stopped treating medically before moving to the second employer? 4) Had the Claimant successfully returned to work? And 5) Did subsequent work contribute to the final disability. See, *Tatro v. Town of Stamford*, Op. No. 25-00WC (2000); *Trask v. Richburg Builders*, Opinion No. 51-98WC (1998).

Claimant testified that it was possible he had back pain when he started to work at Northeast. However, he sought no medical treatment after he left Gates in October 1999 and before he had a specific work-related incident at Northeast in January 2001. Therefore, it follows that his back condition had been stable before his January 2001 injury, that he had stopped treating medically and that he had successfully returned to work. With an objective finding of disc herniation after he was injured at Northeast, pain down his leg and an inability to work after the October 15, 2001 incident, the weight of the factors devolve to a finding of aggravation. In fact there are none that affirmatively support recurrence, as the medical end result determination is not possible to determine on the record. Persistence of back pain alone, the only evidence in support of Northeast's position, is an insufficient basis for a finding of recurrence.

Despite adequate discovery, including medical records and the deposition of the Claimant, the record lacks support for Northeast's position that Claimant's back condition is a recurrence.

THEREFORE, the Gates motion for summary judgment is GRANTED.

Dated at Montpelier, Vermont this 24th day of February 2003.

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Michael S. Bertrand
Commissioner