STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Barbara McLean	)	State File No. S-354
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Treadle Bears of Vermont, Inc.	)	For: R. Tasha Wallis
	)	Commissioner
	)	
	)	Opinion No. 25-02WC

MOTION FOR SUMMARY JUDGMENT

Submitted on briefs.

APPEARANCES:

Joseph Paul O'Hara, Esq. for the claimant
Barbara E. Corey, Esq. for Treadle Bears of Vermont
Harold E. Eaton, Jr., Esq. for One Beacon Insurance Co.

ISSUE:

Is One Beacon entitled to judgment as a matter of law?

FACTS:

1. Barbara McLean was employed by Treadle Bears to sew and assemble teddy bears prior to and during 2001.

2. Treadle Bears maintained a workers' compensation policy with One Beacon Insurance until May 12, 2001. When this policy lapsed, Treadle Bears did not renew its workers' compensation coverage.

3. Claimant first sought treatment for wrist pain in June 2001 and was diagnosed with bilateral carpal tunnel syndrome. Claimant's physical therapist notes in his August 8, 2001 initial evaluation that claimant's pain "began over the spring secondary to an increase in workload."

4. Treadle Bears denied the claim, contending that One Beacon was responsible. Subsequent to an Interim Order of November 29, 2001, Treadle Bears has paid disability and medical benefits to the claimant.

DISCUSSION:

1. Employers who fail to secure workers' compensation shall be personally liable for injuries arising out of and in the course of employment. 21 V.S.A. § 687 (b). When its policy with One Beacon lapsed on May 12, 2001, Treadle Bears became personally liable for work-related injuries occurring after that date.

2. One Beacon seeks summary judgment on the basis that Treadle Bears is liable for this claim under the "last injurious exposure" rule. Treadle Bears did not respond to the motion.

3. "Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, after giving the benefit of all reasonable doubts and inferences to the nonmoving party." *City of Burlington v. National Union Fire Ins. Co.,* 163 Vt. 124, 127 (1994). Treadle Bears' failure to respond to the motion does not require an automatic summary judgment; rather, the materials supporting One Beacon's motion must be sufficient to show the absence of a fact question. See *Miller v. Merchants Bank,* 138 Vt. 235, 237-38 (1980).

4. Treadle Bears accepts that claimant's injury is work related, as evidenced by its May 2, 2002 Pre-Trial Statement of Facts and Issues. Claimant sought treatment, was diagnosed and became disabled after One Beacon was off the risk. However, the specific causation of claimant's injury is determinative of liability. The application of the "last injurious exposure" rule is appropriate "only where separate injuries all causally contribute to the total disability so that it becomes difficult or impossible to allocate liability among several potentially liable employers." *Pacher v. Fairdale Farms,* 166 Vt. 626, 628 (1997).

5. Considering the facts in the light most favorable to Treadle Bears, the causal connection between claimant's injury and her work activities while Treadle Bears was on the risk is in question. The Copley Hospital record referencing the onset of symptoms "over the spring" creates a genuine issue of material fact as to the onset of the carpal tunnel syndrome and aggravation by intensified workload while One Beacon was still on the risk.

CONCLUSION AND ORDER:

Because there are genuine issues of material fact, One Beacon has not met its burden of proof and its motion for summary judgment is DENIED.

Dated at Montpelier, Vermont this 12th day of June 2002.

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R. Tasha Wallis
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.