STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

	)	State File No. R-2653
	)	
	)	By: Margaret A. Mangan
Charlotte Aldrich Hill	)	Hearing Officer
	)	
v.	)	For: R. Tasha Wallis
	)	Commissioner
Steven Brown d/b/a	)	
Candlepin Restaurant	)	Opinion No. 10-02WC

RULING ON THE DEFENSE MOTION FOR SUMMARY JUDGMENT

This claim brought by Charlotte Aldrich Hill (claimant), by and through her attorney, Vincent Illuzzi, Esq., is based on a 1964 work-related injury. Claimant seeks payment of indemnity, permanent partial and medical benefits as well as attorney fees and costs. She also seeks a "declaratory/Summary Judgment as to whether defendant had workers' compensation coverage on January 16, 1964." The defendant, by and through its attorney, Duncan F. Kilmartin, Esq., moves for summary judgment on the basis of statute of limitations. In response to the motion, claimant has filed an affidavit dated June 27, 2000, several letters and medical records.

The injury on which this claim is based occurred on the morning of January 1964 when the claimant was preparing for work in the kitchen at the Candlepin Restaurant. For purposes of this motion, the parties have agreed that the claim was filed and accepted and that all medical bills were paid.

Taking the evidence submitted in the light most favorable to the claimant I find as follows:

On January 16, 1964 the claimant worked as a waitress for Steven Brown who did business as Candlepin Restaurant in Barton. When she arrived for work that morning, hot coffee from the pot spilled on her left leg, causing severe burns.

After the incident, Mr. Brown transported claimant to the former Orleans County Memorial Hospital in Newport where Dr. Bonvouloir treated her for the burns. The emergency department note states that Steve Brown was the claimant's employer. Treatment at that time included several surgical procedures. Claimant was never billed for any of the care she received.

Claimant is currently receiving treatment for left knee pain and swelling and lower leg discomfort. Current problems, particularly climbing stairs, prompted claimant to seek medical care in April 2000.

On May 20, 2000 the claimant filed a Notice and Application for Hearing for the January 1964 injury. The issue stated is: "ongoing disability for which no settlement was ever reached."

On August 7, 2001 the claimant filed a Notice and Application for Hearing for the January 1964 injury on the issue stated as: "ongoing medical expenses resulting from deterioration of the vascular and lymphatic system in her left leg."

By letter dated October 2, 2001 Liam Gannon, M.D. of the Hardwick Area Health Center responded to a question regarding the claimant's left knee and lower leg discomfort with the opinion that "Certainly the problem for which I saw her on August 20, 2001 and in follow-up on August 30, 2001 are related to the burn she sustained many years ago. This type of burn, with it's [sic] scarring, has left the patient with significant compromise of her venous return and has led to symptomatic varicosities of the veins on that side."

DISCUSSION AND CONCLUSIONS OF LAW:

As the moving party in this action, the defendant must prove that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. *White v. Quechee Lakes Landowners' Ass'n*, 170 Vt. 25, 28 (1999), citing V.R.C.P. 56(c). The Court further explained:

> In determining whether a dispute over material facts exists, we accept as true allegations made in opposition to the motion for summary judgment, so long as they are supported by affidavits or other evidentiary material…. Nevertheless, the party opposing summary judgment may not rest upon the mere allegations or denials in it pleadings, "but…must set forth specific facts showing that there is a genuine issue for trial."

White, 170 Vt. at 28, citing V.R.C.P.56(e).

Material submitted in opposition to the motion for summary judgment are: 1) an affidavit of the claimant dated June 27, 2000; 2) letter from Peerless Insurance Company dated September 29, 2000; 3) letters from Kipp Insurance Agency dated May 10, 2000, June 6, 2000, and October 12, 2000. Also considered in this ruling are medical records filed by the claimant, which would be admissible at a hearing.

In essence, the claimant avers that her current left leg condition is a recurrence of the 1964 work-related injury, a recurrence that was not reasonably apparent and discoverable until April 2000.

Defendant argues that under the authority of *Longe v. Boise Cascade*, 171 Vt. 214 (2000) this claim must be dismissed because the application for hearing was not made within six years of the injury.

As the *Longe* Court explained, there are two statutes of limitation that govern Workers' Compensation proceedings. First, under 21 V.S.A. § 656, notice of injury must be given the employer as soon as practicable after the injury, and a claim made within six months after the date of the injury." 21 V.S.A. § 656 (amended 1994, No. 225 §§ 9, 32 (Adj. Sess.)). The 1947 predecessor statute, V.S. § 8110, contains the same requirements. Failure to make a claim within six months is not a bar, however "if it is shown that the employer…had knowledge of the accident or that the employer has not been prejudiced by such delay or want of notice." 21 V.S.A. § 660 (amended 1993, No. 225 (Adj. Session)); *Longe* at 218. The essential elements of § 660 have not changed either since its predecessor statute, V.S. 1947 § 8814. Second, a claimant must file a notice of hearing with the Department "within six years from the date of injury." *Fitch v. Parks & Woolson Mach. Co*., 109 Vt. 92, 98 (1937).

In *Hartman v. Ouellette Plumbing & Heating*, the Court held that for purposes of the notice and claim provisions of § 656, and for purposes of the six-year statute of limitations, the date of injury "is the point in time when an injury becomes reasonably discoverable and apparent." 146 Vt. 443, 447 (1985); *Longe* 171 Vt. at 219. After the injury becomes reasonably discoverable and apparent, a claimant is allowed six months to file a claim with his or her employer. And, "[i]f such claim is denied or contested, the claimant may then bring an action within six years from the date the injury was reasonably discoverable and apparent." *Longe* 171 Vt. at 219.

For purpose of this motion, the parties agree that the employer had notice of the 1964 injury soon after it occurred. However, there is no evidence that a claim for benefits after the initial period was made until the instant action, which is based on a recurrence of the initial injury. A recurrence means "a return of symptoms following a temporary remission." Rule 2.1312, Vermont Workers' Compensation and Occupational Disease Rules. Although the typical recurrence case is one involving successive employers and/or insurers, See, e.g. *Pacher v. Fairdale Farms* (96-434); 166 Vt. 626 (1997), there is nothing in the definition or concept of recurrence to make a subsequent employer a requirement for the claim. Furthermore,

> When the primary injury is shown to have arisen out of and in the course of employment, every natural consequence that flows from the injury likewise arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct. More specifically, the progressive worsening or complication of a work-connected injury remains compensable so long as the worsening is not shown to have been produced by an intervening nonindustrial cause.

1 Larson's Workers' Compensation Law, chapter 10.

The underlying facts in *Hartman* are helpful to the analysis of this claim. In 1976 the *Hartman* claimant suffered a work-related injury to his left knee, but did not miss a significant amount of work and received no disability benefits, although he suffered some problems with his knee. In 1982, Mr. Hartman broke his right ankle in a non-work-related accident, and, with his right leg in a cast, began to suffer increased problems with his left knee. Based upon the newly discovered injury to his left knee, he filed a claim, which his employer denied. In 1983, he filed a notice and application for hearing before this Department. 146 Vt. at 444-45; *Longe* 171 Vt. at 218-19.

The Court first addressed 21 V.S.A. § 656, the six-month statute of limitations for filing a notice and claim, and, citing § 660, concluded that, because the employer had knowledge of the accident, the claimant's delay in filing a notice and claim was not an "automatic bar to workers' compensation in this proceeding." *Longe* at 219 (citing *Hartman* 146 Vt. at 446.) Next, the Court determined that it would be unfair to rigidly apply the six-month and six-year statutes of limitations, particularly where "the injury itself does not exist in compensable degree during the claims period." Id. (citing *Hartman* at 446 and 3 A. Larson, The Law of Workmen's Compensation § 78.42(a) 1985)). Therefore, the *Hartman* court held, for purposes of the notice and claim provisions of § 656, and for purposes of the six-year statute of limitations, the date of injury "is the point in time when an injury becomes reasonably discoverable and apparent." *Hartman* 146 Vt. at 447. After the injury becomes reasonably discoverable and apparent, a claimant is allowed six months to file a claim with her employer. Then, "[i]f such claim is denied or contested, the claimant may then bring an action within six years from the date the injury was reasonably discoverable and apparent." Id.

On the medical records presented, claimant has provided evidence that the recurrence of her injury was reasonably discoverable and apparent in April 2000 and that a Request for a Hearing was filed within a month, clearly within the statute of limitations. The date of discovery is a material fact that precludes summary judgment.

Therefore, the defense motion for summary judgment is DENIED.

The claimant's request for insurance information from the defendant should be addressed through the discovery process.

Date at Montpelier, Vermont this 7th day of March 2002.

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R.Tasha Wallis
Commissioner