STATE OF VERMONT
DEPARTMENT OF LABOR AND INDUSTRY

Rosemary Stoddard	)	State File No. P-06548
	)	
	)	By: Margaret A. Mangan
v.	)	Hearing Officer
	)	
Northeast Rebuilders	)	For: Michael S. Bertrand
	)	Commissioner
	)	
	)	Opinion No. 30SJ-03WC

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

APPEARANCES:

Thomas C. Bixby, Esq., for the Claimant
Andrew C. Boxer, Esq., for the Defendant

ISSUES:

1. Is the claim barred as a matter of law by the applicable statute of limitations?

2. If not, has the claimant presented sufficient evidence from which a reasonable fact finder could conclude that she suffered a personal injury by accident arising out of and in the course of her employment with the defendant?

CLAIM:

1. Claimant Rosemary Stoddard alleges that she developed Multiple Chemical Sensitivity Syndrome (MCS) as a result of her exposure to lead and mercury at Northeast Rebuilders, her place of employment. On September 27, 1999 this office received the employer's First Report of Injury (Form 1). The "accident" as described on that form states that she was "diagnosed with multiple chemical sensitivity caused by her work environment, causing severe headache, burning in throat, fatigue, nausea, etc."

2. Defendant argues that the claim is time-barred as a matter of law, because she did not assert her claim within six months from the date of injury in accordance with 21 V.S.A. §656 and Workers' Compensation (WC) Rule 3.0540; or, in the alternative, within the time allotted by the statute of limitations for occupational diseases under 21 V.S.A. §660(b). In response, Claimant asserts that her claim is timely under §656; or, in the alternative, that it is timely under §660(a).

3. Defendant further argues that claimant's evidence for establishing a causal connection between her injury and her employment is insufficient as a matter of law. Claimant asserts in response that there are genuine issues of material fact pertaining to the issue of causation that warrant submission to a fact finder, and that summary judgment should therefore be denied.

FINDINGS OF FACT:

For the purposes of this motion only, the following facts are undisputed:

1. Claimant Rosemary Stoddard worked as a secretary at Northeast Rebuilders from September 3, 1998 to September 10, 1999.

2. Defendant Northeast Rebuilders is located in Springfield, Vermont. At all times relevant to this litigation, defendant was Claimant's employer within the meaning of the Vermont Worker's Compensation Act.

3. Northeast refurbishes old machine parts with sanding, grinding, painting, and draining fluids. Paints and old solvents were removed from the old machine parts by putting them into a hot dip tank, removing them from the tank, and spraying them with water to remove paint chips and other residue. The resulting fluids, as well as oils and coolants from old machines, were stored in barrels in the machine shop (shop) or in a back room, and some were disposed of through a central local sewer drain.

4. Some of the old machine parts were originally manufactured in the 1950's and 60's and some as early as the 1930's. Most paint manufactured before 1978 contains lead. Employee Elroy La Duc alleges that lead-based paint was stripped off of the machine parts at Northeast.

5. The spray booth had three walls and was open to the shop on one side. Some machines were welded and cut in the shop area. The shop was not properly ventilated or cleaned. The lunch table, where claimant and others ate, was located in the shop. The shop was not in operation during lunchtime.

6. Claimant worked only in an enclosed office, which was adjacent to the shop. Claimant's duties at Northeast included answering the phone, keeping the books, managing payroll, taking care of mail, and similar secretarial duties. Claimant never handled any chemicals nor operated any machinery in the shop at Northeast.

7. There was a window between the office and the shop, which was sometimes open. There was also an air conditioner on the inside wall of the office between the office and the shop. There was a drilling and grinding machine located underneath the air conditioner in the shop. The door to the office was also on the inside wall and opened into the shop.

8. The building in which Northeast was located was shared by other machine shops with all sharing a common corridor, which was adjacent to Claimant's office.

9. Claimant complained about a layer of black dust, which coated the office surfaces and the lunch table on a daily basis.

10. Claimant experienced headaches, dizziness, lightheadedness, difficulty concentrating and thinking, fatigue, and a burning throat and tongue while at work. She also complained about palpitations and nausea. Her symptoms seemed to improve when she was away from work. While employed at Northeast, Claimant reported her symptoms to her superiors John and Doug Hook, on numerous occasions beginning in July 1999. Claimant alleges that John Hook told her that he was having difficulty remembering things and didn't feel well. Employee Elroy La Duc alleges that several employees have complained about headaches from the work environment.

11. Claimant was taken to Springfield Hospital for dizzy spells in May 1999.

12. Claimant had a series of health problems prior to her employment at Northeast, including fibromyalgia, heart palpitations, allergies, hyperthyroidism, anxiety, gastrointestinal problems, and weight problems.

13. Claimant's symptoms in association with her fibromyalgia included sleep disturbances and pain in the tissues.

14. According to Claimant, some symptoms of chronic fatigue syndrome (CFS) include headaches, sore throat, muscle pain, fatigue, and weakness. Claimant began experiencing CFS symptoms in May 2002, and was diagnosed with CFS by Dr. Mary McVean in June 2002. At that time, Dr. Vean opined that claimant's CFS was probably caused by her MCS.

15. According to Claimant, symptoms of over-exposure to lead include headaches, dizziness, loss of coordination, and adverse effects to liver, urinary, and blood.

16. According to medical records submitted by Dr. Barry Elson, symptoms of over-exposure to mercury include fatigue or lack of physical endurance and headaches.

17. Claimant saw Dr. Wendy Klein on August 27, 1999. All tests performed by Dr. Klein were normal, and no toxins were detected. Medical records are incomplete and inconclusive as to lead and mercury exposure.

18. On September 7, 1999, Claimant saw Dr. Barry Elson, and told him that she thought her illness was due to toxic exposure at work. Dr. Elson had tests performed on September 7, 1999 by Doctor's Data, Inc., which revealed lead and mercury levels well above expected ranges in Claimant's blood. On September 7, 1999, Dr. Elson diagnosed Claimant with "Multiple Chemical Sensitivity caused by her work environment, causing severe headache, burning in throat, fatigue, nausea, etc." Claimant began treatment with Dr. Elson on that same day. Claimant's treatment with Dr. Elson continues today. MCS is controversial and is not accepted by the majority of the medical community.

19. On September 8, 1999, Dr. Elson found that Claimant's mercapturic acid level was well above the expected range. According to medical records submitted by Dr. Elson, such a finding is consistent with various types of chemical exposures, including exposures occurring in metal processing industries. These records also indicate that toxic heavy metals such as mercury may be excreted in the form of mercapturic acid. There are alternative explanations for such a finding.

20. As a result of Claimant's complaints, Northeast told her to take time off work. Claimant quit her job on September 10, 1999 in order to avoid exposure.

21. Dr. Davis, who has never examined Claimant, states in a letter to defense attorney dated September 16, 1999, that Claimant has not experienced any illness or toxic exposure as a result of her employment at Northeast.

22. On October 5, 1999, Claimant's husband exploded a battery in the driveway of their home. Batteries contain lead and mercury. Claimant was not home at the time of the explosion, or for five hours afterward.

23. Claimant has mercury fillings in her teeth, which she had removed upon the advice of Dr. Elson.

24. On September 22, 1999, the paint on the wall of Claimant's kitchen was tested by RCI Environmental, Inc. for lead and mercury content. Levels of lead and mercury in the paint sample were normal. RCI also tested Claimant's residential well water. Levels of lead and mercury in the water sample were normal.

25. Blood tests performed by Specialty Labs on October 13, 1999 indicate that mercury and lead levels in Claimant's blood were within normal limits at that time.

26. On October 13, 1999, The Hartford Insurance Group, insurer for Defendant, denied Claimant's worker's compensation claim, "pending further investigation, as we have no evidence to confirm work relatedness." On October 21, 1999, this Department rejected the insurer's denial because there was no evidence given to support the denial, and told the insurer that evidence would need to be provided within 10 days. On November 18, 1999, the insurer sent a letter to Defendant, which referenced, but did not include, an air quality assessment allegedly performed by the insurer on November 16, 1999. Also on November 18, 1999, Claimant received a denial letter. Claimant alleges that she called the Department more than once after receiving the letter, that an unknown person at the Department told her there was not much she could do unless she performed her own air quality test, that this person discouraged her from pursuing her claim any further, and that for this reason she did not pursue her claim any further until 2002. There is no record of these phone calls. On January 12, 2000, the insurer sent a letter of intent to maintain the denial. The insurer's alleged air quality assessment was again referenced or summarized in this letter, but not included.

27. On November 1, 1999, Claimant began working as an administrative assistant for Putney Pasta. While working at Putney, Claimant was bothered by fumes and odors from paint and floor stripping. Claimant has been increasingly bothered by fumes in a variety of locations and settings since working at Northeast. Claimant quit her job at Putney in July 2002.

28. The building in which Defendant is located was designated as a Superfund site by the Environmental Protection Agency (EPA), and tests were being performed there as early as 1998. Environmental cleanup of the site began in 1997 and continues today. Defendant never notified Claimant of the designation or the cleanup, and did not provide her with any safety equipment or information about toxins in the workplace.

29. In April 1998, a site investigation was conducted. A supplemental site investigation was also conducted in August 1998. In February 1999, Phase I of an Environmental Site Assessment (ESA) was prepared. In October and November of 2000, the EPA and Superfund conducted a preliminary site investigation. In May 2001, Phase I of the ESA was conducted by Marin Environmental, Inc. In August and September 2001, Marin conducted Phase II of the Environmental Site Assessment, and submitted its data to the EPA and the VT Department of Environmental Conservation (DEC).

30. This assessment revealed a six-inch layer of ash, coal, and metal debris six inches underground around the metal chip shed. Lead was detected in groundwater samples in the areas around the underground storage tanks, the machine shop, the garage, and the metal chip shed. Levels of lead exceeded the permissible limits in all of those areas, except the underground storage tanks area. Excessive levels of other toxins, such as a variety of petroleum hydrocarbons, chlorinated solvents, and PCBs, were also detected in several locations. More results are expected. The contents of one underground storage tank are still unknown. Further testing of metal levels is needed for verification.

31. On June 6, 2002, the Department received claimant's request to appeal the denial of her claim.

32. On September 30, 2002, Anachem received a sample of black dust from claimant. Claimant alleges that her husband took the sample from the office floor at Northeast. The sample, which was tested for a variety of heavy metals, contained lead and mercury well beyond permissible or safe levels.

CONCLUSIONS OF LAW:

Statute of Limitations

1. In order to determine whether the claim is time-barred, the date upon which the statute of limitations began to run must be determined. "The date of injury, or in the case of an occupational disease, the date of injurious exposure, shall be the point in time when the injury or disease and its relationship to the employment is reasonably discoverable and apparent." 21 V.S.A. §656(b); WC Rule 3.0540. Claimant argues that the date of injury did not occur until some time in 2001, because her claim was not cognizable until further tests were performed, such as the testing on the black dust sample in September 2001. She further alleges that she was not aware of the claim until 2001 because she did not obtain a fact sheet on the effects of lead poisoning, or learn about the Superfund designation until 2001.

2. The running of the statute of limitations commences when a plaintiff discovers or reasonably should discover the injury, its cause, and the existence of a cause of action. *Lillicrap v. Martin*, 156 Vt. 165, 176 (1989). The date of injury is the point at which the claimant had information, or should have obtained information, sufficient to put a reasonable person on notice that a particular defendant may have been liable for her injuries, or sufficient to ascertain that her legal rights have been violated. *Lillicrap* at 174.

3. The plaintiff need not have an airtight case before the limitations period begins to run. Fleshing out the facts will occur during investigation or discovery. *Rodrigue v. Valco Enterprises, Inc.*, 169 Vt. 539, 540 (1999), quoting *Burgett v. Flaherty*, 663 P.2d 332, 334 (Mont. 1983).

4. Claimant suggested to Dr. Elson in her initial appointment with him on September 7, 1999, that her illness was due to her exposure at work. She also quit her job because of and in order to avoid the exposure. Because she obviously knew or believed that her employment was causing her illness, she should reasonably have known at that time that she had a potential cause of action for worker's compensation. At the very least, she must have known when the First Report of Injury was filed in September 1999.

5. Pursuant to 21 V.S.A. § 656(a):

> A proceeding under the provisions of this chapter for compensation shall not be maintained unless a notice of the injury has been given to the employer as soon as practicable after the injury occurred, and unless a claim for compensation with respect to an injury has been made within six months after the date of the injury; or, in case of death, within six months after death, unless the claimant had made a claim for compensation prior to death.

6. Clearly Claimant did not file a claim within the required six months, *See Longe v. Boise Cascade Corp.*, 171 Vt. 214 (1999), citing 21 V.S.A. § 656; WC Rule 3.0540. Even if Claimant made the phone calls she claims she made to this Department, those calls do not constitute making a claim. Defendant is correct in asserting that Claimant's intent to make a claim would have been much clearer had she submitted something in writing, such as Forms 5 and/or 6. WC Rules 3.0600 and 4.1100. Claimant did not file a claim until June 6, 2002, when the Department received her letter stating her intent to appeal the denial. Therefore, Claimant has not met the requirements in §656(a).

7. There is however, another rule which provides for the relaxation of the six-month requirement, and which, despite Defendant's "strong public policy" arguments for adhering to the six-month rule, is applicable to this claim. Failure to give notice or make a claim shall not be a bar to proceedings if it is shown that the employer had knowledge of the accident *or* has not been prejudiced by the lack of notice. 21 V.S.A. §660(a); WC Rule 3.0560. According to the plain language of this rule, if the employee fails to meet either one of the requirements under §656(a), she may still pursue a claim if she meets either one of the requirements under §660(a). The employer in this case had notice of the injury, clearly indicated by the First Report. Furthermore, the employer was not prejudiced by Claimant's failure to make a claim within six months. This second requirement is not important however, as the elements of the rule are disjunctive and the first element has clearly been met. Therefore, the six-month requirement is relaxed.

8. Next is the question of whether or not this is an occupational disease. Although the statute of limitations for a personal injury by accident is six years (21 V.S.A. §660(a)), the statute of limitations for an occupational disease is two years from the date the injury is reasonable discoverable and apparent. 21 V.S.A. §660(b). Because the claimant in this case did not make her claim until 2½ years after the injury was reasonably discoverable and apparent, the claim will only be time-barred if the injury is an occupational disease.

9. An occupational disease is "a disease that results from causes and conditions characteristic of and peculiar to a particular trade, occupation, process, or employment, and to which an employee is not ordinarily subjected or exposed outside or away from the employment and arises out of and in the course of the employment." 21 V.S.A. §601(23).

10. The principal distinction in the occupational disease definition is the distinction from diseases, which might as readily be contracted, in everyday life *or in other occupations*. 3 Larson's Workers' Compensation Law §41.33. The very concept of occupational disease is occupation-specific. What is an occupational disease in one occupation may not be one in another, because over-exposure to certain chemicals is only peculiar to certain occupations.

11. To be within the purview of the occupational disease law, the disease must be so distinctively associated with the employee's occupation that there is a direct connection between the duties of the employment and the disease contracted. *Campbell v. Heinrich Savelberg, Inc.*, 139 Vt. 31, 36 (1980). Based on the statutory definition of occupational disease, the Supreme Court refused to classify a carpenter's fume-induced illness as an occupational disease, because it was not distinctively associated with, or characteristic of his occupation. If exposure to fumes is unusual for the trade of carpentry, it is certainly unusual for the secretarial trade. Defendant in this case recognizes that Claimant's actual duties did not involve dangerous handling of or exposure to any harmful chemicals, other than a little bit of 'Wite-Out'. Under the *Campbell* rule therefore, there is no direct connection between her duties as a secretary and MCS, and MCS is not an occupational disease for her particular occupation.

12. Of course, this is not the same as saying that there is no causal link between her employment at Northeast and her alleged exposure to harmful chemicals. Defendant interprets §660(b) to mean that MCS is peculiar to Claimant's employment if it was caused by her job. But to interpret the definition of occupational disease in this way would answer the ultimate question of causation. Section 660(b) intends "peculiar" to refer to the type of employment, not the place of employment.

13. In contrast, an adverse reaction to latex *is* an occupational disease for dental hygienists, because the incidence is much higher in that occupation than in the general population, and the majority of cases occur within that trade or occupation. *Perkins v. Community Health Plan*, Op. No. 39-98WC, Conclusions 8 (1998). This is not the case with MCS and secretaries.

14. Claimant in this case did not assume the risk of mercury or lead exposure as a part of her secretarial job. As Defendant stipulates, she did not engage in extensive amounts of direct handling of metals. This is because that's not what secretaries are supposed to do; not at Northeast Rebuilders or anywhere else. MCS is therefore not peculiar to the claimant's trade or occupation and is not an occupational disease in this case.

15. Claimant's injury is therefore classified as a personal injury by accident, subject to a six-year statute of limitations under 21 V.S.A. §660(a), and is not time-barred as a matter of law.

Causation

16. In workers' compensation cases, claimant has the burden of establishing all facts essential to the rights asserted. *Goodwin v. Fairbanks, Morse Co.*, 123 Vt. 161 (1963). The claimant must establish by sufficient credible evidence the character and extent of the injury as well as the causal connection between the injury and the employment. *Egbert v. The Book Press*, 144 Vt. 367 (1984).

17. There must be created in the mind of the trier of fact something more than a possibility, suspicion or surmise that the incidents complained of were the cause of injury and the inference from the facts proved must be the more probable hypothesis, *Burton v. Holden Lumber Co.*, 112 Vt. 17 (1941).

18. Personal injury by accident need not be instantaneous to be compensable as a work related injury in Vermont. *Campbell* at 31. The Department has long recognized that cumulative micro trauma arising out of and in the course of employment is compensable. *Petit* at Conclusions 3, citing Workers' Compensation and Occupational Disease Rules, Rule 2(f); *Jefts-Martin v. Claussen's*, Op. No. 43-96WC, (July 15, 1996).

19. In order to determine whether Claimant's evidence of causation is sufficient, the evidence she has presented thus far is examined. The evidence currently in the record, when viewed in a light most favorable to Claimant, includes evidence pertaining to chemicals used at Northeast and whether those chemicals were harmful, Claimant's level of exposure to those chemicals, levels of harmful chemicals detected at Claimant's home, Claimant's medical condition and timing of symptoms, Claimant's health history, and other lifestyle information. There is evidence to show that substances were used at Northeast, exposure to which could cause health problems similar to those Claimant has been experiencing. There is evidence to show that Claimant was exposed to those substances. There is also evidence to show that Claimant was exposed to more harmful substances at work than anywhere else.

20. Defendant bases its assertion that Claimant cannot establish a causal link between her illness and her employment on several grounds, which it sees as being set forth in *Petit v. No. Country Union High School* Opinion No. 20-98WC (1998); *Taft v. Blue Mountain Union School* Opinion No. 10-99WC (1999); *Latouche v. North Country Union High School* Opinion No. 58-98WC (1998).

21. First, Defendant asserts that the evidence of causation is insufficient as a matter of law because there is no agreement in the medical community about the alleged link between MCS and toxic environments. *LaTouche* at Conclusions 12-13, *Taft* at Conclusions 2. However, neither the fact that MCS is not unanimously recognized by the medical community, nor the fact that there are discrepancies between two doctor's opinions, means that summary judgment should be granted. These facts only mean that the claimant *might* not win her case after the factual disputes have been resolved; not that those factual disputes should never be resolved. The purpose of summary judgment is not to weigh the evidence or determine the credibility of witnesses, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The fact that the American Medical Association did not recognize MCS goes to the weight of the evidence, and therefore precludes summary judgment. *Petit* at Conclusions 14, quoting *Fugat v. Las Alamos National Laboratory*, 811 P.2d 1313 (N.M. App. 1991).

22. Defendant briefly implies that there may be an admissibility issue regarding Claimant's expert medical testimony. The trier of fact may not speculate as to an obscure injury which is beyond the ken of layman, and under those circumstances expert testimony is the sole means of laying a foundation for an award. *Lapan v. Berno's, Inc.*, 137 Vt. 393 (1979). In light of the policies set forth in *Petit*, it is not likely that the testimony will be excluded. *Petit* at Conclusions 17-18. There is no specific motion in limine at this point however, and the reference to admissibility is not relevant to this motion.

23. Defendant asserts that there is no causation because Claimant's alleged symptoms could be caused by exposures outside of her work environment. Claimant has presented evidence sufficient for a reasonable fact finder to conclude that the alleged exposure did not result from factors outside the workplace, such as in her home. Unlike *Petit*, *LaTouche*, and *Taft*, Claimant's home in this case was tested for the contaminants in question and found to be within normal limits. *Petit*, *LaTouche*, and *Taft* at Findings 19. In *Petit* and *Latouche*, neither of the claimants' homes was tested at all. *Petit* and *LaTouche*. In *LaTouche*, when the claimant herself was tested, every substance to which she reacted was found in her home and not at her job. *LaTouche* at Findings 27. In *Taft*, the only test done on the claimant's home was a mold test, which revealed much higher levels of mold than were found at her job. *Taft* at Findings 19.

24. Defendant argues that Claimant's illness could have been caused by an exploding battery in her driveway, or by the mercury fillings in her teeth. Claimant asserts however, that the battery exploded outside, that she wasn't anywhere near the house when it exploded or for five hours afterward, and that her husband was unaffected by the explosion. Furthermore, the argument about the mercury fillings doesn't explain the alleged lead exposure. Since lead exposure alone could potentially be compensable, this argument may weaken the causation argument for mercury exposure, but not for causation in general. Finally, Defendant's assertion that Claimant is exposed to dust in her house which may trigger allergies is totally irrelevant to her claim regarding lead and mercury exposure. Despite Defendant's arguments, a reasonable fact finder could conclude that these alternative possibilities were not realistic, or were not the true sources of exposure.

25. The impact of subsequent employment on Claimant's symptoms can be one factor influencing a finding of causation. *Taft* at Conclusions 32(d). However, this factor in and of itself does not preclude a finding of causation as a matter of law.

26. In determining whether the impacts of Claimant's subsequent employment at Putney affect Defendant's liability, the traditional aggravation-recurrence analysis, and not the last injurious exposure rule, is proper. The last injurious exposure rule requires that the claimant be "exposed" to the offending stimulus for the doctrine to be applicable. *Ethan Allen, Inc. v. Bressett-Roberge*, 13 Vt. L.W. 245 (2002). Claimant in this case was not exposed to the offending stimulus at Putney, but was exposed to other offending stimuli, which caused her to experience symptoms.

27. If the injury or condition is a recurrence, then the employer at the time of the original injury is responsible. See *Pacher v. Fairdale Farms*, 166 Vt. 626, 628 n.2, (1997) (mem.) If a subsequent injury or work condition contributed to a claimant's disability, then the second employer is responsible for an aggravation. *Id*.

28. A reasonable fact finder could conclude that the effects of Claimant's exposure to chemicals at Putney were a recurrence and not an aggravation of the alleged injury. In this case, Claimant's treatment was ongoing. Likewise, her condition was ongoing and had not become stable when she worked at Putney.

29. Determining whether a subsequent condition is deemed an aggravation or a recurrence requires expert medical evidence for resolution. *Jackson v. True Temper*, 151 Vt. 592 (1989). This means that regardless of whether Claimant's exposure at Putney is a recurrence or an aggravation, the question itself precludes summary judgment.

30. Next, Defendant asserts that there is no causation because Claimant's alleged symptoms could be caused by her prior medical problems. It has long been held in Vermont that where a work activity aggravates or accelerates a pre-existing condition it is compensable. *Jackson* at 595-96; *Campbell* at 35-36. Defendant asserts that MCS should be an exception to this general rule, but provides no basis for that assertion.

31. A prior condition that has been made symptomatic by work is compensable. *Clark v. U.S. Quarried Slate Products*, Op. No. 8-95WC (Apr. 21, 1995). An employer takes each employee as is, and is responsible under workers' compensation law for an injury which disables one person, but which might not disable another. *Morrill v. Bianchi*, 107 Vt. 80 (1935).

32. Claimant's illness was compensable where her most severe reactions occurred at work, those reactions caused her to leave her job, and she would still be working there had she not had those reactions. *Perkins* at Conclusions 24.

33. Unlike Claimant in this case, neither claimant in *Petit* or *LaTouche* was tested for levels of toxins in their blood. *Petit*, *LaTouche*. In *Taft*, the claimant's pre-existing conditions were more similar to her symptoms than in this case. *Taft*. She already had asthma, and then experienced "asthma-like symptoms." *Id* at Findings 12. In *Petit*, the claimant was shown to be allergic to dust already, which was one of the only potential irritants found in her work place. *Petit* at Findings 4.

34. Causation questions by their very nature are questions of fact. Even if causation was not ultimately found in *Petit*, *LaTouche*, or *Taft*, this does mean that summary judgment would have been granted for defendants in those cases. Each of those claims involved factual disputes, which both deserved and received resolution at a hearing. Defendant in this case admits that the Department in *Taft*, *Petit*, and *LaTouche* allowed the claimants to proceed with their MCS claims. Def.'s Mot. Summ. J. at 8, quoting *Petit*, *LaTouche*, *Taft*. If Defendant so vigorously wishes to analogize those cases with this one, then Defendant will surely agree that Claimant should be allowed to proceed with her claim, whether or not she ultimately wins the claim.

35. Summary judgment should be denied in this case because discovery has not yet been completed. A motion for judgment may be denied and further discovery allowed if the nonmoving party cannot prove the facts essential to justify its opposition to the motion with the affidavits it has available. V.R.C.P. 56(f); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). In this case, there are environmental assessments that have yet to be completed or included in the record, the results of which could help Claimant strengthen her case for causation. There is also information available regarding the health effects of heavy metals exposure, and details about MCS, which, if introduced into the record through further discovery, could strengthen causation. Discovery should be allowed to continue.

36. Summary judgment is appropriate when the moving party has met its burden of proof on the motion by showing that there is no genuine issue as to any material fact, and that it is entitled to judgment as a matter of law. V.R.C.P. 56(c); *Toy, Inc. v. F. M. Burlington Co.*, 155 Vt. 44, 48 (1990). There are several genuine issues of material fact in this case that must be resolved by a fact finder. The question of whether Hartford's denial of the claim was erroneous, whether Hartford actually conducted an air quality assessment and what the results of that assessment were, whether Claimant's husband ran an auto shop out of their home, whether the black dust really came from Northeast or whether it was a fraudulent sample, and whether other employees complained about headaches from the work environment, are all genuine issues of material fact, because they may prove causation or a lack of causation. Therefore, Northeast has not met its burden on the motion for summary judgment.

ORDER:

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered that:

Defendant Northeast Rebuilder's Motion for Summary Judgment is DENIED.

Dated at Montpelier, Vermont this 8th day of July 2003.

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Michael S. Bertrand
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.