

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT

MARK WAYNE JENNINGS,
Claimant,

HF No. 109, 2011/12

v.

DECISION

QUALITY SERVICES, INC.,
Employer,

and

ACUITY,
Insurer,

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held before the Division of Labor and Management, in Pierre, South Dakota. Claimant, Mark Wayne Jennings appeared on his own behalf. Robert B. Anderson represented Employer, Quality Services, Inc. and Insurer, Acuity. This matter has been bifurcated with the sole issue of notice being heard at this hearing.

Issues

Whether Employer/Insurer had notice of Claimant's July 5, 2011, injury pursuant to SDCL 62-7-10.

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

Mark Wayne Jennings (Claimant or Jennings) was employed by Quality Services Inc. (Quality Services or Employer) in Rapid City, South Dakota. On July 5, 2011, Jennings was changing a flat tire on a skid loader when he experienced pain and a popping feeling in his groin. The incident took place around 5:00 pm when no one else was working, therefore Jennings did not report his injury at the time. Jennings was able to return to work the next day and complete his job duties; he did not report the incident during any of his subsequent shifts.

On July 12, 2011, Jennings was terminated from Quality Services for reasons unrelated to his injuries. At the time he was terminated, Jennings met in person with his immediate supervisor, Lance Rom. He did not report the July 5, 2011, incident at the time he was terminated.

On July 18, 2011, Jennings noticed a protrusion in his lower groin area. He contacted Rom, his former supervisor, to inform him of his injury and need for treatment. Rom responded via email that Jennings would need to complete a first report of injury and attached a blank copy. Jennings completed the first report of injury form and returned it to Rom. The first written notice of the injury was received by Rom on July 25, 2011. On July 28, 2011, Acuity denied liability for Jennings' claim, in part because he had failed to report his injury pursuant to SDCL 62-7-10.

Other facts will be determined as necessary.

Analysis

The purpose of the notice requirement is "to give the employer the opportunity to investigate the injury while the facts are accessible. The notice requirement protects the employer by assuring he is alerted to the possibility of a claim so that a prompt investigation can be performed." *Loewn v. Hyman Freightways, Inc.*, 1997 SD 2 ¶ 10, 557 NW2d 762, 767 (citation omitted).

SDCL 62-7-10 provides:

An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than three business days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show:

- (1) The employer or the employer's representative had actual knowledge of the injury; or
- (2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the three business-day period, which determination shall be liberally construed in favor of the employee.

Claimant bears the burden of proof to show that his employer had notice of the work related nature of his injury. *Mudlin v. Hills Materials Company*, 2005 SD 64, 698 NW2d 67.

A first report of injury was not completed by Jennings until July 21, 2011 and received by Employer until July 25, 2011, which is past the three day reporting requirement set forth in SDCL 62-7-10. Jennings must then show that either employer had actual knowledge of the injury, or that he had good cause for failing to give notice within the three day period.

Actual Knowledge

The South Dakota Supreme Court has held,

In determining actual knowledge, the employee must prove that the employer had sufficient knowledge to indicate the possibility of a compensable injury. The employee must also prove that the employer had sufficient knowledge that the injury was sustained as a result of [his] employment versus a pre-existing injury from a prior employment. In other words, to satisfy the actual knowledge notice requirement, the employer: 1) must have sufficient knowledge of the possibility of a compensable injury, and 2) must have sufficient knowledge that the possible injury was related to employment with the employer.

Orth v. Stoebner & Permann Construction, Inc., 2006 S.D. 99, ¶53, 724 N.W.2d 586 (citations omitted).

In this case, Jennings never reported his injuries to his supervisor or any other employee of Quality Services. There were no witnesses to the incident where Jennings claims he was injured and he never had difficulties performing his job duties which might have prompted his employer to inquire whether he was injured. Employer had no actual knowledge of Jennings injury or that it was possibly related to his employment activities until July 18, 2011, at the earliest when Jennings contacted Rom to tell him he needed medical treatment. Jennings has failed to meet his burden to show Employer had actual knowledge of the possibility of a compensable injury.

Good cause

“It is well settled that the time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of the injury or disease.” *Kuhle v. Lecy Chiropractic*, 2006 S.D. 16 ¶18, 711 N.W.2d 244. The Supreme Court has held, “this is an objective standard based on a reasonable person of the claimant’s education and intelligence. Whether the claimant’s conduct is reasonable is determined in the light of his own education and intelligence, not in the light of the standard of some hypothetical

reasonable person of the kind familiar to tort law.” *McNeil v. Superior Siding, Inc.*, 2009 S.D. 68, ¶ 8, 770 N.W.2d 345 (citations omitted).

When Jennings was hired at Quality Services he was given an employee manual which he was required to read and sign prior to being authorized to work. The manual specifically addressed work place injuries as follows,

All injured employees will be taken for immediate medical examination. State law requires on the job injuries to be reported to Worker’s Compensation Insurance within 72 hours. Failure to report claims to the insurance company within this time period can result in denial of an otherwise valid claim. It is imperative that all injuries are reported immediately to QSI even if you think you do not need medical attention.

Jennings signed and returned a copy of the employee manual on May 16, 2011.

Jennings argued that he had good cause for failing to give notice within the three day period because he didn’t think he was injured to the point of needing medical attention. He testified at hearing that he “must plead ignorance” as to the law and the employee policy that required notice within three days. He stated that he did not read the employee manual despite the manual specifically stating “all employees must read and turn in a signed copy of this document prior to being authorized to work on or after January 1, 2011,” because he thought he already knew generally what it stated. Ignorance of the law is not an excuse which can constitute good cause. “Mere ignorance of the law can never be considered a mistake upon which relief from the operation or effect of the law may be predicated.” *Gakin v. City of Rapid City, South Dakota*, 2005 SD 68, ¶13, 698 NW2d 493 (Citing *Sherin v. Eastwood*, 32 SD 95, 101, 142 NW 176, 179 (1913)).

Jennings was a knowledgeable well-educated man, having completed a four year degree and served 12 years in the Marine Corps. He testified that he knew he was injured immediately when he felt pain and experienced a popping sensation while changing the tire on the skid loader. He further testified that the pain never went away in the time between the incident and the time he reported his injury. Jennings as a reasonable person should have recognized that he was injured and the probable compensable character of his injury immediately or at the very least within three days after the incident occurred. Furthermore, Jennings signed the employee manual which provided the policy regarding injuries and the need to report even injuries that do not require medical attention. Jennings was presented with numerous opportunities to report the incident and his injury and yet he failed to do so in a timely manner. Claimant failed to show that he had good cause for failing to give notice within the three day period.

Notice issue is a threshold issue and must be met before workers' compensation benefits are awarded. Jennings has not met his burden of proving either timely notice or a reasonable excuse for not giving such notice. Claimant's petition for benefits must be denied.

Conclusion

Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 19th day of September, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ Taya M. Runyan

Taya M. Runyan
Administrative Law Judge