

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

KAMI KUHLE,

HF No. 199, 2002/03

Claimant,

DECISION

vs.

LECY CHIROPRACTIC,

Employer,

and

ACUITY,

Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor 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 on April 7, 2004, in Rapid City, South Dakota. Kami Kuhle (Claimant) appeared personally and through her attorney of record, Michael J. Simpson. Michael S. McKnight represented Employer/Insurer (Employer).

ISSUE

Whether Claimant provided adequate notice pursuant to SDCL 62-7-10?

FACTS

1. At the time of the hearing, Claimant was thirty-three years old. Claimant lived and worked in Rapid City for a period of time, but currently lives in Sioux Falls.
2. Claimant completed the tenth grade and obtained her GED in 1987 or 1988. Claimant received a medical secretary degree and worked for "a little bit" as a medical secretary. In 1996, Claimant attended Western Dakota Technical Institute and studied phlebotomy. Claimant also attended Black Hills State for a period of time in 2001 studying biology.
3. Claimant has worked in sales, at a veterinary clinic and as a floral designer.
4. Drs. Dan and Robin Lecy own and operate Lecy Chiropractic. Dr. Dan and Dr. Robin have practiced chiropractic medicine for more than twenty years.
5. Claimant started working for Employer in April 2002 as a chiropractic assistant.
6. Claimant's duties included setting up exam rooms, taking patient histories, entering information into a computer and using a massager and/or ultrasound on the patients.
7. The massager resembles a belt sander and is twelve to sixteen inches long and weighs approximately three pounds. To use the massager, Claimant would lean

- over the patient and run the massager along the patient's back for approximately 2 ½ minutes.
8. Claimant spent approximately ten minutes with each patient taking a history and using the massager and/or ultrasound. When Claimant finished with one patient, she moved on to the next patient.
 9. Claimant used the massager up to twenty times each day.
 10. The very first time Claimant used the massager on a patient she noticed burning between her shoulder blades. Thereafter, every time Claimant used the massager, her back would burn between her shoulders.
 11. Claimant's pain between her shoulders would usually go away at night, but would return after she used the massager.
 12. Claimant complained to her husband, Daryn, that she had burning pain in her upper back from using the massager. Claimant told Daryn at least once a week that the massager was causing her to have muscle pain and soreness in her mid back.
 13. During her employment, Claimant periodically received adjustments from both Dr. Robin and Dr. Dan. Claimant estimated that she received adjustments one to two times a month.
 14. Not all of these adjustments were recorded into Employer's system. Employer's staff was responsible for documenting free treatments.
 15. From April 2002 through October 2002, Employer had four treatment records for Claimant. There was no mention in any of these records that Claimant had pain in her mid back due to using the massager.
 16. Claimant testified when she received an adjustment, she would tell Dr. Dan or Dr. Robin that using the massager caused her back pain.
 17. Both Dr. Dan and Dr. Robin credibly testified Claimant did not inform either doctor that using the massager caused problems to her back or that she hurt her back at work.
 18. On April 16, 2002, Claimant received an adjustment for an onset of pain while walking down stairs at Mt. Rushmore. Claimant complained of intermittent tingling, numbness and burning or cold sensation in her index fingers and thumbs and a stiff neck. Claimant did not mention to Dr. Dan that she experienced pain while using the massager. Claimant did not tell Employer that she was making a workers' compensation claim.
 19. Claimant's next documented treatment was on October 2, 2002. Claimant reported to Dr. Dan that she had left mid back pain and that she was sore up and down her left side. Claimant did not report to Dr. Dan that she experienced pain between her shoulders from using the massager even though she associated the pain with using the massager.
 20. Claimant also received an adjustment from Dr. Robin on October 3, 2002. Claimant still had the pain "up and down [her] left mid back." Again, the record does not mention that Claimant reported she had back pain from using the massager.
 21. Claimant testified:

Q: Your chief complaint at that point in time [October 2, 2002] was left mid back [pain] and up and down the left side; is that right?

A: Yes.
Q: And you didn't make a worker's compensation claim at that point in time, did you?
A: No.
Q: And you knew at that point in time that using the massager was causing you to have burning pain in your mid back?
A: Right.

22. Claimant did not miss any work due to her mid back pain until late October 2002.
23. On Friday, October 25, 2002, Claimant received an adjustment from Dr. Dan for mid back pain. No record was kept of this adjustment. Claimant told Dr. Dan that she was sore from doing some work digging an underground sprinkler. Claimant did not inform Dr. Dan that using the massager was the cause of her back problems.
24. Claimant did not work on Saturday, October 26, 2002. Claimant woke up that morning stiff and sore and she called Employer for an appointment for another adjustment. The medical note shows that Dr. Dan treated Claimant for upper back pain on October 26th. There is no reference to back pain caused by using the massager at work.
25. During the adjustment, Claimant felt a pop and stated "it was nothing that I've ever felt before."
26. As Claimant drove home, she experienced increased pain. At some point, Claimant leaned forward and she experienced intense pain and could not move.
27. Daryn took Claimant to the emergency room that evening and he gave the nurse Claimant's history because she was in so much pain. The emergency room record stated that Claimant had back pain that "started 10/24 [while] trying to move a large T.V. – worse." Claimant received a shot for the pain and was sent home.
28. On Sunday, October 27, 2002, Claimant was still in pain and she contacted Dr. Dan for another adjustment. Dr. Dan thought Claimant was getting worse so he referred Claimant to Dr. Kevin Weiland, her family physician.
29. Claimant did not inform Dr. Dan at any time in October 2002 that she wanted to file a workers' compensation claim or that any of her problems were caused by her work activities.
30. Claimant saw Dr. Weiland on Monday, October 28, 2002. Claimant informed Dr. Weiland that she "started to notice a low-grade back discomfort and pain" over a week prior to this appointment. Dr. Weiland admitted Claimant into the hospital and an MRI showed that she had a disc herniation at T8-T9.
31. Claimant was referred to Dr. Edward Seljeskog, a neurosurgeon in Rapid City, to evaluate her thoracic pain. Dr. Seljeskog's medical note from Claimant's first visit on October 30, 2002, stated Claimant's "symptoms began spontaneously about 10-26-02. She works for a chiropractor and had a couple chiropractic treatments that day. Unfortunately, her symptoms did not seem to improve. Sometime over this weekend, the patient was sitting in a car and leaned forward and pulled her jacket down and had significant worsening of her pain." Claimant did not mention to Dr. Seljeskog that using the massager at work caused her mid back pain or that she had experienced this pain since April 2002.

32. Dr. Seljeskog diagnosed Claimant with a thoracic disc herniation at T8-T9.
33. Claimant treated with Dr. Seljeskog and he performed a diskectomy at T8-T9 on November 25, 2002.
34. Claimant returned to work for Employer in January 2003 on a limited basis performing office work.
35. Claimant received an adjustment from Dr. Robin on February 7, 2003.
36. Claimant testified she believed, as of February 7th, that the problems with her back were related to using the massager at work. Claimant did not inform Dr. Robin that she was making a workers' compensation claim at that time.
37. Sometime after this appointment in mid to late February, Claimant discussed with her husband whether the adjustment she received from Dr. Dan on October 26th could have caused the thoracic disc herniation. Claimant contacted an attorney in Rapid City and explained her situation, asking about a malpractice action against Dr. Dan. The attorney suggested Claimant file a workers' compensation claim instead.
38. In early March 2003, Claimant met with Dr. Robin. Claimant told Dr. Robin that she wanted to file a workers' compensation claim and she asked him for a "form."
39. Dr. Robin described this conversation:

Well, she was having problems after the surgery, not being able to return to work, having a lot of difficulty. She hadn't - - she worked for us on light duty for a little bit of time, but that wasn't working. And in March she came in and Kami asked me - - first of all, she asked if we carried any kind of disability insurance for employees. And I told her we didn't. And then she asked me if we could turn this into a workman's compensation.

40. Dr. Robin told Claimant that he did not think this was a workers' compensation claim.
41. After this meeting, Dr. Robin informed Dr. Dan that Claimant was making a workers' compensation claim.
42. At the time Claimant indicated she was going to file a workers' compensation claim, neither Dr. Dan nor Dr. Robin were aware of any work activity that caused Claimant's back problems.
43. Claimant contacted the Department of Labor and requested a First Report of Injury.
44. Claimant completed the First Report of Injury on March 13, 2003. Claimant provided her date of injury as 10/1/02. Claimant described her injury as, "[t]he massager we use at work always makes my back burn between my shoulder blades & down a little. I got an adjustment on Fri. after my shift. On Sat. I got up & my back really hurt, so I went [back] into work & got adjusted again, which hurt. I left & an hour later I reached to pull my coat down & couldn't move."
45. Employer denied Claimant's request for benefits on April 9, 2003.
46. Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT PROVIDED ADEQUATE NOTICE PURSUANT TO SDCL 62-7-10?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). Claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992). The notice requirement is governed by SDCL 62-7-10. This statute 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.

"In order to collect the benefits authorized by the South Dakota Legislature, a worker must meet the requirements of state statute." Aadland v. St. Luke's Midland Regional Medical Ctr., 537 N.W.2d 666, 669 (S.D. 1995). "Notice to the employer of an injury is a condition precedent to compensation." Loewen v. Hyman Freightways, Inc., 557 N.W.2d 764, 766 (S.D. 1997).

The purpose of the notice requirement is to provide Employer the opportunity to investigate the cause and nature of Claimant's injury while the facts are readily accessible. Schuck v. John Morrell & Co., 529 N.W.2d 894, 897 (S.D. 1990). "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." Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶ 24 (citation omitted).

The statute is clear that written notice must be provided within three business days after the occurrence of the injury. "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." Miller v. Lake Area Hosp., 551 N.W.2d 817, 820 (S.D. 1996). The "reasonableness of a claimant's conduct 'should be judged in the light of [her] own education and intelligence, not in the light of the standard of some hypothetical reasonable person of the kind familiar to tort law.'" Loewen, 557 N.W.2d at 768.

Claimant knew from the very first time she used the massager that this activity caused her to have burning pain in her mid back. Claimant would complain weekly to her husband that using the massager at work caused upper back pain. Claimant would

seek periodic adjustments from either Dr. Dan or Dr. Robin for this back pain. Claimant testified the reason she had the adjustments was to treat this condition. Claimant did not provide written notice in April 2002.

On the First Report of Injury, Claimant listed October 1, 2002, as the date of her injury. Claimant testified she used this date because something “major” happened. Claimant stated she “wasn’t going to [file a workers’ compensation claim] at that time.” Claimant received adjustments from Dr. Dan and Dr. Robin on October 2nd and 3rd. Again, Claimant sought treatment because of the burning pain in her upper back she experienced while using the massager. Claimant did not provide written notice to Employer in early October 2002.

On October 26, 2002, Claimant received an adjustment and felt a pop like “nothing that [she’s] ever felt before.” This episode caused the need for further treatment and caused Claimant to miss work. Claimant did not provide Employer with written notice within three days of the occurrence.

On February 7, 2003, Claimant received another adjustment from Dr. Robin. Claimant knew that as of February 2003 the problem with her back was all related to using the massager at work. Claimant testified:

- Q: And then in February of 2003, you had another adjustment by Dr. Robin Lecy; is that accurate?
A: Right.
Q: Did you tell Dr. Robin Lecy that you were making a worker’s comp claim at that time?
A: No.
Q: And you knew in February of 2003 that the problem with you back was all related to using a massager at work, didn’t you?
A: Yeah, part of it, yes.
Q: Okay. And I had asked you about that in your deposition. Do you remember that?
A: Yes, I guess.
Q: That would be your testimony here today, correct?
A: Yes.
Q: So in February of 2003, you knew it was related to the massager at work, right?
A: Right.
Q: And you didn’t make a work comp claim at that time?
A: No.
Q: And you had known for some time even before February of 2003 that the problem was because of using the massager at work; isn’t that fair?
A: Yes.
Q: And you didn’t make a work comp claim before then, did you?
A: No.

Claimant also discussed her situation with an attorney in mid February. It was suggested to Claimant to file a workers’ compensation claim for her injury. Yet, at no time during any of these time periods did Claimant provide written notice to Employer about a back injury caused by using the massager at work even though she believed

her back problems were related to this work activity. Claimant finally provided written notice to Employer of her injury on March 13, 2003. Given Claimant's age and intelligence, Claimant, as a reasonable person, should have recognized the nature, seriousness and probable compensable character of her injury by October 2002. At the very latest, Claimant should have provided written notice in mid February 2003 when she believed that her back problems were all related to her work activities of using the massager.

Claimant failed to provide Employer with written notice of her injury within three business days after the incident occurred. "Therefore, in accordance with SDCL 62-7-10, [Claimant] must demonstrate that [Employer] had actual knowledge of the injury, or that good cause prevented her from complying with the three-day period." Gordon v. St. Mary's Healthcare Ctr., 2000 SD 130, ¶ 30. "In South Dakota, a person seeking worker's compensation benefits has the burden of proving that she provided timely notice of the injury or that her employer had actual knowledge of the injury." Id. ¶ 20 (citations omitted). "Not only must Claimant prove [Employer] had notice of an injury, but also must prove that [Employer] was on notice of the work-related nature of the injury." Miller v. Lake Area Hosp., 551 N.W.2d 817, 819 (S.D. 1996).

Claimant argued that Dr. Dan and Dr. Robin had actual knowledge of her back injury. Claimant testified that during the months when she periodically received treatment from either Dr. Dan or Dr. Robin, she would tell either chiropractor that using the massager hurt her back. However, this testimony from Claimant is not credible. Both Dr. Dan and Dr. Robin credibly testified that Claimant never mentioned using the massager caused her back pain. None of Employer's medical notes contain any reference that Claimant's use of the massager caused her back pain. The records reflect that Claimant provided other reasons to Dr. Dan and Dr. Robin as to the cause of her pain, such as walking down stairs or doing landscaping work. Dr. Dan and Dr. Robin did not have actual knowledge that Claimant was making a workers' compensation claim until early March 2003 when she met with Dr. Robin. Employer did not have actual knowledge of Claimant's back injury. Further, Dr. Dan and Dr. Robin were never aware that Claimant believed her back problems were work-related.

Claimant argued she had good cause to excuse her failure to provide timely notice to Employer. When "the failure to give notice is at issue, the claimant has the burden of showing that for some good and sufficient reason notice could not be given." Shykes, 2000 SD 123, ¶ 40 (citation omitted). Both Dr. Dan and Dr. Robin testified they would not expect an employee to file a workers' compensation claim where free treatment was rendered and no work was missed. However, this testimony has no bearing on Claimant's failure to give notice. Claimant did not rely on any statements from Employer that she did not have to file a claim under such circumstances. Also, SDCL 62-7-10 is clear as to when and how an employee must provide timely notice.

Claimant testified she did not file a workers' compensation claim because 1) she thought she would get better; 2) she did not know what caused her need for surgery and 3) Dr. Dan and Dr. Robin knew she was injured. All of Claimant's reasons do not show good cause for her failure to timely report her injury.

Claimant knew she had specific pain caused by using the massager that began as early as April 2002. Claimant repeatedly told her husband she experienced pain when she used the massager. Claimant would periodically treat for this condition; however, she failed to inform Employer as to the reason for her need for treatment.

Claimant specified October 1, 2002, as her date of injury. She testified something major happened that day. Claimant reported her injury as the “massager we use at work always makes my back burn between my shoulder blades and down a little.” Claimant testified she did not tell Employer she was making a workers’ compensation claim because she “wasn’t going to at that time.” Later, on October 26th, Claimant felt a pop during an adjustment and experienced intense pain that caused the need for additional treatment and for her to miss work.

Claimant stated she did not know what caused her need for treatment and surgery. This testimony is contrary to the extensive evidence showing that Claimant believed her back problems were caused by her work activities of using the massager. Claimant had ample opportunities to inform Employer of her injury; yet, Claimant failed to do so. Instead of providing timely notice to Employer, Claimant waited until March 2003 to inform Employer about her workers’ compensation claim. Dr. Dan and Dr. Robin did not know about Claimant’s injury until she met with Dr. Robin in March 2003. Claimant knew the serious nature of her injury before March 2003 but failed to notify Employer in a timely manner. No good cause exists for this failure.

Claimant failed to establish by a preponderance of the evidence that she provided adequate notice to Employer. Claimant failed to establish by a preponderance of the evidence that Employer had actual notice of her injury. Claimant failed to establish by a preponderance of the evidence that she had good cause for failing to provide Employer with notice within three business days of the injury. Claimant’s petition for benefits must be denied.

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

Dated this 8th day of December, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

Elizabeth J. Fullenkamp
Administrative Law Judge