SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

KIM GILBERT,

Claimant, **HF No. 12, 2013/14**

vs.

DECISION AND ORDER

MARQUARDT/SKYWAY, INC.,

Employer,

and

LUMBERMAN'S UNDERWRITING ALLIANCE,

Insurer.

Claimant filed a Motion for Partial Summary Judgment relative to this matter on or about July 11, 2016. Claimant responded to that Motion and filed a cross-motion for Summary Judgment on August 31, 2016, and Claimant filed her reply on September 8, 2016. This decision is the Division's ruling on the motion. The matter is addressed pursuant to ARSD 47:03:01:08:

> A claimant or an employer or its insurer may, anytime after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The motion asks the Department to find there is no genuine issue of fact as to whether Claimant gave notice of his injury to the Employer.

Here are the facts the department understands to be undisputed:

1. Claimant is asserting a claim for workers' compensation benefits based on injuries to his lumbar spine;

2. On January 13, 2013, Claimant fell on his back while unloading timber in Anacortes, Washington;

3. On January 14, 2013, Claimant twisted his back trying to avoid a forklift in Riddle, Oregon;

4. On February 12, 2013, while on the way to Massachusetts to drop off a load, Claimant stopped in Connecticut to have the truck serviced; he fell on ice in the parking lot, landing on his back;

5. Claimant did not seek any medical treatment immediately after any of these incidents, but kept driving; his next load after Massachusetts was to be taken to Texas. On February 19 or 20, 2013, after he completed his Texas delivery, back pain prompted him to see his doctor in Cleveland, Texas. The doctor faxed a "no work" notice to Employer received on February 20.

6. Claimant used a cell phone and the company's communication system, Qualcom, to keep in contact with Employer. He contacted Employer immediately after the incidents in Washington, Oregon, and Connecticut; Employer asked Claimant at the time the incidents were reported whether he would need medical treatment, but Claimant said no.

7. Around the time Claimant was traveling from Massachusetts to Texas, his cell phone stopped working (his ex-wife had been paying for it, and stopped doing so.) Qualcom would malfunction periodically, and Claimant said it was not functioning during this period, either.

The Department must view any reasonable inferences from these facts in a manner most favorable to the Employer. *Owens v. F.E.M. Electric Association, Inc.,*

2005 SD 35 ¶6, 694 N.W.2d 274,277 (2005). Our courts have not analyzed summary judgment standards when the sole issue is timely notice, though they have observed the question of whether or not an injured employee has satisfied the notice requirement is a mixed question of fact and law, *Orth v Stoebner & Permann Construction, Inc.*, 2006 SD 99, ¶56, 724 N.W.2d 586, 598, and such questions do not lend themselves well to summary judgment. *Cf. Wilson v Great Northern Railway Co. v Christopherson,* 83 SD 207, 212, 157 N.W.2d 19 (1968).

Giving Employer and Insurer the benefit of these rules, it is nonetheless clear that Claimant gave timely notice as a matter of law. The Supreme Court discussed the requirements of the law in a way that is particularly helpful here, in *Mudlin v. Hills Materials Co.*, 2005 SD 64, 698 N.W.2d 67:

> SDCL 62-7-10 requires that an employee who claims compensation for an injury shall provide written notice to the employer within three business days of the occurrence of the injury. However, when an employer had "actual knowledge" of the injury, the failure to provide notice does not bar the claim. SDCL 62-7-10(1). "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." Additionally, the claimant must prove that her employer had notice of the work-related nature of the injury.
> Mudlin failed to provide written notice of her injuries within three business days of the accident because she was in a coma for two weeks. However, Mudlin's supervisor was informed on the day of the accident that she had been injured while traveling to the job site and had been taken to the hospital.
> Hills asserts that there was no actual knowledge of Mudlin's claim because they were not made aware of the compensable nature of the injury. They argue that since it did not appear to them that Mudlin sustained injuries in the course of employment, they did not believe that her injuries were compensable. However, this argument is not persuasive because Hills knew or could have known on the day of the accident that Mudlin was injured while traveling from the company's base location to the job site in her personal vehicle as required by the company.

Mudlin, 2005 SD 64, ¶21-23, 698 N.W.2d at 74. The Employer received "actual knowledge" of the claim even though Mudlin was not able to say her claim was work-related; from her circumstances, they knew or should have known it might be.

In *Orth v. Stoebner & Permann Construction, Inc.,* 2006 S.D. 99, ¶59, 724 N.W.2d 586, 598, the Court made clear that an employer's knowledge of a "potential" compensation claim was enough: "'there must be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim." (Additional citations omitted.) On his work-related trips to Washington, Oregon, Massachusetts, and Texas, Claimant reported immediately he fell on his back twice and twisted his back once. The Employer was prompted to ask repeatedly whether the Claimant needed medical treatment, and was faxed a document concurrently with Claimant's time on the road in Texas that he was being taken off work by a doctor.

Employer argues it was not notified of an injury because Claimant said he did not need medical treatment, but the law does not add this requirement. SDCL 62-6-1 and 62-6-2 establish employer's responsibilities for recording and reporting claims; 62-6-2 requires reporting if "medical treatment other than minor first aid" was involved, 62-6-1 does not. If an employer is required to keep a record of a work injury not involving medical treatment, it is consistent to conclude the employee's report of such an injury provides actual knowledge to satisfy 62-7-10. On the contrary, the fact Employer inquired into the need for medical treatment is proof it had actual knowledge of a "potential" claim. It is concluded the submitted record does not generate a genuine issue of material fact on the issue of whether Claimant gave timely notice to his Employer of his claimed injuries.

Claimant's motion for summary judgment must therefore be GRANTED.

It is so ORDERED.

Dated this 11th day of November, 2016.

/s/ Sarah E. Harris
Sarah E. Harris
Administrative Law Judge