SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

VELDER WILLIAMS, **HF No. 135, 2002/03**

Claimant, **DECISION**

vs.

REX STORES CORPORATION,

Employer,

and

LIBERTY MUTUAL INSURANCE COMPANY,

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 October 24, 2003, in Aberdeen, South Dakota. Claimant appeared personally and through his attorney of record, John M. Wilka. Steven S. Siegel represented Employer/Insurer. The sole issue presented at the hearing was whether Claimant provided Employer with timely notice of his alleged injuries on March 7, 2002, and May 15, 2002.

FACTS

1. At the time of the hearing, Claimant was thirty-four years old.
2. Claimant worked as a salesman for Employer from March 1, 2001, through May 18, 2002.
3. On March 7, 2002, Claimant was working for Employer, along with Ken Miller, an Assistant Manager for Employer and Claimant's supervisor.
4. Claimant went to use the bathroom and as he closed the door, the door handle broke and he fell and hit his lower back on the toilet. Miller heard the incident and helped Claimant up after he fell.
5. Miller informed Larry Biggs, the Store Manager at the time for Employer, about Claimant's fall on March 7th. Employer did not complete a First Report of Injury.
6. Claimant did not seek any medical attention and did not miss any work after this incident.
7. On May 15, 2002, Claimant fell again when he slipped on a battery in back of the warehouse.
8. Claimant testified he immediately informed Freeman Jones, District Manager, about the fall. Jones was working at the store in Aberdeen that day. Claimant stated he "chuckled" as he mentioned the incident to Jones because he was embarrassed about falling. Claimant admitted that Jones "[r]eally didn't pay [ ] attention" when he told Jones about falling.

9. Claimant left the store for his lunch break and did not return to work. Claimant finally called the store around 5:55 p.m. and left a message that his back hurt and he would not be returning to work that day. Claimant did not have further contact with any of Employer's employees.
10. Claimant was scheduled to work on May 16th and 17th, but he did not show up for work. Claimant was fired on May 18, 2002, due to his absences.
11. Claimant sought medical treatment on June 4, 2002, for back pain.
12. Claimant failed to provide written notice to Employer within three days of either the March 7th fall or May 15th fall.
13. Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT PROVIDED EMPLOYER WITH TIMELY NOTICE OF HIS ALLEGED INJURIES ON MARCH 7, 2002, AND MAY 15, 2002?

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:
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> (1) The employer or the employer's representative had actual knowledge of the injury; or
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> (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).

"In South Dakota, a person seeking worker's compensation benefits has the burden of proving that [he] provided timely notice of the injury or that [his] employer had actual knowledge of the injury." Gordon v. St. Mary's Healthcare Ctr., 2000 SD 130, ¶ 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).

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).

It is undisputed that Claimant failed to provide Employer with written notice of either the March 7th injury or the May 15th injury within three business days after the incidents 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 [him] from complying with the three-day period." Gordon, 2000 SD 130, ¶ 30.

The fall on March 7, 2002

Claimant's failure to give written notice of the fall on March 7th is excused because Employer had actual knowledge of the incident. Miller, Claimant's supervisor, was immediately notified that Claimant fell and hit his back. In fact, Miller helped Claimant up from the floor and saw that Claimant was "in some pain." Employer was aware of the work-related nature of the injury. Even though Claimant did not miss any work or seek medical attention, Employer had the opportunity to investigate the incident immediately after it occurred. Claimant established by a preponderance of the evidence that he provided Employer with timely notice of the March 7, 2002, fall.

The fall on May 15, 2002

Claimant testified he informed Jones that he fell on May 15th. Jones denied that Claimant mentioned a work-related fall or back injury. Claimant's testimony that he told Jones about his fall is credible. However, Claimant did not provide Employer with specific details about the fall, including what body part he injured. Claimant simply mentioned that he "slipped and fell in back." "An employer's mere knowledge of an injury does not satisfy the notice requirement because, under our standard of review, a claimant must also demonstrate that the employer knew about the compensable nature of the injury." Id. ¶ 40 (citations omitted).

Claimant called Employer late in the afternoon and left a message that his back hurt and he would not be returning to work that day. Again, Claimant did not provide any specific details about his back injury. Claimant did not inform Employer that his back pain was related to his fall earlier in the afternoon. Claimant did not provide any further information to Employer about his fall until he signed a First Report of Injury on August 6, 2002. Despite Claimant's statement that he informed Employer of his fall, Employer was not aware of the work-related nature of the injury. Claimant did not present evidence that he had good cause for failing to give written notice to Employer. Claimant failed to establish by a preponderance of the evidence that he provided Employer with timely notice of the fall on May 15, 2002.

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 28th day of January, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge