SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

TODD BAKEBERG,
Claimant,

HF No. 138, 2003/04

v.

DECISION

SAFEWAY, INC.,
Employer/Self-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 27, 2006, in Spearfish, South Dakota. Claimant, Todd Bakeberg, appeared personally and through his counsel, Dennis W. Finch. J. G. Shultz represented Employer/Self-Insurer Safeway, Inc. (Employer).

Issues:

1. Whether Claimant gave timely notice to Employer pursuant to SDCL 62-7-10 of his alleged carpal tunnel injury.
2. Whether Claimant gave timely notice to Employer pursuant to SDCL 62-7-10 of his alleged hernia injury.

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

At the time of hearing, Claimant had worked for Employer for almost 23 years. He is currently the manager of the meat department at Employer's Spearfish store. Claimant began working for Employer as a meat cutter in the late 80's or early 90's.

Claimant described meat-cutting duties as taking meat delivered in boxes and on pallets off the truck, putting them on a six-wheeled cart and bringing them to the meat cutting room. The meat cutters then take the meat out of the box and put the meat on the counter, open the plastic and put the meat on the saws or table for cutting. The meat is then trimmed, placed on trays, and sent to the wrapping machine. Some of the meat cutting is done with power saws and some by hand. Sometimes the meat comes in partially frozen and it requires applying pressure with the knife to cut the meat. In cutting the meat, Claimant did the most work with his right hand, his dominant hand. All of the work requires a lot of moving the meat around and using the hands frequently.

Claimant saw Dr. Warren Golliher for a wellness exam on July 23, 2002. At the time of that visit, Claimant was asked about his health history and he advised Dr. Golliher that he had had some groin pain and some stiffness or numbness in his wrists. At the time

of that visit, there was no discussion between Claimant and the doctor about whether Claimant had carpal tunnel. Dr. Golliher advised Claimant that he had a small hernia on the right side. Dr. Golliher knew of Claimant's work duties, including the lifting, and referred to Claimant's lifting as part of the cause of the hernia.

Claimant's next visit with Dr. Golliher was on July 7, 2003. On that date, Claimant sought treatment for a shoulder injury caused by a fall. Claimant and Dr. Golliher did not discuss Claimant's hernia, groin pain, or problems with his wrists.

The next time Claimant saw Dr. Golliher, November 20, 2003, Employer had a big pork sale going on and Claimant was using his hands more than normal. Claimant sought treatment on November 20, 2003, because his wrists were waking him up at night and it was very severe one night. At that visit, Claimant complained of right wrist pain, aching and throbbing during the day and waking him up at night as well as anticubital pain. Claimant could not recall any specific incidents which brought about or started his groin or wrist pain. Dr. Golliher also examined Claimant's right groin area. He referred Claimant to Dr. Giuseffi for a hernia repair

During his November 20, 2003, examination, Dr. Golliher also diagnosed "early carpal tunnel", prescribed a cock-up splint, and referred Claimant to Dr. Tschida. Claimant saw Dr. Tschida in January of 2004 for an EMG test that confirmed he had carpal tunnel syndrome.

Claimant was not scheduled to work on Friday, November 21, 2003. He worked on Saturday, November 22, 2003, and likely on Sunday, November 23, 2003. Claimant did not report Dr. Golliher's diagnoses to Employer until Monday, November 24, 2003.

Other facts will be developed as necessary.

Issue One

Whether Claimant gave timely notice to Employer pursuant to SDCL 62-7-10 of his alleged carpal tunnel injury.

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The 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).

"Notice to the employer of an injury is a condition precedent to compensation." Westergren v. Baptist Hosp. of Winner, 1996 SD 69, ¶ 17, 549 N.W.2d 390, 395 (*citing* Schuck v. John Morrell & Co., 529 N.W.2d 894, 897-98 (S.D. 1995)). SDCL 62-7-10 sets the rules for providing notice:

> 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
> (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.

The proper test for determining when the notice period should begin has been explained: "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 Hospital, 1996 SD 89, ¶ 14. "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.'" Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶ 29 (citing Loewen v. Hyman Freightways, Inc., 1997 SD 2, ¶ 15). "The standard is based on an objective reasonable person with the same education and intelligence as the claimant's." Id. at ¶ 43.

The South Dakota Supreme Court summarized:

> The Workers' Compensation Act was enacted by the South Dakota Legislature in 1917. The purpose is to provide employees, who are injured within the scope of their employment, with reimbursement for medical care and wage benefits without having to prove the employer was at fault or negligent. Schipke v. Grad, 1997 SD 38, ¶ 11, 562 N.W.2d 109, 112. In turn, employers are "granted total immunity from suit for its own negligence in exchange for payment of workers' compensation insurance." Id. (citations omitted). However, an injured employee must also comply with the statutory notice requirements in order to recover.
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> "The purpose of the written 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." Westergren v. Baptist Hospital of Winner, 1996 SD 69, ¶ 18, 549 N.W.2d 390, 395. Therefore, "notice to the employer of an injury is a condition precedent to compensation." Westergren, 1996 SD 69, ¶ 17.

Shykes at ¶¶ 23-24.

Dr. Golliher testified that he did not tell Claimant at the July 2002 examination that meat cutters are susceptible to carpal tunnel syndrome “because he didn’t give me enough complaints really to throw a red flag to start looking for carpal tunnel at that particular visit.” Although testimony at hearing established that Claimant was aware that carpal tunnel was a possible drawback to being a meat cutter, the time period for Claimant’s notice of his alleged carpal tunnel syndrome did not begin until Dr. Golliher told him on November 20, 2003, that he likely suffered from “early carpal tunnel” and referred him to a specialist for diagnostic studies on his right wrist.

Claimant, however, did not provide Employer with written notice of Dr. Golliher’s diagnosis until November 24, 2003, one day beyond the three business days allowed by SDCL 62-7-10. SDCL 62-7-10 provides two exceptions to the three-day notice requirement. Claimant must demonstrate that Employer had actual knowledge of the injury or that he had good cause for failure to provide written notice within three business days.

Claimant testified that after his appointment on November 20, 2003, and after Dr. Golliher advised him of the carpal tunnel diagnosis, he “stopped in [to the store] to talk to Ron Niesent, the store manager, about [the diagnosis] and to let him know what was going on.” Claimant testified that he could not find Niesent at the store, explaining, “either [Niesent] was gone for the day or else he was busy somewhere where I couldn’t find him, so then I went home.” Claimant did not work on Friday, November 21, 2003, and testified that he did not feel like going to the store because the weather was bad that day.

Claimant worked Saturday, November 22, 2003. He testified that he thought he told Ron Niesent on Saturday, November 22, 2003, that he wanted to file a claim of injury. Claimant testified that Niesent indicated that Claimant needed to talk with Konnie Hall-Grass, the assistant manager, about filing the necessary paperwork. While Niesent did not recall any conversation with Claimant regarding the worker’s compensation claim, Niesent alleged that it is his practice to file injury reports immediately and not to wait or pass them off to other members of management. Niesent testified that the only way that he would have referred an injured worker to Hall-Grass was that if Hall-Grass was at the store at the time. He explained,

> I might have asked [Hall-Grass] to go ahead and take care of [the paperwork]. Because of the timelines that Safeway had, we had a deadlines [sic] that we had to report an injury by or we could get into some very big trouble. So postponing it to a later date is not something that I would have done.

Claimant testified that Niesent did tell him to talk to Hall-Grass, which Niesent admitted he might have done, but only if Hall-Grass was at the store. Claimant testified that Hall-Grass was either not working or was busy on Saturday, November 22, 2003. Hall-Grass testified that she had a set schedule in 2003 and that typically she had Saturdays off. Claimant testified that he "didn’t really push the issue” after he talked with Niesent

until Monday, November 24, 2006. Claimant did not report the injury on Sunday, November 23, 2003:

> I don't remember if I worked that day or - - I don't really remember why I didn't talk to anybody on that day. Either I had the day off or else I went to work and had other things on my mind.

The paperwork was filled out on Monday, November 24, 2003. Claimant explained:

> I don't know if it was when I came in to work or I was on my break or lunch. I believe Konnie said she saw me there and she said we need to get these papers done, and we went in the office [at the store] and started them.

Hall-Grass's testimony supports Claimant's testimony that he did not report the injury on Sunday, November 23, 2003. Hall-Grass more than likely was working on Sunday, November 23, 2004. She did not talk to Claimant about the injuries until November 24, 2003.

When asked about the two employee incident reports filed by Claimant, Hall-Grass testified that Claimant came to her about the issues and she "got out the paperwork right away and filled them out." The process of reporting injuries at Employer's Spearfish store involved Hall-Grass talking with the allegedly injured individual and simultaneously filling-out the paperwork herself. Hall-Grass would then call the appropriate parties to ensure prompt reporting of the claim to Employer's self-insurance administrators.

Hall-Grass also testified that whenever anybody came to her with an injury, the paperwork would be done "right away." Hall-Grass testified that employees typically came to her to report injuries and she did not "summon" them to get the paperwork completed. However, Hall-Grass testified further:

> Q: What, if anything, did you ever do as an assistant manager that would create an obstacle to people trying to file work comp claims? Was there something that you routinely did that made it difficult for them, or how would you approach these things?
> A: It would depend on the circumstances and it would depend on the day actually at my job. I guess I would think if I was dealing with someone else at the time that they wanted to talk to me and I - - like an example, a customer and I was not available at the moment they wanted to talk to me, if I was maybe in the check stand at the time that somebody wanted to talk to me.
> Q: So those are the kind of circumstances that might prohibit you from actually going upstairs, filling all the stuff out?
> A: Yeah, for that time being, yes.

The testimony of Claimant, Hall-Grass, and Niesent supports a finding that it is more than likely that Claimant attempted to file the injury reports on November 22, 2003, but

that circumstances prevented the completion of the paperwork. The store was more than likely very busy over those four days in November of 2003. Claimant's testimony at hearing was credible. Claimant should have been more persistent in his attempts to have Employer fill-out the paperwork. He was less than a day late with his written notice. Employer did not demonstrate that its investigation of Claimant's alleged carpal tunnel was in any way prejudiced by the less than one-day delay in reporting. The three "business" days were over a busy weekend at grocery store just before a major holiday. The good cause element in SDCL 62-7-10(2) requires that the Department liberally construe good cause in favor of Claimant. Based upon the totality of the evidence and liberally construing good cause in Claimant's favor, Claimant has demonstrated that he had good cause for his less than one-day tardiness in providing written notice of his alleged carpal tunnel injury.

Issue Two

Whether Claimant gave timely notice to Employer pursuant to SDCL 62-7-10 of his alleged hernia injury.

In July of 2002, Dr. Golliher diagnosed Claimant's hernia, told Claimant that it was likely caused by his work activities, and suggested to Claimant that surgery was necessary before the hernia grew larger. Claimant did not give written notice of his alleged work-related hernia until November 24, 2003, some sixteen months after he knew the probable compensable nature of his injury. The notice period began to run as soon as Dr. Golliher told him that his hernia was likely caused by his work activities. Claimant failed to provide written notice of the hernia injury within three business days of the diagnosis. Claimant did not demonstrate that Employer had actual knowledge of his injury or that he had good cause for failing to provide written notice within three business days of Dr. Golliher's diagnosis. Therefore, Claimant failed to demonstrate that he gave timely notice to Employer pursuant to SDCL 62-7-10 of his alleged hernia injury.

Claimant 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. Employer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections thereto 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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 15th day of November, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge