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

ROBERT MILSTEAD, **HF No. 160, 2010/11**

Claimant,

v. **DECISION**

PURE PULP PRODUCTS, INC.,

Employer,

and

MIDWEST FAMILY MUTUAL,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. A bifurcated hearing was held in this matter on September 13, 2012 in Mitchell, South Dakota. Robert Milstead, Employee and Claimant (Claimant) was present and represented by his attorney James Taylor of Taylor and Miskimins. Employer, Pure Pulp Products, Inc. (Employer) and Insurer, Midwest Family Mutual (Insurer) were represented by their attorney, Jennifer Ferris of Lynn, Jackson, Shultz, & Lebrun, PC.

BIFURCATED ISSUES:

Whether Employer received timely notice of Claimant's purported work-related injury?

Whether Claimant's injury was causally related to his work with Employer or was a work-related injury?

FACTS:

1. Claimant was employed by Employer as a laborer on October 29, 2010.
2. On October 29, 2010, Claimant was digging a trench for Employer. Ethan Hill, a high school student, was working with Claimant at that time.
3. Ethan Hill was not a supervisor or had any supervisory capacity over Claimant. Mr. Hill is the nephew of Employer, Dr. Jason Heezen. Dr. Heezen supervised Claimant and Mr. Hill.

4. At around 2 pm on October 29, 2010, Claimant left work. He told Mr. Hill that he had injured himself while working. Mr. Hill left work at about 4 pm that same day.
5. On Monday, November 1, 2010, Claimant went to the jobsite. Without leaving his truck, Claimant told Mr. Hill that he had injured himself at the jobsite on Friday and could not work that day. Later that same day, Mr. Hill passed the message to Employer that Claimant could not work that day. Mr. Hill told Employer that Claimant injured his back over the weekend.
6. Claimant went to his physician on November 1, 2010.
7. Claimant told his physician that he had injured himself falling down stairs at home. Claimant did not mention that he was injured at work. Claimant testified that he wanted to keep his job with Employer and therefore was going to have the costs covered by his personal health insurance.
8. Claimant received x-rays on November 2, 2010. The x-rays showed that Claimant had a herniated disc. Claimant was referred to the Orthopedic Institute for more specialized treatment.
9. On November 10, 2010, Claimant went to the Orthopedic Institute for further treatment. Claimant told the medical providers that he had tripped on some stairs at home and injured his back.
10. On November 24, 2010, Claimant underwent surgery on his back. Claimant had a microdiskectomy performed on him to remove a foreign body and treat bulging discs in his back. He was discharged from the hospital on November 25, 2010.
11. Around November 24, 2010, just prior to his surgery, Claimant contacted Employer, Dr. Heezen, and informed him that his injury was work-related and that he wanted workers' compensation insurance to pay for treatment.
12. Claimant asked Employer if he had workers' compensation insurance. Claimant was going to have his personal insurance pay for the surgery until he found out how much out of pocket costs he would be responsible to pay.
13. Employer told Claimant to contact the workers' compensation insurance agent.
14. Claimant did not inform his doctors that the injury was work-related until he was scheduled for surgery.

15. Claimant completed a first report of injury on December 7, 2010. He did not list the correct date of the accident on the first report of injury.

16. Employer completed a Supervisor's Accident Report on December 4, 2010. He left blank the date of the accident.

17. Employer and Insurer also made additions to Claimant's original first report of injury.

18. Employer and Claimant both recognize and stipulate that the first report of injury forms contain wrong dates of injury, dates the injury was reported, and wrong signature dates on the part of some of the parties.

Additional facts may be developed in the issue analysis below.

ANALYSIS & DECISION

Did Employer receive timely notice of an injury?

Claimant must prove that he notified his employer of his injury in a timely manner. SDCL § 62-7-10 sets the time deadlines for employees to report work-related injuries to employers. The statute is as follows:

> 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.

SDCL §62-7-10.

The notice requirement is in law for a reason. As the Supreme Court stated, "In addition to the statutory record keeping and filing requirements imposed on the employer, one of the

purposes of the notice statutes is to allow the employer the opportunity to investigate the cause and nature of the injury at the time when the facts are readily accessible." *Mudlin v. Hills Materials*, 2005 SD 64, ¶24, 698 N.W.2d 67, 74-75 (2005). Claimant's failure to immediately notify Employer of his back injury is the foundation for the denial by Insurer. Claimant did not notify Employer of the October 29, 2010 injury until almost a month later, sometime around November 24, 2010.

By the time Claimant notified Employer of the injury, Claimant was well aware of the seriousness of the injury and the compensability of the injury. Claimant only notified Employer of the injury because he did not want to pay the out of pocket expenses that would result from his using his personal health insurance. Claimant may have told a co-worker that he was injured on the job, but Mr. Hill is not a supervisor nor is responsible for passing along pertinent information to Employer.

The South Dakota Supreme Court has clarified SDCL §62-7-10 and the test created within the law. In *Orth v. Stoebner & Permann Construction, Inc.*, 724 NW2d 586 (S.D. 2006), the South Dakota Supreme stated that the notice question is the threshold question in a workers' compensation case. *Orth* at ¶55. To this end, the Court wrote:

> Notification of an injury, either written or by way of actual knowledge, is a condition precedent to compensation. *Westergren*, 1996 SD 69, ¶17, 549 NW2d at 395. The purpose of the written notice requirement is to give the employer the opportunity to investigate the injury while the facts are accessible. *Id.* at ¶18. 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. *Id.*

Orth at ¶ 52.

Most recently, the Supreme Court has ruled on the notice issue and when an injured employee is required to give notice to his employer. The Court wrote:

> It is well settled that "'[t]he 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.'" *Clausen v. N. Plains Recycling*, 2003 SD 63, ¶13, 663 NW2d 685, 689 (quoting

> *Miller v. Lake Area Hosp.*, 1996 SD 89, ¶14, 551 NW2d 817, 820 (quoting 2B Arthur Larson, Larson's Workmen's Compensation Law, § 78.41(a) at 15-185-86 (1995))). This is an objective standard based on a reasonable person of the claimant's education and intelligence. *Shykes*, 2000 SD 123, ¶42, 616 NW2d at 502 (stating that "[w]hether the claimant's conduct is reasonable is determined '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'" (citation omitted)).

McNeil v. Superior Siding, Inc., 2009 SD 68, ¶8, 770 NW2d 345, 348.

As stated before, and viewed objectively, a reasonable person of Claimant's education, intelligence, and experience would report a compensable claim within a few days of realizing he had a compensable injury. Claimant knew he had a compensable claim when he was referred to Orthopedic Associates by his primary physician.

Claimant failed to make a timely report of the October 29, 2010 injury to Employer, pursuant to SDCL § 62-7-10. Claimant's claim for workers' compensation due to the injury sustained on October 29, 2010 is denied due to lack of timely notification to Employer.

WAS CLAIMANT'S INJURY A WORK-RELATED INJURY?

The causation statute, SDCL §62-1-1(7), defines injury (set out in part):

> "Injury" or "personal injury," only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:
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> (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
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> (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment...

SDCL §62-1-1(7). The Claimant has the burden of proving an injury under the above statute.

The Supreme Court has stated that:

> [T]he testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.
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> *Westergren v. Baptist Hospital of Winner*, 1996 SD 69, ¶31, 549 NW2d 390, 398 (quoting *Day v. John Morrell & Co.*, 490 NW2d 720, 724 (SD 1992)). A medical expert's finding of causation cannot be based upon mere possibility or speculation. *Deuschle v. Bak Const. Co.*, 443 NW2d 5, 6 (SD 1989). *See also Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, ¶21, 653 NW2d 247, 252-53 (quoting *Day*, 490 NW2d at 724) (Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under [workers] compensation statutes.). Instead, [c]ausation must be established to a reasonable medical probability[.] *Truck Ins. Exchange v. CNA*, 2001 SD 46, ¶19, 624 NW2d 705, 709.

Orth v. 2006 SD 99, ¶34. Furthermore, the Court has opined on the "level of proof" that must be shown by a claimant.

> "The burden of proof is on [Claimant] to show by a preponderance of the evidence that some incident or activity arising out of [his] employment caused the disability on which the worker's compensation claim is based." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. This level of proof "need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence." Id. To meet his degree of proof "a possibility is insufficient and a probability is necessary." *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

Schneider v. SD Dept. of Transportation, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

The medical records submitted by Claimant do not show or prove that Claimant's injury was work-related or was caused by his work for Employer. The medical records do not indicate that Claimant ever told his doctor or the surgeon that the back injury may have been caused at work. The records indicate that Claimant told the doctors the injury was caused by his slipping and falling on some stairs. There is insufficient proof to hold that Claimant's injury is a work-related injury.

Counsel for Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Claimant shall have an additional 20 days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 8th day of January, 2013.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

Catherine Duenwald
Administrative Law Judge