SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

SUSAN HEINZ,
Claimant,

HF No. 180, 2003/04

v.

DECISION

HAAKON SCHOOL DISTRICT 27-1,
Employer,

and

ASSOCIATED SCHOOL BOARDS OF SOUTH DAKOTA,
Provider.

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. This matter was considered on the written record without hearing. Jon LaFleur represented Claimant. Judith K. Gruenwaldt represented Employer/Insurer.

Issue:

Did Claimant meet the requirements of SDCL 62-7-10?

Facts:

The following facts are found by a preponderance of the evidence:

1. Claimant worked as a cook for Employer from September of 1990 to May of 2003.
2. Claimant has a high school diploma.
3. Claimant suffers from epicondylitis of the right elbow.
4. Epicondylitis is a progressive condition that is caused or aggravated by repetitive motion.
5. To deal with pain in her right elbow, Claimant has worn a self-prescribed elbow brace since the late 1990's.
6. Aside from a short period of treatment in 1995 for elbow pain stemming from an accident, the first medical record reflecting treatment for right-sided elbow symptoms was Dr. David Holman's May 11, 2001, office note. Dr. Holman diagnosed epicondylitis and gave Claimant an injection into the elbow.
7. Dr. Holman noted that Claimant's job involved repetitive motion. He advised her to avoid "repetitive motions as much as possible, this only aggravates and make[s] her lateral epicondylitis worse." Claimant agreed with this plan.

8. Claimant treated with several different medical providers for her elbow condition, including Dr. David Lang and Dr. Bret Lawlor.
9. Claimant received cortisone injections in her elbow on May 11, 2001, September 17, 2001, December 13, 2001, April 15, 2002, and October 16, 2002. These injections provided only temporary relief of her elbow pain.
10. Claimant's arm was placed in a long arm cast on March 31, 2003. This did not help her symptoms.
11. No physician restricted Claimant from working, but Dr. Holman advised Claimant that she should avoid repetitive motion of her right arm while at work.
12. Due to her pain, Claimant limited her personal activities that involved repetitive movement of the right elbow, including bowling and golfing.
13. Claimant's work duties involved repetitive activity.
14. Claimant understood that her work involved repetitive activity.
15. Claimant's elbow pain increased with repetitive activity on and off the job.
16. Claimant understood that repetitive motion increased her symptoms.
17. Claimant's symptoms increased while she was at work and using her right arm repetitively.
18. Claimant understood that her symptoms got worse while at work.
19. Dr. Holman discussed with Claimant the nature of epicondylitis.
20. Claimant understood that epicondylitis is caused and aggravated by repetitive activity of the elbow.
21. Claimant discussed her elbow symptoms with many people and self-treated for many years, even before seeking treatment from Dr. Holman.
22. Claimant understood that all work-related injuries were to be reported to Employer.
23. Claimant had suffered prior work related injuries and received compensation under the South Dakota Workers' Compensation Law.
24. Claimant provided Employer with written notice of her injury on April 11, 2003.

Other facts will be developed as necessary.

Did Claimant meet the requirements of SDCL 62-7-10?

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 governs notice to the employer of an injury:

> 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.

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 her 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.

Claimant first sought professional medical treatment for her elbow symptoms on May 11, 2001. Before that time, she used a self-prescribed brace in an attempt to alleviate her symptoms. Dr. Holman talked with Claimant about the nature of her symptoms. Dr. Holman told Claimant that she suffered from epicondylitis. Dr. Holman explained to Claimant what causes and aggravates the symptoms of epicondylitis, namely repetitive motion of the elbow. Dr. Holman, as part of his treatment plan for Claimant, told Claimant to limit her repetitive activities at work to avoid further aggravating the elbow condition. Dr. Holman's treatment plan, to which Claimant agreed, included this restriction on her work activities.

In Miller, the court considered several factors to determine the beginning of the notice period. Those factors included the length of time the employee was aware of the condition, when medical treatment was required, an employee's suspicions that work was causing symptoms, and what an employee was told by medical providers. Miller at ¶ 18. In this matter, Claimant self-treated for many months, if not years, before seeking medical attention. Claimant even went so far as to try her husband's prescription medication.

Claimant knew on May 11, 2001, that she suffered from an inflammatory condition in her elbow and that her work activities increased her symptoms. On May 11, 2001, Dr. Holman advised her to limit her activities at work that involved repetitive motion of her elbow. After two injections that provided only temporary relief, Claimant was referred for specialized treatment in September of 2001. Claimant suffered pain for many years while working before she sought treatment from Dr. Holman. Claimant was aware that her condition was aggravated by repetitive movements of her elbow at work and had had to have people help her with her job duties. Claimant recognized that repetitive activities at work increased her symptoms. Claimant had suffered prior workers' compensation injuries. As a reasonable person and in light of her own experience with workers' compensation, Claimant should have recognized the nature, seriousness and probable compensable character of her epicondylitis on May 11, 2001, when Dr. Holman gave her an injection of cortisone into her elbow and advised her to curtail repetitive motion of her elbow.

Claimant failed to provide written notice within three business days of May 11, 2001. Therefore, pursuant to SDCL 62-7-10, she must demonstrate that Employer had actual knowledge of the work-related nature of her elbow condition or that she had good cause for her failure to provide notice within three days of May 11, 2001.

Employer did not have actual knowledge of the work-related nature of Claimant's elbow condition. To aid in the determination of whether an employer has actual knowledge, the Supreme Court considers several different factors. One factor for consideration is whether the employer paid for the injured employee's medical bills and other medical services. See Schuck v. John Morrell & Co., 529 N.W.2d 894, 898 (S.D. 1995) (determining that the employer had actual knowledge of the possibility of a future claim based upon the employer's payment of the employee's medical bills and expenses). Employer paid none of Claimant's medical expenses related to her elbow treatment. Claimant's personal health insurance paid those expenses.

Another important factor is the experience and knowledge of the employee. See Clausen v. Northern Plains Recycling, 2003 SD 63, ¶ 14, 663 N.W.2d 685, 689 (affirming a finding that the employer did not have knowledge based, in part, on the employee's knowledge and experience with the worker's compensation system and its requirements). Claimant expected Employer to offer her the workers' compensation claim forms without any indication from her or her medical provider that work could be contributing to her symptoms. Even before May 11, 2001, Claimant knew that her work increased her symptoms. Dr. Holman told Claimant to avoid repetitive motion of her elbow at work. Employer was aware that Claimant was suffering from elbow problems, along with other, nonwork-related health difficulties, but was not aware of the work-related nature of her elbow condition. An employer is not required to guess when an employee might need to file a claim. "It is the intention of the Act that an employer must be fairly apprised of an injury so that there may be an opportunity to investigate its cause and nature." Streyle v. Steiner Corporation, 345 N.W.2d 865, 867 (S.D. 1984) (citing Wilhelm v. Narregang-Hart Co., 66 SD 155, 279 NW 549 (1938)). Employer did not have "sufficient knowledge to indicate the possibility of a compensable injury." Id.

Employer did not have actual knowledge of the possibility that Claimant's work activities were contributing to her elbow condition and need for treatment on or about May 11, 2001. Employer learned in March 2003 that there was a possibility of a work-related component to Claimant's condition. Employer promptly gave Claimant the workers' compensation forms necessary to file a claim.

Although Claimant alleged that she was never told to file or given the forms to file a worker's compensation claim until March of 2003, this does not amount to good cause for her failure to give her employer notice. Claimant was aware of the need to notify her employer of work place injuries. Claimant knew that repetitive motion of her elbow in the course of her employment duties increased the pain in her elbow. Dr. Holman explained to Claimant the nature of her condition and told Claimant to limit repetitive motion of the elbow at work. Claimant modified her duties at work because of pain in her elbow. Nothing prevented Claimant from seeking workers' compensation coverage for her elbow condition on or about May 11, 2001, when Dr. Holman diagnosed her condition, injected her elbow, and explained to her the nature of her condition.

Claimant failed to provide notice of her injury within three business days of when she should have recognized the nature, seriousness, and probable compensable nature of her condition. Claimant failed to demonstrate that Employer had actual knowledge of the probable compensable nature of her condition. Claimant likewise failed to demonstrate that she had good cause for her failure to give Employer notice. Claimant's Petition for Hearing must be dismissed.

Employer 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. Claimant shall have ten (10) days from the date of receipt of Employer'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, Employer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 18th day of October, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

_____

Heather E. Covey
Administrative Law Judge