SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CONNIE K. THOMSEN,
Claimant,

HF No. 187, 2006/07

v.

DECISION

DEADWOOD MOUNTAIN RESORTS AND CALEDONIA CONDO'S,
Employer,

and

ACUITY,
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 December 17, 2008, in Lead, South Dakota. Claimant Connie K. Thomsen appeared personally and represented herself. Charles Larson represented Employer Deadwood Mountain Resorts and Caledonia Condo's and Insurer Acuity (Employer).

Issues:

1. Was Claimant an employee of Employer or an independent contractor on or about the 23rd day of July, 2006?
2. Did Claimant provide notice of her injury pursuant to SDCL 62-7-10?

Finding of Facts:

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

1. Employer consists of two legal entities, Deadwood Mountain Resorts and Caledonia Condos, owned by the same partners. The partners took over an apartment building in Lead, South Dakota, converted it to condominiums, and then began to sell them, and then later decided to use ten of the condominiums as timeshare units, and then the timeshare shut down and it converted back to condominiums.
2. Acuity insured Employer at all times in question.
3. Claimant is a forty-four year old woman who worked at a building site owned by the partners.
4. Claimant has no formal education or training beyond a 1980 G.E.D.
5. Claimant has no prior injuries, including no prior worker's compensation injuries.

6. Claimant began working for Employer on November 18, 2003.
7. Claimant worked cleaning and painting condominiums when Shawn Rost, one of the partners, would ask her. Claimant had keys to the building and would meet and accept the various deliveries at the condominiums for Employer. Whatever needed to be done, Shawn would ask Claimant to do it.
8. When Claimant began working for Employer, she was paid $9.00 per hour for cleaning and $10.00 per hour for maintenance. She kept track of her own hours and days that she worked and what she did. She faxed these to Bruce Byrum, one of the partners in Spearfish. Byrum would pay her by check.
9. Sometimes her checks would be written on Caledonia Condo's account and sometimes on Deadwood Mountain Resort's account.
10. Employer issued checks to Claimant in her name, not a business entity name.
11. Claimant has never had a cleaning company and throughout her life has always worked as an employee, never as an independent contractor.
12. Claimant did not have set hours of work. Claimant did not have to ask for time off.
13. Claimant had regular times that she had to submit her hours.
14. Employer purchased all materials and items of equipment Claimant used. Most of these materials were available to anybody on site who wanted to use them.
15. Claimant met people for deliveries, contractors, carpet cleaners, installers, the postmaster, etc. Claimant was never involved in scheduling these services, but was at the building at Rost's request whenever it was necessary.
16. Employer purchased for Claimant a cell phone so that they could contact her. The cell phone was limited to four numbers that it could call: Employer's office, Shawn Rost, Bruce Byrum, and Rod Galland.
17. Employer did not withhold any taxes or Social Security from payments made to Claimant.
18. Claimant did not fill out a W-4 when she began working for Employer. She did not receive any paperwork regarding her employment status until June of 2006 at Employer.
19. Claimant worked 40 to 50 hours a week in the months before her injury. After her injury, her hours were reduced.
20. Claimant was unaware of the different legal entities and their relationships.
21. Claimant considered Shawn to be her supervisor until Natalya Livingston was hired.
22. Natalya Livingston was hired on as the project manager for Deadwood Mountain Resorts, a timeshare. Livingston has a bachelor of science in accounting and is a certified public accountant.
23. Livingston's employment with Employer began on June 19, 2006 and ended on June 22, 2007.
24. Livingston's duties as project manager for Deadwood Mountain Resorts were "multi-faceted" and "included all the accounting, hiring, supervision, and marketing, and also managing the facility itself, and overseeing construction."
25. Livingston was working at an office in the same building where Claimant worked at the time Claimant was injured.
26. Livingston supervised all employees.
27. Claimant considered herself an employee of Employer.

28. Shawn Rost directed Claimant to report to Livingston.
29. Claimant was paid for her services and no paperwork regarding her employment status was completed before Natalya Livingston directed her to complete a W-9 on June 23, 2006.
30. On June 23, 2006, Claimant was asked by Livingston to fill out a W-9 form, but did not know what it was or what it meant at the time. Claimant had never seen one before that time, but complied with Livingston's request as she felt she had no choice. Claimant did not intend to start a cleaning business.
31. Claimant had performed similar services for Paul Miller at his condominiums. Paul Miller withheld taxes and social security from the checks he gave Claimant.
32. Claimant does not have a cleaning business.
33. Claimant does not advertise herself in any way as a business. She has no business cards, signs, clothing, stationary, etc.
34. Claimant has never bid any cleaning or maintenance jobs from any entity.
35. Claimant does not have a separate bank account for a business. She has no liability insurance or workers' compensation insurance.
36. Claimant does not have any governmental indicia of a business, such as a tax ID number or sales tax license or an excise tax license.
37. Claimant suffered an injury on or about Thursday, July 20 or 27, 2008, when she was unloading a Menard's delivery of doors and base and casing. Claimant suffered a strain to her left wrist as she was helping to unload the doors. She called a man named Andrew Mosher who worked for Employer to help her finish unloading the doors because she had hurt her wrist and was in pain. Mosher helped Claimant finish unloading the delivery.
38. The delivery items were going to be installed by a contractor who was coming the next Monday. After the delivery, Shawn Rost asked Claimant to paint all 26 doors, and enough trim, casing, and base so the contractor could begin installing them on Monday.
39. Claimant began painting on Friday.
40. Claimant continued to experience soreness or aching in her left wrist. Claimant wrapped her wrist on Saturday due to the aching. By Sunday, she was in pain and "hurting."
41. By Monday, Claimant's wrist was so swelled and stiff that she could not use it.
42. On Monday, Claimant went to the emergency room at Sioux San Hospital in Rapid City.
43. Claimant was diagnosed with left wrist tendonitis
44. Claimant was treated with cortisone shots, home stretching exercises, a wrist brace, and over-the-counter pain medication. Claimant continues to wear a brace over her wrist and thumb during the day.
45. Claimant saw Natalya Livingston the same day she went to the Sioux San Emergency Room. Claimant told Livingston that she had hurt her wrist unloading the doors from Menard's. Livingston did not ask any thing more about the wrist brace or the incident.
46. Livingston knew Clamant had injured her wrist and failed to inquire further.
47. Caledonia Condos UOA (Unit Owners Association) is a homeowners association of the people that own condominiums at Caledonia Condo's.

48. Livingston owned one of the Caledonia Condo's and was secretary/treasurer for the association.
49. Livingston later began working for Caledonia Condo's when the partners decided to close down the timeshare because it was no longer financially viable.
50. The timeshare closed on August 24, 2006.
51. When the timeshare closed, Livingston became an employee of Caledonia Condo's, LLC. She helped "shut down the timeshare and then continued trying to manage the condominiums."
52. Based upon Livingston's testimony, the management company hired by the partners to start-up the timeshare business failed to follow through with many of the legal parts of starting up a business. For example, the management company did not hire employees or hire independent contractors. The paperwork necessary to formalize the legal status of the relationship between Claimant and Employer had not been done.
53. Employer informed Claimant that her services would no longer be necessary as of October 31, 2006.
54. Claimant resigned on October 13, 2006 because she could no longer perform her duties.
55. Neither party claimed any adverse consequences or legal action after the termination of Claimant's services.
56. Claimant's testimony was credible.
57. Other facts will be developed as necessary.

Issue One

Was Claimant an employee of Employer or an independent contractor on or about the 23rd day of July, 2006?

The definition of an employee for workers' compensation purposes can be found at SDCL 62-1-3, which states:

> As used in this title, unless the context otherwise plainly requires, the term 'employee' shall mean every person, including a minor, in the services of another under any contract of employment, express or implied, . . . except:
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> 1. One whose employment is not in the usual course of the trade, business, occupation, or profession of the employer;
> 2. Any official of the state or of any subdivision of government . . ..

Under this statute, Claimant is an employee. Claimant's relationship with Employer does not fit under either of the exceptions. Employer consists of at least two entities, both in the real estate improvement/investment business. Employer hired Claimant to do cleaning and maintenance of the common areas owned by Employer as well as to clean and maintain the condominiums. Real estate improvement and maintenance is part of the occupation of Employer. Employer purchased all materials and items of equipment Claimant used. As Rost testified, the cleaning and maintenance supplies available to Claimant on site were "available to anyone who wanted to use them."

Claimant's employment was in the usual course of the trade, business, occupation, or profession of the employer.

In Egemo v. Flores, 470 NW2d 817, 821 (SD 1991), the Supreme Court placed the burden of establishing independent contractor status on the employer. In Egemo, the Court "recognized the statutory presumption that an individual is an employee until his status as an independent contractor is established." (citing Jackson v. Lee's Travelers Lodge, 1997 SD 63 at ¶ 10, 563 NW2d 858, 861.) The entire relationship between the parties must be considered when distinguishing between an employee and an independent contractor. Egemo, 470 NW2d at 820 (SD 1991); Dumire v. Martin, 174 NW2d 215, 216-217 (SD 1970).

In Egemo, the Court used a two-prong test for further clarification of the distinction between an employee and an independent contractor:

(1) The individual has been and will continue to be free from control or direction over the performance of the service, both under his contract of service and in fact; and
(2) The individual is customarily engaged in an independently established trade, occupation, profession or business.

Id. The first prong is referred to as the right to control test. Davis v. Frizzell, 504 NW2d 330, 331, (SD 1993). In determining whether this prong is met, the following factors are considered:

(1) Direct evidence of the right to control;
(2) The method of payment;
(3) The furnishing of major items of equipment; and
(4) The right to terminate the employment relationship at will without liability.

Id. (Citing Egemo, 470 NW2d at 821; Sines v. Sines, 718 P2d 1214, 1215 (Idaho 1986); Hendrickson's Health Care Services, 462 NW2d 655, 659 (SD 1990); Dumire, 174 NW2d at 217).

(1) *Direct evidence of the right to control.*

Claimant did not do any task that required expenditures without Employer's permission. Employer, via Shawn Rost, would call Claimant and ask her to clean and paint condominiums. Only sometimes would Rost ask Claimant how much or how long it would take her to perform a specific task different from painting or cleaning. Claimant was instructed to keep the common areas of the condominiums clean. The evidence shows that Claimant worked on an hourly basis performing specific tasks Employer required of her.

Claimant met people for deliveries, contractors, carpet cleaners, installers, the postmaster, etc. Claimant was never involved in scheduling these services, but

unlocked the building only when Rost asked her to. Employer had the right to control Claimant's duties and hours.

(2) *The method of payment.*

Payment on an hourly basis is indicative of an employer/employee relationship. Jackson, 563 NW2d at 861. Exhibit 10 is a sample of the paperwork Claimant filled out in order to be paid for her time. Claimant was paid on an hourly basis, not by the job or a bid. Claimant had regular times set for her to submit her hours. Claimant never received anything but dollar for dollar reimbursement for the minimal supplies she purchased and never marked those items up for profit. Claimant charged all materials to Employer or materials were ordered by Employer and delivered on site.

(3) Furnishing of major items of equipment.

Employer paid for and provided all items of equipment. Claimant was allowed to charge at local stores to purchase supplies for Employer. Employer purchased a cell phone for Claimant as she did not own one. The phone could be used only to call the office or one of the partners. Claimant had no equipment of her own except her skills.

(4) *Right to terminate.*

Employer has not shown that it would incur possible liability for breach of contract if it fired Claimant or terminated the employment. When the relationship between Employer and Claimant ended in October of 2006, no liability was alleged by either party.

Employer has the burden to prove that Claimant was an independent contractor. The majority of the facts show that Claimant's activity was directed by Employer, that Claimant was paid an hourly wage, that Employer supplied the major, if not all, items of equipment, and that Employer had the right to terminate without contract liability. Employer has not met the burden necessary to prove the first prong of the test to show that Claimant acted as an independent contractor for Employer.

Considering next the question of whether or not Claimant was engaged in an independently established trade, business or occupation, the South Dakota Supreme Court has provided guidance in the form of a four-part test:

(1) An enterprise independently established;
(2) An enterprise created and existing separate and apart from the relationship with the particular employer;
(3) An enterprise that will survive the termination of that relationship;
(4) An enterprise in which the individual possesses a proprietary interest to the extent that it can be operated without hindrance from any other individual.

Davis, 504 NW2d at 331 (citing Hendrickson's, 462 at 659).

(1) *An enterprise independently established.*

The facts show that Claimant does not have an independently established a business. Employer failed to demonstrate any significant indicators of an independently established business. Employer failed to show any of the following:

(a) A legally established business entity or a Certificate of Fictitious Business Name filed with the Secretary of State;
(b) Advertisement as a separate business entity;
(c) Bidding of jobs from other entities;
(d) Establishing a separate bank account for a business;
(e) Obtaining a tax ID number from the IRS for the business;
(f) Holding herself out as an independent business by printing business cards, stationary, signs, clothing, etc.;
(g) Purchase of any kind of business liability insurance or workers' compensation insurance.

Employer did demonstrate that on occasion, Claimant utilized the services of her brother and her father and paid them out of the money she received from Employer. This was done at Employer's request. This alleged "hiring of employees" occurred on separate projects, distinct from the duties she was performing when she was injured. Other than these few undocumented occasions, there is no evidence to show that Claimant engaged in an independently established enterprise.

These factors show that Claimant did not establish her own business. Claimant's testimony is credible. Claimant was surprised by the 2006 1099's, which were done after her injury and after Natalya Livingston's involvement. Employer failed to show that Claimant was given 1099's for her work in 2005 or before.

(2) *Business existing separate and apart from the relationship with Employer.*

Employer offered little evidence that Claimant is engaged in a business existing separate and apart from the relationship with Employer. Claimant's credible testimony establishes that she does not have a business, has never had a business, and did not intend to have a business.

(3) *An enterprise or business that survives the termination of the relationship with Employer.*

Other than a skill set possessed by Claimant, there is no enterprise or business that survived the termination of Claimant's relationship with Employer. Natalya Livingston's treatment of Claimant after the injury does not establish an enterprise or business. Claimant did not intend to start a business when she began her work for Employer, when she signed the W-9, or at the time she was injured.

(4) *An enterprise in which the individual possesses a proprietary interest.*

Claimant does not have a proprietary interest in an enterprise, except her skills. If she had a business, the business owned nothing, not even a cell phone, as evidenced by Employer's purchase of a cell phone for Claimant's use. The alleged cleaning business had no separate bank accounts. The business had no credit. Claimant had no loans of any kind based upon a proprietary interest. Claimant did not purchase insurance of any kind to protect any alleged business. She did not advertise or hold herself out as a separate business entity.

Employer has failed to prove either prong of the test. Employer has not met the burden necessary to prove that Claimant was an independent contractor. The Department finds that Claimant was an employee of Employer at the time of her injury.

Issue Two

Whether Claimant provided timely notice under SDCL 62-7-10.

"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.

Claimant did not provide written notice of her injury within three business days of her injury. She alleges that Employer had actual knowledge of her injury. The South Dakota Supreme Court recently ruled:

> Pursuant to SDCL 62-7-10, an employee who seeks workers' compensation benefits for an injury must provide the employer with written notice of the injury within three days of its occurrence. Mudlin v. Hills Materials Co., 2005 SD 64, ¶21, 698 NW2d 67, 74. "However, when an employer [has] 'actual knowledge' of the injury, the failure to provide notice does not bar the claim." Id. Under South Dakota law, a workers' compensation claimant bears the burden of establishing

> that the claimant either provided written notice of the injury or that the employer had actual knowledge of the injury. Id. Notification of an injury, either written or by way of actual knowledge, is "a condition precedent to compensation." Westergren[v. Baptist Hospital], 1996 SD 69, ¶17, 549 NW2d at 395.
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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." Id. ¶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.
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> "In determining actual knowledge, the employee must prove that the employer had 'sufficient knowledge to indicate the possibility of a compensable injury.'" Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶36, 616 NW2d 493, 501 (quoting Streyle v. Steiner Corp., 345 NW2d 865, 866 (SD 1984)). "The employee must also prove that the employer had sufficient knowledge that the injury was sustained as a result of [his] employment versus a pre-existing injury from a prior employment." Id. (emphasis original). In other words, to satisfy the actual knowledge notice requirement, the employer: 1) must have sufficient knowledge of the possibility of a compensable injury, and 2) must have sufficient knowledge that the possible injury was related to employment with the employer.

Orth v. Stoebner and Permann, 2006 SD 99, ¶¶ 51-53. Natalya Livingston admitted in her testimony that she knew that Claimant had hurt her wrist, but did not recall when Claimant told her. Claimant testified credibly that she told Livingston of her injury the day she first went to the doctor. Claimant testified credibly that she told Livingston that she hurt herself unloading a delivery at the condominiums. Livingston admitted that she did not pay much attention to Claimant's injury. Livingston had sufficient knowledge that Claimant's injury was related to employment with Employer. Livingston testified that she was in charge of all of the property. Livingston had the opportunity to inquire about an injury that took place upon that property.

Claimant has met her burden to show that Employer had "sufficient knowledge of the possibility of a compensable injury" and that Employer had "sufficient knowledge that the possible injury was related to employment."

CONCLUSIONS OF LAW

1. Employer failed to meet its burden to overcome the presumption that Claimant was an employee pursuant to SDCL 62-1-3 on or about July 23, 2006.
2. On or about the 23rd day of July, 2006, Claimant was not an independent contractor pursuant to SDCL 62-1-3.
3. Claimant met her burden to demonstrate adequate notice pursuant to SDCL 62-7-10.
4. Claimant has prevailed on the issues set for hearing.
5. The Department retains jurisdiction over any disputes regarding what benefits are compensable.

Claimant has ten (10) days from receipt of this Decision to submit objections and/or proposed Findings of Fact and Conclusions of Law consistent with this Decision. Counsel for Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's objections and/or proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Counsel for Employer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 5th day of May, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge