February 13, 2015

Tana Marie Hagel
973 Spring Ct
Newburg, WI 53095

Letter Decision and Order

Thomas J. Von Wald
Boyce, Greenfield, Pashby & Welk LLP
P.O. Box 5015
Sioux Falls, SD 57117-5015

RE: HF No. 190, 2013/14 – Tana Marie Hagel v. Avera McKennan amd Avera Workers' Compensation Fund

Dear Ms. Hagel and Mr. Von Wald:

Submissions

This letter addresses the following submissions by the parties:

November 11, 2014	Employer and Insurer's Motion for Summary Judgment;
	Employer and Insurer's Brief in Support of Motion for Summary Judgment;
	Affidavit of Thomas J. Von Wald;
December 15, 2014	[Claimant's] Response to Avera's Motion for Summary Judgment;
February 9, 2015	Employer and Insurer's Reply Brief in Support of Motion for Summary Judgment.

Facts:

The facts of this case are stated as follows:

1. In July of 2012, Tana Marie Hagel (Hagel) was employed by Avera McKennan (Employer) as a registered nurse.

2. Hagel was given a handbook about reporting work injuries at the time she was hired by Employer and testified that she understood it.

3. On July 16, 2012, Hagel, a respiratory therapist and a nurse anesthetist transported a patient and the patient's bed to the ICU. As the medical team reached the ICU floor, the respiratory therapist and nurse anesthetist pushed the bed down the hall while Hagel steered the bed from the front. When the medical team reached the ICU, the patient was transferred over to the ICU bed and monitored. On her way back to her unit after delivering the patient to the ICU, Hagel noticed that her shoulders were sore.

4. On July 17, 2012, Hagel went to work and informed her supervisor that she was out of shape because she was sore from the prior night's transfer. However, Hagel did not mention any type of injury at that time.

5. Hagel continued to work that day and thereafter.

6. Hagel's shoulder pain got increasingly worse as time went on. About two weeks after July 16, 2012, Hagel's shoulder pain turned into a dull but excruciating pain at night that severely disrupted her sleep.

7. Hagel did internet research regarding the pain and discovered she may have a torn rotator cuff.

8. Hagel "[j]ust tried to tough it out" for a couple of weeks until she was able to be treated with Dr. Gutnik.

9. On August 23, 2012, Hagel saw Dr. Gutnik who referred Hagel to physical therapy and for pain management with Dr. Scott Lockwood. Hagel informed Employee Health that day of a potential work injury after being examined by Dr. Gutnik.

10. During Hagel's deposition, she testified that she could not remember any conversation with any person at work about her injury, between the day after the injury and Dr. Gutnik.[1]

11. Hagel was later diagnosed with a partial rotator cuff tear.

12. Hagel had at least two reported work injuries prior to July 16, 2012, wherein she received medical treatment and workers' compensation benefits.

13. Additional facts will be discussed in the analysis below.

[1] Hagel stated in her response to Employer and Insurer's Motion for Summary Judgment that her supervisor was aware of her injury when she was trying to make a doctor's appointment. However, she does not explain why this statement differs from her deposition testimony. Therefore, she now cannot, "claim a better version of facts in an affidavit prepared for summary judgment than the witness testified to in a prior deposition." See Guilford v. Nw. Pub. Serv., 1998 S.D. 71, ¶ 12, 581 N.W.2d 178, 181.

Summary Judgment:

Employer and Insurer filed a Motion for Summary Judgment. ARSD 47:03:01:08 governs the Department of Labor & Regulation's authority to grant summary judgment in workers' compensation cases. That regulation states:

> A claimant or an employer or its insurer may, any time after expiration of 30 days from the filing of a petition, move with supporting affidavits for a summary judgment. The division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

ARSD 47:03:01:08. There is no issue of material fact in this case.

Notice Requirement:

The legal question posed here is whether Hagel provided notice of her work-related injury to her employer as required by SDCL 62-7-10. That statue states:

> 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.

SDCL 62-7-10 (emphasis added).

Notice of an injury to the employer is a condition precedent to compensation. Shykes v. Rapid City Hilton Inn, 2000 SD 123, 124. Moreover, 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 N.W.2d 685, 689(quoting Miller v. Lake Area Hosp., 551 N.W.2d 817,820 (SD 1996) (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, 616 N.W.2d 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.").

Hagel is a nurse. A reasonable nurse should have known that her shoulder injury was serious at the time the pain became excruciating and started interfering with her sleep. At the point she decided to see a doctor, she was aware that the injury was compensable. Nevertheless, she "toughed" it out for two more weeks before giving notice to the employer. Consequently, Hagel did not provide written notice of her injury within the time permitted by this statute.

Under SDCL 62-7-10, Hagel's claim is barred unless she meets one of the two exceptions provided in the statue. The first exception is that the "employer or the employer's representative had actual knowledge of the injury." The day after the injury, Hagel told her supervisor that she was out of shape and was sore, but the Employer had no other information until Hagel called from Dr. Gutnik's office. Therefore the Employer did not have actual knowledge of the injury.

The second exception is when the "employee had good cause for failing to give written notice within the three business-day period." Good cause does not exist here. Hagel was given a handbook when she was hired that explained how to report work injuries and she testified that she understood the handbook. Indeed, she had filed at least two claims prior to this injury.

As a result, the Department must conclude that Hagel failed to meet the notice requirement of SDCL 62-7-10 and her claim is now barred. Employer and Insurer are entitled to judgment as a matter of law.

Order

It is, therefore, Ordered that Employer and Insurer's Motion for Summary Judgment is granted. This case is dismissed with prejudice. This letter shall constitute the order in this matter.

Sincerely,

_/s/ Donald w. Hageman___
Donald W. Hageman
Administrative Law Judge