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

LARRY SMITH **HF No. 194, 2015/16**

Claimant,

v. **DECISION**

MYRL & ROY'S PAVING, INC.,

Employer,

and

HARTFORD INSURANCE,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on May 30, 2018, in Sioux Falls, South Dakota. Claimant, Larry Smith was present and represented by Glenn Boomsma of Breit Law Office. The Employer, Myrl and Roy's Paving, Inc. and Insurer, Hartford Insurance, were represented by Jennifer Van Anne of Woods, Fuller, Shultz, & Smith.

Legal Issue:

The legal issues presented at hearing are stated as follows:

a. Whether notice was provided under SDCL § 62-7-10;
b. Causation of Smith's condition;
c. Compensability; and
d. Whether Larry Smith (Smith or Claimant) is entitled to Temporary Total Disability, Permanent Partial Disability, medical, and vocational benefits.

Background:

Larry Smith (Claimant or Smith) worked for Myrl & Roy's Paving, Inc. (Employer or Myrl & Roy's) as a diesel shop mechanic. Myrl and Roy's was insured for workers' compensation purposes at all times pertinent by Hartford Insurance (Insurer). He began

working at Myrl & Roy's on July 20, 2012. As a diesel and shop mechanic, Smith's duties were to perform scheduled and unscheduled repairs, inspections, maintenance, and overhauls on all company vehicles and equipment.

Smith claims that on March 20, 2014, he was at the top of an 8-10 foot tall ladder (attempting to remove a hood so that he could remove a radiator) when the hood fell and knocked the ladder out from underneath him. When he was thrown from the top of the ladder, he used his arms to protect himself from the fall. He initially landed on both of his arms and hit a paving machine. After hitting the paving machine, Smith landed on his feet. In addition to the shoulder injuries, Smith claims he sustained a cut on his leg.

After Smith's leg injury was resolved, he noticed his shoulder pain was continuing. Smith treated with multiple medical professionals. He went to a chiropractor for an adjustment. Smith saw Dean Berg, DC, FACO at Total Health Chiropractic in Sioux Falls, South Dakota on April 4, 2014, for mid back and left shoulder pain. Following this initial chiropractic visit, Smith's pain increased. He experienced numbness that became constant, and he developed a burning sensation in his left shoulder. He saw Cassandra Swann, PA-C at Orthopedic Institute in Sioux Falls on April 10, 2014, for his ongoing left shoulder pain. Swann said Smith could return to work with limitations. Smith continued to receive treatment for his shoulder pain. He is no longer employed by Myrl & Roy's.

Smith filed a Petition for workers' compensation benefits on June 21, 2016, and an Amended Petition for workers' compensation benefits on June 27, 2018. Employer and Insurer filed the Answer denying benefits on July 27, 2018.

Additional facts and background may be developed in the issue analysis below.

Analysis:

Whether notice was properly given under SDCL § 62-7-10.

Smith must prove that he provided proper notice to Employer and Insurer. SDCL § 62-7-10 states, in pertinent part;

> 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.

Smith filled out an official First Report of Injury (FROI) on August 20, 2014. The FROI was completed five months after the initial injury. He was assisted in filing this FROI by Mylene Bangasser. Bangasser has worked for Myrl & Roy's for 34 years. Among her other responsibilities, she acts as a human resources and safety assistant. It is in that capacity that Bangasser helped Smith fill out the FROI. Bangasser stated that while she and Smith were filling out the FROI, he was unable to provide many specific details. The date of injury was changed at some point to March 20, 2014. Bangasser stated that she asked Smith what had happened, and he was unable to provide details. The form lists as a description of the injury, "left & right shoulder pain." There is no mention of a fall, but it does indicate that the injury took place in the "shop." The document has a section to list anyone who may have witnessed the injury. The document lists witnesses as "none." The FROI was signed by both Bangasser and Smith.

SDCL § 62-7-10 requires notice to be provided no later than three business days from the injury. However, it also provides exceptions to that requirement. First, notice is considered properly provided if the employer or the employer's representative had actual knowledge of the injury. Second, notice is proper if 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. "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,* 616 N. W. 2d 493, 501 (S.D. 2000) (quoting *Streyle v. Steiner Corp.*, 345 N.W.2d 865, 866 (S.D. 1984). "The employee must also prove that the employer had sufficient knowledge that injury was sustained *as a result of [his] employment* versus a pre-existing injury from a prior employment.' *Id.* (emphasis original). In this matter, Smith states that the injury occurred in front of his supervisor, Tim Thies. If the supervisor witnessed the injury, he would have had actual knowledge of the injury.

Thies has stated that he does not recall having seen Smith fall from a ladder while working on an engine. He has stated that had he witnessed Smith falling he would have taken him through the established process to handle such occurrences. The process would have involved notifying Myrl & Roy's safety director, Rod Anderson. Neither Smith nor Thies filed any report with Anderson. Thies stated that he does not believe the work place injury occurred. Thies admitted that Smith did make multiple complaints about shoulder pain. Smith asserts that Thies knew that Claimant was in

pain and required restrictions, but Thies insisted he perform work-related tasks anyway. Anderson admitted that he was never informed about the work restrictions Smith had submitted to Employer. Smith did not inform Anderson about his alleged injury. Due to the fact that Smith did not make a formal first report of injury until five months after the injury, Anderson was not able to conduct a thorough investigation of the incident. By the time Claimant filed his FROI, video footage that would have captured his injury had been taped over because the video records over itself every three to four weeks.

In order to prevail in this matter, Smith must prove that he properly provided notice. Notice was not provided within three business days of injury, therefore, under SDCL § 62-7-10, Smith must prove that either employer had actual knowledge of the injury or that he had good cause for failing to give written notice within the three business-day period. The statute further requires that the determination shall be liberally construed in favor of the employee.

The Department is not persuaded by the record that Smith has proven that Myrl & Roy's had actual knowledge of his alleged workplace injury. Smith has not proven that Thies witnessed the injury. Smith did not list Thies as a witness on the FROI document. Thies has admitted that he was aware that Smith had shoulder pain and work restrictions. However, knowledge of an injury or pain is not the same as the knowledge that an injury occurred at work. It is an employee's responsibility to notify the employer of an injury. The employer is not obligated to assume that any injury or pain an employee reports is work related.

The FROI also fails to provide details of the injury. The document lists as a description of the injury, "left & right shoulder pain." There is nothing in that report detailing a fall off a ladder. It is worth noting that, this was not Smith's first workers' compensation claim at Myrl & Roy's. Claimant was injured at work, reported it immediately, a FROI was completed, and he was provided medical care by Employer. The prior injury is unrelated to the alleged injury in this matter. However, the previous injury shows that Claimant was familiar with the workers' compensation process at Myrl & Roy's.

Smith has not shown that Employer had actual knowledge of the injury nor has he shown good reason for failing to report the injury within three days as required by SDCL § 62-7-10. Therefore, Smith did not properly provide notice in this matter.

Causation and Compensability

Smith has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry Inc.*, 2010 S.D. 4,11, 777 N.W2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. *Caldwell v. John Morrell & Co.*, 489 N.W.2d 353, 358 (S.D. 1992).
SDCL § 62-1-1(7) defines "injury" or "personal injury" as:

> [O]nly 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;

"The 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." *Day v. John Morrell & Co*., 490 N.W.2d 720, 724 (S.D. 1992). "A medical expert's finding of causation cannot be based upon mere possibility or speculation. Instead, "[c]ausation must be established to a reasonable medical probability." *Orth v. Stoebner & Permann Const*., Inc., 2006 SD 99, 34, 724 N.W. 2d 586, 593 (citation omitted). Additionally, "our law does not require objective findings in order to sustain a workers' compensation claim." *Vollmer v. Wal-Mart*, 729 N.W.2d 377, 385 (S.D. 2007). The proper standard is a preponderance of the evidence. *Wise v. Brooks Constr. Serv*., 2006 SD 80, 721 N.W.2d 461, 466.

To be entitled to benefits, Smith must show that his current condition is the result of a workplace injury. While his medical record shows a clear increase in Smith's medical treatment for shoulder pain following the date of March 20, 2014, there is no reference to a fall off a ladder in the medical record until August of 2015. Smith states his first medical visit following his alleged injury was to his chiropractor Berg on April 4, 2014. Berg noted on the record for that day that Claimant had reported to him, "The pain in my left shoulder is similar to pain I had when I tore my right rotator cuff a few years ago but it isn't as intense." The note does not include any mention of a ladder injury or any other workplace injury.

Smith saw multiple medical professionals and received various treatments including chiropractic treatment, physical therapy, and surgery. As part of the Smith's visit to Swann on April 10, 2014, he filled out a "patient complaint" form. The form asked him to describe the accident or injury. Smith wrote, "Pain started about three months ago." Claimant did not write anything about falling off a ladder.

Claimant saw Dr. Robert Wenger on August 12, 2014. Wenger notes that Claimant mentioned he "had some mild pain in his right shoulder for a long time. The left shoulder seems to be aggravated by getting in different positions of work when he works as a mechanic." Wenger's notes do not reference a fall off a ladder.

On August 27, 2014, Claimant saw Dr. Travis Liddell at Core Orthopedics. Claimant was asked to complete a primary concern form at both visits. He circled "No" when asked whether his pain or symptoms started after a specific injury. When asked "Did your pain or symptoms start after a specific injury', he circled "Yes" and when

asked to describe the injury, he only wrote "last year." He did not mention falling off a ladder.

At a visit on July 31, 2015, Wenger noted: "He is trying to get a note from Dr. Liddell saying that his injury is related to work, so far he has a note saying possibly it could be. He does remember an incident where he fell off a piece of equipment, it was witnessed by his supervisor, but at first he did not think he had an injury and it kind of started hurting several days after that. When I first saw him with the shoulder he did not mention any injury at that time."

Liddell opined that Claimant's employment-related activities at Myrl & Roy's were a major contributing cause of his bilateral shoulder complaints on June 24, 2015.

Liddell noted on August 20, 2015, that Smith wanted Liddell to make a clarification in his record that the shoulder problems were related to a work-related injury. At that visit when filling out paperwork, Smith stated he had pain since April of 2014, that the pain or symptoms started after a specific injury, and described the injury as "had a ladder knocked from under me." This marks the first primary concern form that mentions a fall from a ladder.

It is Claimant's burden to prove that the claimed injury is the cause of his current condition. The Department is not persuaded by the record that a work-related injury is the cause of Smith's condition. Starting around March or April 2014, Claimant needed ongoing care for his shoulder. However, this does not prove that a work-related injury occurred to cause this need for medical care. Smith did not note the ladder incident when filling out medical paperwork over the course of many visits. He reported to Swann on April 10, 2014, that, "[p]ain started about three months ago" which would set the beginning of his pain back significantly before the alleged injury date of March 20, 2014. Claimant appears to be very unclear about when and how the pain started. The fact that Liddell has concluded that work place activity is the major contributing cause of Smith's current condition is unpersuasive primarily because it relies on Smith's unclear and inconsistent account of his own injury. Smith has not sufficiently proven that he experienced a workplace injury that resulted in his current condition.

Entitlement to Benefits

Smith failed to provide proper notice to Myrl & Roy's regarding his alleged workplace injury, and further, he has not shown that such an injury is the cause of his current condition. Therefore, Smith is not entitled to workers' compensation benefits.

Conclusion:

Larry Smith did not properly provide notice to Myrl and Roy's about his alleged workplace injury, he has not proven that a workplace injury is the cause of his current condition, and therefore, he is not entitled to workers' compensation benefits including

Temporary Total Disability, Permanent Partial Disability, medical, and vocational benefits.

Counsel for Employer and Insurer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Claimant shall have an additional twenty (20) days from the date of receipt of Employer and Insurer's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own 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, Employer and Insurer shall submit such Stipulation along with an Order consistent with this Decision.

Dated this __1___ day of February, 2019.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle M. Faw

Michelle M. Faw
Administrative Law Judge