

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

**GLORIA WYSUPH,**

**HF No. 290, 2001/02**

**Claimant,**

**DECISION**

vs.

**CONSECO FINANCE CO.,**

**Employer,**

and

**CHUBB GROUP,**

**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 January 26, 2006, in Rapid City, South Dakota. Gloria Wysuph (Claimant) appeared personally and through her attorney of record, Marcia Whiting. Patricia A. Meyers represented Employer and Insurer (Employer). Employer raised the issue of whether Claimant provided timely notice pursuant to SDCL 62-7-10 and Claimant requested payment for certain medical expenses.

**FACTS**

The Department finds the following facts, as established by a preponderance of the evidence:

1. At the time of the hearing, Claimant was fifty-seven years old and lived in Black Hawk, South Dakota.
2. Claimant has a Bachelor of Science degree in sociology and psychology and has seventeen credits towards a Master's degree. Claimant has never been employed in her field of study.
3. Claimant was diagnosed with Type I diabetes in 1983. Claimant had trouble controlling her diabetes because she was in denial about her condition. Claimant stated "I didn't want to hear about it. I didn't want to deal with it. I didn't want to follow the diet. I took the shots, but I didn't want to discuss it or I didn't want to hear about it[.]"
4. Claimant did not join a diabetic support group and she does not have any family member or friends who also suffer from diabetes.
5. Dr. Steven Stocks, an internist, has been Claimant's primary care physician for her diabetic condition.
6. Claimant started working for Employer as a customer service representative on April 26, 1995. At that time, Employer was known as Green Tree Financial.

7. Claimant worked in various departments for Employer and handled telephone calls and performed continuous data entry in all her jobs.
8. Claimant was provided with a copy of Employer's handbook and was aware that she had to report any injury within three business days after its occurrence.
9. In 1997, Claimant experienced tingling symptoms in the palm of her right hand as she planted shrubs in her yard. The tingling sensation lasted only a few seconds. At the time, Claimant did not give much thought to her condition because she assumed the tingling was related to performing yard work.
10. Over the next few years, Claimant continued to experience the tingling sensation in her right hand and it "started lasting longer as time went on."
11. At some point, Claimant also experienced numbness in her right hand.
12. In 2001, Claimant noticed her right hand symptoms were "getting pretty bad." Claimant stated "[t]he numbness was lasting a lot longer, and it was hard to even take a shower because I couldn't move the fingers very much. And, of course, then my mother was really sick and so I just put it off. I didn't even want to deal with it."
13. In the fall of 2001, Claimant's right hand symptoms continued to increase. Claimant also remained in denial about the seriousness of her diabetic condition and struggled with the death of her mother. Claimant continued to attribute her hand symptoms to her diabetic condition.
14. Claimant was able to perform her duties for Employer and did not miss any work despite the persistent right hand symptoms.
15. Claimant began to experience numbness and tingling in her left hand in early 1992.
16. Claimant did not seek medical treatment for her hands because she thought the symptoms were related solely to her diabetic condition. Claimant stated "[a]ll I had ever heard about diabetics was that they got nerve damage and then they had to have amputations. And I was scared to talk about it. I didn't want to hear about it, and so I just put it off as long as I could."
17. In the spring of 2002, Claimant finally reached a point where she thought it was time to seek medical treatment because her "hands were so numb during the night that they were painful, and [she] wasn't sleeping." Claimant added, "[a]nd like I said, in 2002, it was just so bad I was losing sleep. And . . . I was scared it would start to affect my work."
18. Claimant continued to think the symptoms in her hands were caused by her diabetic condition. Claimant credibly testified, "I always thought it was just related to diabetes."
19. Claimant saw Dr. Stocks on Monday, April 15, 2002. Dr. Stocks noted "Gloria is here today because she is just not doing well overall. She is depressed. She has trouble concentrating. Her work is stressful. Her blood sugars are poorly controlled." Dr. Stocks provided Claimant with an authorization to take a medical leave from work for thirty days.
20. Claimant testified that during the April 15<sup>th</sup> appointment, she and Dr. Stocks discussed the symptoms in her hands. Claimant stated "I told him that it started with tingling a few years ago and had been getting worse and worse. And then it turned into numbness and that now they were numb during the night and it was so painful that I couldn't sleep. And I told him that I didn't tell him before because

- I thought it was related to diabetes, and I was scared he'd tell me I had to have my fingers amputated.”
21. Claimant testified that Dr. Stocks informed her that her hand condition was probably not related to diabetes, but that her condition might be carpal tunnel syndrome and it might be related to her work. Claimant stated “He put it like, have you thought that it could be work-related, or he said it could be work-related. It was - - he didn't say specifically that he thought it was, and then he just suggested that I see a neurologist.”
  22. Dr. Stocks' records do not contain any references that he and Claimant discussed the symptoms in her hands, her job duties or that she might have carpal tunnel syndrome.
  23. Dr. Stocks did not provide any treatment to Claimant for the symptoms in her hands. But, Dr. Stocks did refer Claimant to Dr. Heather Cwach, a neurologist, for an examination of Claimant's bilateral hand numbness.
  24. On April 16, 2002, Claimant completed Employer's Leave of Absence Request form. Claimant provided her reasons for requesting leave as “depression due to medical problems: diabetes out of control . . . [and] possible carpal tunnel syndrome . . . .”
  25. Some time between the April 15<sup>th</sup> appointment with Dr. Stocks and April 22<sup>nd</sup>, Claimant spoke with her sister, who suffered from carpal tunnel syndrome a few years earlier.
  26. Claimant's appointment with Dr. Stocks and the conversation with her sister prompted Claimant to think that she should file a report with Employer. Claimant stated “talking to her about when she had carpal tunnel and thinking then, well, it could be work-related; maybe I should file a report.”
  27. Claimant's sister also sent Claimant splints to wear on her hands. Claimant tried using the splints, but her condition did not improve.
  28. On Monday, April 22, 2002, Claimant notified Employer's HR Manager that she was experiencing problems with her right arm.
  29. Based upon Claimant's report, Employer's HR Manager completed an “Injury Worksheet.” Claimant informed Employer that the date of accident was “unknown.” Claimant also indicated that she “has had problems for 2 [years].”
  30. Claimant provided a description of her injury as “experienced pain in [right] forearm, goes numb after extended use or if sleeping on it. Getting worse – at night – fine during the day. Started about 2 [years] ago – worse since gardening. Also bad in a.m.”
  31. Claimant took a medical leave of absence from work for one month, from April 30, 2002, through June 3, 2002.
  32. Employer began conducting an investigation and on May 3, 2002, Scott Otten, a claims representative for Insurer, took a recorded statement from Claimant. Claimant informed Otten that her symptoms began in 1997, but she thought the symptoms were caused by her diabetic condition.
  33. Claimant saw Dr. Cwach on June 10, 2002. Claimant informed Dr. Cwach that she began having numbness and tingling in her right hand in 1997 and numbness and tingling in her left hand beginning in 2002.
  34. Dr. Cwach examined Claimant and concluded that “[t]his may be carpal tunnel syndrome.” Dr. Cwach referred Claimant for nerve conduction studies. Dr.

- Cwach stated “[s]he has already tried a wrist splint which did not help. If the nerve condition studies show carpal tunnel syndrome, we will probably need to refer her to a surgeon for a carpal tunnel release.”
35. Claimant filed her Petition for Hearing with the Department on June 11, 2002. Claimant alleged that she suffered an injury on January 1, 1997. Claimant described her injury as “tingling & numbness started in right hand sporadically & has worsened over the years & now left hand is going numb also; when it started it was just a few seconds each time, therefore, wasn’t reported to employer within 3 days[.]”
  36. Dr. Brian Tschida, a neurologist in Rapid City, performed an EMG nerve conduction study on June 19, 2002, “to further evaluate bilateral hand pain and numbness and tingling.”
  37. Dr. Tschida concluded “[t]his study reveals evidence of severe right median nerve dysfunction of the type seen in severe carpal tunnel syndrome. On the left side, there is evidence for moderately severe carpal tunnel syndrome again with both motor and sensory involvement. Certainly surgical intervention on the right side needs to be seriously considered now. Surgery on the left side also can be definitely considered based on these numbers.”
  38. Claimant learned on Friday, June 21, 2002, that she had bilateral carpal tunnel syndrome. Claimant filed a First Report of Injury with Employer on Tuesday, June 25, 2002. Claimant described the injury as “tingling & numbness in both hands; diagnosed with carpal tunnel – severe in right hand, moderate in left.” Claimant provided the date of injury as “spring 1997 – no specific date.”
  39. Dr. Dale Anderson, an orthopedic surgeon, performed right carpal tunnel surgery on July 11, 2002, and left carpal tunnel surgery on September 26, 2002.
  40. Claimant missed only two days of work for each surgery.
  41. On January 17, 2003, Dr. Stocks wrote in his medical records, “[t]his letter is to certify that Gloria Wysuph has severe hand pain due to carpal tunnel syndrome. This is in both hands as a result of years of typing and computer keyboard work. There can be no doubt as to the relationship of these symptoms and her work.”
  42. Claimant currently works for Employer as a collection assistant.
  43. Claimant was a credible witness. This is based on her consistent testimony and on the opportunity to observe her demeanor at the hearing.
  44. Other facts will be developed as necessary.

## ISSUE

### WHETHER CLAIMANT PROVIDED TIMELY NOTICE PURSUANT TO SDCL 62-7-10?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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). The notice requirement is governed by SDCL 62-7-10. This statute provides:

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.

"In order to collect the benefits authorized by the South Dakota Legislature, a worker must meet the requirements of state statute." Aadland v. St. Luke's Midland Regional Medical Ctr., 537 N.W.2d 666, 669 (S.D. 1995). "Notice to the employer of an injury is a condition precedent to compensation." Loewen v. Hyman Freightways, Inc., 557 N.W.2d 764, 766 (S.D. 1997).

The purpose of the notice requirement is to provide Employer the opportunity to investigate the cause and nature of Claimant's injury while the facts are readily accessible. Schuck v. John Morrell & Co., 529 N.W.2d 894, 897 (S.D. 1990). "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." Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶ 24 (citation omitted).

The statute is clear that written notice must be provided within three business days after the occurrence of the injury. Claimant's condition was gradual and progressive in nature and there was no specific date of injury. "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 Hosp., 551 N.W.2d 817, 820 (S.D. 1996). The "reasonableness of a claimant's conduct 'should be judged 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.'" Loewen, 557 N.W.2d at 768.

The South Dakota Supreme Court has previously held "that the duty to notify [an] employer did not arise until the date when the compensable injury was known to [claimant]." Vu v. John Morrell & Co., 2000 SD 105, ¶ 23 (citing Pirrung v. American News Co., 67 N.W.2d 748 (S.D. 1954)). The court also stated:

[T]he fact that [claimant] suffered from pain and other symptoms is not the determinative factor and will not support a determination that respondent had knowledge of the existence or extent of [her] injury. A claimant cannot be expected to be a diagnostician and, while he or she may be aware of a problem, until he or she is aware that the problem is a compensable injury, the statute of limitations does not begin to run.

Id. at ¶ 24 (citing Bearshield v. City of Gregory, 278 N.W.2d 164, 166 (S.D. 1979)).

Claimant provided Employer with written notice of her condition on two separate occasions. Claimant first provided Employer with notice of a claim on April 22, 2002, when she informed Employer's HR Manager about the symptoms in her right arm. Employer completed an Injury Worksheet on the same day and provided it to Insurer. Insurer began an investigation of Claimant's claim. Claimant also provided Employer with written notice of her injury on June 25, 2002, when she completed the South Dakota Employer's First Report of Injury. Claimant completed this form within three business days after she was informed that she, in fact, had bilateral carpal tunnel syndrome.

There is no dispute that Claimant began to experience pain symptoms in her right hand in 1997. But, the time period for notice did not begin to run because Claimant did not recognize the nature, seriousness and probable compensable character of her injury. At the time, Claimant associated the tingling in her right hand with performing yard work. As the symptoms in her right hand persisted and gradually increased, Claimant attributed the pain to her diabetic condition. Claimant did not associate the symptoms in her hands with her work for Employer. As Claimant credibly testified, she "always thought" the problems with her hands were caused by her diabetic condition. Claimant's belief was reasonable given her understanding of her diabetic condition and that she was in denial about the seriousness of her diabetic condition. Claimant poorly managed her diabetes, she did not join a support group and she did not have any friends or family who suffered from diabetes. Claimant did not discuss the symptoms in her hands with Dr. Stocks because she feared the loss of her fingers or hands. Claimant did not attribute the pain in her hands to her work activities because she was able to perform her duties for Employer and did not miss any work due to the symptoms in her hands.

In April 2002, Claimant finally decided to seek medical treatment for her hands because she was concerned that her pain and symptoms might start to impact her job performance. Claimant remained in denial about the seriousness of her diabetic condition and maintained that her diabetes was the cause of the problems with her hands. Despite the fact that Claimant decided to seek medical treatment, she still did not recognize the nature, seriousness and probable compensable character of her injury.

On April 15, 2002, Claimant spoke with Dr. Stocks about the problems she was experiencing with her hands. On this date, Claimant finally learned that her diabetic condition was probably not the cause of the numbness and tingling in her hands. Dr. Stocks informed Claimant that her pain complaints might be caused by carpal tunnel syndrome and the pain complaints might be related to her work. Even though Claimant and Dr. Stocks discussed a possible diagnosis and a possible cause of her pain complaints, Claimant still did not recognize the nature, seriousness and probable compensable character of her injury on April 15, 2002. Claimant did not know if she had bilateral carpal tunnel syndrome. All Claimant knew after the appointment was that her pain complaints were not caused by her diabetic condition and that Dr. Stocks thought she should see a neurologist.

After her appointment with Dr. Stocks, Claimant spoke with her sister on the telephone. Claimant's sister suffered from carpal tunnel syndrome several years earlier. This conversation prompted Claimant to begin thinking that her symptoms might be

related to her work activities. Claimant credibly testified, "I believe it was due to a conversation I had with my sister and talking to her about when she had carpal tunnel and thinking then, well it could be work-related; maybe I should file a report." Claimant filed a report with Employer on April 22, 2002.

Even though Claimant provided a written report to Employer on April 22, 2002, Claimant still did not recognize the nature, seriousness and probable compensable character of her injury. It was not until Dr. Tschida definitively diagnosed Claimant with bilateral carpal tunnel syndrome that she recognized the nature, seriousness and probable compensable character of her injury. Claimant was notified of the diagnosis on Friday, June 21, 2002. Claimant promptly and timely filed a First Report of Injury with Employer on Tuesday, June 25, 2002.

Claimant recognized the nature, seriousness and probable compensable character of her injury on June 21, 2002. As of this date, Claimant still did not know whether her bilateral carpal tunnel syndrome was work-related. No doctor had expressed an opinion yet as to whether Claimant's condition was work-related. Even so, Claimant knew that she had to report any injury to Employer. Claimant previously filed a written report on April 22, 2002, when she suspected her pain symptoms might be related to her work activities. As of April 22, 2002, Employer was alerted to the possibility of a claim. Employer promptly began its investigation as evidenced by the recorded statement taken by Insurer's claims representative. Claimant then provided written notice when she was definitively diagnosed with bilateral carpal tunnel syndrome. Employer received timely notice of Claimant's injury pursuant to SDCL 62-7-10 and Employer was provided with ample opportunity to investigate this claim. Claimant is entitled to payment of medical expenses as set forth in Exhibit 9.

Claimant shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Employer shall have ten days from the date of receipt of Claimant's proposed Findings and Conclusions to submit objections 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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 27<sup>th</sup> day of April, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp  
Administrative Law Judge