SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DANIEL M. WRICH, **HF No. 37, 2006/07**

Claimant,

v. **DECISION**

UNITED BUILDING CENTERS,

Employer,

and

TRAVELERS INDEMNITY COMPANY OF AMERICA,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. A bifurcated hearing was held in this matter on December 15 and 16, 2009 in Sioux Falls, South Dakota. Daniel M. Wrich, Employee and Claimant (Claimant) was present and represented by his attorney N. Dean Nasser. Employer, United Building Centers (Employer) and Insurer, Travelers Indemnity Company of America (Insurer) were represented by their attorney, Kristi Geisler Holm.

ISSUES:

(1) Whether Claimant suffered a work-related injury while employed by Employer?

(2) Whether Employer received timely notice of this injury?

FACTS:

Claimant, at the date of hearing, is a 52-year old man with a high-school education. Claimant is married to Rita Wrich and lives in Larchwood, Iowa. He was hired by Employer on May 22, 2006 and received training regarding Employer's policies and procedures. Claimant has held a variety of jobs during his adulthood, mostly involving construction or trucking.

Claimant has a Class A Commercial Drivers License (CDL) and is able to drive any motor vehicle within the restrictions set down by law. During his employment, Claimant was one of two employees with Employer to possess a Class A CDL. In the summer of 2006, Employer had a large double-axle combination truck and tractor that could only be driven with those in possession of a Class A CDL (hereinafter, the tandem truck). In addition to the items to be delivered, this tandem truck always carried a fork-lift that could be used by the driver in unloading the delivery.

On August 2, 2006, Claimant was employed with Employer. Claimant's supervisor was Troy Doeden, the general manager for Employer. On August 2, 2006, Claimant was assisting co-workers with strapping down a truck load of foam. Claimant was attempting to throw a 25-foot tie-down strap across the load and was unable to do so. Claimant's co-worker told Claimant that he "threw like a girl." Claimant became upset and went into Mr. Doeden's office. Claimant told Mr. Doeden that if Claimant could be told he threw like a girl, then he had a right to report his work-related injury.

Claimant related to Mr. Doeden that on the day he delivered a load of siding to the "Feickema project" near Rock Rapids, Iowa, he drove the tandem truck over some railroad tracks and injured his shoulder. Claimant said the date was a few weeks earlier, sometime in July, 2006. Claimant could not recall the exact date, but knew it was after July 4, 2006. Mr. Doeden, an office assistant, and Claimant narrowed the date down to July 18, based upon the dates of the deliveries to Rock Rapids. Mr. Doeden took down the information and asked Claimant to fill out a first report of injury form. Weeks later, Mr. Doeden looked through the time sheets and realized that Claimant did not work on July 18, but did work on July 19. Claimant had also been driving the tandem truck to different project sites on July 19. Mr. Doeden changed the dates on the first report of injury to July 19.

Claimant specified that the location of the incident took place on "Highway 116 by RR track on North side of Donnie Javers place." Claimant reported that when he drove

over the railroad tracks, the truck bounced his head to the roof of the tractor cab and the seat belt locked down on his left shoulder. Claimant reported that his left shoulder was still swollen and his left hand was tingling. After unloading the siding at the project and returning to the work yard, Claimant related to a co-worker, Terry Oldenberg, that the truck ran hard and drivers had to watch how they drove over bumps. Mr. Oldenberg does not recall the date of that conversation, but does recall that the conversation took place. At the time of the incident, Claimant did not tell Mr. Oldenberg that he had sustained an injury. On August 2, at the time he reported this injury to Mr. Doeden, this was the only incident that was reported by Claimant, as causing an injury to his shoulder or neck. Claimant told Mr. Doeden that Claimant realized he was injured from the truck incident, when he was unloading a truckload of shingles. Claimant did not claim he was injured while unloading the shingles, but only that the pain felt at that time must have been caused by the truck incident in July. The First Report of Injury does not mention that Claimant was unloading shingles or that he was injured while unloading shingles.

The next day, August 3, 2006, Mr. Doeden faxed Claimant's statement and his own statement to the corporate office. On August 3, 2006, Claimant and Mr. Doeden went to the Tea Medical Clinic and saw Certified Nurse Practitioner Brenda Wills. Claimant reported the same story to CNP Wills. Claimant may have mentioned he was unloading shingles at the time he became aware of the injury that was caused the month prior. CNP Wills did not write down or dictate any information regarding Claimant unloading shingles on August 2. Mr. Doeden accompanied Claimant to the Tea Clinic to ensure that Claimant received information regarding his ability to work or any work restrictions. CNP Wills gave Claimant work restrictions for seven days and prescribed pain medication and muscle relaxants. CNP Wills also ordered an x-ray of Claimant's left shoulder which was taken on August 3.

On August 3, Employer gave Claimant a written disciplinary action notice for failing to report an injury as soon as Claimant knew it happened. Employer's policy is that all injuries must be reported to the center manager "as soon as possible." The supervisors

who testified at hearing will generally have their employees make a first report of injury within 48 hours of an injury. For instance, if a muscle injury occurs, Employer's supervisor would tell an employee to report the injury if the pain does not go away. Employer prefers that all injuries or incidents be reported within 24 hours.

Claimant was unable to perform his usual tasks for Employer during the week of August 2 to 10. Claimant reported to work on August 4 and 5. He performed menial tasks such as dusting displays or picking up garbage in the parking lot.

On August 8, Claimant saw an orthopedist at the Orthopedic Institute. The orthopedist gave Claimant a restriction of light work with a lifting restriction of 20 pounds. The cover sheet for the return to work form, lists July 19 and August 2 as the dates of injury. The dates were on the cover sheet when it was received by Employer on August 11.

On August 9, 2006, Insurer wrote Claimant a letter denying coverage under workers' compensation. Employer telephoned Claimant that same day and spoke with him about Insurer's decision to deny coverage. Employer told Claimant that if he was able to come back to work that week without restrictions that Employer had work available.

On August 11, 2006, Claimant came into work in the morning. He gave Employer a copy of the Orthopedic Institute return to work form along with the cover sheet. Employer and Claimant had a brief conversation about an injury that Claimant was now reporting had occurred on August 2 while delivering shingles. Employer, to that date, had not been told by Claimant that he was also injured on August 2.

Employer met with his corporate human resources office on August 11. Employer made the decision to discharge Claimant and a letter was sent to Claimant. Employer expected Claimant to perform his previous duties without restrictions and Claimant could not do so.

Additional facts will be developed in the issue analyses below.

ISSUE ONE: Whether Claimant suffered a work-related injury?

The first issue is whether Claimant suffered a work-related injury. The SD Supreme Court, in the case of *Gerlach v. State*, 2008 SD 25, has summarized the requirements under the law necessary for a Claimant to sustain a claim for workers' compensation benefits:

> When applying for workers compensation benefits [Claimant] bears the burden of proving a causal connection between his condition and his work-related injury. *Wise v. Brooks Constr. Serv.,* 2006 SD 80, 21, 721 NW2d 461, 468. SDCL 62-1-1(7) provides that a compensable injury must be established by medical evidence, and that [n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of. Whether [Claimant's] employment was a major contributing cause of his condition is necessarily a question of fact.
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> > In applying the statute, we have held a workers compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of his employment. We have further said South Dakota law requires [Claimant] to establish by medical evidence that the employment or employment conditions are a major contributing cause of the condition complained of. A possibility is insufficient and a probability is necessary.
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> *Wise*, 2006 SD 80, 21, 721 NW2d at 468 (internal citations omitted).

Gerlach, 2008 SD 28, ¶7.

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 evidence necessary to support an award must not be speculative, but rather must be precise and well supported. *Horn v. Dakota Pork*, 2006 SD 5, 14, 709 NW2d 38, 42.

Claimant claims two injuries; the first occurring on July 19 and the second on August 2. The first injury claimed is that of a shoulder injury from driving over a railroad track on the route to a specific job site outside Rock Rapids, Iowa. The second injury is that of a neck injury sustained while unloading shingles.

Employer contests that the first injury took place on the date and in the geographic location reported by Claimant. Employer's contention is that Claimant could not have received the reported injury on July 19 as Claimant was not in the described location on July 19. The Supreme Court has made clear that a claimant must show that the injury was one arising out of and in the course of his employment. *Westergren v. Baptist Hosp.,* 1996 SD 69, 549 NW2d 390. The Supreme Court has consistently interpreted the statutory language 'in the course of' to refer to the time, place and circumstances of the injury. *Mudlin v. Hills Material Co.*, 2005 SD 64, ¶15, 698 NW2d 67, 73; *Zacher v. Homestake Mining Co.¸* 514 NW2d 394, 395 (SD 1992); *Krier v. Dick's Linoleum Shop,* 78 S.D. 16, 119, 98 nW2d 486, 487 (1959); SDCL 62-1-1(7).

All deliveries made by Employer are logged into a delivery log book. This log book is kept in the normal and regular course of business by the dispatcher, Jeff Petersen. All deliveries are accompanied by a sales invoice. The delivery driver regularly initials the invoice when the delivery is completed. A copy of the invoice is brought back to Employer for billing purposes. Mr. Petersen admits that mistakes can occur in the logbook; however, the invoices are only initialed by the drivers who made the delivery. Drivers do not initial invoices or take responsibility for a delivery they did not make.

Employer's records indicate that Claimant did not deliver a load of siding to the Feickema jobsite outside of Rock Rapids, Iowa on July 19, 2006. Employer's delivery log book shows that Claimant was making other deliveries at the time the siding was delivered to the Rock Rapids jobsite. Claimant's initials also appear on the sales invoices of those deliveries in Sioux Falls. Another employee, Reuben Sundheim, initialed the invoice of the siding to Rock Rapids and his name is listed in the log book

as the driver. The logbook times for the Mr. Sundheim's delivery to Rock Rapids are wrong; the time it takes to drive to Rock Rapids and return does not match the logbooks times for leaving and arriving. Mr. Sundheim credibly testified that he would not have initialed an invoice of a delivery he did not make. Claimant remembers delivering siding to the Rock Rapids site, but does not recall the date. He suspects it was on July 18 or 19, but there is no paperwork which shows Claimant took that delivery. Claimant was driving the tandem truck on July 19, but he did not drive a load to the Rock Rapids jobsite on July 19. Claimant did not work on July 18.

Claimant's presented credible testimony that he remembered making deliveries to the Rock Rapids project. However, those deliveries, according to the delivery logs and invoices, would have to have been made on a day other than July 18 or 19, 2006. Claimant is claiming that he sustained an injury on July 19, but the records do not corroborate his report.

Claimant must prove all elements of his case by a preponderance of the evidence. Where the evidence is not conclusive, or the probabilities are equal, Claimant fails to meet his burden by a preponderance of the evidence. *Enger v. FMC,* 565 NW2d 79, 84 (SD 1997); *Hanten v. Palace Builders, Inc.,* 1997 SD 3 ¶9, 558 NW2d 76, 78. "While the worker's compensation act is to be liberally construed in favor of the claimant, this rule applies to the law and not to the evidence offered to support the claim." *Hanten,* 1997 SD 3, ¶10, 558 NW2d at 78; *Wold v. Meilman Food Industries, Inc*., 269 NW2d 112, 116 (SD 1978); and *Podio v. American Colloid*, 83 SD 528, 534, 162 NW2d 385, 388 (1968)).

Claimant has not proven, by a preponderance of the evidence, that his left shoulder injury arose out of and in the course of his employment on July 19, 2006. The preponderance of the evidence shows that Claimant was not driving Employer's tandem truck over the railroad tracks near Rock Rapids, Iowa on July 19, 2006. Claimant was driving the tandem truck on another delivery in Sioux Falls at the time the delivery went to the Rock Rapids project.

In regards to the second injury, Claimant has shown, by a preponderance of the evidence, that he was unloading shingles on August 2, 2006. That he was at work unloading shingles on August 2, 2006, is not being denied by Employer.

ISSUE TWO: Whether Employer received timely notice of an injury?

The second issue that Claimant must prove is that he notified his employer of his injuries in a timely manner. SDCL § 62-7-10 sets the time deadlines for employees to report work-related injuries to employers. The statute is as follows:

> 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
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> (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.

The notice requirement is in law for a reason. As the Supreme Court stated, "In addition to the statutory record keeping and filing requirements imposed on the employer, one of the purposes of the notice statutes is to allow the employer the opportunity to investigate the cause and nature of the injury at the time when the facts are readily accessible." *Mudlin v. Hills Materials*, 2005 SD 64, ¶24, 698 N.W.2d 67, 74-75 (2005). Claimant's failure to immediately notify Employer of his initial shoulder injury in July is the foundation for the denial by Insurer. Furthermore, Employer denies the second claimed injury as Claimant failed to immediately notify Employer that he was injured due to his unloading shingles. Claimant did not notify Employer of the August 2

injury until August 9. On August 2, Claimant told Employer that he realized his July injury occurred while unloading shingles. However, Claimant did not say that the unloading of shingles was a separate injury incident until August 9, more than three days after the incident.

Claimant's premise is that he did not know the July incident was compensable until August 2. Furthermore, Claimant's premise is that the August 2 incident was the basis for the initial reporting and that he reported the August 2 injury at the same time as he reported the July incident. Claimant admits that at the time of the reporting and his initial medical appointment, he focused on the tandem truck incident as the cause of the pain and not the shingle episode.

Claimant testified that did not have an opportunity to write a statement in regards to the shingle unloading episode. Employer denies that Claimant's reporting or statements were limited by Mr. Doeden. Claimant wrote a statement on the front and back side of a form before turning it into Mr. Doeden. Claimant had the opportunity to tell Mr. Doeden that his neck was injured while unloading shingles, but he did not do so. Claimant did not prepare any further written report regarding the August 2 incident for submission to the Insurer. Later, Claimant admitted to Mr. Doeden, and the statement of admission is supported by eyewitnesses, that Claimant sometimes takes awhile to think of things.

The South Dakota Supreme Court has clarified SDCL §62-7-10 and the test created within the law. In *Orth v. Stoebner & Permann Construction, Inc*., 724 NW2d 586 (S.D. 2006), the South Dakota Supreme Court overruled the Circuit Court that decided the employer had not received actual notice of the injury from the claimant. *Orth* at ¶63. The notice question is the threshold question in a workers' compensation case. *Orth* at ¶55. To this end, the Court wrote:

> Notification of an injury, either written or by way of actual knowledge, is a condition precedent to compensation. *Westergren*, 1996 SD 69, ¶17, 549

> NW2d at 395. The purpose of the written notice requirement is to give the employer the opportunity to investigate the injury while the facts are accessible. *Id.* at ¶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 at ¶ 52-53.

Employer did not have actual knowledge of Claimant's shoulder injury based upon his statement to the yard supervisor, Terry Oldenberg. Claimant has testified, and has claimed in the alternative, that his statement to Mr. Oldenberg, regarding the tandem truck, was notice to Employer. Claimant's statement was something to the effect that the tandem truck rode hard. Claimant did not elaborate on that statement to Mr. Oldenberg in any way. Claimant did not mention that he sustained any sort of injury to his shoulder or his head in any manner. Claimant only spoke about how the truck rode hard over bumps in the road. Furthermore, the specific date Claimant made this statement to Mr. Oldenberg is not clear. Mr. Oldenberg recalls the conversation but does not recall the exact date. Claimant testifies the date was July 19, as that is the date he believes he made that delivery to Rock Rapids, Iowa. The record is not clear or precise on the facts regarding Claimant's delivery of siding to Rock Rapids.

Most recently, the Supreme Court has ruled on the notice issue and when an injured employee is required to give notice to his employer. The Court wrote:

> 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 NW2d 685, 689 (quoting *Miller v. Lake Area Hosp.,* 1996 SD 89, ¶14, 551 NW2d 817, 820 (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*, 2000 SD 123, ¶42, 616 NW2d 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'" (citation omitted)).

McNeil v. Superior Siding, Inc., 2009 SD 68, ¶8, 770 NW2d 345, 348. The *McNeil* case follows a long line of precedent regarding this issue. In the leading case of *Bearshield v. City of Gregory*, 278 N.W.2d 164 (SD 1979), the South Dakota Supreme Court reasoned:

> [T]he fact that [employee] suffered from pain and other symptoms is not the determinative factor and will not support a determination that [employee] had knowledge of the existence or extent of his 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 166.

Claimant is a high-school educated person who has worked in manufacturing and trucking jobs for most of his adult life. Claimant has sustained a number of injuries over the years that were covered by workers' compensation insurance. Specifically, Claimant reported at least three injuries when he worked for John Morrell & Company (Sioux Falls, SD), one back injury while working for K-Concrete (an Illinois company), and he reported an eye injury to Employer on July 20, 2006, just a day after the tandem truck incident supposedly occurred. Claimant has been involved in two different lawsuits involving workers' compensation, the first for the back injury and the second for a groin injury at John Morrell's. Claimant has experience in claiming and collecting workers' compensation insurance due to workplace injuries.

Throughout discovery for this case and during the hearing, Claimant testified to the fact that he had gone over the railroad tracks on July 19, 2006 and had hit his head on the roof of the cab. He further testified that he sustained an injury to his left shoulder. Claimant continued to work between the dates of the railroad incident and August 2, although his shoulder ached during that time. Claimant did not miss work due to a sore neck or shoulder prior to August 2. On July 20, Claimant saw a medical provider for an eye injury. Claimant did not mention to the medical provider that he had hurt his head and shoulder the day prior. On August 3, Claimant told CNP Wills that the left shoulder was swollen and that his fingers were tingling in his left hand. Claimant's testimony is that his shoulder progressively got worse and that the shingle incident on August 2 caused an aggravation to the injury. Due to the late date of notice, Employer and Insurer were unable to investigate the matter fully. Employer had to look up potential dates that Claimant was injured. Claimant had already forgotten which date in July the incident occurred.

A reasonable person of Claimant's education, intelligence, and experience would have reported a compensable injury within the three day deadline. However, as the testimony and record indicate, Claimant did not know that the shoulder injury from the railroad track incident was compensable until August 2. Claimant knew Employer's expectations in regards to notification of injuries. Claimant had made at least one other workers' compensation claim against Employer on July 20, the day after the reported July 18 or 19 injury. Claimant was a new employee and had gone through new employee orientation in late May, 2006.

Due to the conclusion that Claimant has not proven the circumstances surrounding the injury by a preponderance of the evidence, Claimant's claim for benefits for the July 18 or 19 injury is denied. Claimant's notice meets the legal requirement, if Claimant had sustained an injury to his shoulder on the date and in the manner reported, July 18 or 19, 2006, on Highway 116 near Rock Rapids, Iowa. Claimant has

proven that he did not know the injury was compensable until August 2, 2006, when the shoulder injury became aggravated.

On August 2, when Claimant informed Employer of the July 18 or 19 shoulder injury, Claimant filled out a written statement. The following day Claimant went to the Tea Clinic and reported his July 18 or 19 injury to CNP Wills. On August 3, Employer gave Claimant a disciplinary action for failing to report the July 18 or 19 incident in a timely manner. On August 3, Claimant knew or should have known that he was to report all injuries or incidents to Employer immediately. It was not until after Claimant received the radiology report and had met with an orthopedic doctor that Claimant informed Employer he was also injured on August 2. On August 11, Claimant informed Employer that it takes awhile for him to think of these things.

Claimant's testimony regarding the August 2 injury is that he immediately felt a "pop" or pain in his neck. He testified during his pre-hearing deposition on May 16, 2008, "Something pulled in the back of my neck. It's like a strained a muscle back there or something on my neck. My shoulder – it was just kind of …aching and … the shoulder was … real weak. Like I couldn't – when I was lifting those 80-pounders, I got through most of the 28 bundles. It was the last three or four of them, when I was picking them up, my shoulder was ...real sore. … It stung worse then than it did from the seat belt when I hit the bump in the struck." On August 2, Claimant experienced pain in both his left shoulder and his neck or back.

As stated before, and viewed objectively, a reasonable person of Claimant's education, intelligence, and experience would report a compensable claim within a few days of realizing he had a compensable injury. Claimant's statement regarding the neck or back injury leads to a conclusion that Claimant knew that the neck or back injury was compensable at the time it occurred. Claimant did not report to Employer that his neck or back was injured while lifting shingles on August 2, until August 9.

Claimant failed to make a timely report of the August 2 injury to Employer, pursuant to SDCL § 62-7-10. Claimant's claim for workers' compensation due to the injury sustained on August 2, 2006 is denied due to lack of timely notification to Employer.

Counsel for Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Counsel for Claimant shall have an additional 20 days from the date of receipt of Employer/Insurer's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

DONE at Pierre, Hughes County, South Dakota, this _8th___ day of April, 2010

SOUTH DAKOTA DEPARTMENT OF LABOR

_____/s/_____
Catherine Duenwald
Administrative Law Judge