SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

BRETT HOLLER, **HF No. 53, 2003/04**

Claimant, **DECISION**

vs.

**HASE PLUMBING, HEATING &
AIR CONDITIONING, INC.,**

Employer,

and

ACUITY INSURANCE,

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 November 2, 2004, in Aberdeen, South Dakota. Brett Holler (Claimant) appeared personally and through his attorney of record, Thomas P. Tonner. Susan Brunick Simons represented Employer/Insurer (Employer). The sole issue presented was whether Claimant provided timely notice pursuant to SDCL 62-7-10.

FACTS

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

1. Claimant started working for Employer in April 2001 as a laborer. Claimant was not a plumber, but would assist other plumbers as needed on various projects.
2. Employer provided training and information to employees as to the process of reporting work injuries.
3. Larry Bader, an Estimator for Employer, was in charge of Employer's safety program. The safety program and distribution of the safety manual first occurred on October 19, 2001. Claimant attended this meeting and thereafter, he attended other Health and Safety Meetings on several occasions.
4. Claimant testified as follows:

    Q: Was there ever a class or a schooling by Hase that told you what to do if you had a work-related injury?
    A: No, not that I recall.

5. Contrary to Claimant's testimony, on October 19, 2001, Claimant signed an Acknowledgement stating that he received a copy of Employer's Safety Program.

Included within the Safety Program were the Statement of Safety Policy and General Safety Guidelines. Employer advised Claimant and other employees that "[a]ll ACCIDENTS must be reported to your immediate supervisor. If necessary, in-house FIRST AID or professional medical attention will be available. In ALL cases a written report of injury will be completed."

6. Bader confirmed that all employees were instructed to report immediately any accidents or injuries.
7. Jim Hase (Jim), the owner of Hase Plumbing, also testified that Claimant received information and training as to the process of reporting work injuries.
8. Sometime before February 2002, Employer was awarded a job at the 3M plant in Aberdeen. Part of the project included installation of steam and condensate pipe.
9. Claimant and Brad Schilling, one Employer's plumbers, worked on the 3M project during January and February 2002.
10. Schilling was Claimant's supervisor while working on the 3M project.
11. Because Claimant was assigned to work on a project at 3M, he acknowledged receipt of and agreed to abide by 3M's policies. As with Employer's policy, 3M's policy required that any work-related injury be reported immediately.
12. For the 3M project, a total of 105 feet of three-inch steel pipe was ordered. The pipe comes in 21-foot lengths, so a total of five 21-foot pieces were ordered for the entire project.
13. The work orders showed that 70-72 feet of three-inch steel pipe were used in the project by February 20, 2002.
14. Both Schilling's and Claimant's timecards showed that the steam and condensate lines were tested on February 19 and February 20, 2002. According to Schilling, a system is not tested before it is completed. Schilling testified:

    Q: What does it mean when it says you ran the system and the condensate line and tested the system?
    A: That was the day we tested for leaks.
    Q: So what does it mean as far as where you were in the project on the 19th or 20th of February?
    A: Basically we were finished with the project.

    Therefore, the installation of the steam and condensate pipe was completed by February 20, 2002.
15. As of February 27, 2002, only 35 feet of the three-inch pipe remained. According to Schilling, it would be unusual at the end of the project to have more than two complete 21-foot lengths of three-inch pipe leftover. There is no evidence that a full 21-foot piece was returned; therefore, it is unlikely that of the remaining 35 feet, a full 21-foot piece would have remained on the job site on February 27th.
16. Claimant alleged at the hearing that he sustained an injury to his back while moving pipes at 3M on Wednesday, February 27, 2002.
17. Claimant testified that he was working with Schilling on February 27th and that they were "moving pipes and cleaning up things and putting up hangers, hauling stuff back to the shop." Claimant explained:

The pipes we moved, this was at the end of the day, the last thing we did, we'd been moving pipes and doing various things all day at 3M and at the end of the day they had some pipes in another room, a main part of the building and they needed them out of there because they couldn't get back in the corner and that's where they were all, so we were moving them to the new part of the building to get them out of the way and the pipes were big pipes.

18. Claimant stated it took two people to move the pipes because the pipes were approximately twenty-two feet long and extremely heavy.
19. Claimant described the incident as, "[w]hen we were carrying the pipes, I felt a twinge in my body and I didn't really think anything of it that day." Claimant further stated, "[j]ust a tinge through my body, yeah. I mean it wasn't a big singe. It was just like a flash[.]"
20. Claimant testified at the hearing:

Q: How many of these steam pipes would you say you had to move now on the morning of February 27th?
A: We didn't move them in the morning.
Q: Okay, I'm sorry. The day of February 27th?
A: How many did we move?
Q: Yes.
A: Quite a few. I don't remember exact - - the exact number. There was quite a few of them.
Q: Well, can you - - understanding that it's an estimate because quite a few means something different to everybody, was it two, was it four, less than ten, give us your best estimate of how many of the large heavy steam pipes you moved on February 27th?
A: I'm going to say maybe a half a dozen. I don't - -
Q: Okay. So your best estimate is about six?
A: I would say, yes. I mean I don't know for sure. We just moved them until they were all gone.
Q: More than one long one?
A: Yes.
Q: More than two?
A: Yes.

21. At the hearing, Claimant testified:

Q: And that literally, in terms of your duties, that was some of the last things you did that day [carrying the pipes]?
A: That was the last thing that we did that day, yeah, before we went back to the shop.

22. In his deposition taken on May 11, 2004, Claimant provided different testimony as to when the incident occurred. Claimant stated:

Q: Do you remember what time of the day this happened at?
A: This was in the morning.
Q: Okay, and your usual workday would start at what time?
A: Seven.
Q: Okay. So a few hours into your shift or more or less than that?
A: It was, yeah, it was probably in the mid part of it I would assume.
Q: 9:30 or 10 in the morning?
A: Yes.
Q: If you remember?
A: Yeah, it was in the middle of the workday.

23. In his Answers to Interrogatories signed on December 30, 2003, Claimant's sworn statement was that "Brad Schilling was assisting the claimant with the steam pipe at the time the injury occurred, Chris Hase and Bob Brewer were in the area working on drain pipe when the injury occurred and know the weight of the steam pipe and know the claimant was working with steam pipe on that date."
24. Contrary to Claimant's testimony, on February 27, 2002, Claimant was the only employee who worked at 3M.
25. Employer's timecards showed that no other employee worked at 3M on February 27, 2002.
26. Schilling did not work at 3M on February 27th. In fact, Schilling was off work on February 27th, 28th and March 1st.
27. On February 27 and 28, 2002, Chris Hase (Chris) and Bob Brewer worked all day at "Mother Jo" with the exception of one hour on February 28th when Brewer worked at Jason's Auto Body. Claimant, Chris and Brewer all worked at Mother Jo on March 1, 2002.
28. According to Claimant's timecard, he performed the following work at 3M on February 27th: "finish silcock, patch holes, bring supplies back to shop."
29. There would have been no need for Schilling or any other employee to be present at 3M to assist or supervise Claimant performing the tasks listed on his timecard.
30. Claimant did not work again at 3M after February 27th.
31. According to Claimant, he finished his shift on February 27th and went home without telling anyone about what had occurred at 3M. Claimant testified:

Q: And you never said anything to Brad Schilling who was your supervisor on the 27th that you thought you had hurt yourself that day?
A: No, I didn't that day.

32. Claimant stated when he woke up the next morning "I went to stand up and I was just stiff and everything hurt."
33. Claimant testified at the hearing that when he went to work on February 28th, he reported the incident to Lon Feickert, "his immediate supervisor." However, Feickert was not one of Claimant's supervisors.
34. Feickert is a journeyman plumber who was employed by Employer for over eight and one-half years. Feickert was not Claimant's supervisor on February 27,

2002, because Feickert did not work on the 3M project. Again, Schilling was Claimant's supervisor on the 3M project.

35. Jim was Claimant's primary supervisor.

36. At hearing, Claimant testified that on February 28th, he and Feickert informed Bader about Claimant's injury that occurred on February 27th. Feickert testified:

> A: In fact, I was telling Brett, I said we better go let [Bader] know then that you're - - you know, because he said I'm going to have to set up an appointment for a chiropractor and I said well, then we better let Larry know, so we both walked in and - -
> Q: So the two of you - -
> A: Yes.
> Q: Walked over to Larry?
> A: Yep, and I leaned over his little wooden stub wall and I said Larry, did you hear what we were talking about and he says no, and I said well, Brett was saying that he hurt his back yesterday when he was moving some pipes.

37. In his deposition, Claimant provided the following version of his conversation on February 28th:

> What I did is I come to the shop and the guys that were - - there was Brad Schilling, and myself, and Chris Hase and Bob Brewer were all out there that day, and what happened the next day that when I seen them I asked them if they were sore from hauling pipes, because I was sore from hauling pipes.
> Q: Okay, but had all of them been hauling pipes as well?
> A: Yes, all of them, yeah.
> Q: Okay.
> A: We weren't all working together. Me and Brad were working our pipes, and Chris and Bob were working on cast iron pipes.
> Q: Okay. Also out at 3M?
> A: Yes.

38. Also in his deposition, Claimant testified that he reported his alleged injury to Chris and Jim and not Bader, as he claimed at the hearing. Claimant stated in his deposition:

> Q: You said that this incident that you believed happened in March before you saw, I think we narrowed it down, two days before you saw Dr. Ryman you reported it to Larry Bader?
> A: The first day I reported it to Chris Hase.
> Q: Okay, well, how, tell me how you reported it to Chris Hase?
> A: Verbally.
> Q: Okay. Is he your supervisor?
> A: He is owner of Hase Incorporated.

Q: All right. You view him more as the boss then or supervisor not a coworker?
A: Yeah, as a boss.

39. Also in his deposition, Claimant testified that "I reported it to Jim Hase the day that I went to the doctor [Dr. Ryman]."
40. In his Answers to Interrogatories, Claimant's sworn statement was that he reported his injury to Chris on March 1, 2002, and handed the written claim to Jim on March 4, 2002.
41. Claimant testified that Chris suggested he go see a chiropractor. Claimant testified as follows:

Q: Now at some point did Chris Hase suggest to you that you should go see a chiropractor because he had had good results from a chiropractor?
A: He said he did, yes.
Q: Do you remember when that was?
A: Not exactly, no.
Q: Do you know if it was before you went to see the chiropractor or - -
A: Before I went to see Dr. Stan Ryman, yes.
Q: Okay. So if your injury allegedly occurred now on February 27th, that would have had to have been either the 28th of February or the 1st of March, correct?
A: Correct.
Q: Because you saw him on the 4th?
A: Correct.
Q: And you recall Chris telling you that maybe you should go see a chiropractor because he'd had back pain in the past and seen one?
A: Correct.

42. In contrast, Chris credibly testified:

Q: Okay. Chris have you ever been to see a chiropractor?
A: No.

43. Claimant went to see Dr. Stan Ryman, a chiropractor, on Monday, March 4, 2002. Claimant testified that Dr. Ryman took Claimant off work for two days. However, Dr. Ryman's records make no statement regarding Claimant's ability to work. Dr. Ryman's note stated, "Brett HAS LB PAIN WC RESTRICTS ROM AND LIMITS SOME ACTIVITES TENDER TO PALP, L4, 5, MASSAGE/MANIPULATION L, See in 2 days."
44. At the hearing, Claimant testified he handed Jim a note from Dr. Ryman excusing Claimant from work for two days. Claimant testified:

Q: Now when you first took this note in that you claim that you took to Mr. Hase on the 4th of March?
A: Yes.

Q: Did you tell him that it was from lifting heavy pipes, that that's why you had been to see the chiropractor and that's why you weren't going to be working for a few days?
A: I handed Jim the note and Jim was in a bad mood that day and he did not talk to me and that really hurt me.
Q: So you didn't tell him? The answer to my question is you did not tell Mr. Hase on the 4th when you handed him the slip that this was because of an injury that you had had at work?
A: I had told Larry and them guys earlier and I told them to tell Jim that I was hurt.
Q: . . . you did not tell Jim Hase on the 4th that you were giving him this note that said you couldn't work for three days because you had hurt yourself at work?
A: I did not tell Jim that, no.

45. Jim credibly testified that Claimant did not give him a doctor's note or inform him about any alleged injury. Jim testified:

Q: You heard Mr. Holler's testimony that he came and saw you on March 4th. I think he said you were in a bad mood that day if I remember correctly and handed you a note that was from his chiropractor that said he needed to be off for a couple days, did you hear that testimony?
A: Yes.
Q: Did that happen?
A: Not to my knowledge, no.
Q: What would be the normal operating procedure if in fact somebody had come in with a note such as Mr. Holler had done?
A: It would be put in his personal job file.
. . . .
Q: Did you go through the personnel files at Hase to find out if Mr. Holler's alleged note from March 4th had been misfiled?
A: Yes, we did.
Q: Did you find any note in any file at Hase Plumbing that would have been from a doctor, chiropractor by the name of Stan Ryman that related to Mr. Holler being off work in March of 2002?
A: No.

46. Bader's credible testimony was that he did not recall Claimant telling him about any injury. Bader testified:

> I don't remember that at all. I know that sometimes comments are given at my desk area in the back where everybody meets in the mornings and you know, things go on and try to go a lot of different directions. I would have thought though if there would have been more to it that we would have gone further with that at that point.

47. However, Bader recalled that Claimant and Feickert approached him on a Monday morning well after the alleged incident on February 27th. Both Claimant and Feickert complained of back pain after remodeling Claimant's bathroom over the weekend.
48. Prior to being approached after the home remodeling project, Bader had no recollection of any alleged injury sustained by Claimant at work.
49. Bader also credibly testified that had Claimant reported an injury to him, he would have maintained some type of report. Bader did not have any type of written report of Claimant reporting an injury to him.
50. Feickert's testimony that he and Claimant informed Bader about a work injury that occurred on February 27th was not credible. Feickert's testimony was inconsistent with Bader's credible testimony.
51. Claimant returned to see Dr. Ryman on March 6, 2002. Dr. Ryman noted there was no change in Claimant's pain and discomfort. Dr. Ryman performed another treatment and indicated that "[Claimant] will call" for another appointment.
52. After March 6th, Claimant returned to work and continued to work for Employer until late April 2002.
53. Claimant testified his back continued to be sore and felt weaker during March and April 2002.
54. Dr. Ryman told Claimant to return for treatment if he continued to have problems with his back:

> Q: And [Dr. Ryman] told you to come back if you continued to have problems, didn't he?
> A: He told me to come back if I didn't - - yeah, if I didn't feel right, yes.
> Q: And you just testified you didn't feel right from and after March 6th until you went to see the orthopod, right?
> A: Correct.

55. Claimant never returned to see Dr. Ryman after March 6, 2002.
56. Claimant made an appointment to see Dr. Matthew Reynen, an orthopedic surgeon, on or about April 16, 2002. The appointment was scheduled for April 22, 2002. Claimant testified he made the appointment because, at that time, he "just knew [his injuries] were severe." But, Claimant knew no more about the nature of his alleged injury on April 16, 2002, than he did on April 22, 2002.
57. Claimant reported an alleged injury to Employer on April 22, 2002. Claimant and Employer completed a First Report of Injury on the same date. Although Claimant dated the First Report of Injury as "April 23, 2002," he completed the form before his appointment with Dr. Reynen on April 22nd. Employer's representative dated the First Report of Injury April 22, 2002.
58. On the First Report of Injury, Claimant listed his date of injury as "April" and described his injury as "lifting heavy objects caused pain in back. Continued to get worse."
59. At the time Claimant executed the First Report of Injury, he did not know anything more as to the actual diagnosis of his injury than when he went to see Dr. Ryman on March 4, 2002.

60. Claimant saw Dr. Reynen on April 22, 2002. Claimant completed the "Workman's Compensation Information Sheet for Orthopedic Surgery Specialists, Ltd." on the same date. On this information sheet, Claimant provided his date of injury as "April." Claimant stated that he injured his back by "lifting heavy pipe." Finally, Claimant indicated that the date of his first treatment was "April 1" with Dr. Ryman.
61. On the "Patient's Medical History" sheet, Claimant again stated that his date of injury was "April" and that he injured himself "lifting."
62. Dr. Reynen's medical note from April 22nd stated, "[p]atient reports straining the low back in early April while lifting a heavy pipe at work. He has noted that over the least [sic] several weeks he's had progressive weakness in his legs particularly on the right and feels as if he does not balance well."
63. Dr. Reynen's initial impression was that Claimant had a lumbar strain with radicular symptoms. However, after diagnostic testing, Dr. Reynen diagnosed Claimant with a cervical disc herniation.
64. On April 30, 2002, Claimant was examined for a pre-op evaluation before cervical fusion surgery. The medical note from Avera United Clinic stated, "[t]his 45-year-old male developed a backache approximately one month ago. Back discomfort and weakness. Reports that his back felt heavy. He attributed it initially to work, but symptoms gradually worsened."
65. Claimant's surgery was performed at the Spine Center in Minneapolis, Minnesota, in May 2002.
66. Claimant did not return to work for Employer.
67. In a recorded statement taken by Insurer's representative on May 9, 2002, Claimant identified the date of injury as April 2002. Claimant stated:

    Q: And, um, when did you first notice some problems, I mean do you know?
    A: When did I first notice it?
    Q: Yeah.
    A: Wasn't, wasn't really like kind of a notice, it was just kind of a little ache in my back to start with.
    Q: Was that, I mean, a month ago, more than a month ago?
    A: Oh, yeah, it was, it started about the first part of April.

68. In the recorded statement, Claimant also stated:

    Q: And were you, when you said, you know, you had that acheness [sic] and that, and that first started early April, was there any particular job you were working at at that time that you think was like more heavy than the other job or?
    A: Not really.

69. Insurer's representative issued a denial of Claimant's request for workers' compensation benefits on May 15, 2002.

70. Claimant filed a Petition for Hearing with the Department on September 16, 2003. In his Petition, Claimant alleged that he suffered injuries arising out of and in the course of his employment with Employer on or about April 22, 2002.
71. At his deposition, Claimant testified as follows:

> Q: Are you able to narrow down what month it happened in January, February, March, April, May?
> A: I would - -
> Q: Well, not May I guess you weren't there anymore. We'll back it up.
> A: It was in March.
> Q: Do you remember what day of the week?
> A: It was shortly before I went to see Dr. Stan Ryman is all I know.

72. After Claimant's deposition was taken, Claimant filed an Amended Petition for Hearing with the Department on October 14, 2004, alleging that he suffered injuries arising out of and in the course of his employment with Employer on or about February 28, 2002.
73. At the hearing, Claimant could not give an explanation for providing varying dates of injury in his testimony and on various documents. Claimant testified:

> Q: So at least on two occasions you told somebody that April was the onset, is that correct?
> A: Correct.
> Q: And as you said before this Court today, do you have any explanation to this Court as to why you said April?
> A: No.

74. In summary, the evidence established that Claimant worked alone at 3M on February 27, 2002. Neither Chris, nor Brewer nor Brad Schilling worked at 3M on either February 27 or 28, 2002. The steam pipe that Claimant allegedly lifted could not have existed on February 27th as the steam and condensate project had been completed and tested seven days earlier. At best, 35 feet of the pipe remained and, most likely, no 21-foot pieces remained.
75. Despite this evidence, Claimant insisted that while at 3M on February 27th, he lifted at least two 21-foot steam pipes with Schilling, who did not work at 3M that day, and injured his back.
76. Claimant did not inform his supervisors of any alleged injury until he completed a written report on April 22, 2002. Even then, Claimant specified that his injury occurred in April 2002.
77. After having the opportunity to listen to Claimant's live testimony and observe his demeanor at hearing, Claimant was not credible. As demonstrated in the facts, Claimant provided multiple versions of crucial events surrounding his alleged injury. Claimant's hearing testimony contradicted other sworn testimony and Claimant could not explain the numerous inconsistencies throughout his testimony. Therefore, Claimant lacked credibility.
78. 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. "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 his 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.

Despite the overwhelming evidence to the contrary, Claimant maintained throughout the hearing and in his post-hearing briefs that he "was injured on February

27, 2002." Under no version of the facts did Claimant provide written notice of his alleged injury within three business days after its occurrence. The first and only written report was prepared by Claimant on April 22, 2002, when he completed the First Report of Injury. In fact, Claimant admitted that he "did not give written notice as required by SDCL 62-7-10[.]"

In accordance with SDCL 62-7-10, "[Claimant] must demonstrate that [Employer] had actual knowledge of the injury, or that good cause prevented [him] from complying with the three-day period." Gordon v. St. Mary's Healthcare Ctr., 2000 SD 130, ¶ 30. The Court stated, "'[t]he standard used for determining whether an employer has actual knowledge is: whether the employer is "alerted to the possibility of a claim so that a prompt investigation can be performed."'" Id. ¶ 32 (citations omitted). In addition, "[i]n determining actual knowledge, the employee must prove that the employer had 'sufficient knowledge to indicate the possibility of a compensable injury.'" Shykes, 2000 SD 123, ¶ 36 (citation omitted). "An employer's mere knowledge of an injury does not satisfy the notice requirement because, under our standard of review, a claimant must also demonstrate that the employer knew about the compensable nature of the injury." Gordon, 2000 SD 130, ¶ 42.

Claimant asserted that Employer had actual knowledge of his February 27th injury because he provided verbal notice to Feickert, his "supervisor," on February 28, 2002. As already established, Feickert was not Claimant's supervisor and was just a co-worker. Claimant also relied upon Feickert's testimony that Employer had actual knowledge of the February 27th injury because Feickert testified that he and Claimant informed Bader on February 28th about a work incident. However, Feickert's testimony cannot be believed as it was inconsistent with Bader's credible testimony. Bader credibly testified that he did not have a recollection or record of any work injury concerning Claimant. The only incident Bader recalled concerned Claimant's and Feickert's complaints of back pain after remodeling Claimant's bathroom over a weekend some time well after February 2002.

In another version of the events, Claimant alleged that he provided verbal notice to Chris on March 1st and written notice to Jim on March 4th, after his appointment with Dr. Ryman. But, there is no evidence to support Claimant's testimony. There was no evidence presented to suggest that Chris had actual knowledge of any alleged injury. Jim credibly testified that Claimant did not give him a written note from Dr. Ryman on March 4th. Even if it can somehow be construed that Claimant gave the medical note to Jim, at no time did Claimant inform Jim that his need to be off work was due to a work-related injury.

The first time Jim became aware that Claimant was making a workers' compensation claim was after April 22, 2002, when he returned from vacation and saw the First Report of Injury on his desk. Employer did not have actual knowledge of Claimant's alleged work injury because at no time prior to April 22, 2002, was Employer alerted to the possibility of a claim by Claimant for an alleged work injury. Employer did not have sufficient knowledge to indicate the possibility of a claim.

Claimant also argued he had good cause to excuse his failure to provide timely notice to Employer. When "'the failure to give notice is at issue, the claimant has the burden of showing that for some good and sufficient reason notice could not be given.'" Shykes, 2000 SD 123, ¶ 40 (citation omitted). Claimant did not have good cause for failing to provide timely notice to Employer. According to his testimony, Claimant knew

that he had injured his back on February 27, 2002, when he lifted several pipes. Despite this, Claimant waited until April 22, 2002, to file a written report. Claimant admitted that when he completed the First Report of Injury, he had no greater knowledge of his condition than when he sought treatment from Dr. Ryman on March 4, 2002. Claimant provided no valid explanation as to why he waited over six weeks to report his alleged injury. Claimant failed to demonstrate that he had good cause to excuse his delay in providing timely notice to Employer.

Based on the foregoing, Claimant failed to establish by a preponderance of the evidence that he provided timely notice of his injury to Employer as required by SDCL 62-7-10. Claimant failed to establish by a preponderance of the evidence that Employer had actual notice of his injury. Claimant failed to establish by a preponderance of the evidence that he had good cause for failing to provide Employer with notice within three business days of the injury. Claimant's request for workers' compensation benefits must be denied and his petition for benefits must be denied and dismissed with prejudice.

Employer 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. Claimant shall have ten days from the date of receipt of Employer'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, Employer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 17th day of May, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

_____

Elizabeth J. Fullenkamp
Administrative Law Judge