SOUTH DAKOTA DEPARTMENT OF LABOR

DIVISION OF LABOR AND MANAGEMENT

TERRY MCNEIL, Claimant, vs. SUPERIOR SIDING, INC., Employer, and ACUITY INSURANCE, Insurer.	HF No. 60, 2006/07 **DECISION**

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 hearing was held in this matter on October 2, 2007 at 10:00 am MT in Rapid City, South Dakota. Anthony Bolson, of Beardsley Jensen & VonWald, represents Claimant Terry McNeil (Claimant). Michael S. McKnight and Charles A. Larson, of Boyce, Greenfield, Pashby & Welk, L.L.P., represent Employer/Insurer (Employer).

ISSUE:

Did Claimant comply with the notice requirement of SDCL 62-7-10 ?

FACTS:

The employer, Superior Siding (Employer), is a corporation owned and operated by Chad Roth, the President of the Corporation. The claimant, Terry McNeil (Claimant), began working for Employer as a general laborer in May 2001. Claimant has a high-school diploma and attended one semester of college. Claimant was a valued employee of the owner and was Employer's "right-hand man." Claimant's supervisor, Chad Roth, trusted Claimant and believed Claimant to be an honest person. Claimant performed physical labor for Employer and was also responsible for overseeing projects (a crew chief) and responding to customers' inquiries and complaints.

In his duty as crew chief, Claimant managed other employees. As part of his duties, Claimant was asked to review the employee handbook prior to its finalization and make comments or suggestions. Claimant received and fully understood the contents of Employer's employee handbook. However, due to his position, Claimant did not know whether the handbook applied to him. The handbook stated that all employees

must immediately report injuries to the supervisor or crew chief. An injury form is attached to the handbook for employees to use. Claimant was the person to whom others reported their work injuries. Claimant had taken other employees to the clinic or emergency room when injuries occurred on the jobsite.

Employer does not require employees to report every injury that occurs on the jobsite, despite the language in the handbook. Employer will not fill out a first report of injury form for scratches or minor aches, unless requested by the employee. If the employee believes the injury is serious, Employer will fill out a form. If the minor injury becomes serious or is found later to be a serious injury, i.e. an infected scratch, then Employer will report the injury to their insurer. The employees perform physical labor and regularly lift heavy items. Many employees complain daily about aches and pains due to sore muscles or overworked joints. These employees do not report the minor aches to Employer as work-related injuries as the pain is not recurrent and the employee does not seek medical treatment for the pain.

Claimant was first injured on the job, while working for Employer, on December 29, 2003. Claimant reported the low-back injury the same day to Roth. Claimant reinjured his lower back in January 2005 when he lifted a heavy piece of siding and fell to his knees in pain. Claimant was treated for these injuries until reaching maximum medical improvement on September 12, 2005.

Claimant injured his upper-back on August 13, 2005. Claimant was carrying a box of siding from one side of the jobsite to the other. After Claimant picked up the box and put it on his shoulder, Claimant "heard a pop and felt a pulsation down [his] arms and things went numb in [his] arms." The "pop" was in Claimant's upper back, between the shoulder blades. Claimant felt numbness from his upper left arm, down to his fingers. The pain was "intense" at that time; however, Claimant continued to work and finished the job. Claimant neither dropped the box of siding nor stopped working when the upper-back pain started. The intense pain went away that same day. However, the next day Claimant still felt some pain between his shoulder blades. Claimant had pulled or overworked muscles in the past and assumed this injury was a minor pulled muscle. Claimant believed that his upper-back ache would heal itself quickly and that it was not a serious injury.

Claimant did not immediately report this upper-back injury to Employer, or complete a first report of injury form. At the time of the injury, Claimant was seeing a physical therapist for his low-back. Claimant reported upper-back pain to his physical therapist a few days after the injury. The physical therapist noted Claimant's upper-back and left arm complaints on August 15 and 30, 2005. The physical therapist did not specifically treat for the new pain in the upper-back and shoulder.

Claimant continued to work full-time for Employer. Claimant did not think the upper-back injury was serious until his symptoms did not go away. Claimant's left arm and hand would go numb while Claimant was driving, hunting, or sleeping. If Claimant's

arms were positioned or extended a certain way, Claimant felt pain between his shoulder blades and his arms felt numb or tingling. When the recurrent pain and discomfort became more frequent, Claimant realized the injury was serious and he spoke with Employer.

On November 8, 2005, Claimant and Employer completed a First Report of Injury Form to submit to the Insurer. This form was completed almost 3 months after the injury. Insurer, Acuity Insurance, denied Claimant's worker's compensation claim based upon Claimant's failure to report the injury immediately to Employer.

ANALYSIS & DECISION:

SDCL 62-7-10 regulates the time deadlines for employees to report work-related injuries to employers.

> 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.

The South Dakota Supreme Court has clarified this law and the test created within the law. In *Kuhle v. Lecy Chiropractic*, 2006 SD 16, 711 NW2d 244, the Supreme Court upheld a decision denying workers compensation benefits to a chiropractic assistant who should have known the seriousness of her injury, based upon her education and experience.

> Claimant carries the burden of proving that he or she provided timely notice to the employer, or that either (1) the employer had actual notice, or (2) that good cause exists 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; *Clausen*, 2003 SD 63, ¶8, 663 NW2d at 687 (citing *Miller v. Lake Area Hospital*, 1996 SD 89, ¶11, 551 NW2d 817, 819). However, it is well settled that "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." *Clausen*, 2003 SD 63, ¶13, 663 NW2d at 689 (quoting 2B Arthur Larson, Larson's Workmen's Compensation Law, § 78.41(a) at 15-185-6 (1995)). Whether the conduct in question was reasonable is based on the claimant's education and intelligence, not on the hypothetical reasonable person familiar to tort law. *Shykes*, 2000 SD 123, ¶42, 616 NW2d 493, 502. However, the standard creates an objective, not subjective test. Id. ¶43 ("The standard is based on an objective reasonable person with the same education and intelligence as the claimant's").

Kuhle v. Lecy Chiropractic, 2006 SD 16 ¶18, 711 NW2d 244, 247-248 (2006).

Kuhle followed the reasoning issued earlier in *Bearshield v. City of Gregory*, 278 N.W.2d 164 (SD 1979). In that leading case, the 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.

In the present case before the Department, Claimant does not have the education or experience to know which of his aches and pains are serious injuries or are just muscle strains. Claimant may have had a prior low-back injury but he also had any number of pulled muscles and muscle pains from overworking. The work that Claimant performed for Employer was physical labor that required heavy lifting on a regular basis. Many employees had daily complaints of muscle aches and pains. Claimant attempted to relieve his upper back pain by stretching or exercising. Claimant's testimony indicates that after the initial injury, the pain between his shoulders was not constant, but was an occasional discomfort, not unlike a sore muscle. However, Claimant realized later that this occasional discomfort was more frequent than normal and was caused by a single incident.

Claimant had made a prior injury report to Employer in December 2003 for his lower-back injury. Similarly, Claimant reported an injury in January 2005 when he picked up a piece of equipment and fell to his knees in pain. Unlike either of those injuries, Claimant did not recognize the seriousness of the upper-back injury that occurred in August 2005.

Claimant's testimony was both plausible and credible. Employer credibly testified that he does not think Claimant would falsify where or how he was injured. Employer believes Claimant is an honest person. Claimant's live testimony does not contradict his deposed testimony. I found both Employer and Claimant to have testified truthfully.

It is the Department's decision that Claimant complied with the notice requirement of SDCL 62-7-10. Liberal construction of SDCL 62-7-10 supports finding that Claimant "had good cause for failing to give written notice within the three business-day period." Claimant notified Employer immediately after "recognize[ing] the nature, seriousness and probable compensable character of [the] injury or disease." *Kuhle* at ¶18.

Counsel for Claimant 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. Employer/Insurer shall have an additional 20 days from the date of receipt of Claimant'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 Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated this 13th day of February, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Catherine Duenwald
Administrative Law Judge