SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

MYRENE F. BROCKEL,
Claimant,

HF No. 87, 2003/04

v.

AMENDED DECISION

ST. MARY'S HEALTHCARE CENTER,
Employer/Self-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 27, 2005, in Pierre, South Dakota. Myrene F. Brockel (Claimant) appeared personally and through her counsel, Margo Tschetter Julius. Kristi Geisler Holm represented Employer/Self-Insurer St. Mary's Healthcare Center (Employer).

Issue:

Whether Claimant provided timely notice under SDCL 62-7-10.

Facts:

Based upon the record and the live testimony at hearing, the following facts are found by a preponderance of the evidence:

1. Claimant was 62 years old at the time of the hearing. She currently lives in Bowdle, South Dakota.
2. In January 1996, Claimant began working for Employer as a registered nurse.
3. In March of 2003, she was a staff nurse working on the medical/surgical floor. Her responsibilities included delivering total patient care to her assigned patients. Total patient care includes everything from bathing to discharge planning.
4. Claimant generally worked the night shift from 7:00 p.m. until 7:00 a.m.
5. On Monday, March 24, 2003, Claimant went to work at her regularly scheduled shift at 7:00 p.m. At approximately 10:00 p.m. during her shift, Claimant cared for and helped lift an extremely obese patient who weighed approximately 489 pounds. While the patient was not Claimant's assigned patient, she helped because it took four nurses to roll the patient onto and off a bedpan.
6. The four nurses, including Claimant, used a specific technique called a "log roll" to maneuver the obese patient.
7. The four nurses, including Claimant, also moved the patient to a more comfortable position using a lifting pad.
8. At the time that Claimant assisted in rolling the patient and lifting the patient, she did not feel or notice any back pain.

9. Later on during her shift, Claimant repositioned the obese patient's leg, which required a rather heavy dead lift.
10. Claimant did not experience any symptoms or pain before, during, or after this patient lift. It was a routine lift.
11. Claimant finished her shift and did not notice any symptoms or back pain. Claimant went home at 7:00 a.m. and went to bed.
12. Claimant first noticed back pain when she woke up on the afternoon of March 25, 2003. She took some Motrin or Tylenol and studied for a class she was scheduled to take on March 26 and 27.
13. Claimant related the back pain to her age and working five 12-hour shifts in a row. She thought she was just getting old and tired.
14. On Wednesday morning, March 26, 2003, Claimant awakened with a severe migraine. Claimant had been medically diagnosed with migraines and had prescription medication to take. Claimant had missed work on several occasions due to migraine headaches.
15. Claimant called Employer and reported that because of her migraine she would not be able to attend the class.
16. Claimant suffered with the migraine for four days.
17. Claimant's testimony about her migraine and its effects was credible and not disputed by credible evidence.
18. Claimant suffered severe pain in her head, nausea, and problems "thinking right". Claimant was unable to function normally. She was unable to do much besides lie in bed, take her prescription medication, and wait for the pain to subside.
19. Throughout the time Claimant suffered with the migraine, she continued to have low back pain. Claimant self-medicated with Motrin.
20. On Saturday, March 29, Claimant had to cancel a scheduled trip to see two of her children in Bowdle, South Dakota. Claimant did not trust herself to drive because of the migraine and related symptoms.
21. Claimant had not experienced previous low back pain. On occasion Claimant had a sore, stiff neck upon awakening, but the pain always resolved on its own.
22. Claimant's back pain worsened only slightly throughout the four days she suffered with the migraine.
23. On Saturday and Sunday, as Claimant began to recover from the migraine, she began to wonder what was wrong with her back. Claimant recalled no specific incident where she felt an immediate onset of pain. She never felt a "pop", or a "twinge", or a "pull". Claimant testified that she thought of the obese patient lift on late Saturday night or Sunday. She thought maybe that was the cause of the pain. She also thought she could have just slept too long in the wrong position. She also thought she was just getting old.
24. Claimant did not work on March 30 or 31.
25. Claimant provided written notice to her employer on April 1, 2003, that she thought she a suffered a probable compensable injury to her low back on March 24 or 25, 2003.
26. Teri Ellenbecker, director of nursing and Claimant's supervisor, conducted an investigation of Claimant's report of back pain. Her investigative report and follow-up revealed no additional information from Claimant's first report of injury.

Ellenbecker did not talk with the three other people involved with lifting the obese patient.

27. Other facts will be developed as necessary.

Whether Claimant provided timely notice under SDCL 62-7-10.

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). The 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).

"Notice to the employer of an injury is a condition precedent to compensation." Westergren v. Baptist Hosp. of Winner, 1996 SD 69, ¶ 17, 549 N.W.2d 390, 395 (*citing* Schuck v. John Morrell & Co., 529 N.W.2d 894, 897-98 (S.D. 1995)). The South Dakota Supreme Court summarized:

Notice is governed by SDCL 62-7-10, which states:

> An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than three business days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show:
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> (1) The employer or the employer's representative had actual knowledge of the injury; or
> (2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the three business-day period, which determination shall be liberally construed in favor of the employee.

The proper test for determining when the notice period should begin has been explained: "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 Hospital, 1996 SD 89, ¶ 14. "Whether 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.'" Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶ 29 (citing Loewen v. Hyman Freightways, Inc., 1997 SD 2, ¶ 15). "The standard is based on an objective reasonable person with the same education and intelligence as the claimant's." Id. at ¶ 43. "The fact that [Claimant]

suffered from pain and other symptoms is not the determinative factor and will not support a determination that [Claimant] had knowledge of the existence of extent of [her] injury." Miller v. Lake Area Hospital, 1996 S.D. 89, 551 N.W.2d 817, ¶ 12 (citing Bearshield v. City of Gregory, 278 N.W.2d 164, 166 (S.D. 1979)). Claimant credibly testified that she thought the pain would go away on its own because she did not think she had injured her back. She did not experience an identifiable injury or even suffer an onset of pain while at work. Claimant treated the backache with heat, ice, and over-the-counter pain medication. Claimant provided written notice of her back pain on Tuesday, April 1, 2003, two business days after she realized that an incident at work might be contributing to her pain.

Claimant credibly testified that she did not relate her back pain to lifting the obese patient until Saturday, March 29, when she began recovering from her migraine and started to wonder if her back pain was anything more than her age and working 60 hours in five days. Claimant credibly testified that she did not feel anything unusual when she helped lift or reposition the patient.

Claimant is a registered nurse. She reported at least six work-related injuries before March of 2003. She understood that all injuries must be reported to Employer. Claimant's education, intelligence, and experience with the workers' compensation system do not penalize her in this situation. Claimant first noticed the pain upon awakening on March 25, 2003 and at the time did not relate it to any specific incident at work that brought on the pain. When she realized on Saturday that her pain was not going away and that there might be something wrong with her, she recognized that working with the obese patient could have something to do with her pain. She testified, "I started to think about what did I do or what could I have done, and that is the only thing I can 100 percent honestly say that was a change in any of my habits or doings or whatever, was lifting that patient who was so very obese."

Marlys Bomesberger testified that she suddenly recalled shortly before the hearing that Claimant reported to her on March 30 or 31 that she heard a "pop" and a "snap" while helping lift the patient. Her testimony contained new information that was not documented in any way at the time of Claimant's report. The investigative report did not contain this information. The phone logs did not contain this information. The medical records, including those of a physician, a physical therapist, and a surgeon do not contain a reference to a "snap" or a "pop". Claimant denied that she heard a "pop" or a "snap." Claimant's testimony is consistent with the evidence in this record. Bomesberger's testimony is not and is not supported by other testimony or evidence. Claimant's testimony regarding the relevant details of her back pain and when she reported it are supported by and consistent with the report of injury, the supervisor's investigative report, and the medical records. Bomesberger's testimony is rejected. Claimant's testimony was credible. She provided written notification within three business days of recognizing the nature, seriousness, and possible work-relatedness of her pain.

Claimant's conduct in not immediately relating the pain to an incident at work is reasonable because no specific incident occurred that caused Claimant an immediate onset of pain. Claimant did not feel a "snap" or a "pop" when she lifted the obese patient. She testified that she thought the pain might be from working five 12-hour shifts in five days or because she is getting older and maybe should not work so hard. Claimant related her pain to lifting the obese patient only after consideration of her activities that could have caused her back pain. Claimant did not suspect that she had suffered an injury at work until Saturday, March 29. Claimant's conduct was reasonable.

Claimant, as a reasonable person with her education and intelligence, did not recognize the nature, seriousness, and probable compensable nature of her back pain until Saturday, March 29, 2005. Her testimony was credible. The notice period did not begin to run until March 29, 2003. Claimant reported her injury within two business days of recognizing the nature, seriousness and probable compensable nature of her pain. Claimant provided notice within three business days of when she recognized or should have recognized the nature, seriousness and probable compensable character of her back pain as required by SDCL 62-7-10 and Miller v. Lake Area Hospital, 1996 SD 89. Claimant has established by a preponderance of the evidence that she provided timely notice of her injury to Employer as required by SDCL 62-7-10.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections thereto 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 9th day of August, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge