SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

ROBERTA OLSON
Claimant,

HF No. 87, 2002/03

v.

DECISION

EVANGELICAL LUTHERAN GOOD SAMARITAN SOCIETY, INC.,
Employer,

and

SENTRY CLAIMS SERVICE,
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. By stipulation, the parties agreed to waive the opportunity for an evidentiary hearing in front of the Division Labor and Management and submitted this matter on the record. Rollyn Samp represented Claimant, Roberta Olson. Eric C. Schulte represented Employer Evangelical Lutheran Good Samaritan Society and Insurer Sentry Claims Service (Employer).

Issue:

Did Claimant provide timely notice of her injury pursuant to 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:

On and prior to January 6, 2002, Claimant was employed by Employer as a certified nursing assistant. A certified nursing assistant was not a management position with Employer in January of 2002.

On January 6, 2002, Claimant felt a "twinge" in her back while performing a two-person transfer of a patient. She felt pain immediately afterward and that pain continued throughout the rest of her shift, the rest of the day and all of the next day. Claimant concedes that she was aware during the evening of January 6, 2002, that her back pain started shortly after she lifted the patient and felt a "twinge." Claimant was not scheduled to work on January 7, 2002. When she awoke the morning of January 8, 2002, her back pain had intensified to the point where she could hardly walk. She called Employer and was told to come in to work for an assessment by a nurse.

Claimant declined and made an appointment to see Dr. David Zeigler at Sioux Valley Physician Group.

On January 8, 2002, Dr. Zeigler took a history from Claimant. His notes do not reflect that Claimant told him about the lifting incident at work. Dr. Zeigler diagnosed a probable herniated lumbar disk and put Claimant on two weeks bed rest. He faxed a work release to Employer on January 8, 2002, at approximately 3:30 p.m. The fax did not state that Claimant had experienced a work related injury.

On January 8, 2002, Claimant spoke with Kathy Frank, Employer's Director of Nursing, about her back condition, but failed to inform Frank that she had injured herself while working.

Claimant did not provide notice of the alleged work related nature of her injury until January 16, 2002. Claimant did not sign a First Report of Injury form until January 23, 2002.

Did Claimant provide timely notice of her injury 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)). SDCL 62-7-10 sets the rules for providing notice:

> 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.

Claimant suffered pain and a "twinge" on January 6, 2002, while at work transferring a patient. Claimant sought medical care two days later because she could hardly get out of her bed. The record of that care shows she indicated her pain increased intensely after supper on January 7, 2002. She sought care from Dr. Zeigler and he diagnosed a probable herniated lumbar disk. Claimant knew on January 8, 2002, that Dr. Zeigler suspected a herniated disk in her low back as the cause of her pain. She knew that she had suffered pain and a "twinge" on January 6, 2002, but did not know that she had a probable injury until January 8, 2002, when Dr. Zeigler told her that she probably had a herniated disk. The notice period began to run on January 8, 2002, because Claimant as a reasonable person should have recognized the nature, seriousness, and probable compensable nature of the incident.

Claimant could not remember if she told Dr. Zeigler about the work incident. Dr. Zeigler's notes do not reflect that she told him of the alleged work incident. Claimant could not remember if she told Kathy Frank about the work incident when the two spoke on January 8, 2002. Kathy Frank does not remember Claimant mentioning an incident at work.

Claimant did provide verbal notice to Employer/Insurer on January 16, 2002, when she requested a first report of injury form. Claimant did not provide notice of her injury within three business days. Claimant did not provide Employer/Insurer with written notice until January 23, 2002.

Because Claimant did not provide written notice within three business days of the injury, she must demonstrate either that Employer had actual knowledge of the injury or that she had good cause for failing to report the injury.

Claimant argued that the note from Dr. Zeigler gave Employer/Insurer actual knowledge of the probable compensable nature of her injury. The note made no mention of the potential work related nature of the injury. Claimant conceded that she did not tell Employer of her injury until January 16, 2002. Employer/Insurer did know of the probable compensable nature of her condition until January 16, 2002. Pursuant to South Dakota law, "[a]n employer's mere knowledge of an injury does not satisfy the notice requirement because . . . a claimant must also demonstrate that the employer

knew about the compensable nature of the injury." Gordon v. St. Mary's Healthcare Center, 617 N.W.2d 51, 162, (S.D. 2000). Employer did not have actual knowledge of the alleged injury within three business days of the injury.

Claimant's only avenue left for claiming to meet the requirement's of SDCL 62-7-10 is to show that she had good cause for failing to provide written notice. Claimant contended that she was either too ill to provide notice or that she felt "terminated" and about to lose her job, thus intimidating her into not giving notice of the potential work-related nature of her injury. Claimant's argument that she had good cause for failing to provide notice contradicts her contention that she provided Employer with actual knowledge of her injury within three business days of January 6, 2002. Neither one of Claimant's contentions is supported by the record.

There is no evidence in the record supporting Claimant's argument that she was too ill to provide notice. Claimant finished her shift after the incident. She spoke with Employer's representatives on the morning of January 8, 2002, and was offered the opportunity to be assessed by a nurse right away that morning. On January 8, 2002, she told her physician about her pain and did not mention a work incident. After her appointment with Dr. Zeigler and learning that she had probably suffered a herniated disk, she spoke with Kathy Frank about her condition. Claimant could not recall during her testimony whether she informed Kathy Frank about the work incident during the January 8, 2002, phone call. Kathy Frank testified that there was no mention of a work incident during the phone call.

Claimant's contention that Kathy Frank would have ignored her even if she had told Frank that she hurt herself at work does not meet her burden to show good cause. Claimant failed to offer evidence that she tried to report the injury as work-related. The record showed that Claimant talked to multiple employees of Employer on various occasions within three business days of January 6, 2002, and January 8, 2002, and never reported a work related injury. Claimant was not harassed or intimidated during these conversations. Employer offered to have Claimant assessed by a nurse the morning of January 8, 2002. Claimant did not have good cause for failing to provide written notice as required by SDCL 62-7-10.

Claimant failed to provide written notice within three business days of when she realized the nature, seriousness, and probable compensable character of her injury. Claimant failed to demonstrate that Employer had actual knowledge of Claimant's injury. Claimant failed to demonstrate that she had good cause for her failure to provide timely notice. Claimant did not meet the requirements of SDCL 62-7-10 and her claim must be dismissed.

Employer/Insurer 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. Claimant shall have ten (10) days from the date of receipt of Employer/Insurer'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, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 17th day of August, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge