SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION
DIVISION OF LABOR AND MANAGEMENT

Patrick B. Pulscher,
Claimant,

HF No. 91, 2009/10

v.

DECISION

Gehl Company,
Employer,

and

Sentry Insurance, a Mutual Company
a/k/a, Sentry Claims Services,
Insurer,

This is a workers' compensation proceeding brought before the South Dakota Department of Labor and Regulation 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, in Sioux Falls, South Dakota. Claimant, Patrick B. Pulscher appeared personally and through his attorney of record, Grant G. Alvine. William J. Gassen represented Employer, Gehl Company and Insurer, Sentry Insurance, a Mutual Company a/k/a Sentry Claims Services. This matter has been bifurcated with the sole issue of notice being heard at this hearing.

Issues

1. Whether Employer/Insurer had notice of Claimant's October 1, 2008, injury pursuant to SDCL §62-7-10.

Facts

Based upon the evidence presented and live testimony at hearing, the following facts have been established by a preponderance of the evidence:

At the time of the hearing, Patrick Pulscher (Claimant or Pulscher) was 59 years old. After completing high school, Pulscher received two degrees in woodworking and welding from Omaha Tech and became a certified welder. Pulscher held several positions including 10 years as a welder in Wisconsin before returning to South Dakota. Pulscher began working for Gehl Company on September 9, 2008. He was hired by Luke Morgan (Morgan) as a second shift welder. Second shift hours were from 3:30p.m. to 12:00 a.m. Morgan was Pulscher's direct supervisor. Pulscher began welding in the scrap metals and small parts division and was later moved to the Quick Attach area

working on the ROPS (roll over protection systems) as a finish welder. During each shift, Morgan would routinely observe the employees several times during each shift.

On Thursday, October 1, 2008, Pulscher was working in the Quick Attach division welding end caps on metal tubes. Each metal tube weighed approximately 18 to 20 pounds and was 36 inches long. As was common for employees in the Quick Attach area, Pulscher picked up 3 or 4 of these tubes at a time, carried them to his work station and welded the end caps. He then returned them to a rack when he was finished. Sometime after his regular 8 p.m. dinner break on October 1, 2008, Pulscher was working when he felt a sharp pain that he characterized as “a lightning bolt down his neck” causing him to drop the tubes he was carrying. Pulscher picked up the tubes and returned to work, Morgan checked on Pulscher at least once after this incident and Pulscher told Morgan that he had been hurt. Pulscher was able to complete the remainder of his shift.

On Friday, October 2, 2008, Pulscher returned to work at 3:30 p.m. When Morgan approached him at his work station, Morgans told Pulscher that his welds were poor quality. Pulscher explained that it was due to the injury from his last shift. Morgan told Pulscher to go home and he would call him Monday to discuss returning to work.

Morgan called on Monday, October 6, 2008, to see if Pulscher was able to return to work. Pulscher indicated that he needed the job and that he would return even though he was still hurt. Morgan told him to see a doctor if it got worse. Pulscher returned to work for his regularly scheduled shift at 3:30 p.m. When Pulscher got to work, Morgan asked to speak to Pulscher in his office. Morgan talked to Pulscher about the poor quality of his welds. When Pulscher explained that it was due to his injury and asked to speak to a supervisor.

Jeff Hatch, the production manager and Morgan’s immediate supervisor, was called into the meeting. Pulscher informed him of his October 1, 2008 injury and explained this was causing his poor welds and that he had reported the incident to Morgan. Hatch confirmed that no first report of injury or incident report had been filled out by Morgan and requested that he do so. Pulscher returned to work after this meeting. On October 8, 2008, Pulscher was terminated by Morgan.

Pulscher sought treatment for his neck, arm and shoulder pain on October 13, 2008. While Pulscher knew he was injured and associated it with his work activities immediately, however Pulscher did not know the full nature, extent or severity of his injury until after this appointment.

Other facts will be determined as necessary.

Analysis
The purpose of the notice requirement is “to give the employer the opportunity to investigate the injury while the facts are accessible. 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.” *Loewn v. Hyman Freightways, Inc*., 1997 SD 2 ¶ 10, 557 NW2d 762, 767 (citation omitted).

SDCL §62-7-10 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.

Pulscher bears the burden of proof to show that his employer had notice of the work related nature of his injury. *Mudlin v. Hills Materials Company*, 2005 SD 64, 698 NW2d 67. The Supreme Court has consistently held that workers’ compensation statutes should be construed liberally in favor of injured employees. *Rawls v. Coleman-Frizzell, Inc*., 2002 SD 130, 653 NW2d 247.

There is no dispute that Pulscher did not give his employer written notice within three business days of his injury. Therefore, Pulscher must show that either employer had actual knowledge of the injury, or that he had good cause for failing to give written notice within the three day period.

The South Dakota Supreme Court has held,

> In determining actual knowledge, the employee must prove that the employer had sufficient knowledge to indicate the possibility of a compensable injury. 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. 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 v. Stoebner & Permann Construction, Inc., 2006 S.D. 99, ¶53, 724 N.W.2d 586 (citations omitted).

During orientation at Gehl, all new employees are instructed to report all injuries, no matter how slight to their supervisor. In this case, Pulscher's direct supervisor was Luke Morgan. Pulscher testified that he understood that failure to report his injury could result of loss of workers' compensation benefits.

Pulscher argues that Employer had actual knowledge that he was injured and sufficient knowledge that the injury was sustained as a result of his employment. Pulscher argues that Employer was first notified of his injury on October 1, 2008, when Morgan, Pulscher's immediate supervisor, came to his work station and noticed that Pulscher's welds were not good, Pulscher contends that he explained it was because he was hurt from lifting the steel tubes. Pulscher argues that Morgan acknowledged this and told him to take it easy and do one at a time to complete the job. After reporting his injury to Morgan, Pulscher did not report his injury to human resources as they were closed for the evening.

Pulscher testified that on October 2, 2008, he told Morgans that his hands were shaky from being hurt the previous day and Morgan sent him home to rest for the weekend. Pulscher testified that he discussed his injury with Morgan for a third time when he called Pulscher's home on October 6, 2008. Pulscher further testified that Morgan acknowledged that Pulscher was hurt and told him that if it did not improve he would have to go see a doctor. Pulscher's longtime girlfriend Cindy also testified that she was present and heard Morgan as the call was received via a speaker phone which was the customary way the phone was answered in the Pulscher household.

Pulscher also testified that on October 6, 2008, after returning to work he was called in to Morgan's office and again they discussed his injury. When Morgan focused on the poor quality of his welds rather than the injury, Pulscher felt that Morgan was not listening to him he requested to speak to a production manager, Jeff Hatch. Pulscher explained to Hatch that he had been injured and this was why his welds were poor. Pulscher testified that Hatch instructed Morgan to fill out a First Report of Injury immediately, however Morgan did not fill out a Frist Report of Injury, instead he just filled out an incident report. Morgan admitted at the hearing that he did not know whose responsibility it was to fill out a First Report of Injury and did not have experience with the procedure and had never done it before.

Employer/Insurer argues that it did not have proper written notice or actual knowledge of Pulscher's injury. Morgan testified that he had no knowledge of Pulscher's injury until October 6, 2008. Morgan claimed that Pulscher was a poor welder from the beginning of his employment with Gehl and that they made efforts to move him to various divisions trying to find a good fit for him as a welder within the company. Morgan testified that on October 1, 2008, when he stopped to supervise Pulscher's work, no injury was reported. He further claimed that if an injury had been reported, there would have been documentation to support it as is required and in this case there was none.

Morgan further testified that when he spoke to Pulscher about the quality of his welds on October 2, 2008, Pulscher became upset, disrespectful and disruptive. He testified that this sort of insubordination was consistent with Pulscher's overall behavior during the time he worked for Gehl. Morgans claimed that due to Pulscher's insubordination, Pulscher was sent home or suspended from work.

Morgans testified that he did not recollect making a phone call on October 6, 2008 to tell Pulscher to return to work, however he does admit that it was more than likely him as Pulscher's direct supervisor that would have made that call. Morgan's denies any mention of an injury during that conversation. When Pulscher returned to work on October 6, 2008, Morgan asked to meet with Pulscher regarding his substandard work quality and attitude. Morgan testified that this was the first time he received notice of any injury. Morgan further testified that Pulscher was defensive and lost his temper at this meeting.

Despite Morgan's claims that Pulscher was a substandard employee, there was no documentation in Pulscher's personnel file to indicate that he had ever been written up for insubordination or poor work performance prior to his termination. The employee handbook required written documentation for acts of insubordination and other offenses. In this this case there was nothing to corroborate Morgan's claims that Pulscher was continuously insubordinate or performed poor quality welds. Morgan testified that he followed the manual with regard to personnel issues and injuries; however there was no evidence that Morgan ever made any documentation regarding Pulscher. The Department finds the testimony of Pulscher more credible than that of Morgan. Employer had actual knowledge of Pulscher's injury as early as October 1, 2008.

Claimant has met his burden of proof to show that Employer had notice of Pulscher's injury pursuant to SDCL 62-7-10. The Department shall retain jurisdictions on the remaining issues in this matter.

Conclusion

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/Insurer shall have ten (10) days from the date of receipt of

Claimant's proposed Findings of Fact and Conclusions of Law to submit objections thereto or to submit proposed Findings of Fact and Conclusions of Law. 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 24th day of February, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

/s/ *Taya Runyan*

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Taya M. Runyan
Administrative Law Judge