

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

**SHEILA KARI-JOHNSON,**  
**Claimant,**

**HF No. 112, 2005/06**

v.

**RAPID CITY SCHOOL DISTRICT,**  
**Employer,**

**DECISION**

and

**ASSOCIATED SCHOOL BOARDS OF  
SOUTH DAKOTA WORKER'S  
COMPENSATION TRUST FUND,**  
**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, in Rapid City, South Dakota. Claimant appeared personally and through her attorney of record, Dennis W. Finch. Jessica L. Filler represented Employer/Insurer.

**Issues**

It was stipulated by the parties that the sole issue before the Department at this time is whether Claimant met the statutory notice requirements of SDCL 62-7-10.

**Facts**

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

Shelia Kari-Johnson (Claimant) began working for the Rapid City School District (Employer) in 1989 as a special education teacher in a self-contained behavior room and behavior consultant. As part of her job, Claimant traveled to many elementary school buildings to consult with children who had severe behavior disorders. Claimant was assigned to travel to as many as eight schools at one time. Claimant's position was coordinated by Judy Osburn-Dryden, her direct supervisor. Claimant also reported to the principal at each school if there were any problems at that individual building. As part of her job duties, Claimant helped the classroom teachers as well as worked with

individual students each week. If the children became physically out of control, Claimant occasionally had to physically restrain them.

In 2003, Claimant contracted the West Nile Virus. The diagnosis of West Nile Virus was confirmed by the State Health Department. As a result of the virus, Claimant missed many days of work. Due to the numerous absences, Employer placed Claimant on a plan of assistance. The plan of assistance required Claimant to have a note from her physician if she was absent from work.

On March 8, 2005, Claimant was working at Rapid Valley Elementary School where she was serving a 5<sup>th</sup> grade female student. The student became very disruptive in the classroom. Claimant removed the student from the classroom to try to calm her. Claimant took the student into the speech room, where the student experienced periods of calm and periods of anger. At some point it became necessary to restrain the student. Claimant utilized a basket hold to restrain the student, meaning that Claimant was on the floor with her legs out and the student in between her legs and Claimant had her arms wrapped around the student. The student was restrained until her mother could come to pick her up from school. The restraint was not unusual or different from a typical student restraint incident.

During the incident, several people at the school observed Claimant talking to and restraining the student. Troy Volesky, the school principal, checked on Claimant, who indicated that everything was okay and she did not need help. Todd Christensen, the special education program director also observed the incident for several minutes. Claimant did not indicate to Christiansen that she was injured. Elaine Reed, a school psychologist, Judy Anderson and Cassidy Kennedy, other staff members at Rapid Valley Elementary, also observed the incident. Claimant indicated to them that everything was okay.

Following the incident, Claimant filled out a standard incident report. The report detailed the events leading up to the incident and techniques utilized by Claimant to try to calm the student including the restraint. Claimant stated that the restraint lasted about one hour. Claimant described the physical condition of the student after the restraint as having red arms from being held tight. Claimant also remarked that another staff member had red shaking hands from assisting in the hold for so long. Claimant made no mention of an injury to herself as a result of the incident. Troy Volesky, the principal at Rapid Valley Elementary School at the time of the incident, had already left for the day so Claimant left the incident report in his inbox.

Following the incident, Claimant never spoke to Troy Volesky, the school principal or any of the other staff that witnessed the incident about the restraint or the incident. None of the witnesses to the incident ever observed Claimant behaving differently to indicate that she was hurt or injured. Claimant did not report the incident or any resulting injury to her direct supervisor, Judy Osburn-Dryden. Although she had had contact with

Claimant on several occasions following the incident, Osburn-Dryden did not become aware of the incident until Claimant filled out the first report of injury in September of 2005.

On March 10, 2005, Claimant sought treatment at the Rapid City Medical Center. Claimant saw Dr. Abernathie. Claimant did not complain about any problems with her shoulder or arms. Claimant indicated that she had left knee pain. Claimant related to the doctor that she had restrained a student the day before and had her legs wrapped around the student when she felt a strain in her left knee. Upon examination, the doctor noted that there was no loss of motion in the left knee and there was minimal tenderness.

On March 23, 2005, Claimant again sought treatment at Rapid City Medical Center. Claimant saw Jennifer Johnson, a physician's assistant. Claimant's chief complaint was tiredness and lack of energy. Claimant made mention of left knee pain and that she had been very achy which may be due to various "take downs" of children with behavior problems at her job. Claimant made no mention of shoulder or arm pain.

Claimant continued to work until the end of the school year. Claimant did not talk to her supervisor, co workers, or the principal at the school about an injury to her shoulder or any other injury that was sustained as a result of the incident that took place on March 8, 2005 involving the restraint of a disruptive student.

In May of 2005, Claimant again sought treatment at Rapid City Medical Center. Claimant saw Jennifer Johnson, PA. Claimant presented with left shoulder pain and was given a Kenalog injection in her left shoulder. On August 5, 2005, Claimant returned to see Jennifer Johnson, PA. Claimant continued to complain of left shoulder pain. Claimant reported that the Kenalog injection had helped a little bit, but that she continued to have pain which she had been treating with ibuprofen. The medical records state,

Claimant admits that she has been quite active especially over the last couple weeks. She has been helping her mother out on her farm and really has been overusing the left arm and shoulder.

X-rays taken of the left shoulder showed no acute bony abnormalities. Claimant was prescribed physical therapy which she began on September 13, 2005. At the suggestion of the physical therapist, Claimant filled out a first report of injury with Employer. Claimant indicated on the first report of injury that on March 8, 2005, she was elbowed and injured her left shoulder from holding the student during a physical restraint.

Claimant was referred to an orthopedic surgeon, Dr. Stephen Eckrich who ordered an MRI of Claimant's left shoulder on November 2, 2005. Dr. Eckrich diagnosed Claimant with a rotator cuff tear.

Other facts will be determined as necessary.

### **Analysis**

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.

Claimant bears the burden of proof to show that her employer had notice of the work related nature of her injury. *Mudlin v. Hills Materials Company*, 2005 SD 64, 698 NW2d 67. It is undisputed that Claimant did not give written notice of her shoulder injury within three business days as required by the statute. However, Claimant argues that she has met both of the exceptions to the three-day reporting requirement.

### **Actual Knowledge**

When an employer has actual knowledge of the injury, the failure to provide notice does not bar the claim. A workers' compensation claimant bears the burden of establishing that the claimant either provided written notice of the injury or that the employer had actual knowledge of the injury. *Westergren v. Baptist Hospital*, 1996 SD 69, ¶17, 549 NW2d at 395.

Claimant argues that an employee need only provide notice of the possibility that an injury occurred and that the injury is work-related. Claimant argues that Employer had actual knowledge of the incident and the physical nature of the restraint, therefore alerting the Employer to the possibility of an injury being sustained. Claimant relies on *Orth v. Stoebner*, 2006 SD 99, 724 NW2d 586 to support this argument.

Employer/Insurer argues that *Orth* is not applicable in this matter. The Supreme Court held in *Orth*, that "[Claimant's] workers' compensation claim could proceed only if he proved that his employers had actual knowledge of both his injury and its potential work-relatedness." *Id* at ¶54. Employer in *Orth* knew that Claimant had an injury. The

Supreme Court further stated, “[t]here must be some knowledge of accompanying facts connecting the injury or illness with the employment, and indicating to a reasonably conscientious manager that the case might involve a potential compensation claim.” *Id* at ¶ 58. *Orth* is distinguishable from this matter. Claimant gave no indication that she was injured as a result of the March 8, 2005 incident. Claimant provided no notice of any injury on the incident report. Claimant’s demeanor at work did not indicate that she was injured in any way. Claimant did not tell her supervisor that she had sustained an injury as a result of the incident on March 8, 2005. There was no evidence presented that a reasonably conscientious employer would have reason to believe that a potential claim resulted from the incident. The facts here do not demonstrate that Claimant’s supervisor/employer had actual knowledge of her alleged injury.

Claimant failed to meet her burden to show that Employer had actual knowledge of her injury. The exception to the three day written notice requirement set forth in SDCL 62-7-10(1) does not apply to the facts of this case.

### **Good Cause**

Claimant argues that she had good cause for failing to give written notice within three days as required by SDCL 62-4-10. Claimant argues that she did not know the seriousness of her injury until September of 2005 when a physical therapist suggested that she had a serious enough problem to warrant seeing an orthopedic surgeon and that Claimant first felt compelled to file a first report of injury.

[I]t 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. 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. However, the standard creates an objective, not subjective test. (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, 711 NW2d 244 (citations omitted).

Claimant testified that she had filed previous workers’ compensation claims for other work related injuries and understood the importance of reporting all work related injuries as soon as possible. Claimant testified at hearing that she knew her shoulder was injured March 8, 2005 during the physical restraint of a student, Claimant testified that she did not report an injury to any part of her body the day of the incident because she was always sore and physically drained after a restraint and did not feel that it was necessary to report an injury at that time.

The medical records indicate that Claimant failed to seek any medical treatment including injections in her shoulder until May of 2005. The medical records further

indicate that some time prior to her appointment in August 2005, Claimant had discussed her shoulder condition with a friend who suggested physical therapy for her shoulder condition. At her appointment in August 2005, Claimant indicated that the shoulder pain was due to over using her arm and shoulder at her mother's farm. Claimant's testimony that she did not realize the seriousness of her injury until September 2005 was not credible due to the inconsistencies between Claimant's testimony and the medical records. The Department finds the medical records to be more reliable. Given her education and intelligence, Claimant should have realized the compensable nature of her injury by May 2005 or, at the very latest, August of 2005.

Claimant also argues that she had good cause for failing to provide written notice within three days because she was fearful that she might lose her job. This argument is without merit. While it is true that Claimant was on a plan of assistance as a result of her absenteeism, Claimant missed work after the plan of assistance was implemented and as long as she had a note from the doctor, she was not terminated or disciplined. Employer had made accommodations in the past for Claimant's medical condition and Claimant did not provide evidence that her job would be in jeopardy if she filed a workers' compensation claim.

Claimant failed to meet her burden to show that she had good cause for failing to give written notice within the three business-day period. The exception to the three day written notice requirement set forth in SDCL 62-7-10(2) does not apply to the facts of this case.

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 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, Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 4th day of December, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Taya M. Dockter  
Administrative Law Judge