

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

**KATHY BELTON,**

**HF No. 135, 2004/05**

**Claimant,**

**DECISION**

vs.

**SIoux VALLEY REGIONAL HEALTH  
SERVICES, d/b/a MID DAKOTA HOSPITAL,**

**Employer,**

and

**DAKOTA TRUCK UNDERWRITERS,**

**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 March 2, 2006, in Chamberlain, South Dakota. Kathy Belton Leibrich (Claimant) appeared personally and through her attorney of record, Kit McCahren. Michael S. McKnight and Charles A. Larson represented Employer and Insurer (Employer). The two issues presented at the hearing were whether Claimant sustained an injury arising out of and in the course of her employment with Employer and whether Claimant provided timely notice to Employer pursuant to SDCL 62-7-10.

**FACTS**

The Department finds the following facts, as established by a preponderance of the evidence:

At the time of the hearing, Claimant was forty-two years old and lived in Chamberlain, South Dakota. Claimant graduated from high school in 1982 and did not pursue any further educational or vocational training. After high school, Claimant did not work as she stayed home to care for her children.

Claimant began working in 1992 as a Certified Nursing Assistant (CNA) for various employers in Montana and North Dakota. Claimant moved to Chamberlain and obtained a job with Employer as a CNA on October 15, 2004. Claimant passed her pre-employment physical and then received orientation training for two days on October 19 & 20, 2004. During orientation, Claimant received information about reporting injuries at work. Employer's policy required employees to notify the charge nurse on duty of any work injury, no matter how minor. Claimant's first day working on the floor was Thursday, October 21, 2004.

Claimant testified she injured her right foot sometime during her work shift on October 21, 2004. Claimant was certain that she suffered an injury on October 21, 2004. However, Claimant gave her medical providers various dates of injury, including

October 2, October 12, October 16, October 22 and October 25. Dawn Boyer, Claimant's co-worker, thought the incident took place on or around October 24, 2004. However, Boyer could not remember the specific date because she and Claimant worked together only for a few days.

Claimant and Boyer were transferring resident Dorothy Lake from the commode to a wheelchair. Claimant testified she hurt her foot during this transfer. Claimant stated, "[w]e were transferring Dorothy, and my right foot got caught in between the commode and the wheelchair and I twisted it. And at that time I fell, and I said, 'Oh, shit, dammit. I hurt my foot.' And I caught myself – the commode kind of turned a little bit – or the wheelchair, and I fell to the – the side of the bed." During her deposition testimony, Claimant testified she stated, "[s]on of bitch that hurt."

Claimant testified she caught herself as she fell. She stated, "I was kind of on the ground versus halfway on the bed." During her deposition testimony, Claimant testified that she twisted her foot and almost fell, but Boyer caught her. At the hearing, Claimant stated that Boyer did not catch her. Claimant testified that Boyer told her "well, you'd better get up to the charge nurse."

Boyer remembered there was an incident that happened sometime in October 2004 when she and Claimant transferred Dorothy from the commode to a wheelchair. During the transfer, the three heard a "popping" noise and Dorothy thought it was her bones popping because she had osteoporosis. Claimant informed Boyer and Dorothy that it was actually her bones popping because she, too, had osteoporosis.

Boyer did not observe Claimant trip or fall. Boyer did not "catch" Claimant during Dorothy's transfer. Claimant did not say to Boyer "oh, shit, dammit. I hurt my foot." Boyer did not inform Claimant "that she needed to go tell somebody what had happened." Claimant did not mention to Boyer that she hurt her foot. Boyer had no indication that Claimant was hurt in any way because when the two left Dorothy's room, Boyer and Claimant were "still laughing" about the "popping" incident. To the contrary, during her deposition, Claimant stated she was limping as she exited Dorothy's room.

Claimant testified she went to the medication room and informed Phyllis Soulek, an RN for fifty-one years, that she hurt her foot. In her deposition, Claimant testified Soulek was at the front desk. Claimant stated, "I told her I said, 'Phyllis, I hurt my foot.' And she turned around and she says, 'Are you okay?' And I said, 'Well, it hurts.' And she says, 'Well, can you go back to work?' And I said, 'Yeah.'"

Soulek was one of two nurses working during the day shift on October 21, 2004. Soulek credibly testified that Claimant did not report to her on October 21<sup>st</sup>, or at any other time, that Claimant suffered an injury to her right foot. Angie Frederick, Employer's Director of Nursing, was the other nurse on duty during Claimant's shift. Frederick, not Soulek, was the charge nurse on duty for the area where Claimant worked on October 21<sup>st</sup>. As the charge nurse, Frederick was Claimant's supervisor on October 21, 2004. Claimant did not report any injury or incident concerning her right foot to Frederick on October 21, 2004, or any other time prior to November 9, 2004.

Even though Claimant testified she reported her injury to Soulek on October 21<sup>st</sup>, Claimant did not provide Employer with written notice of her injury within three business days of October 21<sup>st</sup>. Claimant testified she did not complete a written report of her injury on October 21<sup>st</sup> because, "I wasn't – I thought it was just a sprain at that time. I didn't think you had to fill one out at that time. I wasn't asking for workmen's compensation at that

time.” Claimant’s testimony conflicted with the information provided to her during orientation as she was required to notify Employer of any injury, no matter how minor.

During the evening of October 31, 2004, Claimant was on a break with Twila Gilbert, a CNA who was training Claimant during the work shift. Frederick returned to work after trick-or-treating with her children to complete some paperwork. Frederick went into the break room and noticed Claimant had her right foot propped up and that it was swollen. Both Frederick and Gilbert asked Claimant what was wrong with her foot. Claimant informed Frederick and Gilbert that she did not know how she hurt her foot. Frederick specifically asked Claimant if she hurt her foot at work. Claimant responded, “No.” Frederick also asked Claimant if she thought about seeing a doctor for her foot. Claimant informed Frederick that her “insurance doesn’t kick in until the beginning of the month.” Claimant had no recollection of the October 31<sup>st</sup> conversation with either Frederick or Gilbert. Claimant testified that she did not discuss her foot with Frederick before November 9, 2004.

During her brief employment, Claimant’s co-workers noticed that Claimant was having difficulties with her right foot. Claimant always denied that she injured her foot at work. Claimant even informed Rebecca Hill-Reuer, the CNA coordinator for Employer, that she thought she injured her foot at home. Claimant also told her co-workers that she could not seek medical treatment because she did not yet have insurance.

On November 3, 2004, Claimant saw Dr. Frank Bieberly concerning her right foot. Dr. Bieberly noted, “[Claimant] twisted her right foot about a week ago and has had ankle pain since that time.” X-rays taken were unremarkable. Dr. Bieberly was unsure if Claimant had a severe ankle sprain or a stress fracture in the right foot and ordered a bone scan.

On November 9, 2004, Claimant returned to see Dr. Bieberly. The bone scan showed “a recent navicular bone fracture.” Dr. Bieberly referred Claimant to see Dr. Robert McWhirter, an orthopedic surgeon in Mitchell, South Dakota, and took Claimant off work.

Employer first learned on November 9, 2004, that Claimant intended to file a workers’ compensation claim due to an injury concerning her right foot. After her appointment with Dr. Bieberly, Claimant called Carol Lake, the charge nurse on duty that morning. Claimant informed Carol that she was unable to work due to her fractured foot and that she wanted to file a workers’ compensation claim. Carol contacted Frederick and Frederick immediately called Claimant to come into the office to complete the necessary paper work. When Frederick contacted Claimant on November 9<sup>th</sup>, Frederick had no idea that Claimant’s right foot problems were related to a work injury. November 9<sup>th</sup> was the first day Employer learned that Claimant was making a claim for workers’ compensation benefits due to an incident on October 21<sup>st</sup>.

On November 9<sup>th</sup>, Claimant completed a South Dakota Employer’s First Report of Injury and Employer’s Workers’ Compensation Claimant’s Report. On both documents, Claimant indicated that she broke her ankle while working on October 21, 2004. Claimant also wrote that she reported her injury to the charge nurse on duty on October 21<sup>st</sup>.

Claimant saw Dr. McWhirter on November 10, 2004. Dr. McWhirter provided the following history in his medical record:

Kathy is a 40 year of female, certified nursing assistant. She had worked at Sunset Valley Nursing home for a 2 day period of time and apparently she caught her right foot on about 10/2/04, although the dates are somewhat unknown to her. It may have been 10/12/04.

She injured her foot. She states she reported it to the charge nurse but no forms were filled out.

She had severe pain, worked an additional 2 weeks after the injury, but because of the pain she had not worked for the past 2 weeks. She is having severe pain.

Dr. McWhirter suspected either a stress fracture or navicular fracture in Claimant's right foot. Dr. McWhirter put Claimant in a leg cast and eventually referred Claimant to Dr. William Bell in Sioux Falls.

On November 11, 2004, Dr. Bieberly reexamined Claimant's right foot. Dr. Bieberly wrote in his medical record, "[a]pparently Ms. Belton did not report the injury at the time it occurred. I suspect one could have had only minor discomfort initially and then there was displacement of the navicular fracture the pain could come some days later though I am not sure quite how this all progressed. She relates it to a specific incident however and seems fairly certain that this is when the discomfort occurred though it progressed over a number of days."

After November 2004, Claimant sought medical treatment from various providers. Employer denied Claimant was entitled to workers' compensation benefits because her injury was not work-related and that she failed to give proper notice as required by SDCL 62-7-10.

Claimant was not a credible witness. This is based on her inconsistent testimony that was not corroborated by six other credible witnesses and based on the opportunity to observe Claimant's demeanor at the hearing.

Other facts will be developed as necessary.

## ISSUE I

### WHETHER CLAIMANT SUSTAINED AN INJURY ARISING OUT OF AND IN THE COURSE OF HER EMPLOYMENT WITH EMPLOYER?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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). Claimant must show that her "injury arose out of [her] employment by showing a causal connection between [her] employment and the injury sustained." Horn v. Dakota Pork, 2006 SD 5, ¶ 13 (citations omitted). "The employment need not be the direct nor proximate cause of the injury in order to establish this causal connection, but rather must be shown to be a contributing factor to the injury." Id. "[T]o show that an injury 'arose out of' employment, it is sufficient if the employment 1) contributes to causing the injury; or 2) the activity is one in which the employee might reasonably be expected to engage or 3) the activity brings about the disability upon which compensation is based." Norton v. Deuel Sch. Dist., 2004 SD 6, ¶ 8 (citations omitted).

“The phrase, ‘in the course of’ employment ‘refers to time, place and circumstances under which the accident took place.’” Id. ¶ 9 (citations omitted). “An employee is considered within the course of employment if ‘[s]he is doing something that is either naturally or incidentally related to employment.’” Id. “[A]n activity that was expressly or impliedly authorized by the contract or nature of employment falls within the course of employment.” Id. (citation omitted).

Claimant testified her injury occurred at work and that her employment contributed to the injury because she was transferring a patient at the time of the injury. Claimant’s testimony is not credible because it was in direct conflict with six other credible witnesses.

Claimant was certain that she suffered an injury to her right foot on October 21<sup>st</sup> when she and Boyer transferred Dorothy from the commode to her wheelchair. There is no dispute that Boyer assisted Claimant with a transfer of Dorothy and there was a popping noise. Thereafter, the versions of what happened during the transfer significantly diverge. Claimant’s testimony of this incident was not corroborated by any other credible witness.

Claimant testified that when she caught her foot, she exclaimed, “oh shit, dammit. I hurt my foot.” Boyer did not hear Claimant yell any statement such as “son of a bitch that hurt” or “oh, shit, dammit. I hurt my foot.” Claimant did not tell Boyer that she hurt her foot. Boyer did not tell Claimant to report an injury.

In her deposition, Claimant contended that after she twisted her foot, she fell, but Boyer caught her. However, at hearing Claimant testified Boyer did not catch her and that she caught herself as she fell and landed on the bed. Boyer did not catch Claimant because Claimant never fell.

Boyer heard a popping sound during the transfer. Claimant alleged the popping noise was her foot breaking. But, the evidence demonstrated Dorothy asked if the popping noise was her bones as she had osteoporosis. Claimant told both Boyer and Dorothy it was her bones that popped because she also had osteoporosis.

After completing the transfer, Claimant testified in her deposition that she got up and started limping. This is in direct conflict with the credible testimony that as Claimant and Boyer left Dorothy’s room, there was no indication that Claimant was hurt in any way because both were still laughing about the “popping” incident. Claimant also contradicted herself at the hearing because Claimant did not testify that she was limping. Claimant testified she thought she had only a minor injury.

In her deposition, Claimant initially testified that when she left Dorothy’s room, she went to the front desk and informed Soulek of her injury. At the hearing, Claimant testified she went to the medication room and told Soulek that she hurt her foot. Soulek was one of the nurses on duty on October 21<sup>st</sup>, but she was not the charge nurse on duty. Frederick was the charge nurse on duty at the time and Claimant should have reported any injury to Frederick. More importantly, Soulek credibly testified that Claimant did not report any injury to her on October 21<sup>st</sup> or any time thereafter. Frederick credibly testified that Claimant did not report any injury to her on October 21<sup>st</sup> or any time subsequent until November 9, 2004. Claimant’s hearing testimony also conflicted with her statement to Dr. Bieberly on November 11<sup>th</sup> as Claimant informed Dr. Bieberly that she “did not report the injury at the time it occurred.”

Throughout her employment with Employer, Claimant either complained about her feet to various co-workers or the co-workers noticed her limping. For example,

Claimant discussed with Boyer that her feet were hurting. Boyer testified, “[w]e had talked about it. She said her feet were both hurting, and we talked about where to buy new shoes and – and support hose because she was new to the area.”

Gilbert noticed Claimant limping on several occasions. Gilbert credibly testified when she asked Claimant about her foot, Claimant always answered that she did not know how she hurt her foot. Hill-Reuer noticed Claimant limping and asked Claimant about her foot on October 24, 2004. Hill-Reuer credibly described her conversation with Claimant:

I had asked Kathy what had – what had happened, what she had done [to her foot]. And - -

Q: What did she say?

A: She said she didn’t – she didn’t know for sure. I asked her where she had done it. She said she thought she had done it at home.

. . . .

A: I told that she – we- looked at it. It was really swollen. I told her that she needed to go see the doctor.

Q: What did she say?

A: She said that she couldn’t because she didn’t have any insurance until December.

Hill-Reuer informed Claimant that if she had injured herself at work, she needed to complete the necessary workers’ compensation papers. Hill-Reuer even told Claimant exactly where the papers were located in the office. Claimant did not complete any written documentation until November 9, 2004.

Elaine Olson, another CNA, noticed Claimant limping during the times they worked together. Olson asked Claimant about her problem and Claimant indicated her feet hurt because of her new shoes. Claimant did not mention to Olson about any incident at work that caused her foot to hurt.

These conversations between Claimant and her co-workers were consistent with the conversation Claimant had with Frederick on October 31, 2004. On that date, Frederick noticed that Claimant’s foot was swollen. Frederick inquired as to what happened to Claimant’s foot. Frederick specifically asked Claimant if she had hurt her foot at work. Claimant responded that she did not hurt her foot at work and that she could not see a doctor because she did not yet have insurance.

Claimant claimed she hurt her foot at work and the injury was associated with the October 21<sup>st</sup> transfer of Dorothy. However, Claimant’s testimony was contradicted by the six credible witnesses. In order to believe Claimant’s testimony, Frederick, Boyer, Gilbert, Soulek, Hill-Reuer and Olson would have to be lying or mistaken. This is simply not the case. Boyer, Gilbert and Olson were Claimant’s co-workers, but employed by a separate employer that provided CNA services to various facilities. These employees had nothing to gain by misleading the Department with false testimony.

Claimant’s only evidence that her injury arose out of and the course of her employment was her self-serving testimony that changed throughout her deposition and hearing testimony. Claimant also argued that her injury was work-related because it was supported by the medical records. However, the medical records contained statements and diagnoses based solely on Claimant’s inconsistent history and

information. The medical records revealed numerous contradictions in Claimant's reports to her doctors concerning the date of injury and even whether or not she reported the injury. Claimant was not credible and her testimony must be rejected.

Claimant failed to present any credible evidence that she injured her right foot at work. Claimant failed to establish by a preponderance of the evidence that her right foot injury arose out of or occurred in the course of her employment.

## ISSUE II

### WHETHER CLAIMANT PROVIDED TIMELY NOTICE TO EMPLOYER PURSUANT TO SDCL 62-7-10?

Even assuming Claimant suffered an injury to her right foot at work, she failed to provide Employer with timely notice. The notice requirement is governed by SDCL 62-7-10. This statute 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.

"In order to collect the benefits authorized by the South Dakota Legislature, a worker must meet the requirements of state statute." Aadland v. St. Luke's Midland Regional Medical Ctr., 537 N.W.2d 666, 669 (S.D. 1995). "Notice to the employer of an injury is a condition precedent to compensation." Loewen v. Hyman Freightways, Inc., 557 N.W.2d 764, 766 (S.D. 1997).

The purpose of the notice requirement is to provide Employer the opportunity to investigate the cause and nature of Claimant's injury while the facts are readily accessible. Schuck v. John Morrell & Co., 529 N.W.2d 894, 897 (S.D. 1990). "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." Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶ 24 (citation omitted).

The statute is clear that written notice must be provided within three business days after the occurrence of the injury. "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 Hosp., 551 N.W.2d 817, 820 (S.D. 1996). The "reasonableness of a

claimant's conduct 'should be judged 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.'" Loewen, 557 N.W.2d at 768.

The South Dakota Supreme Court has previously held "that the duty to notify [an] employer did not arise until the date when the compensable injury was known to [claimant]." Vu v. John Morrell & Co., 2000 SD 105, ¶ 23 (citing Pirrung v. American News Co., 67 N.W.2d 748 (S.D. 1954)). The court also stated:

[T]he fact that [claimant] suffered from pain and other symptoms is not the determinative factor and will not support a determination that respondent had knowledge of the existence or extent of [her] 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 ¶ 24 (citing Bearshield v. City of Gregory, 278 N.W.2d 164, 166 (S.D. 1979)).

Claimant was certain that she suffered an injury to her right foot when she twisted it on October 21, 2004. Claimant testified that she said to her co-worker that she hurt her foot. Based on her testimony, Claimant immediately thought that she had a work-related injury. Claimant also testified that she verbally reported her injury to Soulek, a nurse on duty at the time. But, Claimant failed to provide Employer with written notice of her injury within three business days after its occurrence.

Claimant alleged that her injury appeared to be minor on October 21<sup>st</sup>. Therefore, Claimant argued the time period for notice did not begin to run until November 9<sup>th</sup>, when she learned from Dr. Bieberly the extent of her injury. Claimant cannot argue in the alternative as she "cannot 'assert a better version of the facts than [her] prior testimony and 'cannot now claim a material issue of fact which assumes a conclusion contrary to [her] own testimony.'" Clausen v. Northern Plains Recycling, 2003 SD 63, ¶ 18 (citations omitted). Claimant contradicted herself as she testified she knew she had injured herself on October 21<sup>st</sup> during the transfer incident.

If Claimant's testimony is believed, she knew on October 21<sup>st</sup> that she had a work-related injury. Claimant had three business days from October 21<sup>st</sup> to provide Employer with written notice of her injury. Claimant testified that she reported her injury to Soulek. This testimony is not credible as the evidence showed that Claimant did not report any injury until November 9, 2004, well outside the time frame set forth in SDCL 62-7-10.

Therefore, Claimant must demonstrate either that Employer or Employer's representative had actual knowledge of the injury or that Claimant had good cause for failing to give written notice within the three business-day period.

Employer did not have actual knowledge of Claimant's injury until November 9, 2004. Prior to November 9<sup>th</sup>, Frederick noticed that Claimant's right foot was swollen. Frederick asked Claimant about her foot condition and Claimant denied that she suffered an injury at work. At no time prior to November 9<sup>th</sup> was Employer alerted to the possibility of a claim so that it could begin an investigation. Employer did not begin to investigate this claim until approximately nineteen days after the incident took place.

Once Claimant informed Frederick about her injury, Frederick began to investigate the circumstances surrounding Claimant's injury. On November 9<sup>th</sup>,

Frederick talked to various co-workers and these individuals prepared written statements about the circumstances surrounding Claimant's injury. Boyer was one of the individuals who completed a form titled "Mid Dakota Medical Center Long Term Care Documentation" on November 9<sup>th</sup>. Boyer wrote:

On or about October 24, Kathy and I were in a resident's room transferring the resident onto [the] commode. We heard a popping sound. The resident ask[ed] if it was her bones cracking and Kathy replied it was hers. We all laughed about signs of getting old. Kathy stated that she has [had] osteoporosis. And has had it for some time.

She did not bump herself or trip on anything.

Later she said her foot was really hurting. I told her she needs to get this checked. She said it was probably from walking on the hard floors. We talked about places to purchase shoes and ted hose.

Later in the week she told me her foot was swelled [sic]. I again said she needs to get it checked. She kept telling me she had no insurance. She again talked about osteoporosis. I ask[ed] if it was that easy for her bones to break – should she be lifting these people. Again, she refused to get the foot checked.

Gilbert also provided a written statement on November 9<sup>th</sup> concerning the October 31<sup>st</sup> conversation:

When I was in the breakroom with Angie Frederick and Kathy Belton she stated that her foot hurt. I asked her if she did anything specific to hurt her foot or if anything happened to hurt it [and] she said no. I said maybe she should try different shoes then because maybe they were hurting her feet. She also stated that her insurance wouldn't be in effect until later.

Olson provided the following written statement on November 9<sup>th</sup>:

When I was working with Kathy she was limping and she said her foot hurt. I asked her if she hurt it somehow and she said no, it started hurting after I got my new pair of shoes for work and have been wearing them. I said maybe you should wear your old one's for awhile then until your foot feels better and she said "no" I got these for work and I'm going to use them. I asked her if she had gone to the Dr. to see if anything was causing the swelling or to get some medicine and she said I can't because I don't have insurance until Dec. and I can't afford to go.

These written statements further demonstrate that Employer did not have actual knowledge of Claimant's alleged injury on October 21, 2004. Claimant failed to establish by a preponderance of the evidence that Employer or Employer's representative had actual knowledge of her injury.

Claimant did not have good cause for failing to provide written notice within three business days of the incident on October 21, 2004. When "the failure to give notice is at issue, the claimant has the burden of showing that for some good and sufficient reason notice could not be given." Shykes, 2000 SD 123, ¶ 40 (citation omitted).

Claimant argued she did not have to provide notice to Employer until November 9, 2004, when she first learned she fractured her right ankle. However, this position is inconsistent with Claimant's prior testimony that she did, in fact, provide notice on October 21, 2004. Claimant is bound by her testimony that she provided Employer with notice of her injury, even though her testimony is not credible. Claimant failed to demonstrate by a preponderance of the evidence that she had good cause for failing to provide notice to Employer within the three-day period. Claimant failed to provide Employer with timely notice pursuant to SDCL 62-7-10.

Based on this decision, Claimant is precluded from recovering any workers' compensation benefits. Claimant's Petition for Hearing must be dismissed with prejudice.

Employer shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Claimant shall have ten days from the date of receipt of Employer's proposed Findings and Conclusions to submit objections 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 shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 28<sup>th</sup> day of June, 2006.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp  
Administrative Law Judge