

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

**BETTY WISE ,**  
**Claimant,**

**HF No. 170, 2007/08**

v.

**DECISION**

**WAL-MART STORES, INC.,**  
**Employer,**

and

**CLAIMS MANAGEMENT INC.,**  
**Third-party Claim**  
**Administrator,**

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 Rapid City, South Dakota. Claimant, Betty Wise, appeared personally and through her attorney of record, Frank Driscoll. Daniel E. Ashmore represented Employer/Self-Insurer, Wal-Mart.

**Issues**

1. Notice
2. Causation & Compensability
3. Nature & Extent of Claimant's Disability
4. Work Comp Rate
5. Willful Misconduct

**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, Betty Wise (Claimant or Wise) was 73 years old. She is divorced and has five grown children. Wise underwent a hysterectomy in 1972. She began experiencing problems with spontaneous leakage of urine in 1980. Wise testified that her problems began after a move where she had done a lot of heavy lifting and

moving boxes. Wise was diagnosed with a grade 3 cystocele. On January 24, 1985, she was treated in Fairmont, Minnesota by Dr. R.L. Zemke who performed surgery to repair her bladder with a sling. The surgery was successful and Wise testified that she had complete control of her bladder following the surgery.

In 1999, Wise began working for Wal-Mart in Chesapeake, Virginia working in the foods, fabrics and the dairy departments. In 2003, she put in for a transfer after moving to Rapid City, South Dakota. At the Rapid City Wal-Mart, Wise began working in the foods department and later transferred to the fabrics department. Wise testified that there was some lifting in the fabric department, but nothing she couldn't handle.

In 2004, Wise requested a transfer to another department due to a conflict with another employee. Wise testified that the other employee embarrassed her in front of customers and they were unable to resolve their differences. Wise's request was approved and she was transferred to Department 82. Department 82 included all the miscellaneous items that were displayed near the cash registers and batteries. Wise's duties in Department 82 were mostly restocking the merchandise. Merchandise would be taken from the stock room on carts and put out on display shelving and clip strips.<sup>1</sup> Most merchandise weighed between 2-6 pounds. Batteries were the heaviest merchandise in Department 82 that Wise would have dealt with. Wise testified that during the holiday season, the amount of batteries she handled significantly increased. The heaviest cases of batteries were the D-cell and six-volt which weighed approximately 20 pounds. Wise was not required to lift a whole case of merchandise, she had been shown by her supervisor how to break down the larger boxes and take the smaller packages out to the display on her cart. While working in Department 82, Wise began to experience bladder control problems. Her problems began with small leakage and gradually increased until she had no bladder control at all.

On November 17, 2004, Wise saw Dr. Douglas Heintz at Rapid City Medical Center. She reported that she had been experiencing symptoms such as urgency, frequency and burning similar to her symptoms in the 1980's that required her to have her bladder "tied up." Dr. Heintz referred her to Dr. Jeff L. Bendt for further treatment.

By the end of November 2004, Wise experienced an increase in problems with her bladder leaking and she felt she could no longer continue working. Wise submitted her resignation identifying health problems as her reason for quitting. Wise did not disclose the nature of her health issues nor did she indicate that her health issues were brought on by her employment activities at Wal-Mart.

Wise saw Dr. Bendt on November 23, 2004. Wise reported to Dr. Bendt that she had "essentially quit working at Wal-Mart because when she lifts heavy things she noticed at

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<sup>1</sup> Clip strips were the plastic strips that hang near the check out. Small merchandise such as candy, lip balm or batteries was clipped to the strips for display.

the end of the day when she goes home she may have a full bladder and she will just sit down and twice a week now recently for the last few weeks, she will just have a gush of urine come out uncontrollably.” Wise requested that her bladder be “tied up” again like her previous surgery. Dr. Bendt did not recommend surgery, but rather recommended medication and if that did not work, he would refer her to Dr. Gerald Butz, an urologist at Black Hills Urology, P.C.

On December 7, 2004 Wise saw Dr. Eric Eidem, the physician’s assistant who worked with Dr. Butz at Black Hills Urology. Wise reported to Dr. Eidem that she had increased problems with incontinence over the last six months and that it generally occurred after she had been working hard. Dr. Eidem noted that Wise suffered from incontinence, but that it was somewhat difficult to tell which type exactly. On December 29, 2004, Dr. Butz, performed surgery to suspend Wise’s bladder.

Initially, the surgery performed by Dr. Butz restored Wise’s bladder control to normal, but after a period of time, her bladder control gradually began to diminish. Dr. Butz performed multiple collagen injections on December 18, 2007 and again on June 1, 2009, however Wise continued to experience poor bladder control.

In March 2005, Wise filled out a first report of injury and submitted it to the Department. In April of 2005, Wise sought unemployment benefits. Wise claimed in her unemployment application that she was required to lift in excess of 50 pounds<sup>2</sup> at Wal-Mart and this caused her bladder to fall. Wise testified live at hearing that she did not report the accident at the time of her injury and did not request medical leave. In May 2008, Wise filed a petition for workers’ compensation benefits.

Other facts will be determined as necessary.

## **Analysis**

### **Notice**

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.

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<sup>2</sup>. Wise had lifting restrictions from a previous non-work related back injury in 1992. She had lifting restrictions of 30 pounds and carrying 50 pounds.

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.

Wise 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.

There is no dispute that Wise did not report her bladder injury within three business days after its occurrence. Therefore, Wise must show that either employer had actual knowledge of the injury, or that Wise had good cause for failing to give notice within the three day period.

#### *Actual Knowledge*

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). Wise testified that she did not report the injury at the time it occurred or report her problems to her supervisor. She testified that she was embarrassed due to the personal nature of her condition and was brought up not to talk about things like that. Wise did not tell anyone at Wal-Mart about her condition. Wise did not request medical leave or give any other indication that she had health issues before submitting her resignation. Wise continued to complete her job duties until she resigned. Nothing about Wise's performance would lead a reasonably conscientious manager to

reasonably conclude that Wise had an injury that might involve a potential compensation claim. Employer was never put on notice that Wise had sustained an injury or that her injury was potentially work related. Wise failed to show that Employer had actual knowledge of her injury.

### *Good Cause*

“It 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.” *Kuhle v. Lecy Chiropractic*, 2006 S.D. 16 ¶18, 711 N.W.2d 244. Wise argues that she did not know that her injury was potentially work related until after she saw Dr. Butz on October 28, 2008, and he offered a medical opinion on the probable cause of her bladder condition.

The medical records reflect that Wise had discussed what she believed to be the cause of her bladder problems with several physicians. On November 23, 2004, Wise saw Dr. Bendt. She reported to Dr. Bendt that she had “quit working at Wal-Mart because when she lifts heavy things she noticed at the end of the day when she goes home she may have a full bladder and she will just sit down and twice a week now recently for the last few weeks, she will just have a gush of urine come out uncontrollably.” On December 7, 2004, Dr. Eidem noted that “she has been having increased problems with incontinence. This happens generally after she has been working hard.” On August 8, 2005, Dr. Bendt again noted that Wise correlated lifting heavy things at Wal-Mart to her urine leakage. On October 30, 2006, Dr. Eidem noted that “her incontinence is certainly better than what it was prior to surgery. She is having less stress incontinence. She blames this on the work she did at Wal-Mart where she did a lot of heavy lifting.” On November 7, 2007, Dr. Eidem noted “she continues to feel her incontinence problems really started after doing a lot of heavy lifting at Wal-Mart.”

On October 28, 2008, Wise’s attorney arranged for Wise to meet with Dr. Butz to discuss her workers’ compensation claim in further detail. In his medical record he noted,

Betty comes in to give me further history regarding her urinary leakage and what has been going on. She had a first pelvic sling in 1985. She did fine and worked at Wal-Mart until October of 2004 for 7 years without trouble. But in October of 2004 she started having significant leakage because she was expected to lift. She tells me she was in a car accident in 1992 and was specifically told not to lift more than 30 or 35 pounds and had no urinary leakage until she started lifting heavy things at Wal-Mart and then she developed urinary leakage because she was lifting over 35 pounds.

With that history that's a good representation that would indicate that the lifting was a probable cause of her repeat lifting of her repeat leakage problem.

When Wise met with Dr. Butz for the appointment on October 28, 2008, she had already sought unemployment benefits claiming that lifting at work caused her to be injured. Also before this appointment, Wise filed a first report of injury and filed a petition for workers' compensation benefits. Based on the evidence presented, the medical records and the history given by Wise at the October 28, 2008, appointment, it is clear that this was not the first time Wise had contemplated the potential work relatedness of her injury and need for treatment.

The medical records establish that Wise believed her work related activities may have contributed to her bladder problems as early as November or December 2004. Regardless of whether a medical expert had opined as to causation prior to that time, Wise, as a reasonable person, should have recognized the nature, seriousness, and probably compensable character of her injury as early as November 2004 when she first discussed her condition with her physician. Wise had a history of bladder control problems that by her own testimony had been precipitated by instances of heavy lifting and knew of the possible connection. Despite this, Wise did not report her injury to a supervisor, she did not file a first report of injury at that time, she did not submit her medical bills to Wal-Mart for reimbursement for payment under workers' compensation and she did not disclose the nature of her problems when she turned in her resignation. Wise failed to meet her burden to show that she had good cause for failing to give written notice within the three business-day period.

At no time before March 2005, did Wal-Mart have any knowledge that Wise was having bladder problems and was not put on notice that her work activities may have contributed to her need for treatment. Wise did not show good cause for her delay in reporting. Wal-Mart was given no opportunity to investigate Wise's claim. Wise failed to meet her burden to show that employer had notice of the work related nature of her injury.

Notice issue is a threshold issue and must be met before workers' compensation benefits are awarded. Wise has failed to show by a preponderance of the evidence that she is entitled to workers' compensation benefits. Claimant's petition must be denied.

## **Conclusion**

Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within fifteen (15) 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 10<sup>th</sup> day of February, 2012.

SOUTH DAKOTA DEPARTMENT OF LABOR AND REGULATION

*/s/ Taya M. Runyan*

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Taya M. Runyan  
Administrative Law Judge