April 1, 2005 **LETTER DECISION**

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RE: HF No. 209, 2003/04 – Rickey G. Harris vs. French Cleaners and Shirt Laundry and The Travelers

Dear Mr. Bradsky & Mr. Parr:

I am in receipt of Claimant's Motion for Summary Judgment on Issues of Notice and Compensability and Claimant's Brief in Support of Claimant's Motion for Summary Judgment on Issues of Notice and Compensability in the above-referenced matter. I have also received and reviewed the following:

1) Employer and Insurer's Resistance to Claimant's Motion for Summary Judgment on Issues of Notice and Compensability, Cross-Motion for Summary Judgment on Issue of Notice and Brief in Support;
2) Deposition of Rickey G. Harris and attached exhibit;
3) Deposition of Charlene Harris;
4) Claimant's Reply Brief on Claimant's Motion for Partial Summary Judgment and In Opposition to Insurer's Cross-Motion;
5) Employer and Insurer's Reply Brief to Claimant's Motion for Summary Judgment and Opposition to Employer and Insurer's Cross-Motion for Summary Judgment;
6) Affidavit of Stefanie Stockberger;
7) Affidavit of Doug Meiron;
8) Deposition of Gary Kluthe; and
9) Deposition of Donna Kluthe.

Claimant is fifty-three years old and lives in Rapid City with his wife, Charlene. Claimant joined the Navy in 1969 before completing high school. While in the Navy, Claimant worked as an illustrator and draftsman and also obtained his GED. Claimant was honorably discharged in 1973.

Since 1973, Claimant has worked in a variety of positions in Rapid City and for five years in Connecticut in the mid 1980's. For example, Claimant worked doing chemical analysis of cement at the South Dakota State Cement Plant, as batch processor and design engineer for a pharmaceutical company, as an illustrator doing computer animation for a television station in Rapid City, construction work and as a maintenance engineer at the Rushmore Plaza Holiday Inn and Black Hills Workshop.

During his numerous years of employment, Claimant never had the need to report an injury to his employers. Claimant never filed a workers' compensation claim prior to his employment with Employer. Even though Claimant never had the need to file a workers' compensation claim before February 2004, Claimant had received information from previous employers, including the Rushmore Plaza Holiday Inn and the Black Hills Workshop, about how to report a claim.

Claimant started working for Employer in October 2003. Claimant's duties included steaming and pressing coats, loading the delivery van and making daily deliveries. Charlene also worked for Employer as a clothing inspector. Claimant's supervisors were Gary and Donna Kluthe, the owners of French Cleaners and Shirt Laundry.

On Thursday, February 12, 2004, while in the process of loading the delivery van at the main store in Baken Park, Claimant picked up two sets of large and heavy drapes and heard a slight "popping" in his right shoulder. Claimant stated, "I picked them up not knowing, assuming they weren't as heavy as they were, and I felt a sharp pain in my right arm." Claimant did not think the "popping" was serious because "joints pop all the time" and "[i]t wasn't painful."

Claimant finished loading the van and experienced "a little soreness" as he drove to the satellite store on Mount Rushmore Road. Claimant described his pain as, "[i]t was just like I had overworked. I don't know if you work out in a gym, when you over work, you have muscle aches and pain. It was similar. It wasn't anything extreme."

When Claimant arrived at the store, he mentioned to his co-worker, Tina, to be careful lifting the drapes because they were heavier than they appeared. Claimant told Tina that he had some soreness in his arm from lifting the drapes. Claimant completed his work duties for the day. Claimant continued to have some discomfort, but no further sharp pains.

On Friday morning, Claimant told Charlene about the incident lifting the drapes. Claimant mentioned that his shoulder was a little stiff and sore. Charlene told Claimant to take some pain medication and work it out. Like Claimant, Charlene "didn't think it was serious."

Claimant decided to take a Tylenol with codeine that he happened to have left over from an earlier prescription for pain associated with gout. Claimant stated, "I remembered having those. So I thought, well, I'll just use them; I've got them." Claimant also stated, "I just took those feeling, well, I'll work it out and it will help me make it through the day." The medication relieved his pain and discomfort.

Claimant worked on Friday, February 13th, and was able to perform his normal duties. Again, Claimant's arm was sore, "like [he] overdid it." Claimant saw Gary and Donna that day but did not mention the incident lifting the drapes because he "didn't realize that - - it wasn't a painful pain at the time. It was something [he] thought [he'd] work out, like a stiff muscle." Even Charlene testified that she did not mention the incident to Gary or Donna because she "didn't think it was serious."

Claimant experienced a normal weekend at home. Claimant enjoys cooking and spent time at his computer searching and selecting recipes to cook a Valentine's Day dinner for his wife. Charlene noticed that Claimant was in pain during the weekend because "he held his arm a lot." Claimant took one Tylenol with codeine during the weekend. Claimant described how he felt over the weekend as, "[i]t was pretty much the same, it was just stiff. It was just like a pulled muscle or something. It was stringent or there was no sharp pain or anything like that."

Claimant returned to work the following week. Again, Claimant was able to perform his normal duties. On Tuesday, Claimant took another Tylenol with codeine for his pain and discomfort. Thereafter, Claimant continued to take this medication during the week to alleviate his pain and discomfort.

It was not until either Wednesday, February 18th, or Thursday, February 19th, that Claimant thought he had really injured himself during the lifting incident on February 12th. Claimant had pain in his right shoulder shooting all the way down his arm and it felt like he "had banged [his] funny bone." More importantly, Claimant noticed for the first time that some of his fingers were tingling and numb. When Claimant noticed these new symptoms, he finally decided that he needed to seek medical attention for his right shoulder and arm.

On Friday, February 20th, Claimant told Gary that he injured himself on February 12th. Gary recalled the conversation, "I was in the office and he stepped in and said he thought he might be hurt and might need to report a claim, an injury." Claimant told Gary that he injured himself on February 12th, but "he just thought it was something that was going to go away." Gary helped Claimant complete the necessary paperwork to report the injury.

After work on Friday, Claimant sought medical treatment at the Emergi-Clinic. Claimant eventually was referred to a neurologist and an MRI showed Claimant had a herniated cervical disc at C-7. Surgery has been recommended to remove and replace the disc. While Claimant awaits surgery, he continues to take prescription pain medication for his condition.

Claimant did not report the incident before February 20th because he did not think his injury was serious. He stated, "I would have told [Gary and Donna] sooner, if I thought it was serious. It wasn't painful enough that I didn't think it could be worked out[.]" Insurer denied Claimant's request for benefits in a letter dated March 8, 2004, stating that Claimant "failed to report the injury within three days as required [by] the South Dakota Workers' Compensation Statute."

Motion and Cross-Motion for Summary Judgment

ARSD 47:03:01:08 provides "[t]he division shall grant the summary judgment immediately if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The moving party bears the burden to show there are no genuine issues of material fact. To successfully resist the motion, the non-moving party must present specific facts that demonstrate the existence of genuine issues of material fact. All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. Kermmoade v. Quality Inn, 2000 SD 81, ¶ 11.

After consideration of all the evidence presented, including the Department's file, depositions, affidavits and written briefs, no genuine issues of material fact exist and summary judgment is appropriate on the issue of notice.

Whether Claimant provided timely notice of his injury?

"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).

SDCL 62-7-10 requires that Claimant provide Employer with written notice of any injury no later than three business days after its occurrence. However, "[t]he 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 [his] injury or disease." Miller v. Lake Area Hosp., 551 N.W.2d 817, 820 (S.D. 1996). Whether Claimant's conduct was reasonable "should be judged in the light of his 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 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).

Claimant provided Employer with written notice of his injury on February 20, 2004, eight days after his injury. Employer argued Claimant should have provided written notice on February 12th, the date of the incident.

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 his 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 did not initially report his injury to Employer because it "just felt like [he] pulled a muscle, like [he] worked too hard." Claimant did not immediately recognize the nature, seriousness and probable compensable character of his injury.

It is true that Claimant chose to self-medicate for the pain and discomfort associated with his right shoulder and arm. Even with the pain medication, Claimant did not think he had a serious or compensable injury. The undisputed testimony showed that Claimant thought he "could work it out" and that his condition felt like a pulled muscle. Claimant was able to continue working his regular shifts and performed his normal work duties.

On either February 18th or February 19th, once Claimant's condition "started getting worse" and he noticed new and significant symptoms, he decided to seek medical attention. It was at this time that Claimant recognized the nature, seriousness and probable compensable character of his injury. Thus, the time period for notice did not begin to run until either February 18th or 19th.

As soon as Claimant recognized the nature, seriousness and probable compensable character of his injury, he immediately informed Employer of the incident and completed an accident report on February 20, 2004. Employer received timely notice of Claimant's injury and was provided with ample opportunity to investigate this claim. The evidence established that Claimant did not recognize the nature, seriousness and probable compensable character of his injury until February 18th or 19th, the date when he first noticed numbness and tingling in his arm and decided he needed to seek medical treatment. Claimant provided written notice of his injury on February 20th,

within three business days as required by SDCL 62-7-10. Therefore, Claimant established there are no genuine issues of material fact and that he provided timely notice of his injury to Employer. Claimant's Motion for Summary Judgment on Issue of Notice is granted. Employer and Insurer's Cross-Motion for Summary Judgment is denied.

As for Claimant's Motion for Summary Judgment on Issue of Compensability, the parties did not address this issue in their briefs. Genuine issues of material fact exist as to the issue of compensability. Therefore, Claimant's Motion for Summary Judgment on the Issue of Compensability is denied.

Claimant is directed to submit an Order consistent with this Letter Decision.

Sincerely,

Elizabeth J. Fullenkamp
Administrative Law Judge