SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

TERESA CRUNK, **HF No. 225, 2002/03**
Claimant,

v. **DECISION**

DAJE, INC., EASY DOUGH PIZZA,
Employer,
and

FIRST DAKOTA INDEMNITY COMPANY,
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 17, 2004, in Elk Point, South Dakota. Claimant, Teresa Crunk, (hereafter Claimant), appeared personally and through her counsel, Robert Tiefenthaler. Michael S. McKnight represented Employer DAJE, Inc., Easy Dough Pizza, and Insurer First Dakota Indemnity Company.

Issue:

1. Whether Claimant provided notice pursuant to SDCL 62-7-10.

Facts:

The Department denied Employer/Insurer's Motion for Summary Judgment because it was based upon their argument that Claimant did not present credible testimony at her deposition. The Department found that Claimant's credibility was a genuine issue of material fact and because the Department found that other genuine issues of material fact existed to preclude summary judgment, a hearing was held on March 17, 2004. Claimant and Dr. Jason Zortman, a co-owner of Employer, were the only two witnesses who testified at hearing. The following facts are found by a preponderance of the evidence.

Claimant began working for Easy Dough Pizza in November of 2001. She worked full-time as a waitress and cashier. Claimant soon thereafter became the manager of Easy Dough Pizza. Her managerial duties required her to schedule employees for work and order products and supplies as needed. She worked from 6:00 p.m. to 2:00 a.m. Although her responsibilities included ensuring injured employees filled out First Reports of Injury, she never assisted an employee of Easy Dough Pizza in filling out a First Report of Injury form. However, Claimant's receipt of worker's compensation

benefits from an earlier work-related injury with a previous employer demonstrates her knowledge of the worker's compensation system.

On February 25, 2003, Claimant attempted to roll a keg of beer up a ramp and lift it into its place when she heard a "pop" in her left shoulder and began to experience pain. Despite the alleged injury, Claimant continued working and completed her shift. Claimant did not notify her employer, Dr. Jason Zortman, of the injury, nor did she fill out a First Report of Injury that day. Claimant worked the next day as well and again did not notify Dr. Zortman. Claimant, as a manager, knew where the First Report of Injury forms were located. Claimant worked on February 26 and did not fill out a form that day.

Later in the week, Claimant called Dr. Zortman and the two met at the casino to discuss Claimant's request for a night off. Claimant told Dr. Zortman that she hurt her shoulder and that she was having family problems. Dr. Zortman sent her home to rest because she was upset and in no condition to work. Several days later, Claimant's employment was terminated. On March 24, 2003, Claimant completed and signed her First Report of Injury, alleging that Employer had actual knowledge of her injury.

Issue

Whether Claimant provided notice pursuant to SDCL 62-7-10.

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Const. Co., 155 N.W.2d 193, 195 (S.D. 1967). The 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).

"Notice to the employer of an injury is a condition precedent to compensation." Westergren v. Baptist Hosp. of Winner, 1996 SD 69, ¶ 17, 549 N.W.2d 390, 395 (*citing* Schuck v. John Morrell & Co., 529 N.W.2d 894, 897-98 (S.D. 1995)). The purpose of the notice requirement is "to give the employer 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." Id.

SDCL 62-7-10 states:

> 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.

There is no dispute that Claimant did not provide Employer/Insurer with written notice of her injury until March 24, 2003, well outside of three business days after February 25, 2003, the date that Claimant has sworn is her date of injury.

Whether Employer had actual knowledge of Claimant's alleged injury.

The standard used to determine whether an employer has actual knowledge is "whether the employer is 'alerted to the *possibility* of a claim so that a prompt investigation can be performed.'" Vaughn v. John Morrell & Co., 2000 SD 31, ¶ 28, 606 N.W.2d 919, 924, quoting Loewen v. Hyman Freightways, Inc., 1997 SD 2, ¶ 18, 557 N.W.2d 762, 768). An employer's mere knowledge of an injury does not suffice because the claimant must also demonstrate that the employer knew about the compensable nature of the injury. See Gordon v. St. Mary's Healthcare Ctr, 2000 SD 130, ¶ 42, 617 N.W.2d 151, 162.

Claimant's version of events differs from Dr. Zortman's version. Claimant testified that, in addition to trying to call Dr. Zortman the day the injury allegedly happened, she told Dr. Zortman on February 27, 2003, that she hurt her shoulder "moving a keg of beer." Claimant testified that Dr. Zortman sent her home for the weekend "to rest." Claimant testified that Dr. Zortman called her on Monday and fired her because "she talked to one of the girls."

Dr. Zortman does not recall a meeting with Claimant on February 27, but does recall a meeting with her on February 28, 2003. Dr. Zortman testified that on February 28, Claimant met with him and he sent her home to "get it together" because she was too upset because of her family problems to work. Dr. Zortman testified that he was unaware of Claimant's alleged injury until Claimant's attorney contacted him in the "springtime."

Claimant's testimony is rife with inconsistencies. She has obvious difficulties with remembering dates. The medical records do not support Claimant's testimony of an injury date of February 25, 2003. Most troubling are Claimant's statements that she had attempted to contact Dr. Zortman but could not reach him. Dr. Zortman testified credibly that he has his cell phone with him at all times. Dr. Zortman testified credibly that he is at the casino everyday, usually by 8:00 a.m. Although Dr. Zortman's testimony was self-serving and evasive at times, the burden is on Claimant. Unfortunately, Claimant's testimony is not convincing enough to sustain her burden of proof that her employer had actual knowledge of the compensable nature of her injury.

Claimant has likewise failed to demonstrate that she had good cause for failing to provide written notice of her alleged injury within three business days of its occurrence.

The proper test for determining when the notice period should begin has been explained: "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 Hospital, 1996 SD 89, ¶ 14. "Whether the claimant's conduct is reasonable is determined '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.'" Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶ 29 (citing Loewen v. Hyman Freightways, Inc., 1997 SD 2, ¶ 15). "The standard is based on an objective reasonable person with the same education and intelligence as the claimant's." Id. at ¶ 43.

The South Dakota Supreme Court summarized:

> The Workers' Compensation Act was enacted by the South Dakota Legislature in 1917. The purpose is to provide employees, who are injured within the scope of their employment, with reimbursement for medical care and wage benefits without having to prove the employer was at fault or negligent. Schipke v. Grad, 1997 SD 38, ¶ 11, 562 N.W.2d 109, 112. In turn, employers are "granted total immunity from suit for its own negligence in exchange for payment of workers' compensation insurance." Id. (citations omitted). However, an injured employee must also comply with the statutory notice requirements in order to recover.
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> "The purpose of the written 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." Westergren v. Baptist Hospital of Winner, 1996 SD 69, ¶ 18, 549 N.W.2d 390, 395. Therefore, "notice to the employer of an injury is a condition precedent to compensation." Westergren, 1996 SD 69, ¶ 17.

Shykes, at ¶¶ 23-24.

Claimant admitted that she felt immediate pain and a popping sensation in her shoulder. She admitted that she knew she needed to notify her employer as soon as the injury happened. She admitted that she knew that a first report of injury needed to be completed and that she knew where the forms were kept. Claimant's testimony fails to support a conclusion that her employer interfered with her ability to provide notice. Claimant's testimony and the medical records fail to support a conclusion that she was unaware of the compensable nature of her injury. Claimant knew of the compensable nature of her injury on February 25, 2003, and failed to meet the requirements of SDCL 62-7-10.

Claimant has failed to meet her burden of proof under SDCL 62-7-10 and the South Dakota Worker's Compensation Act. Because notice is a threshold issue and she has failed in her burden of proof, her Petition for Hearing is dismissed.

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 Claimant's proposed Findings of Fact and Conclusions to submit objections thereto 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/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 19th day of April, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Heather E. Covey
Administrative Law Judge