

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

SURIA SILIEZAR,

HF No. 136, 2018/19

Claimant,

DECISION

v.

**SMITHFIELD FOODS, INC d/b/a
JOHN MORRELL & COMPANY**

Employer and Self-Insurer,

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on September 13, 2022. Claimant, Suria Siliezar, was present and represented by Bram Weidenaar of Alvine Law Firm. Employer and Self-Insurer, Smithfield Foods, Inc d/b/a John Morrell & Company, was represented by Laura K. Hensley of Boyce Law Firm, L.L.P.

Background:

1. In 2005, Suria Siliezar (Siliezar) began working for Smithfield Foods, Inc d/b/a John Morrell & Company (Smithfield).
2. On or about January 16, 2017, Siliezar alleges she suffered a work-related injury when bones from a line behind her struck her on the upper back, neck, and right shoulder area.

3. On January 17, 2017, Siliezar¹ sought medical treatment at the nurses' station at Smithfield. The notes indicate that she told the nurse that she did not know what happened. Later that day, she went to Dr. Stenson who examined her for complaints of right shoulder pain and swelling in her hands. He noted that a heavy object fell on her the day before. He gave her a Toradol injection, ordered lab tests, and took her off work for a week.
4. On April 3, 2017, Dr. O'Brien at Avera Orthopedics and Sports Medicine saw Siliezar. She reported that she injured her shoulders when bones fell on her and hit her upper back, neck, and right shoulder area. She also reported bilateral shoulder pain with the right shoulder being more painful. Upon examination, Dr. O'Brien noted that Siliezar had pain in her right shoulder upon palpation and with attempted motion. He also found her to have positive impingement signs in her left shoulder. He ordered an X-ray which indicated a nondisplaced fracture through the greater tuberosity. Dr. O'Brien concluded that the work injury caused her condition. He ordered an MRI of her right shoulder.
5. On April 11, 2017, Dr. O'Brien saw Siliezar who reported that she was injured while working for Smithfield in January 2017, and as a result, she had pain in the anterior and lateral aspect of her right shoulder. Dr. O'Brien opined that her shoulder condition was the result of the injury. He recommended physical therapy and wanted her to return in four weeks.

¹ Siliezar's first language is Spanish. The nurses' station did not have an interpreter.

6. On June 6, 2017, Siliezar saw PA-C Vanoverbeke for her right shoulder. PA-C Vanoverbeke noted an X-ray revealed that the shoulder fracture was healing well. Siliezar was advised to continue her home exercise program and begin strengthening exercises at physical therapy. PA-C Vanoverbeke opined that Siliezar's condition was the result of her work injury.
7. In September 2018, Siliezar's attorney sent a letter to Smithfield alleging a date of injury of March 2017.
8. On September 25, 2018, Smithfield informed Siliezar's attorney that it did not have any documentation regarding an alleged injury sustained on or around March 2017.
9. On June 12, 2019, Siliezar submitted her Petition for Hearing with the Department of Labor & Regulation (Department).

Issues:

The issues presented at the hearing were:

1. Notice
2. Causation
3. Nature and extent of injuries
4. Indemnity benefits
5. Medical benefits

To prevail in this matter, Siliezar must, pursuant to SDCL 62-1-1(7), prove that her injury arose out of and in the course of her employment, that her work-related injury is a major contributing cause of her condition, and that she has met the notice requirement under SDCL 62-7-10. The standard of proof for causation in a worker's compensation

claim is a preponderance of the evidence. *Armstrong v. Longview Farms, LLP*, 2020 S.D. 1, ¶ 21, 938 N.W.2d 425, 430.

In her Petition for hearing, Siliezar alleged a date of injury of February 1, 2017. In her answers to interrogatories, she alleged a date of injury of January 22, 2017. Siliezar also swore in an affidavit that the injury occurred on January 16, 2017. Then during her deposition, she testified the work injury occurred on January 22, 2017. Eventually at hearing she testified that the injury occurred in February. She had told vocational expert Tom Audet that the injury happened sometime in January 2017. Her attorney sent a letter to Smithfield in September 2018 alleging a date of injury of March 2017.

Siliezar was also asked at hearing what she told the nurse when she went to first aid after her alleged injury. Siliezar testified through an interpreter that she told the nurse that she had been hit when bones had fallen on her. The nurse's notes provide that Siliezar reported pain in both of her shoulders and that she woke up in pain. The notes also indicate that Siliezar had taken pain medicine at home and that she wanted to see Dr. Stenson. She did not know what caused her pain. Siliezar signed a "Non-Occupational" form indicating her complaints were not work-related and had Dr. Stenson sign it as well. She then returned the form to Smithfield.

Siliezar has provided multiple possible dates for the injury January 16, January 17, January 22, February 1, and March 2017. However, she was out of work on sick leave for most of the possible dates. Thus, of the dates proposed, January 16, 2017, is the most likely date. While there is a record of her going to first aid at Smithfield the next day, the notes indicate she did not know what caused her pain. The medical record from her visit with Dr. Stenson on January 17, 2017, indicates that she reported a heavy

object had fallen on her the day before, and that she had increased right shoulder pain and swelling in her hands. The note further provides that Siliezar was having bilateral shoulder pain for two (2) years prior. Siliezar was on personal sick leave January 17, 2017, until June 9, 2017. However, she and her doctor both signed the form indicating that the incident was not work-related.

Luke Achor (Achor) testified at hearing. Achor has worked for Smithfield for 16 years and is currently a production supervisor. Before becoming supervisor, he worked as lead supervisor on the fifth floor where he worked with Siliezar in a position he held for 15 years. He had years of experience working in the room where the alleged injury occurred. He testified that Siliezar checked neck bones coming down the conveyor belt, which was low to the floor, less than a few inches off the ground. She was tasked with inspecting the bones to make sure they were all cut correctly and the work she performed was at waist level. The size of the bones was approximately two to three fingers wide at the most. Achor was asked if there was a conveyor belt overhead that could have dropped a bag of meat and bones onto Siliezar, and he answered that the highest conveyor was only about waist high. He testified that no conveyor goes over the person. He did not believe it was possible for a bag of meat and bones to fall on someone's back and shoulder.

For the following reasons, the Department is persuaded that Siliezar sustained a work injury that occurred on January 16, 2017:

1. On January 17, 2017, Siliezar was seen at first aid at Smithfield for pain in both of her shoulders. The nurse's notes indicate that Siliezar woke up with pain but did not know the cause. However, Siliezar was seen later that day by

Dr. Stenson who noted Siliezar was there for recently increased right shoulder pain and swelling in her hands and she reported that a heavy object had fallen on her back the day before while at work. Dr. Stenson and Siliezar both signed the form indicating her injury was not work-related, but the notes indicate something did happen on January 16, 2017.

2. Siliezar testified that bones fell on her. Achor testified that Siliezar checked neck bones coming down the conveyor belt which was low to the floor and the work she performed was at waist level. No conveyor goes over the person,

However, Siliezar's testimony at hearing was not that bones fell on her from overhead. She testified that the individual who pressed the button allowing the bones to fall on the line was distracted and was allowing the bones to pile up and even topple off the line. Siliezar's testimony is that some of the bones fell off the line but some of the bones fell on her and the other workers. There was no bag of meat and bones that could fall from above, but individual bones could fall off the line onto Siliezar.

It is significant that Siliezar has a language barrier as she is not a native English speaker, and that causes issues with communication. Although there are inconsistencies regarding the dates and some of the factual details, it appears more likely than not that an incident involving bones occurred as described by Siliezar on January 16, 2017.

Therefore, Siliezar has met her burden of proof that she sustained an injury arising out of and in the course of her employment pursuant to SDCL 62-1-1(7).

As the Department has been persuaded that a work-related injury occurred on January 16, 2017, Siliezar must next prove that she met the notice requirement under SDCL 62-7-10. Smithfield asserts that Siliezar did not provide proper notice and points to her hearing testimony regarding the date of her injury. Siliezar was asked at hearing what date of injury she was claiming, she testified she did not remember. She was asked again later if she recalled the date she was injured, and she testified she could not remember but she would be able to remember sometime that day. During the direct examination of Siliezar, she gave testimony recounting specific details regarding her medical history including twenty-four (24) visits with Dr. Stenson but was unable to remember the date of her injury. Siliezar did not communicate to the nurse at first aid on January 17, 2017, that an incident had happened at work the day before. She also signed a document indicating her injury was not work-related and had her doctor do the same.

Smithfield asserts that it did not receive notice of the alleged work injury until Siliezar filed her Petition for Hearing on June 10, 2019. On May 17, 2017, Siliezar was seen by PA-C Vanoverbeke who recommended contacting Smithfield's worker's compensation representative because she opined the injury caused the right shoulder condition. Siliezar's attorney contacted Smithfield identifying a date of injury of March 2017, a time that Siliezar was on sick leave, but did not provide additional details of the injury. On September 25, 2018, Smithfield informed Siliezar's attorney that it had no documentation regarding an alleged injury sustained on or around March 2017. Smithfield did not receive a response to the letter.

Siliezar testified that she had received training on where to report injuries and that they should be reported to her supervisor or the nurse. She sought medical treatment at Smithfield's health services over fifty times prior to the reported work injury. During these visits, she reported multiple work-related injuries. Smithfield argues that these reports of injury show that Siliezar knew how to report a work injury and had done so in the past. Additionally in her Answers to Interrogatories, Siliezar provided that she never sustained any work injury at Smithfield prior to January 22, 2017. However, she did sustain a work injury at Smithfield in 2012 which she reported to her supervisor as required and for which she received benefits. Siliezar testified that she knew how to report a work injury. 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

The South Dakota Supreme Court has held that "the duty of an employee to notify his or her employer of the occurrence of an injury does not arise until the employee learns that he or she has sustained a compensable injury." *Tieszen v. John Morrell & Co.*, 528 N.W.2d 401, 404 (S.D. 1995).

[T]he fact that [employee] suffered from pain and other symptoms is not the determinative factor and will not support a determination that [employee] 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.

Construing the notice requirement liberally and considering other potential issues such as the language barrier, the Department concludes that Siliezar failed to meet the requirements of SDCL 62-7-10. “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 his injury or disease.” *Id.* at 405 (citations omitted). The purpose of the notice requirement is to allow an employer to investigate alleged injuries. Siliezar was familiar with the process of reporting work injuries and had effectively done so in the past. In this matter, she did not inform her supervisor or the nurse at first aid that a work injury occurred. In fact, she stated she reported to the nurse that she did not know what caused the pain she was experiencing. She and her doctor also signed a form asserting her condition was not work-related. If the Department would instead consider the date of the visit with PA Vanoverbeke May 17, 2017, as the day Siliezar knew that her work injury was compensable, there is no evidence that she provided notice within three days at that time either. She did not timely report the January 16, 2017, injury nor has she provided good cause as to why she failed to do so. She has also not shown that Smithfield had

actual knowledge of the injury. Therefore, Siliezar did not provide notice and is thus not entitled to compensation pursuant to SDL 62-7-10.

As Siliezar has failed to meet the notice requirement, the Department will not consider causation, nature, and extent of injuries, indemnity benefits, or medical benefits.

Conclusion:

Siliezar has not met the notice requirement pursuant to SDCL 62-7-10 and is thus not entitled to benefits.

Smithfield is not responsible for payment of benefits.

Employer and Insurer shall submit **Findings of Fact and Conclusions of Law and an Order** consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Siliezar shall have an additional twenty (20) days from the date of receipt of Employer and Insurer's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own 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 and Insurer shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 5th day of July 2023.

BY THE DEPARTMENT:



Michelle M. Faw
Administrative Law Judge