

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

BRUCE THIEWES,
Claimant,

HF No. 160, 2007/08

v.

DECISION

STATE OF SOUTH DAKOTA
UNIFIED JUDICIAL SYSTEM,
Employer and Self-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, in Rapid City, South Dakota. Claimant, Bruce Thiewes appeared personally and through his attorney of record, Michael J Simpson. Christina L Klinger represented Employer and Self-Insurer, South Dakota Unified Judicial System.

Issues

The only issue before the Department is Claimant's date of injury for purposes of determining his workers' compensation rate.

Facts

At the time of hearing, Bruce Thiewes (Claimant) was 58 years old. He worked for Employer, Unified Judicial System (UJS) as a court reporter since 1988. Claimant worked as Judge John Erickson's court reporter from 1988 to 1990. Upon relocating to Rapid City, Claimant worked as Judge Merton Tice's court reporter from 1990 to June 26, 2008. Prior to working as a court reporter, Claimant attended and taught court reporting school.

In November or December of 1989, Claimant began to notice physical problems associated with his employment. Claimant's left thumb and wrist were affected at that time. Claimant did not file a first report of injury at that time.

Claimant's symptoms continued to progress to left wrist and arm pain and tightness of the left neck and shoulder. Claimant filed a first report of injury in April 1991, for tendinitis of his left wrist and arm. In May 1991, Claimant filed another first report of

injury for tendinitis in his right wrist and arm. Claimant did not miss any work or receive any workers' compensation benefits due to his injury.

Claimant filed a subsequent first report of injury in August of 2007, for pain and swelling in left hand, wrist, elbow; pain and tenderness, weakness and paresthesia in both hands, arms, pain, stiffness, tightness in neck and shoulders, swelling and pain in little finger. Claimant was taken off work for two weeks and received workers' compensation benefits during that time. Claimant then returned to his regular job as a court reporter.

Beginning in 1990, Claimant sought treatment with Dr. John Nelson, a chiropractor. Claimant treated with Dr. Nelson on a regular basis for nearly 18 years for his symptoms. Dr. Nelson testified in his deposition that the symptoms that have caused Claimant to be permanently and totally disabled have been ongoing since 1990. Dr. Nelson diagnosed cervical strain myofascitis of the upper trapezius and tendinitis; he testified that was his original and ongoing diagnosis. Dr. Nelson described Claimant's position as a court reporter as static and sedentary with little movement except the hands and elbows and wrist. Dr. Nelson explained that the "repetitive overutilization can, in some individuals, be with them the next morning and can compound." He testified that "if the muscles and tendons are not given adequate rest then the condition tends to worsen, exacerbate over time."

In November of 2007, Claimant began treating with Dr. Christopher Dietrich, a physiatrist, rehab and pain specialist with the Rehab Doctors in Rapid City. Dr. Dietrich testified within a reasonable degree of medical probability that Claimant's employment as a court reporter was a major contributing cause of Claimant's upper extremity repetitive use syndrome. Dr. Dietrich explained that Claimant's symptoms had been consistent and progressively worsening. Dr. Dietrich had reviewed Claimant's medical history and testified that Claimant's condition is cumulative and that the records show that over time his condition has continually and progressively worsened.

In 1992, Claimant saw Dr. Sabow, a neurologist and in 1999, Claimant saw Dr. Simonsen, a physiatrist with Rehab doctors in Rapid City. The medical records reflect that Claimant presented with similar symptoms to those he reported to Dr. Dietrich in 2007. Claimant was also referred to Dr. Jennifer May, a rheumatologist. It was determined that he suffered from rheumatoid arthritis and was treated with medications. Some of Claimant's symptoms were relieved by the treatments, yet Dr. May agreed Claimant had work related symptoms since 1989 that were not associated with his rheumatoid arthritis.

Claimant testified at hearing, that over time, his symptoms changed; more areas of Claimant's upper extremities were affected, the pain became more severe, lasted longer, and his recovery time was longer. From 1991 until 2008 when Claimant left employment with UJS, his symptoms increased in intensity and location. On June 26,

2008, Claimant's treating physician, Dr. Dietrich, prohibited him from working as a court reporter due to his "upper extremity overuse syndrome."

Analysis

The only issue before the Department is Claimant's date of injury for purposes of determining his workers' compensation rate.

Employer relies on *Loewen v. Hyman Freightways*, 1997 SD 2, ¶15, 557 NW2d 764, in which the South Dakota Supreme Court applied a reasonable person test, holding 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." Employer argues that Claimant understood the seriousness of his injury in April 1991. Employer further argues that notice is to be given at the time the injury occurred; therefore since Claimant gave notice in April of 1991, the date of injury should be April 1991. Employer also argues that this was not a cumulative trauma because the Claimant had identical symptoms in 1991 as he did in 2007. Employer points to Claimant's testimony that his pain had never completely resolved at any time when he was working.

Employer's arguments that Claimant did not suffer from a cumulative injury are rejected. While Claimant's symptoms may have been the same in type, there was an increase in the severity of Claimant's symptoms over many years of repetitive movement performing his job as a court reporter. Claimant's symptoms and condition were clearly not identical if after 18 years of treatment, Claimant's condition had come to a point where Claimant's treating physician, Dr. Dietrich, prohibited him from working as a court reporter due to his "upper extremity overuse syndrome."

Loewen is distinguishable from the present case because in *Loewen*, the Claimant suffered an "abrupt, acute injury at the workplace...he was aware he had sustained a compensable injury immediately after it occurred..." *Id.* at ¶16. In the present case, the medical records and testimony of Claimant's physicians show that Claimant suffered a progressive and cumulative injury over a period of years. In *Loewen*, Justice Sabers, concurring specially, specifically asserts,

Tieszen v. John Morrell & Co., 528 NW2d 401 (SD1995), remains precedent for situations similar to *Tieszen's* where the disability was caused by a work activity which can be gradual and progressive in nature, when the date of the injury is the date where pain prevents the employee from continuing to work.

Id. at ¶22 (citations omitted).

Claimant argues that the Department should follow the "cumulative trauma doctrine" and determine the date of injury as June 26, 2008, when Claimant was taken off work. Claimant relies *Tieszen* and on a South Dakota Circuit Court case, *Kuck v. Miller*

Structures (SD 6th Cir. 2001) in which the court applied the cumulative trauma doctrine and last date of work rule to determine liability in a case with multiple employers.

In *Tieszen*, the South Dakota Supreme Court concluded, “the time period in which Tieszen was to give notice began to run on ...the day that Tieszen last worked...and at that time he was aware that his back, neck, and shoulder injuries were severe enough that he would require time off from work to let the injuries heal.”

The determination of date of injury is problematic in the case of a repetitive cumulative injury where the symptoms worsen over an extended period of time. Setting the date of injury is important as it determines statutory limitations for notice, liability and a claimant’s compensation rate. Other jurisdictions have addressed the issue of establishing the date of injury and provide a framework for resolution of the problem. See *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P2d 1261 (Kan. Ct. App. 1994). (date of injury is last date on which claimant worked); *Lawson v. Lear Seating Corporation*, 994 SW2d 340 (Tenn. 1997)(limitations period commenced on first day claimant was unable to perform her job because of injury); *Buckingham v. Fidelity & Guaranty Insurance Co*, 2007 WL 3120710 (Tenn. Workers Comp. Panel 2007)(Court determined that Claimant with carpal tunnel syndrome sustained a new trauma every day the employee worked, to determine date of injury, court applied last- day-worked rule); *Oscar Mayer & Co v. Industrial Comm’n*, 176 Ill. App 3d 607, 126 Ill. Dec 41, 531 NE2d 174 (1988) (the court acknowledged that an employee that continues to work despite progressive ill-being should not be punished merely for trying to perform his or her duties).

After an in depth analysis of holdings in other states, the Kansas Court of Appeals in *Berry* created a bright line rule fixing the date of injury for all carpal tunnel cases as the last date worked. The Court held that establishing the last date of work as the date of injury in such cases caused “the least potential prejudice [to the claimant] and upholds the spirit of our Workers Compensation Act.” *Id.* at 230; see also *Larson, Workmen’s Compensation Law* § 50.05 (2000); The Kansas Supreme Court in *Treaster v. Dillon Companies, Inc.*, 987 P2d 325(KS 1999) upheld the bright line rule established in *Berry*.

In Circuit Court in *Kuck v. Miller Structures*, looked to the last day of work rule and the cumulative trauma doctrine which applied when no singular identifiable injury causing event exists and the time of injury is gradual and therefore indeterminable. *Id.* at 12. The Circuit Court agreed with the bright line rule adopted in *Treaster* and concluded that the cumulative trauma doctrine and the last day of work rule were consistent with South Dakota precedent. *Id.* at 15.

The policies set forth by other jurisdictions and the South Dakota Supreme Court in *Tieszen* apply in this case. In this instance, where there is a repetitive, cumulative injury, and where there was no identifiable event or accident that resulted in injury, the “last

day worked” rule is to be applied. The date of injury in the present case is June 26, 2008, the last day Claimant was able to work as a court reporter.

Conclusion

Claimant 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. Employer/Self-Insurer shall have ten (10) days from the date of receipt of Claimant’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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 29th day of June, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

Taya M. Dockter
Administrative Law Judge