SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

ROBERT R. ALLEN, **HF No. 166, 2004/05**

Claimant, **DECISION**

vs.

LEO BESTGEN CONSTRUCTION,

Employer,

and

TRUCK INSURANCE EXCHANGE,

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 July 19, 2005, in Rapid City, South Dakota. Robert R. Allen (Claimant) appeared personally and through his attorney of record, James D. Leach. Eric C. Blomfelt represented Employer and Insurer (Employer).

The Prehearing Order entered on June 13, 2005, listed compensability as the issue to be presented at hearing. In post-hearing briefs, both parties agreed that the issue of compensability included whether Claimant sustained an injury arising out of and in the course of his employment and whether Claimant provided timely notice pursuant to SDCL 62-7-10. However, in its brief, Employer failed to address the issue of whether Claimant sustained an injury arising out of and in the course of his employment. A party who raised an issue and then failed to support it with authority was deemed to have waived the issue. Harris v. Young, 473 N.W.2d 141 (S.D. 1991). The issue of whether Claimant sustained an injury arising out of and in the course of his employment is deemed to be waived by Employer. Therefore, the sole issue to be addressed is whether Claimant provided timely notice pursuant to SDCL 62-7-10.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence:

1. At the time of the hearing, Claimant was forty-five years old and lived in Vale, South Dakota.
2. Claimant graduated from high school in 1978. Claimant did not receive any further education or training.
3. Before Claimant went to work for Employer, he worked primarily in the areas of construction, plumbing, truck driving and welding.

4. Claimant started working for Employer in the fall of 2003 in exchange for rent and then went on Employer's payroll in January 2004.
5. On January 5, 2004, Claimant signed an Employee Orientation Information sheet that contained a checklist of pertinent employment information. Number 7 stated, "[r]eport accidents or injuries – Work Comp." Claimant did not recall signing the form or discussing any of the information with Employer.
6. Claimant performed a variety of tasks for Employer including snow removal, lawn work, cleaning and painting rental properties and general construction.
7. Leo Bestgen, the owner of Bestgen Construction, owned the Murray Addition, a new development consisting of at least eleven lots.
8. On Monday, November 29, 2004, Claimant and fellow employees, Aaron and Tommy O'Connor, began working on the Murray Addition, which involved digging a trench for water and communication lines. They dug the trench with a backhoe and then buried the lines in separate layers.
9. Claimant worked on the Murray Addition for nine days, starting on Monday, November 29, 2004, until Thursday, December 9, 2004.
10. Work on this project was physically demanding. Claimant, Aaron and Tommy did quite a bit of digging and shoveling in order to bury the water and communication lines. This included shoveling dirt and sand and throwing rocks out of the trench.
11. Claimant first started having problems with his right shoulder while working on the Murray Addition project, but he did not know the exact day that his shoulder began to hurt.
12. Claimant first noticed a light pain in his right shoulder running down to his elbow while using a shovel to throw dirt and rocks up and out of the trench.
13. Claimant thought he had pulled a muscle and kept working and shoveling. Claimant stopped throwing rocks out of the trench.
14. Claimant noticed a sharper pain in his right shoulder as he pushed himself up out of the trench.
15. Claimant still thought he had a pulled muscle and that it would get better after he got used to shoveling.
16. Claimant completed the job as assigned for the Murray Addition.
17. On Monday, December 13 and Tuesday, December 14, 2004, Claimant worked with Aaron trimming trees on another lot owned by Bestgen.
18. On the first day, Claimant and Aaron spent the day trimming trees from the ground.
19. On the second day, Claimant initially started cutting the trees in a loader bucket about ten to twelve feet off the ground while Aaron operated the loader bucket.
20. To cut the trees, Claimant used a chainsaw weighing fifteen to twenty pounds that was attached to a pole about twelve to thirteen feet long.
21. As he cut the trees, Claimant felt a very sharp pain in his right shoulder.
22. Claimant finished cutting one tree and then asked Aaron to switch positions because Claimant "couldn't hardly finish." Claimant told Aaron his upper body was sore and that he thought he had pulled a muscle. When Claimant mentioned this to Aaron, Aaron assumed Claimant was sore from the work at the Murray Addition because "we were all a little sore after the job."
23. Aaron agreed to switch places and he finished cutting the trees while Claimant operated the loader bucket.

24. Both Claimant and Aaron finished the job as assigned.
25. On Wednesday, December 15 through Friday, December 17, 2004, Claimant, Aaron and another employee worked on a truck engine, which included pulling out the motor and installing new gaskets.
26. When Claimant was under the truck, he experienced pain in his right shoulder while reaching up to unbolt the motor from the transmission.
27. Claimant also had trouble raising his arm over his head to hold a plate in place. The plate weighed ten to fifteen pounds and Claimant asked another employee to take his place to hold and reinstall the plate.
28. Claimant also experienced pain in his right shoulder when he reached for the motor as it started to fall off a stand.
29. Despite his pain, Claimant completed the work as assigned.
30. Again, Claimant just thought he had pulled a muscle. Claimant did not think he needed medical treatment or that he needed to inform Bestgen about the pain in his right shoulder because Claimant thought it would get better.
31. Sometime after Claimant worked on the truck engine, Tommy asked Claimant about his right shoulder. Claimant told Tommy that "he hurt his shoulder and he couldn't lift it up all the way or lift things." Claimant informed Tommy that he thought he had pulled a muscle and that the pain started while working on the Murray Addition. Tommy told Claimant that he should have his shoulder checked out in case it was "something more."
32. Claimant worked for Employer on December 20 to 22, and December 27 to 29, 2004. Claimant did not recall any problems with his right shoulder during those two weeks.
33. Claimant completed all his assigned work tasks.
34. Claimant was off work over the Christmas and New Year's holidays.
35. On Monday, January 3, 2005, Claimant returned to work. Claimant and Aaron went to the Sherman Street shop to change a tire on a trailer.
36. Claimant tried to back the trailer into the shop, but he "couldn't hardly turn the steering wheel" on the truck because of the pain in his right arm.
37. Claimant complained to Aaron that his right arm was sore and he could not back the truck into the shop because it did not have power steering.
38. Aaron backed the truck into the shop and moved some chains for Claimant.
39. The two finished the assigned task and then went to a meeting with Bestgen to get their next work assignment. Claimant was sent home because it was slow.
40. Before this meeting, Aaron told Claimant that he should have his arm checked by a doctor and inform Bestgen about the problem.
41. Later that day and after he was sent home, Claimant decided that because he was off work, he would get his right arm checked out. Claimant still thought he had a pulled muscle and would not have gone to the doctor if he was still working.
42. Claimant knew he was to report any on-the-job injury to Bestgen. However, prior to January 3rd, it was not discussed with the employees about what to report or not to report concerning on-the-job injuries.
43. On January 3, 2005, Claimant called Bestgen. Claimant informed Bestgen that he was having problems with his right arm. Claimant stated, "I think I said it

might be a muscle, but I'm not for sure, and I'm thinking I needed to go get it checked out."

44. Claimant told Bestgen he thought he hurt his arm while working on the Murray Addition.
45. Claimant also asked Bestgen to recommend a doctor because he was not familiar with physicians in the area. The last time Claimant went to a doctor was sometime in the past ten years when he got a piece of steel in his eye while welding.
46. Prior to January 3rd, Claimant did not miss any work due to the pain in his right shoulder.
47. On January 3, 2005, Claimant saw Dr. David Lauer in Sturgis. Claimant told Dr. Lauer that his right shoulder had bothered him for the past three weeks after he hurt it digging on the job.
48. Claimant had limited range of motion in the shoulder and an x-ray was negative.
49. Dr. Lauer suspected rotator cuff tendinitis or a possible tear and requested that an MRI be performed.
50. Bestgen's wife, Synette, called Dr. Lauer after Claimant's appointment and expressed concerns about having an MRI performed. Dr. Lauer recommended that Claimant rest his shoulder and have a cortisone injection.
51. Employer had actual knowledge of Claimant's right shoulder injury on January 3, 2005.
52. The prescribed treatment did not resolve Claimant's right shoulder problems and Dr. Lauer re-prescribed the MRI, which showed a torn rotator cuff.
53. Dr. Lauer referred Claimant to Black Hills Orthopedic for further evaluation.
54. Dr. Stuart Fromm, orthopedic surgeon, saw Claimant on February 2, 2005, and recommended surgery, which was performed on February 17, 2005.
55. Claimant recovered uneventfully and he returned to work full-time for a new employer in May 2005.
56. Claimant was a credible witness. This is based on his consistent testimony and on the opportunity to observe his demeanor at the hearing.
57. Other facts will be developed as necessary.

ISSUE

WHETHER CLAIMANT PROVIDED TIMELY NOTICE PURSUANT TO SDCL 62-7-10?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). 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). The notice requirement is governed by SDCL 62-7-10. This statute 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.

"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).

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).

The statute is clear that written notice must be provided within three business days after the occurrence of the injury. "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 Hosp., 551 N.W.2d 817, 820 (S.D. 1996). The "reasonableness of a claimant's conduct '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 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)).

Employer argued that Claimant should have recognized the nature, seriousness and probable compensable character of his injury when it prevented him from performing assigned tasks. Thus, Employer argued the time period for providing notice to Employer began on either 1) the day the injury occurred at the Murray Addition when

Claimant felt a sharp pain and was unable to throw rocks out of the trench; 2) December 14, 2003, when Claimant felt a sharp pain in his shoulder and switched places with Aaron; or 3) December 15, 2004, when Claimant felt shoulder pain while working on the truck engine and had another employee install the plate.

Contrary to Employer's argument, the notice period does not begin to run just because Claimant switched places in order to complete assigned work tasks. Claimant first noticed pain in his right shoulder while working on the Murray Addition. Claimant stopped throwing rocks out of the trench but, he did not consider his right shoulder pain to be serious. Claimant thought his condition would improve once he got used to shoveling. Claimant completed his work as assigned and did not miss any work after completing this project.

Claimant changed other work tasks with his co-workers due to shoulder pain. However, Claimant was able to complete his jobs as assigned and did not miss work due to shoulder pain. More importantly, Claimant did not recognize at any time prior to January 3, 2005, the nature, seriousness and probable compensable character of his condition. Claimant thought he had pulled a muscle and that it would get better.

The time period for Claimant to report his injury did not begin to run until January 3, 2005. Starting with the Murray Addition job, Claimant's right shoulder hurt off and on after strenuous exertion. But, pain and other symptoms are not determinative and do not support a determination that Claimant knew the existence or extent of his injury. Claimant credibly testified he thought it was a pulled muscle and that it would heal with time. Claimant only went to the doctor on January 3rd because he had time off work. As of that date, Claimant had missed no time from work because of his right shoulder pain. Claimant did not know the existence or the extent of his injury until he sought medical treatment on January 3, 2005.

Claimant had a high school education and no other formal training and worked primarily in manual labor positions. Claimant was a hard worker, one who did not go to the doctor each time he experienced an ache or pain on the job. In the ten years before January 3rd, Claimant had been to a doctor twice. Claimant had never hurt his shoulder before. Claimant's belief that he had a pulled muscle and that it would get better with time was reasonable.

On January 3, 2005, Claimant suspected that he might have something wrong with his right shoulder. Before he did anything further, Claimant called Bestgen. Claimant informed Bestgen that he was having problems with his right shoulder that started when he worked on the Murray Addition and that he wanted "to go get it checked out." Even when he called Bestgen, Claimant still did not recognize the nature, seriousness and probable compensable character of his injury. It was not until Dr. Lauer informed Claimant that he had an injury more serious than a pulled muscle that Claimant recognized the nature, seriousness and probable compensable character of his injury. On January 3, 2005, Employer received timely notice and was promptly alerted to the possibility of a claim.

Based upon the foregoing, Claimant sustained an injury arising out of and in the course of his employment. Claimant provided timely notice to Employer pursuant to SDCL 62-7-10. Claimant suffered a compensable injury and is entitled to workers' compensation benefits. The Department shall retain jurisdiction over the issue of extent and degree of Claimant's disability, if any.

Claimant shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Employer shall have ten days from the date of receipt of Claimant's proposed Findings and Conclusions to submit objections 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, Claimant shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 22nd day of September, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge