

SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

PHILIP W. MUSGRAVE,
Claimant,

HF No. 3, 2003/04

v.

DECISION

**STARMARK, INC. formerly a division
of MASCO Corporation,
Employer,**

and

**TRAVELERS PROPERTY CASUALTY
INSURANCE 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. This matter was considered on the written record without hearing. Rollyn H. Samp represented Claimant. Richard L. Travis represented Employer/Insurer. The parties entered a Stipulation for Bifurcation on the issue of notice in this matter. The parties have stipulated as follows:

The issue of whether the Claimant's claim is barred pursuant to the provisions of SDCL 62-8-29 shall be bifurcated from all other issues pertaining to the referenced claim, and said issue shall be submitted to the Department of Labor pursuant to the deposition transcripts of Claimant and Dr. Michael Olson, and the Briefs of the parties.

The Department received and considered the deposition transcripts of Claimant, Dr. Michael Olson, and the Briefs and exhibits submitted by the parties.

Facts

1. StarMark Inc. (StarMark) is a cabinet manufacturing plant.
2. Claimant, Philip W. Musgrave (Musgrave) began working for StarMark in 1986. He began working in the Sioux Falls, SD plant in the shipping warehouses and later the production side of the company, supervising assembly, finishing, and shipping operations. Musgrave was transferred to Lynchburg, VA where he worked as a production manager. Musgrave returned to Sioux Falls where he managed the subassembly operations.
3. Musgrave's last day of actual work at StarMark was January 19, 2001.

4. On January 22, 2001, Musgrave applied for a leave of absence due to medical problems including chronic bronchitis, allergies, and viral sinus infection.
5. On March 9, 2001, Musgrave sought treatment with Dr. Michael Olson. Dr. Olson recommended that Musgrave change his work environment.
6. On August 1, 2001, Musgrave resigned from his employment at StarMark. Musgrave did not have any further contact with Employer.
7. On July 7, 2003, Musgrave filed Petition for Hearing with the Department of Labor.
8. Musgrave never sent written notice that he had a claim for workers' compensation benefits due to an occupational disease in the six month period after his employment at StarMark ceased.
9. Other facts will be developed as necessary.

Issue

Whether the Claimant's claim is barred pursuant to the provisions of SDCL 62-8-29.

Analysis

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. *Horn v. Dakota Pork*, 2006 SD 5, ¶14, 709 NW2d 38, 42 (citations omitted).

There are two statutory provisions of SDCL 62-8 that are relevant to the notice issue in occupational disease cases. SDCL 62-8-13 provides:

An employer shall not be liable for compensation or other benefits under the provisions of this chapter for disability or death unless notice of disability and claim for compensation has been given and made to the employer in writing within the time period fixed in SDCL 62-8-29 to 62-8-32, inclusive.

SDCL 62-8-29 provides:

Unless written notice of an occupational disease is given by the worker to the employer within six months after the employment has ceased in which it is claimed that the disease was contracted, and, in case of death, unless written notice of such death is given within ninety days after the occurrence, all rights to compensation for disability, or death, from an occupational disease are forever barred.

Musgrave argues that there is no limit to the number of writings needed to meet the notice requirements of SDCL 62-8-29 and that there is no reasonable interpretation of SDCL 62-8-29 which would require that the notice be given within the period from the day after the employment ceased until six months had passed. Musgrave argues that notice could be given while employee was still employed. Musgrave argues that written notice was given, although in separate documents over a period of 8 months, all submitted while still employed or within the six month period after employment ceased.

Musgrave claims that the separate but duplicative documents submitted to Employer over an eight month period constitute notice. The documents include a letter stating that Musgrave was no longer able to work as many hours as he had in the past, a Leave of Absence Memorandum which referenced a serious health condition, a request for leave of absence setting forth chronic bronchitis, allergies, and viral sinus infection as the basis for leave, the Disability Claim Attending Physician's Statement that suggested that Musgrave should "get out of the environment- sawdust fumes", Musgrave's reference to missed work due to health reasons, references to disability benefits, and the note from Dr. Olson that Musgrave will need ongoing medical treatment as long as he is in the dusty work environment.

To satisfy the written notice requirement, the notice must give an indication of the medical problem suffered by Musgrave, identify an alleged causal connection between the workplace and his medical condition and make a claim for compensation for the occupational disease. *Heupel v. Imprimis Technology*, 473 NW2d 464 (SD 1991). The documents offered by Musgrave do not meet the statutory requirement of written notice of an occupational disease that is required by SDCL 62-8-29. None of the documents set forth that Musgrave had an occupational disease as defined by SDCL 62-8-1(6).

SDCL 62-8-1(6) defines occupational disease as,

[A] disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment and includes any disease due or attributable to exposure to or contact with any radioactive material by an employee in the course of employment;

In his deposition and affidavit, Musgrave testified that he did not send any specific claim to employer stating "I have a claim for workers' compensation benefits for an occupational disease" because the Employer was aware of his health condition. The statute does not provide exceptions, such as actual knowledge, to the written notice requirement. Even if Employer knew of Musgrave's condition and claim for compensation,

[T]he statutory language of SDCL 62-8-13 and -29 clearly and unambiguously requires written notice of an occupational disease be given by the employee to the employer within six months after employment has ceased. Notwithstanding the general rule that workers' compensation statutes are to be construed liberally, we will not liberally construe a statute to avoid a seemingly harsh result where such construction would do violence to the plain meaning of the statute.

Heupel, 473 NW2d 464, 466 (SD 1991) (citations omitted). Musgrave failed to meet the clear command of the statutory notice requirement.

Musgrave also argued that there is evidence in this case that Employer, through its employees, Thomas Fuller (Fuller) and Sandra Murphy (Murphy), concealed material facts with respect to Employee's claim for compensation by directing employee away

from worker's compensation and towards less expensive and less beneficial options for employer.

The deposition testimony of Fuller and Murphy reinforces that Musgrave never reported a work related injury or gave written notice of an occupational disease or other claim for benefits under the workers' compensation laws. The testimony of Fuller and Murphy does not establish that they should have advised Musgrave to file a work comp claim. Rather, their testimony along with that of Musgrave himself, establish that Musgrave had supervisory capacity and should have known himself to file a workers compensation claim.

Conclusion

Musgrave has failed to meet his burden of proof to show he provided notice of an occupational disease at any time during his employment or within 6 months after his employment ended. . The documents offered by Musgrave do not amount to written notice as contemplated by the statutes. Even if they amounted to notice of a disability, they do not amount to timely notice in writing of any claim for compensation based on the disability as required by SDCL 62-8-13, or notice in writing of an occupational disease as required y SDCL 62-8-29. While Musgrave provided adequate notice at the time of filing his petition for hearing with the Department of Labor; this was well past the six month deadline set forth by statute. Therefore Notice was not timely.

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

Dated this 23rd day of December, 2008.

SOUTH DAKOTA DEPARTMENT OF LABOR

Taya M. Dockter
Administrative Law Judge