SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

STEVEN R. BAHM, **HF No. 117, 2008/09**

Claimant,

v. **DECISION**

HUBER HOME IMPROVEMENTS, INC.,

Employer,

and

DAKOTA TRUCK UNDERWRITERS,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This case was heard by Donald W. Hageman, Administrative Law Judge on April 8, 2010, in Yankton, South Dakota. Steven R. Bahm (Claimant) was represented by Kerri Cook Huber. Michael S. McKnight represented Huber Home Improvements, Inc. (Employer) and Dakota Truck Underwriters (Insurer).

Issue:

Whether Claimant's October 18, 2005 work-related injury was a major contributing cause of the medial meniscus tear of his right knee which required the surgery performed on November 16, 2006?

Facts:

The record in this case reflects the following facts by a preponderance of the evidence:

1. Claimant was hired by Employer on October 17, 2005.

2. On October 18, 2005, Employer was insured by Insurer for purposes of workers' compensation.

3. On or about October 18, 2005, Claimant was working for Employer at a job site in Yankton, South Dakota, installing facia and soffit on a house. While attempting to remove old facia from the front of the house, Claimant slipped off the roof and

4. Claimant instantly felt pain in his right knee after the fall.

5. Claimant remained on the job site till the end of the work day following his fall.

6. The morning, following Claimant's fall, he called Employer to report his injury. Claimant also told Employer that he would not return to work for a few days.

7. Claimant did not seek immediate medical attention for his October 18, 2005 injury. Claimant eventually sough medical treatment for his right knee on October 24, 2005.

8. On October 24, 2005, Claimant saw his primary physician, Dr. Thomas Olson. Olson ordered X-rays and diagnosed the right knee as having a "probable meniscus tear, bucket handle type." Olson then referred Claimant to Dr. Peter Rodman, an orthopedic surgeon and ordered an MRI of the knee

9. On October 27, 2005. Dr. Rodman of the Orthopedic Institute, examined Claimant, Rodman noted that, "[h]e has catching sensation. Clinically has a meniscal tear."

10. An MRI of Claimant's right knee was taken on October 28, 2005. That MRI was read by Dr. Garry Famestead, radiologist. His report states that the MRI demonstrated a moderate-size joint effusion, a complex tear of the posterior horn of the medial meniscus with a linear component extending down to the tibial articular surface. Famestead also noted that there was an intrameniscal degenerative lateral meniscus. Also noted was a thinning of the articular cartilage of the medial compartment of the right knee joint.

11. Claimant was released to return to sedentary work on November 14, 2005 by Dr. Rodman.

12. On November 23, 2005, Dr. Rodman's records note that, "MRI scan does show the suspected medial meniscus tear and we will set up a time to scope the knee."

13. Dr. Rodman performed a right knee arthroscopy with partial lateral meniscectomy on Claimant on December 23, 2005. Rodman's operative notes indicated that the medial compartment looked good.

14. On January 9, 2006, Dr. Rodman's records indicate, "[t]he patient is having more symptoms than I would have anticipated given the pathology at the time of the arthroscopy. I am not sure why he is having the giving way episodes… The knee isn't swollen. He has good stability. He had one episode where he fell

15. On January 24, 2006, Dr. Rodman released Claimant to light duty work. Employer offered Claimant an office position.

16. Claimant did not return to work for Employer after the December, 2005 surgery. The reason Claimant did not return to work for Employer were unrelated to his October 18, 2005 injury.

17. On May 18, 2006, Claimant reported "a flare in symptoms" to Dr. Rodman during a recheck.

18. On June 15, 2006, Dr. Rodman's saw Claimant on a recheck. Rodman's records state, "[h]e still describes some catching in the knee. The knee examines well. The big question is whether he has new meniscal pathology. We will follow it conservatively. If it stays a problem, would want to take a second look arthroscopy."

19. Dr. Rodman determined Claimant had reached maximum medical improvement (MMI) as of July 17, 2006. At that time, Rodman gave Claimant a 2% permanent impairment rating of the lower extremity.

20. Insurer paid Claimant in accordance with the 2% permanent impairment rating. Insurer paid all of Claimant's medical bills associated with the December 2005 surgery. Insurer also paid for all time that Claimant missed from work as a result of the December 2005 surgery.

21. Dr. Olson examined Claimant on November 14, 2006. Olson's records indicate that "patient has had increased pain in the lateral aspect of his right knee. The pain has gotten worse and he is now unable to work."

22. On November 16, 2006, Claimant underwent a second arthroscopic procedure by Dr. Rodman. The procedure is described in Rodman's notes as arthroscopy with partial medial meniscectomy of the right knee.

23. On November 22, 2006, Dr. Rodman released Claimant to work without limitations as of November 27, 2006.

24. One of Claimant's attorney's, Michael Stevens, wrote Dr. Rodman a letter dated June 13, 2007. In that letter, Stevens asked for Rodman's medical opinion; whether the need for Claimant's surgery on November 16, 2006 was caused by Claimant's injury on October 18, 2005. In a hand written response, Rodman answered, "[y]es, more likely than not, the November 16, 2006 surgery was a direct result of the October 18, 2005 injury".

25. Rodman followed up with a letter to Stevens dated June 21, 2007. In that letter Rodman reasserted that it was his medical opinion that it was more likely than not that the surgery on November 16, 2006 was a direct result of the October 18, 2005 injury.

26. In a third correspondence, Risk Administration Services, Inc. asked Dr. Rodman: "Would the changes after December 23, 2005, but before November 16, 2005 be due to an "intervening incident?" Rodman answered in the negative and directed the claims examiner to his letter to Stevens dated June 21, 2007.

27. Employer and Insurer sought independent medical opinions from Dr. Jeff Luther and Dr. William Bell. Both doctors conducted a records review without examining Claimant.

28. After conducting his review, Dr. Bell indicated in a letter dated September 27, 2007 that he could not reconcile the two surgeries without an intervening event.

29. After Dr. Luther's review, he indicated that he was unable to conclude with a reasonable degree of medial certainty that Claimant's medial meniscus tear is causally related to Claimant's October 18, 2005 injury.

30. Addition facts may be discussed in the analysis below.

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). To recover under workers' compensation law, a claimant must prove by a preponderance of the evidence that he sustained an injury "arising out of and in the course of the employment." SDCL 62-1-1(7); *Norton v. Deuel School District #19-4*, 2004 SD 6, ¶ 7, 674 NW2d 518, 520. SDCL 62-1-1(7) provides that "[n]o injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.]"

The testimony of medical professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion. *Orth v. Stoebner & Permann Construction, Inc.*, 2006 SD 99, ¶34, 724 NW2d 586. Moreover, a medical expert's finding of causation cannot be based upon mere possibility or speculation. *Deuschle v. Bak Const. Co.,* 443 NW2d 5, 6 (SD 1989); see also *Gerlach v. State*, 2008 SD 25, ¶ 7, 747 NW2d 662, 664 ("[A] worker's compensation award cannot be based on possibilities or probabilities, but must be based on sufficient evidence that the claimant incurred a disability arising out of and in the course of [his] employment."). Instead, "[c]ausation must be established to a reasonable medical probability [.]" *Truck Ins. Exchange v. CNA*, 2001 SD 46, ¶ 19, 624 NW2d 705, 709 (citing *Enger v. FMC*, 1997 SD 70, ¶ 18, 565 NW2d 79, 85).

"The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and prove nothing if its factual basis is not true." *Johnson v. Albertsons*, 2000 SD 47, ¶ 25, 610 NW2d 449, 455 (citing *Podio v. American Colloid Co.,* 162 NW2d 385, 387 (SD 1968)).

Dr. Luther and Dr. Bell were asked for their medical opinions by Employer and Insurer. Luther stated that he was unable conclude with medical certainty that Claimant's second surgery on November 16, 2006 was casually related to his October, 2005 work injury. Bell indicated that he could not reconcile the two surgeries without an intervening event. These opinions are at variance with Dr. Rodman's opinions.

Dr. Rodman offered a medical opinion that Claimant's need for the second surgery was likely caused by his October 18, 2005 injury. Rodman also opined that the need for second surgery was not caused by an intervening event which occurred between the two surgeries. The facts in this case support Dr. Rodman's opinions.

When Claimant first sought treatment, Dr. Olson diagnosed a probable meniscus tear of Claimant's right knee. During Dr. Rodman's initial evaluation, he too suspected a meniscus tear. During Rodman's second examination, he noted that an MRI confirmed the suspected medial meniscus tear. Rodman then scheduled surgery.

Dr. Rodman did not repair a medial meniscus tear during the first surgery; he opted to repair the lateral meniscus. After the surgery, Rodman voiced concern about the knee's continuing symptoms' including "catching" and "giving way". Claimant continued to have pain and the "catching" episodes; sometimes the knee "locked up". One of these episodes contributed to Claimant falling down some steps. Rodman was aware of this incident but did not indicate that it caused any permanent damage.

Six months after the surgery, Dr. Rodman noted that the knee was still catching and that a second look may be necessary. By November of 2006, Claimant's condition had declined to the point where Dr. Rodman performed the second surgery in which the medical meniscus tear was repaired.

These facts indicate that Claimant suffered a medial meniscus tear during his October, 18, 2005 injury. A pre-operative MRI confirmed that tear. Surgery on the lateral meniscus did not relieve Claimant's symptoms. A continuation and worsening of those symptoms necessitated the second surgery.

The primary reason Dr. Luther and Dr. Bell did not believe that a medial meniscus tear was present during the first surgery is the fact that Dr. Rodman did not see a problem with the medial compartment during that procedure and that a surgeon of Rodman's skill would not have missed the tear had it been there. However, it must be noted that it is Dr. Rodman's opinion that the tear was caused by the October, 2005 injury. Consequently, whether Rodman failed to see the tear or did not deem it serious enough to repair, he has acknowledged that the tear existed at the time of the first surgery.

It is also significant for purposes of evaluating their opinions that Dr. Rodman was the surgeon and treating physician, whereas Dr. Bell and Dr. Luther never treated or examined Claimant. Therefore, Claimant has demonstrated by a preponderance of the evidence that his October, 2005 work-related injury was a major contributing cause of the medial meniscus tear of his right knee which required the surgery performed on November 16, 2006.

Conclusion:

The costs associated with Claimant's second surgery are compensable under the workers' compensation laws of this state. Claimant shall submit Proposed Findings of Fact and Conclusions of Law and a Final Order consistent with this Decision, within 20 days after receiving this Decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant's Proposed Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Claimant shall submit such stipulation together with an Order consistent with this Decision.

Dated this _7 th_ day of September, 2010.

____/s/ Donald W. Hageman_
Donald W. Hageman
Administrative Law Judge