

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

WAYNE ARDEN FOOTE,

HF No. 185, 2009/10

Claimant,

v.

DECISION

**LIKNESS BROTHERS IMPLEMENT
COMPANY,**

Employer,

and

FEDERATED INSURANCE COMPANY

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. This matter was heard by Donald W. Hageman, Administrative Law Judge on July 7, 2011, in Aberdeen, SD. Claimant, Wayne Arden Foote, is represented by A. Russell Janklow. Employer, Likness Brothers Implement Company and Insurer, Federated Insurance Company are represented by Timothy A. Clausen.

Issues:

This case presents the following legal issues:

1. Whether Claimant's work-related injuries in 2000 and 2009 are a major contributing cause of his need for knee replacement surgery on both knees?
2. Whether Claimant's employment or employment related activities are a major contributing cause of his need for knee replacement surgery on both knees?

Facts:

The following facts are found by a preponderance of the evidence:

1. Wayne Arden Foote (Claimant) was born on May 26, 1956, and grew up in Langford, South Dakota. He graduated from Langford High School in 1974. Claimant has never married, and has no children.
2. After graduating from high school, Claimant worked for a couple of years doing "farm work".

3. During the time relevant in this case, Likness Brothers Implement Company (Employer) was involved in the sales and servicing of farm implements, operating as a Case IH dealer.
4. In 1989, Claimant began working for Employer as a combine mechanic and truck driver. Claimant frequently worked 45 to 60 hours per week.
5. As a combine mechanic, Claimant's daily duties involved medium to heavy physical labor that incorporated lifting, bending, stooping, kneeling and other similar activities.
6. On July 12, 2000, Claimant suffered a work-related injury to his left knee. Claimant "felt something" in his knee while trying to get into position to work on the forward gear box of a combine that he was repairing. After the injury, Claimant's knee became stiff and sore and he felt sharp pain.
7. Claimant initially sought medical treatment for his left knee from Dr. Parker on July 12, 2000. Claimant was later referred to Dr. MacDougall, who is an orthopedic surgeon.
8. Dr. MacDougall examined Claimant and took x-rays of his left knee. MacDougall found that Claimant's left knee had advanced degenerative changes for Claimant's age. MacDougall began conservative treatment of the knee including Cortisone shots. However, this course of treatment did not provide Claimant with much relief from his pain.
9. Dr. MacDougall testified that the degenerative condition of Claimant's left knee was osteoarthritis of the medial compartment and that Claimant had a degenerative medial meniscus tear, meaning that the meniscus cartilage in the knee as part of the degenerative process had weakened, and it could be torn either with or without trauma.
10. Dr. MacDougall ultimately performed arthroscopic surgery on Claimant's left knee on October 25, 2000, to repair the torn medial meniscus.
11. Dr. MacDougall next saw Claimant in April of 2007. X-rays were taken of Claimant's left knee and showed advanced degenerative changes resulting in bone-on-bone articulation in the medial compartment, which means complete loss of cartilage space on the medial side of the knee. The degenerative changes found in the April of 2007 were much worse than the degenerative changes discovered in 2000.
12. Dr. MacDougall saw Claimant again on February 4, 2009, regarding his left knee. X-rays were taken and showed left knee end stage osteoarthritis of the medial hemi-joint. MacDougall recommended left knee replacement.
13. For purposes of this case, Dr. MacDougall testified that Claimant's July 2000 work injury accelerated the development of Claimant's osteoarthritis and is a major contributing cause of his need for left knee replacement.

14. Dr. MacDougall also testified that the end stage osteoarthritis is a major contributing cause of Claimant's need for a left knee replacement.
15. On January 21, 2009, Claimant suffered a work-related injury to his right knee while climbing a combine ladder. Claimant testified that "something just popped in [his] right knee" and the knee locked up. Claimant felt pain in his right knee following the injury.
16. Claimant was eventually treated for his right knee injury by Dr. Patrick Miller, an orthopedic surgeon. Miller diagnosed osteoarthritis and a full thickness medial meniscus tear of the right knee. Miller ultimately performed arthroscopic surgery on the right knee on May 29, 2009.
17. The May 2009 surgery did not give Claimant any relief for the pain in his right knee. Consequently, Miller has now recommended right knee replacement surgery.
18. Dr. Miller testified that Claimant's January 2009 work injury was a major contributing cause of his need for right knee replacement. He apportioned Claimant's need for right knee replacement at 75% due to the work injury in January 2009 and 25% to the pre-existing degenerative arthritis.
19. Dr. Vorlicky performed an independent medical examination of Claimant on behalf of Employer and Insurer on October 30, 2009. Vorlicky has opined for purposes of this case, that the work injuries to Claimant's knees were an exacerbation or aggravation of the pre-existing degenerative osteoarthritis that afflicted both of Claimant's knees. Vorlicky opined that neither work injury was a major contributing cause of Claimant's current need for knee replacement surgery.
20. Dr. Vorlicky testified that Claimant's osteoarthritis was probably a congenital condition.
21. Dr. Vorlicky testified that osteoarthritis is a progressive disease. He stated that Claimant would have needed the right knee replacement even if he was an office worker and not a mechanic.
22. There is no correlation between an activity or occupation and the development of osteoarthritis.
23. Employer and Insurer provided workers' compensation coverage for the medical expenses of the initial knee injuries but deny responsibility for the replacement of either knee.
24. Additional facts may be discussed in the analysis below.

Analysis:

Causation:

Claimant has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 777 N.W.2d 363, 367 (SO 2010); Day v. John Morrell & Co., 490 N.W.2d (SD 1967). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

SDCL 62-1-1(7) defines “injury” or “personal injury” as:

[O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

- (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
- (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment, or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment;
- (c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment.

SDCL.62-1-1 (7).

The South Dakota Supreme Court has noted that there is a distinction between the use of the term “injury” and the term “condition” in this statute. See Grauel v. South Dakota Sch. of Mines and Technology, 2000 SD 145, ¶ 9. “Injury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result.” Id. Therefore, “in order to prevail, an employee seeking benefits under our workers’ compensation law must show both: (1) that the injury arose out of and in the course of employment and (2) that the employment or employment related activities were a major contributing cause of the condition of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.” Id. (citations omitted).

“The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion.” Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). “A medical expert’s finding of causation cannot be based upon mere possibility or speculation. Instead, “[c]ausation must be established to a reasonable medical probability.” Orth v. Stoebner & Permman Const., Inc., 2006 SD 99, ¶ 34, 724 NW2d 586, 593 (citation omitted).

Knee Injuries:

In this case, there is no dispute that the initial knee injuries were work related. However, the question to be answered here is whether those knee injuries are a major contributing cause of Claimant's current need for knee replacement surgery on both knees.

Dr. MacDougall has treated Claimant's left knee injury which occurred in July of 2000. MacDougall has opined that the left knee injury is a major contributing cause of Claimant's present need for knee replacement because the injury accelerated the progression of osteoarthritis.

Dr. Miller has treated Claimant's right knee injury which occurred in January of 2009. Miller has opined that Claimant's right knee injury is a major contributing cause of his present need for replacing the right knee. Miller has assigned a 75% of the cause of Claimant's need for right knee replacement to the injury.

In isolation, Dr. MacDougall and Dr. Miller's opinions' sound convincing. However, when Claimant's knee injuries are viewed together, the Doctors' rationale breaks down. Claimant's left knee injury occurred nine years prior to his right knee injury. Dr. MacDougall stated that the left knee injury accelerated the progression of the osteoarthritis in that knee. However, the knee replacement surgeries for both knees were recommended to Claimant within months of each other in 2009. This fact strongly suggests that the speed of the degeneration of Claimant's left knee was influenced more by the natural progression of the osteoarthritis than by the injury which occurred nine years earlier.

Despite their separation in time, the injuries were remarkably similar. They were both low impact injuries meaning that they did not occur as a result of a fall or collision of any type. They both occur without incident while Claimant was performing his routine work duties. Both injuries resulted with medial meniscus tears. It is unlikely that these similarities are mere coincidence. It is more likely that the meniscus tears occurred because the cartilage was predisposed to injury due to the degenerative changes of the osteoarthritis. Indeed, the injuries may not have occurred at all had the knees been healthy. These factors contradict Dr. Miller's conclusion that the need for right knee replacement is primarily due to the injury rather than the osteoarthritis.

Claimant has osteoarthritis in both knees. That condition predates both work injuries and is likely due to Claimant's genetic predisposition. Osteoarthritis is a progressive degenerative disease of the knee cartilage. Dr. Vorlicky testified that it is quite possible that the arthritic condition of Claimant's knees would have required replacement surgery even if he had not suffered the work related injuries. Under these circumstances, he believes that it is unlikely that the injuries contributed in any substantial way to the need for Claimant's knee replacements.

Claimant tries to bolster his position by pointing to Dr. Vorlicky's testimony that the injury to Claimant's right knee may have been the "straw that broke the camel's back." However, a "straw" does not constitute "a major contributing cause" under South Dakota workers' compensation law. At the very least, the law requires a very large straw, perhaps even a "bale."

