

SOUTH DAKOTA DEPARTMENT OF LABOR  
DIVISION OF LABOR AND MANAGEMENT

**STUART L. CORCORAN,**

**HF No. 30, 2001/02**

**Claimant,**

**DECISION**

vs.

**MOUSEL CONSTRUCTION, INC.,**

**Employer,**

and

**WAUSAU 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. A hearing was held before the Division of Labor and Management on December 4, 2003, in Rapid City, South Dakota. Stuart L. Corcoran (Claimant) appeared personally and through his attorney of record, Mark J. Connot. Catherine M. Sabers represented Employer/Insurer (Employer).

**ISSUES**

1. Whether Claimant's injury of April 28, 1995, is a contributing factor to his current physical condition and injuries?
2. Whether Claimant's refusal to undergo total knee arthroplasty is reasonable?
3. Whether Claimant is permanently and totally disabled?

**FACTS**

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

1. At the time of the hearing, Claimant was fifty-three years old.
2. Claimant graduated from high school in 1969. Claimant attended one semester at the School of Mines where he pursued general studies. Claimant did not perform very well and he has not pursued any further formal education.
3. Claimant then began working as a general concrete laborer for R&S Construction in Rapid City. Claimant worked as a general concrete laborer for various employers, including Employer, from 1970 until 2000.
4. Claimant's work consisted primarily of flat work, residential and some commercial work. Claimant also performed curb and gutter concrete work. This is extremely physical work and hard on the knees.

5. Claimant has a history of problems with his right knee. In the early 1970's, Claimant was working at the Oahe Dam. Claimant fell twenty-five feet and landed on his back. During his hospitalization, Claimant discussed his overall condition with his physician. Claimant mentioned that his right knee had popped since junior high, which he found to be an inconvenience. Dr. Ahrlin performed surgery, including the removal of two cartilages, on Claimant's right knee. Claimant recovered from surgery and returned to concrete work. However, Claimant's knees continued to pop after surgery and at least until June 1995.
6. On November 21, 1986, Claimant slipped on some ice and twisted his right knee while working for Dean Kurtz Construction. Claimant was off work for three or four days. This incident did not cause Claimant any problems at work, nor did Claimant have any further problems with his right knee until 1990.
7. On January 15, 1990, Claimant sustained a work-related injury while working for Employer. Claimant twisted and sprained his right knee while pushing a wheelbarrow on an incline.
8. At that time, Employer was insured by American States Insurance.
9. Claimant saw his treating physician, Dr. George Jenter, three times after this incident. Dr. Jenter diagnosed a strained right knee with bursitis. On January 25, 1990, Dr. Jenter's records show that Claimant's right knee was doing a lot better and he was released to return to work on January 29, 1990. Dr. Jenter stated in his record, "[w]e have obtained an X-ray of his knee tonight. It shows significant degenerative joint disease. I have told him that sometime in his lifetime he will probably need to have an artificial knee."
10. Claimant returned to work for Employer and his right knee did not cause him any further significant problems until 1995. Claimant complained to Dr. Jenter in December 1992 that he had strained his right knee. However, Claimant did not require any medical treatment. Claimant did not return to see Dr. Jenter for his right knee until 1995, after another work incident.
11. On April 28, 1995, Claimant sprained his right knee while carrying some lumber at work. Claimant slipped and seriously twisted his right knee. Claimant described the incident:

I was carrying - - I don't know whether they were two-by-fours, or two-by-sixes, or what, but they were sixteen foot long, and I think I had four, or six, of them on my right shoulder, and I was - - I had them up, and I was walking to put them in the truck, and I slipped on - - I don't know - - it had to have been ice - - and when I slipped, I really - - I wrenched my knee, and because of the weight on my shoulder, it really pushed down on my knee, and it really twisted it, and I fell onto my right shoulder, and, boy, I knew that wasn't no good; but, in all of the other incidents, I was either just walking, or pushing a wheelbarrow, with the weight down below my hips, or at my hip level; not up on top of my shoulders.

12. Claimant saw Dr. Jenter on May 2, May 10, May 22 and June 6, 1995, for the problems with his right knee.
13. After this incident, it was the first time since the surgery in the 1970's that Claimant had to use crutches.

14. On July 8, 1995, Dr. David Boyer, an orthopedic surgeon, examined Claimant based on a referral from Dr. Jenter. Dr. Boyer evaluated Claimant's right knee and diagnosed Claimant with degenerative arthritis. Dr. Boyer discussed with Claimant treatment options including total knee joint replacement versus living with his condition. Claimant informed Dr. Boyer that "he want[ed] to get along with it."
15. Claimant treated with Dr. Jenter through September 28, 1995. On that date, Dr. Jenter opined Claimant had a five percent impairment rating to his lower extremity as a result of the April 28<sup>th</sup> injury.
16. Prior to the April 28<sup>th</sup> injury, Claimant would have occasional pain in his right knee. Claimant could walk and perform his normal work activities without any difficulties.
17. After the April 28<sup>th</sup> injury, Claimant's condition was much worse. Claimant experienced sharp, continuous pain. The severity of Claimant's pain fluctuated depending upon the amount of pain medication he would take.
18. Claimant returned to work for Employer, but he experienced difficulties performing his work. Claimant described his problems:

Getting up off my knees go to be very difficult, to the point where I would have to pull myself up. If I was doing the edge of this wall, let's say, and this chair rail was here, I would have to use that and pull myself up; and if there wasn't anything like that that I could grab and pull myself up, why, then I would either use a shovel handle, or a hammer, or something where I could push myself up. I never had to do that before.

- Claimant's knee injury also slowed him down and he could not complete as much work as he had in the past.
19. Claimant began to favor his right knee after the April 28<sup>th</sup> injury, and he would put more weight on his left knee. As a result, he began to experience pain in his left knee, although these problems were not to the same degree and intensity as his right knee.
  20. Employer laid off Claimant in either December 1995 or early 1996. Claimant went back to work for Dean Kurtz Construction. Claimant worked as a cement finisher until he returned to work for Employer in 1998.
  21. Claimant saw Dr. Jenter on July 29, 1997, for right knee pain. Dr. Jenter wrote the "patient does have kind of a recurrence of a severe bursitis [in] his right knee." Dr. Jenter gave Claimant an injection in his right knee and told Claimant to return in a week if he had any problems. Claimant did not return to see Dr. Jenter until August 1998.
  22. On August 5, 1998, Claimant saw Dr. Jenter for left knee pain. Claimant experienced increased left knee pain while at home putting on his socks. Dr. Jenter injected Claimant's left knee and took Claimant off work for one week. Claimant did not return to see Dr. Jenter specifically for his knees until June 2001.
  23. Claimant continued to work for Employer until he was laid off in April 2000. Claimant filed for and received unemployment benefits.

24. Claimant saw Dr. Boyer again on May 10, 2000. Dr. Boyer diagnosed severe degenerative arthritis in both knees. Dr. Boyer recommended that Claimant use ibuprofen for pain relief. In addition, Dr. Boyer stated, “[w]e talked about total knee joint replacement in detail. I think he is bad enough that he would benefit by that, but we tried to help him understand the risk-benefit ratio, and I think he understands that reasonably well and wants to think about that.”
25. On May 12, 2000, Dr. Boyer opined that Claimant had a fifty percent impairment rating to his right lower extremity based on the condition of his right knee. Dr. Boyer stated, “[m]ost patients with this severity of degenerative arthritis in their knees are not able to work at all.”
26. In June 2000, Claimant went to work for Mark Zallar helping with the construction of a home in Hot Springs. Claimant worked for Zallar for eight to ten weeks doing concrete work. Claimant experienced difficulties with his knees while working on this project.
27. Claimant’s work for Zallar ended in August 2000 and Claimant has not been employed since that time. Claimant tried to start his own business sharpening drill bits. However, this attempt at self-employment was unsuccessful.
28. Claimant saw Dr. Jenter on June 4, 2001, for continuing trouble with his knees. Claimant related his problems all back to the April 1995 injury. Dr. Jenter spent time with Claimant discussing his condition.
29. Dr. Jenter opined Claimant’s current condition relates back to the work-related injury that occurred on April 28, 1995. Dr. Jenter agreed that Claimant would need a total knee replacement, but because he is not an orthopedist, Dr. Jenter would defer to Dr. Boyer and Dr. Anderson for their evaluation of the success or recommendation of knee replacement surgery for Claimant.
30. Claimant’s current right knee problems include that he cannot bend his right knee as much as he used to do, his right knee hurts all the time and it is swollen. Claimant experiences pain at least four days a week. Depending upon his activities and how much he favors his right knee, Claimant experiences pain in his left knee at least two to three times per week. When his knee hurts, Claimant wears a knee brace and takes 600 mg of ibuprofen, five to six times a day. Claimant is not very active during a typical day due to the condition of his knees.
31. On March 19, 2002, Dr. Dale Anderson, board certified orthopedic surgeon, performed an independent medical examination of Claimant. Dr. Anderson noted that Claimant had severe degenerative changes in both knees, but the right knee is significantly worse. Dr. Anderson opined that Claimant’s only treatment option is a knee replacement.
32. Myron Sorestad, P.T., conducted a Functional Capacity Evaluation (FCE) of Claimant on March 28, 2002. During the FCE, Claimant needed frequent rest breaks due to his pain. The FCE showed that Claimant is capable of performing physical work at the light level with certain restrictions. However, the FCE also indicated that, based on the evaluation, it was difficult to predict whether Claimant would be capable of sustaining light level of work for eight hours a day.
33. On April 17, 2003, Dr. Boyer visited with Claimant’s attorney about Claimant’s ability to have surgery. Once again, Dr. Boyer recommended total knee replacement surgery for Claimant. Dr. Boyer acknowledged that this “is elective surgery, and he needs to decide if he wants to have this performed.”

34. Claimant understood that total knee replacement surgery has been recommended by Dr. Jenter, Dr. Boyer and Dr. Anderson. To date, Claimant has refused to undergo this surgery. Claimant stated, "I don't like anybody cutting me open[.]" Claimant is aware of the risks involved with the surgery and stated that surgery "doesn't sound too good."
35. Claimant's primary limiting factor is his pain.
36. Claimant currently receives social security disability benefits due to his knee condition.
37. Claimant was a credible witness. This is based on consistent testimony at the hearing and in the medical records and based on the opportunity to observe his demeanor at hearing.
38. Insurer provided workers' compensation coverage for Employer from September 6, 1994, through September 6, 1995.
39. Other facts will be developed as necessary.

## ISSUE I

### WHETHER CLAIMANT'S APRIL 28, 1995, INJURY IS A CONTRIBUTING FACTOR TO HIS CURRENT PHYSICAL CONDITION AND INJURIES?

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). Claimant sustained a work-related injury on April 28, 1995. "The law in effect when the injury occurred governs the rights of the parties." Westergren v. Baptist Hosp. of Winner, 549 N.W.2d 390, 395 (S.D. 1996). Claimant "must establish a causal connection between [his] injury and [his] employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. The causation requirement does not mean that Claimant must prove that his employment was the proximate, direct, or sole cause of his injury. Claimant must show that his employment was a contributing factor to his injury. Gilchrist v. Trail King Indus., 2000 SD 68, ¶ 7. "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). 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).

Claimant argued "contributing factor" is the appropriate standard to use to analyze causation in this matter, given Claimant's date of injury of April 28, 1995. Employer argued the last injurious exposure rule is applicable here and the incident in April 1995 was a mere recurrence of Claimant's 1990 injury.

The last injurious exposure rule applies when dealing with successive injuries. This rule states:

When a disability develops gradually, or when it comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation.

Titus v. Sioux Valley Hosp., 2003 SD 22, ¶ 12. Here, Claimant's disability comes as a result of a succession of accidents in 1990 and 1995. The question to resolve is "whether the successive injury is a mere recurrence or an independent aggravation of the first injury." Id. at ¶ 13 (citation omitted). "In successive injury cases, the original employer/insurer remains liable if the second injury is a mere recurrence of the first. If the second injury is an aggravation that contributed independently to the final disability then the subsequent employer/insurer is liable." Enger, 1997 SD 70, ¶ 13 (citation omitted). To find that the second injury was an aggravation of the first, the evidence must show:

1. A second injury; and
2. That this second injury contributed independently to the final disability.

Paulson v. Black Hills Packing Co., 554 N.W.2d 194, 196 (S.D. 1996). To find that the second injury was a recurrence of the first injury, the evidence must show:

1. There have been persistent symptoms of the injury; and
2. No specific incident that can independently explain the second onset of symptoms.

Id. The "contribution of the second injury, however slight, must be to the *causation* of the disability." Enger, 1997 SD 70, ¶ 17. It is necessary to examine whether "a significant occurrence, amounting to an independent contribution to the final disability, causes an onset of increased or new symptoms." Id.

Again, Employer argued the 1995 injury was a recurrence of the 1990 injury based upon Dr. Anderson's testimony. Dr. Anderson opined the 1995 injury was an aggravation of the 1990 injury that improved over time. He stated, "the problem that usually occurs is trying to determine causation of symptoms, and it was apparent to me that [Claimant] had significant arthritis in his knees prior to the injury in 1995. And I guess I was not assuming that his injury caused his arthritis. His injury was contributing to an aggravation or making his symptoms worse for a period of time."

Claimant clearly suffered a second injury on April 28, 1995. It is true that Claimant had degenerative arthritis in his knees and that Claimant had difficulties with his right knee prior to 1995. Claimant conceded his knee condition was slowing him down a bit, but not to the extent and degree following the April 1995 injury. After the April 1995 injury, Claimant had to use crutches and wear a knee brace. Claimant's right knee injury caused a change in his work as the injury caused him to slow down and he could not produce as much work as before. After April 1995, Claimant had constant pain that affected his ability to get up and down and walk. This caused Claimant to favor his right knee, which in turn caused an increase of pain in his left knee. In addition, Claimant received an impairment rating for the first time after the April 1995 injury.

The April 1995 injury contributed independently to Claimant's final disability. Dr. Jenter, Claimant's treating physician for over fifteen years, opined Claimant's work-related injury in April 1995 caused or contributed to Claimant's current problems with both knees. In fact, Dr. Jenter went so far as to say that Claimant's work for Employer

was a major contributing cause of his current physical condition. Even Dr. Anderson agreed that Claimant's 1995 work injury, a sudden and severe twisting and downward motion, could be a contributing factor to Claimant's current knee condition. Dr. Anderson testified:

- Q: So is it your opinion that the 1995 injury was a, doesn't have to be the, just a contributing factor to [Claimant's] knee condition presently?
- A: Well, it was a condition of pain and a reason for treatment. I guess I'm not aware that it contributed to his arthritis. It was an aggravation of that condition.
- Q: So the 1995 injury which [Claimant] has described as sudden and severe twisting and downward motion would not be in your opinion a contributing factor, a contributing factor to his current knee condition?
- A: Well, it can be a contributing factor, I guess what I - - I don't know exactly how you're using the term because it can be an aggravating factor for a period of time and then heals and goes back to a steady state again.
- Q: And also it can be either a contributing factor or an aggravating factor and continue, can't it, and be a chronic problem as a result of the injury?
- A: Yes, to a certain degree that's true.

Employer also relied upon Dr. Anderson's opinion where he stated that Claimant's current knee condition is the result of a series of injuries over ten years, including the 1995 injury. However, Claimant's current condition is a mere recurrence of his April 1995 injury. It is true Claimant continued to work as cement finisher after the 1995 injury. But, there was no significant occurrence after 1995 that could independently explain Claimant's continued symptoms. After the 1995 injury, Claimant experienced a significant increase in pain that has remained constant to the present time. Claimant returned to work for Employer, but he experienced continued difficulties performing his work that did not exist prior to April 1995.

Dr. Jenter opined the accelerated wear and deterioration of Claimant's left knee was related to the April 1995 work-related injury. Claimant finally reached a point where he could not work due to his pain and the condition of his knees. Any episodes of pain or need for treatment have been persistent symptoms of his injury in 1995. Again, Dr. Jenter opined that the April 1995 injury is the cause of his current condition. Dr. Jenter's opinions are more persuasive than those opinions expressed by Dr. Anderson. Dr. Jenter's opinions are accepted and Claimant has established by a preponderance of the evidence that Employer, along with its Insurer at the time, Wausau, is responsible for payment of Claimant's workers' compensation benefits. Claimant has also established that the April 1995 injury was a contributing factor to his current condition.

## ISSUE II

### WHETHER CLAIMANT'S REFUSAL TO UNDERGO TOTAL KNEE ARTHROPLASTY IS REASONABLE?

Claimant has refused to undergo total knee replacement surgery even though it has been recommended by three physicians. The South Dakota Supreme Court stated

“the question of whether refusal of treatment should be a bar to compensation turns on a determination of whether the refusal is reasonable.” Schlenker v. Boyd’s Drug Mart, 458 N.W.2d 368 (S.D. 1990) (quoting 1 Larson’s Workman’s Compensation Law § 13.22 (b)). “Reasonableness in turn resolves itself into a weighing of the probability of the treatment successfully reducing the disability by a significant amount, against the risk of the treatment to the claimant.” Id.

Claimant’s current disability status is that he is severely limited due to his knee pain and lack of mobility. Claimant’s knee pain limits his ability to work. Claimant cannot walk without experiencing pain. As for distance, Claimant cannot walk from one end of the mall to the other without pain. Claimant cannot stand for more than thirty minutes because of pain. Claimant has reported difficulties sitting and lifting because of knee pain. During the FCE, Claimant needed to take frequent rest breaks because of his pain. Claimant’s knee pain is sometimes severe enough that it interferes with his ability to sleep. Claimant frequently takes high doses of ibuprofen to alleviate his knee pain. Even with the use of medication, Claimant’s knee pain is his primary limiting factor. Claimant recognized that his life would be significantly better without the pain.

All three physicians providing testimony in this case have recommended that Claimant have total knee replacement surgery to improve his condition. Claimant offered this rationale for rejecting surgery:

Well, first of all, I ain’t too - - I don’t like anybody cutting me open, and, then, of course, with no - - no recourse on what happens if there’s complications; what happens if it doesn’t work; what happens if, and when, it wears out, then what? No; there’s - - there’s too many open end, and ifs and buts, in that scenario, to be of any value to me.

Claimant understood the risks involved with the surgery. He stated,

I understand that there could be a series of complications or risks all within that - - that same surgery, and, the, of course, during the healing process, also. Each one of them is separate. But, you know, under extreme conditions, quite a few of them could - - could occur at the same time. It doesn’t sound, you know, very good to me. I wouldn’t want to bet my money on it.

When specifically asked why he did not want to have surgery at this time, Claimant responded:

Well, I don’t think I’m - - I really need it right now, other than just for pain control, but, then, again, with all of the risks that are associated with, you know, just the surgery, itself, is, to me, what I consider substantial, and if it’s not necessary, there’s no - - I see no sense in risking major health problems, or even death. Then, again, there’s the issue about what happens when it wears out, and then you’ve got to get another one. Everything - - all of the risks, and everything, increase substantially again. To me, it sounds like it’s quite a serious gamble.

Although Claimant’s fear of surgery is understandable, it does not present a reasonable basis for refusal of surgery.



Dr. Boyer recommended the total knee arthroplasty for Claimant because he is of the opinion that it is likely the surgery can help Claimant. Dr. Boyer would not recommend surgery unless he thought it would substantially help Claimant's condition. Total knee arthroplasty is one of the most common joint replacement surgeries performed by orthopedic surgeons. The purpose of the surgery is to reduce pain. Dr. Boyer acknowledged there are risks associated with surgery including heart attack, stroke, blood clots, pneumonia, phlebitis and infection. In addition, Dr. Boyer stated the average "lifespan for a total knee joint replacement is approximately 15 years from general wear activities." Dr. Boyer confirmed that the prosthesis can wear out, especially if the person is doing more physical activity than walking, including heavy work. Therefore, Dr. Boyer recommends that a person who has the total knee arthroplasty not lift more than twenty-five or thirty pounds and be limited to low impact-type activities. If Claimant had the total knee replacement surgery, Dr. Boyer would give Claimant restrictions of no kneeling, squatting, heavy lifting or heavy labor.

Dr. Anderson also recommended knee replacement surgery for Claimant. Dr. Anderson testified, "[Claimant] is significantly limited in his ability to walk and function, and I believe there's a very good chance that he could have improvement in his ability to walk and in pain relief if he had the surgery for arthroplasty." Dr. Anderson opined the "benefit of knee replacement is a ninety percent chance of improving function and pain." Dr. Anderson agreed that total knee arthroplasty is a common procedure performed by all orthopedists. Dr. Anderson performs fifty to sixty of these procedures in a year. Dr. Anderson opined that this surgery is highly successful for decreasing pain because "the articulation between the femur and the tibia would be resurfaced with metal and plastic this would decrease the pain and discomfort with use of the knee when standing and walking."

Dr. Anderson opined that Claimant's impairment or restriction of physical activity would be decreased by the surgery. Dr. Anderson conceded that a total knee replacement does not make the extremity "normal." However, Claimant would be able to resume normal low impact activities with a decrease in pain. As with Dr. Boyer's testimony, Dr. Anderson acknowledged there are certain risks involved with this type of surgery. Dr. Anderson stated, "the potential risks associated with a knee replacement are primarily those of loosening of the implants if the extremity is used to an excessive degree and the other major risk is infection since the metal and plastic is a foreign body." Dr. Anderson opined the risk of infection is about one percent and the average lifespan of a knee replacement is fifteen years. Both physicians agreed that if Claimant had the surgery, there is a possibility that he would need another knee replacement given his age.

Claimant's refusal of total knee replacement surgery is unreasonable. Claimant's primary limiting factor is his knee pain. One of the main purposes of knee replacement surgery is to reduce pain when walking and standing. This surgery is ninety percent successful for improving both function and pain. Although there are risks inherent to this type of surgery, the benefits far outweigh the risks. Dr. Anderson opined one of the main risks is infection, but this risk is minimal, about a one percent chance of infection. Dr. Anderson opined Claimant's physical impairment would decrease with knee replacement surgery. The procedure would improve Claimant's ability to walk, stand or sit for any length of time and his ability to go up and down stairs.

The medical testimony supports the conclusion that the total knee arthroplasty has a high success rate and would increase the function of Claimant's knee and significantly decrease his pain. The recommended surgery is a reasonable medical alternative that has the potential to reduce Claimant's disability. The benefits of this procedure far outweigh the risks associated with the surgery. Moreover, the probability of the knee replacement surgery significantly reducing Claimant's disability far exceeds the risks associated with the surgery. Claimant's refusal of surgery is unreasonable because surgery would significantly reduce his disability by improving his pain and function.

Claimant's condition is not permanent and stationary and it is unnecessary to address the issue of whether Claimant is permanently and totally disabled. The Department shall retain jurisdiction over the issue of permanent and total disability, depending upon Claimant's decision regarding the total knee arthroplasty.

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

Dated this 8<sup>th</sup> day of February, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp  
Administrative Law Judge