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

TIMOTHY REIMAN, **HF No. 30, 2010/11**

Claimant,

v. **DECISION**

ZYLSTRA BODY & FRAME, INC.,

Employer,

And

DAKOTA TRUCK UNDERWRITERS,

Insurer,

And

AUTO OWNERS INSURANCE COMPANY,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by Donald W. Hageman, Administrative Law Judge, on July 2 and 3, 2013, in Rapid City, South Dakota. Claimant, Timothy Reiman, is represented by Rexford Hagg. The Employer, Zylstra Body & Frame, Inc. and Insurer, Dakota Truck Underwriters' are represented by Michael McKnight and Charles Larson. And Employer, Zylstra Body & Frame, Inc. and Insurer, Auto Owners Insurance Company are represented by Rick Orr.

Legal Issues:

The legal issues presented at hearing are stated as follows:

1. Whether Reiman's work activities are a major contributing cause of the current condition of his knees and need for bilateral knee replacement surgeries?

2. Whether Reiman's knee replacement injuries are due to his willful misconduct?

3. If the need for Reiman's knee replacement surgeries' are causally related to Reiman's work activities, which insurer is responsible for the cost of Reiman's claims?

4. Whether Reiman is permanently and totally disabled as a result of his work activities?

Facts:

The Department finds the following facts:

1. Timothy Reiman (Reiman) worked for Zylstra Body & Frame, Inc. (Zylstra) from November 14, 1986, to March 2010. Zylstra is an auto-body repair shop located in Rapid City. Ken and Dorothy Zylstra are the owners of Zylstra.

2. Reiman worked for Zylstra as an auto body repairman and painter. This job required Reiman to stoop, squat and kneel from 33 to 66% of the time.

3. Reiman's date of birth is July 27, 1961. He was 51 years old at the time of the hearing.

4. Reiman completed 9 grades of schooling. He did not graduate from high school, but later earned a GED with the assistance of his wife. Reiman has difficulty reading and writing.

5. Dakota Truck Underwriters (Dakota Truck) insured Zylstra for workers' compensation from October 19, 2000, to June 6, 2006.

6. Reiman first received treatment for his knees in 2003 with Dr. Lewis. Reiman did not know what was causing his knee pain. He was instructed during that visit to use knee pads at work and ice his knees, to help manage his pain. Reiman reported having a long-term history of knee pain. Reiman had injections in his knees, but his knee pain continued. Reiman was treated for bursitis but signs of chondromalacia were also diagnosed.

7. On May 6, 2004, Rieman returned to Dr. Lewis for knee pain, which in turn referred him to Dr. Sigmond, an orthopedic surgeon.

8. Dr. Sigmond saw Claimant for the first time on September 3, 2004. Reiman was diagnosed with pre-patellar bursitis. This condition is also known as "Housemaid's knee", and is inflammation of tissue between the skin and the surface of the kneecap. The bursa, which is a little sack of fluid near the kneecap, became irritated and inflamed.

9. Dakota Truck requested that an ergonomic study of Reiman's work place be completed by Human Engineering Solutions. The study was performed on October 27, 2004. The study indicated that Reiman's job involved substantial kneeling, stooping, and bending, and recommended that Zylstra purchase lifts to raise vehicles to lessen the impact on the employees' knees.

10. In January 2005, Claimant underwent an MRI of both of his knees. Hereafter, he underwent some physical therapy and additional injections for his bursitis and tendonitis through 2005 and 2006.

11. Dakota Truck accepted responsibility for all claims filed by Reiman and paid all bills for treatment of his knees prior to June 5, 2006.

12. Auto Owners Insurance Company (Auto Owners) has insured Zylstra for purposes of workers' compensation since June 6, 2006.

13. On October 27, 2006, Reiman saw Dr. Sigmond for the treatment of bilateral pes anserine bursitis, Dr. Sigmund's medical note from that visit states in part:

> It appears that his profession is the main cause of this chronic tendinitis and that it will not improve until he changes profession. He was told that he would not do any structural damage to the knee, but that he would have to endure the pain.

14. In June of 2007, Reiman saw Dr. Fromm because his knee pain was getting worse. Dr. Fromm performed a lateral release on Reiman's right knee with arthroscopic surgery in 2007. This surgery was performed to correct a condition where the kneecap was not sliding smoothly in its grooves. The surgery did not relieve Reiman's knee pain. During the surgery, Dr. Fromm noted mild chondromalacia and very little sign of osteoarthritis.

15. Reiman returned to Dr. Fromm in October 2008, complaining of knee and back pain. X-rays of Reiman's knees were unremarkable. Dr. Fromm told Reiman that he was not a candidate for knee replacement surgery. Reiman was referred to Dr. Lawlor for treatment of the pain.

16. In November of 2008, Reiman tried taping his knees and obtained another injection in an attempt to release the pain, but his knee pain continued to worsen.

17. Later that month, Dr. Lawlor evaluated Reiman regarding his knee pain. Reiman also mentioned some low back pain, which had worsened in the previous eight months. Dr. Lawlor recommended some conservative treatments and physical therapy.

18. Dakota Truck and Auto Owners had Independent Medical Evaluations (IMEs) conducted to evaluate the condition of Reiman's knees. Dr. Paul Ruttle performed an IME on 11/18/04. Two were performed by Dr. Jeff Luther on 05/04/06 and 04/15/07, and one by Dr. Wayne Anderson on 06/14/07. All of these IMEs found that Reiman's knee condition, at those times to be work related.

19. Reiman made a claim for a lower back injury in December 2008. Reiman had an MRI of his lower back, which showed limited changes, except for a small protrusion at L2-L3 and some degenerative changes. Dr. Lawlor testified in his deposition, that the disc protrusion is not clinically significant.

20. Auto Owners has accepted all claims filed and paid all medical bills up until the time that he was laid off. Reiman has also been paid permanent partial impairment benefits for his back injury at a rate of 5%.

21. Reiman continued to undergo conservative treatments for his knees and back throughout 2009.

22. Reiman continued to work for Zylstra until he was laid off in March of 2010. The condition of Reiman's knees continued to worsen after the termination of his job.

23. Reiman underwent another MRI of his knees in June of 2010.

24. Reiman had his left knee replaced on March 2, 2011, by Dr. Jeffrey Marrs. During the surgery, the surgeon found that the knee to be in worse condition than the MRI prior to surgery had indicated. Dr. Marrs stated that the condition of the knee deteriorated between the time of the MRI and the surgery. During surgery, Dr. Marrs found that Reiman's knee had "two areas of full thickness cartilage loss with exposed bone" which constitutes "structural damage' to the left knee.

25. Dr. Marrs has also recommended knee replacement surgery for Reiman's right knee.

26. Reiman's preoperative pain was relieved by the knee replacement surgery. However, he began to suffer from another type of pain which was eventually diagnosed as Reflex Sympathetic Dystrophy.

27. Dr. Marrs opined during his deposition that Reiman's work as an auto body repairman and painter was a major contributing cause of his need for bilateral knee replacements. He also testified that medical literature indicated that there was a relationship between frequent knee bending and osteoarthritis of the knee.

28. Reiman has been diagnosed with chondromalacia since 2003. This condition refers to the gradual thinning, softening, and weakness of the articular cartilage which cushions the femur's movement against the patella. The final stage of chondromalacia is a total loss of cartilage and the onset of osteoarthritis, which by definition is inflammation of the joint.

29. The onset of osteoarthritis is multi-factorial. Osteoarthritis in the knees is caused by the normal wear and tear involved in the normal use and bending of the knee. The occurrence of osteoarthritis and the speed with which the condition

progresses can be affected greatly by other factors such as gender, age, obesity and one's predisposition.

30. Auto Owners accepted responsibility for all claims and paid the bills for treatment of Reiman's back and knees prior to his knee replacement surgery. Both Dakota Truck and Auto Owners denied coverage for the knee replacement surgery of both knees.

31. Reiman's wife testified that her husband started having sleep issues from knee pain in 2003, but that the pain has progressively gotten worse from 2003 to the present. In fact, Claimant no longer sleeps in the martial bed as he cannot sleep and does not want to disturb his wife.

32. Reiman's pain medications are substantial. He takes Hydrocodone, Oxycontin, Cymbalta, Lyrica and Celebrex.

33. Dr. Lawlor has provided work restrictions for Claimant's knee and back conditions. These restrictions are no lifting greater than 5 pounds and no bending, stooping, and kneeling.

34. Dr. Lawlor opined during his deposition that Reiman's work activities were a major contributing cause of his knee complaints.

35. Dr. Segal, an orthopedic surgeon, conducted an IME of Reiman on behalf of Auto Owners on January 24, 2013. Dr. Segal reviewed all of Claimant's medical records, including x-rays and MRIs, took a history, and examined Reiman. Dr. Segal assigned a 40 pound lifting and carrying restriction, no squatting, crawling, or kneeling on the left leg, avoid ladders and impact loading on the left leg. Dr. Segal opined that Reiman was not a candidate for knee replacement because there was no structural damage to the knees and that his work was not responsible for his knees' condition. His opinion was based in large part on the imaging, both x-ray and MRIs. He stated that there was little evidence of osteoarthritis and that there was only mild chondromalacia present in the images. Later, during cross examination, Dr. Segal admitted that Dr. Marrs' operative report indicated that there had been structural damage to the left knee.

36. Dr. Emerson, an orthopedic surgeon, conducted a medical records review of Reiman's knee condition, without a physical examination. Dr. Emerson opined that Reiman's work activities were not a major contributing cause of his knees' condition. Dr. Emerson stated in his initial report that he could not make a diagnosis of Reiman's symptoms. Later after reviewing Dr. Marrs' operative note of Reiman's left knee replacement, he still was unwilling to make a diagnosis because he did not know the size of the areas of exposed bone.

37. Reiman looked for employment from May of 2010 to late January of 2011 while he collected unemployment insurance benefits. His job contacts never exceeded

two per week which was the minimum required to collect unemployment benefits. He has not searched for a job since that time.

38. Reiman's weekly compensation rate is $498.00 based on his 2004 earnings.

39. Reiman's weekly compensation rate is $571.00 based on his 2008 earnings.

40. Reiman was given a 50% impairment rating to his left lower extremity by Dr. Lawlor on March 7, 2012, for his left total knee arthroplasty.

41. Reiman cannot return to his usual and customary employment.

42. Rick Ostrander, Reiman's vocational expert, testified at hearing that Reiman was "obviously unemployable" under the laws of this state.

43. Jim Carroll, Dakota Truck and Auto Owners vocational expert, testified that several job opportunities were available to Reiman using Dr. Segal's work restriction. However, if Dr. Lawlor's restrictions were used, both vocational experts testified that there were no jobs available that would restore Reiman to his compensation rate.

44. Rick Ostrander testified "there was no retraining that could be expected to restore him to employment." He opined that Reiman could not complete any vocational programs due to either his physical or mental limitations.

45. Jim Carroll found one training program which he felt Reiman could utilize to restore him to a wage comparable to that earned as a body repairman.

46. Additional facts will be discussed in the discussion below.

Discussion:

The testimony varied widely as to how much time Reiman spent kneeling, stooping and squatting while at work. Reiman set forth evidence that he was squatting or kneeling 70-80% of the time. Ken Zylstra testified that Reiman rarely kneeled or bent his knees.

The Department does not find Ken Zylstra's testimony or that of his wife, Dorothy, to be credible. Their demeanor was defensive during the relevant parts of their testimony. In addition, Ken Zylstra's testimony flies in the face of the ergonomic study requested by Dakota Truck. Even after being told by Ken Zylstra that the body repairmen rarely kneeled and squatted, Dr. Anderson, who conducted the ergonomic study, concluded that Reiman stooped, squatted and kneeled 0-33% of the time when working on the upper part of a vehicle and 33-66% of the time when working on the lower part of a vehicle. He also recommended additional lifts to reduce the kneeling.

It is also likely that Reiman's evidence is exaggerated. The Department finds that it is more likely than not that Reiman kneeled, stooped and squatted 33-66% of the time, depending of the project. This finding is supported by the Department of Labor & Regulation's job description of body repairman and painter. 33-66% of the work day is a substantial amount of time when extended over a 23 year career.

Analysis:

Causation:

The Department must first determine whether there is a causal relationship between Reiman's work activities and his need for knee replacements. Reiman, as the claimant in a workers' compensation case, has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 2010 S.D. 4, ¶ 11, 777 NW2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 NW2d 353,358 (SD 1992).
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.
>
> The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought;

SDCL 62-1-1 (7) (emphasis added).

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, and ¶ 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 & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 N.W. 2d 586, 593 (citation omitted).

In this case, Dr. Segal and Dr. Emerson have opined that Reiman was not a candidate for knee replacement surgery and that his work activities are not a major contributing cause of the current condition of his knees. On the other hand, Dr. Marrs and Dr. Lawlor have opined that Reiman's work as an auto body repairman is a major contributing cause of his knees' condition and need for knee replacements.

Dr. Emerson's and Dr. Segal's opinions are based in large part on two factors: 1)That the pre-surgery imaging of the knees, i.e. x-rays and MRIs do not indicate that the knees were in need of replacement, and 2) that there is very little if any, relationship between occupational exposure and osteoarthritic of the knee.

Both of these factors fall short of the mark in this case. The first factor is undermined by Dr. Marr's examination of the left knee during the knee replacement surgery. Dr. Marrs noted that the articular cartilage was worn completely through in two locations and that bone was exposed. Consequently, Dr. Marrs' view of the knee during surgery indicated that the knee had structural damage and was in worse condition than the pre-surgery imaging indicated.

Frankly, the Department is perplexed by Dr. Emerson's and Dr. Segal's reluctance to accept Dr. Marrs' observations and conclusions during Reiman's knee replacement at face value. They accept Dr. Fromm's observations and opinions during the 2007 arthroscopic surgery and rely heavily on it to form their opinions, but they seem unwilling to accept Dr. Marrs' conclusion during surgery that the knee required replacement after viewing the knee directly during the surgery. On one hand, they

believed Dr. Fromm when his observations revealed a right knee in better condition than the imaging revealed, but on the other, doubted Dr. Marrs when he found the left knee to be in worse condition than the imaging. Dr. Emerson wanted measurements of the exposed bone before admitting that there was structural damage to the joint and Dr. Segal was unwilling to admit that knee replacement was necessary, even after admitting that Dr. Marrs' observations, if accepted, indicated structural damage to the joint.

It is generally accepted that a direct view during surgery is superior to the view provided by imaging. In addition, Dr. Marrs testified that he would not proceed with a knee replacement if he found that the joint did not require replacement after viewing it during surgery. The Department has been provided no reason to doubt Dr. Marrs' medical determination during surgery that knee replacement was necessary. At that moment, he was in the best position to make that determination.[1]

The second point upon which Dr. Emerson and Dr. Segal rely is the primary focus of Dakota Truck's argument in its post-hearing brief. That point is that there is no correlation between ones occupation and the development of osteoarthritis in one's knees. This point is not very helpful when evaluating the cause in a specific case. All parties have acknowledged that osteoarthritis is multi factorial. There are many factors that account for its onset and the speed at which the condition progresses. Some of these factors are gender (women suffer from the condition more frequently than men), age, obesity and predisposition (genetics). Without categorizing the occupations and the factors involved in each case, use of general correlations is problematic because we again have no knowledge of the other factors. Factors are in play in any of the cases making up the data. Likewise, it is unhelpful to say that many of Dr. Marrs' patients, who required knee replacements, held desk jobs in an attempt to show that work activities were not the cause of Reiman's condition because we again do not know what other risk factors were involved.

If the Department were to accept Dakota Trucks' argument without qualification, it would mean that osteoarthritis can never be shown to be causally connected to work activities. This would fly in the face of the South Dakota Supreme Court decision in Arends v. Dacotah Cement, 2002 SD 57, 645 N.W.2d 583, where the Court found that claimant's work activities were a major contributing cause of his need for knee replacement surgery and numerous other cases which involved cumulative injuries. Instead, each case must be evaluated on the specific facts of the case and not determined by a general statement of probability.

It is clear that frequent knee bending and kneeling is also a factor in the onset of osteoarthritis of the knee. In addition to the case law mentioned above, both Reiman and Dakota Truck referred to osteoarthritis as "wear and tear" arthritis. This point is also inferred from the fact that both Dr. Marrs and Dr. Lawlor have opined that Reiman's

[1] This analysis uses the condition of both of Reiman's knees at different points in time and the Department is aware that the condition of the knees may not be identical. However, both knees are symptomatic and the same causal factors are at play with both knees. Therefore, it is reasonable to infer that both knees are being impacted by osteoarthritis.

work activities are a major contributing cause of his knee problems. In this case, the osteoarthritis was the inevitable outcome when the chondromalacia reached its end stage. There is also an association between chondromalacia and "wear and tear." Finally, it is also noteworthy that some of the other factors, namely age and obesity, are related to the "wear and tear" factor. Age is related because the knees are inevitably used more with the passage of time and obesity results in more weight on the knees, thus causing more "wear and tear."

In this case, the "wear and tear" factor was present. Reiman spent 33-66% of his time bending, stooping, squatting and kneeling, while at work. That amounts to a substantial amount of time over a 23 year career that he is utilizing his knees. While the Department agrees that Reiman's knee complaints from 2003 through 2007 are not directly related to Reiman's current knee condition, those work related injuries are yet more evidence that Reiman's knees were being exposed to a great deal of "wear and tear."

Dr. Segal conceded during his testimony that gender, age and obesity are not factors in this case. Consequently, the only major factors remaining are frequent knee bending, i.e. "wear and tear "and predisposition." Dr. Fromm indicated that he observed minor chondromalacia and very little sign of osteoarthritis during the right knee arthroscopic surgery in 2007. The fact that there was very little sign of osteoarthritis in 2007 seems to suggest that predisposition, did not play a huge role in the onset of osteoarthritis in this case. Therefore, it is likely than not that "wear and tear" was a primary risk factor involved in case.

The focus of Auto Owners' argument is that the determination in this case should be guided by the decision in Jewett v. Real Tuff, Inc., 2011 S.D. 33, 800 N.W.2d 345. The Department disagrees.

In Jewett, the Supreme Court found that the claimant did not meet his burden of showing that his work activities were a major contributing cause of his need for knee replacements. Despite the fact that the claimant in Jewett worked on his knees a great deal of the time, there are three pivotal distinctions between the facts in that case and the facts found here. First, in Jewett, the claimant worked for the employer for 9 or 10 years, less than half of the time Reiman worked for Zylstra, as such Reiman underwent many more years on his knees than did Jewett. Second, in Jewett, the osteoarthritis was discovered after the claimant injured his knees in a separate incident. At the time of its discovery, the condition was far advanced. Therefore the onset of the osteoarthritis took place much earlier in the career of Jewett than it did here. In this case, we know that there was very little sign of osteoarthritis in Reiman's right knee as late as 2007. Consequently, it appears that predisposition may have played a bigger role in that case than did Jewett's work activities. Finally, the ALJ in Jewett rejected the opinion of claimant's physician because his opinion was based on an erroneous fact. In this case, it was Zylstra and its Insurers' physicians who formed their opinion based on erroneous facts. The imaging upon which Dr. Segal and Dr. Emerson relied heavily did not reflect the reality of the condition of Reiman's knee.

Marrs' opinion is that the condition of Reiman's knees was caused by his work activities. His opinion is supported by the facts in this case. Dr. Marrs described the progression of Reiman's osteoarthritis. He said that the chondromalacia in Reiman's knees (which was diagnosed as early as 2003) progressed to the point where it became inflamed (presumably sometime after 2007) at which time the condition progressed more rapidly until it resulted in osteoarthritis.

As a result of the above analysis, the Department finds that Dr. Marrs and Dr. Lawlor's opinions are the more persuasive. Therefore, it finds that Reiman has sustained his burden of showing that that his work activities were a major contributing cause of the current condition of Reiman's knees and need for knee replacements.

Misconduct:

Auto Owners contends that Reiman is not entitled to benefits because his injuries resulted from his willful misconduct. Misconduct in workers' compensation cases are governed by SDCL 62-4-37. That statute provides:

> No compensation may be allowed for any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of any schedule I or schedule II drug, or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statute. The burden of proof under this section is on the defendant employer.

SDCL 62-4-37.

Under this statute, the employer has the burden of proving by a preponderance of the evidence that the employee engaged in willful misconduct and that the employee's injuries were "due to the employee's willful misconduct." VanSteenwyk v. Baumgartner Trees and Landscaping, 2007 SD 36, ¶ 12, 731 NW2d 214, citing, Goebel v. Warner Transportation, 2000 SD 79, ¶¶ 12-13, 612 NW2d 18, 22. "Willful misconduct under the workers' compensation statutory scheme 'contemplates the intentional doing of something with the knowledge that it is likely to result in serious injuries, or with reckless disregard of its probable consequences.' " Holscher v. Valley Queen Cheese Factory, 2006 SD 35, ¶ 48, 713 NW2d 555, quoting Fenner, 1996 SD 121, ¶9, 554 NW2d 485, 48.

Auto Owners argues that Reiman was told by Dr. Sigmond in 2006 that he should change his line of employment and that Reiman's failure to do so constitutes willful misconduct. Dr. Sigmond's medical note from an office visit by Reiman on October 27, 2006, states in relevant part:

> It appears that his profession is the main cause of this chronic tendinitis and that it will not improve until he changes profession. He was told that he would not do any structural damages to the knee, but that he would have to endure the pain.

First, the condition for which Reiman was being treated was tendonitis. This condition had no direct relationship with the cause of Reiman's need for knee replacement. Next, the note does not state that Reiman was advised to change jobs; rather it states that Reiman was told that if he continued working "he would not do any structural damages to the knee, but that he would have to endure the pain." From this, Reiman could not have known that his continued working was "likely to result in serious injuries". Under these circumstances, Reiman's action did not constitute misconduct.

Last Injurious Exposure:

The Department must next determine whether Dakota Truck or Auto Owners is responsible for Reiman's benefits. This issue is governed by SDCL 62-1-18. That statute states:

> If an employee who has previously sustained an injury, or suffers from a preexisting condition, receives a subsequent compensable injury, the current employer shall pay all medical and hospital expenses and compensation provided by this title.

In this case, Reiman's condition is due to cumulative injuries. Presumably, the injuries that thinned Reiman's articular cartilage occurred over time. Reiman's duties did not change appreciably over the years that he worked for Zylstra. Therefore it is reasonable to infer that the injuries occurred over the entire time that he worked. Auto Owners insures the current owner. Therefore the Department finds that Auto Owners is liable for Reiman's claims.

PTD:

Finally, the Department must determine whether Reiman is entitled to permanent total disability benefits (PTD). The standard for determining whether a claimant qualifies for "odd-lot" benefits is set forth in SDCL 62-4-53, which provides in relevant part:

> An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on

> the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

SDCL 62-4-53.

SDCL 62-4-52(2) defines "sporadic employment resulting in an insubstantial income" as "employment that does not offer an employee the opportunity to work either full-time or part-time and pay wages equivalent to, or greater than, the workers' compensation benefit rate applicable to the employee at the time of the employee's injury."

In McClaflin v. John Morrell & Co., 2001 SD 86, the South Dakota Supreme Court opinion discussed the burdens of proof further:

> To qualify for odd-lot workers' compensation benefits, a claimant must show that he or she suffers a temporary or permanent "total disability." Our definition of "total disability" has been stated thusly:
>
> > A person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in insubstantial income.
>
> Under the odd-lot doctrine, the ultimate burden of persuasion remains with the claimant to make a prima facie showing that his physical impairment, mental capacity, education, training and age place him in the odd-lot category. If the claimant can make this showing, the burden shifts to the employer to show that some suitable work is regularly and continuously available to the claimant.
>
> We have recognized two avenues in which a claimant may pursue in making the prima facie showing necessary to fall under the odd-lot category. First, if the claimant is "obviously unemployable," then the burden of production shifts to the employer to show that some suitable employment within claimant's limitations is actually available in the community. A claimant may show "obvious unemployability" by: 1) showing that his "physical condition, coupled with his education, training and age make it obvious that he is in the odd-lot total disability category," or 2) "persuading the trier of fact that he is in the kind of continuous, severe and debilitating pain which he claims."
>
> Second, if "the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or regulated to the odd-lot category,' then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has made 'reasonable efforts' to find work" and was unsuccessful. If the claimant makes a prima facie showing based on the second avenue of recovery, the burden shifts to the employer to show that "some form of suitable work is regularly and continuously

> available to the claimant." Even though the burden of production may shift to the employer, however, the ultimate burden of persuasion remains with the claimant.

McClaflin at ¶ 7 (citations omitted).

A recognized test of a prima facie case is this: "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" 9 Wigmore, Evidence, (3rd {*506} Ed.) § 2494; see Jerke v. Delmont State Bank, 54 S.D. 446, 223 N.W. 585, 72 A.L.R. 7. Northwest Realty Co. v. Perez, 81 S.D. 500, 505, 137 N.W.2d 345, 348 (S.D. 1965).

In addition to qualifying for PTD discussed above, SDCL 62-4-53 demands that "[a]n employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible."

In this case, Rick Ostrander, Reiman's vocational expert, testified at hearing that Reiman was "obviously unemployable" under the laws of this state. He testified that Reiman's physical condition, in combination with his age, training, and experience excluded him from the type of work available in the his community.

In addition, Reiman's wife's testimony and the list of pain medications that Reiman is currently taking has convinced the Department that he is in the type of continuous, severe and debilitating pain which would make employment nearly impossible. Therefore, Reiman has made a prima facie showing of permanent total disability.

The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. Jim Carroll, Zylstra's and his Insurers' vocational expert, testified that several positions were available to Reiman using Dr. Segal's limitations. However, both Rick Ostrander and Jim Carroll agreed that no jobs were available using Dr. Lawlor's limitations.

The differences between Dr. Lawlor's and Dr. Segal's work limitations for Reiman require the Department to decide which physician's limitations is the more appropriate. Dr. Lawlor has seen Reiman a least 10 times, perhaps more. Dr. Segal has seen Reiman only once. In addition, as an expert in rehabilitation medicine, Dr. Lawlor is at least as qualified to set occupational limitations as Dr. Segal is, perhaps even more. Based on these factors, the Department finds that Dr. Lawlor's limitations are the more appropriate in this case. Using Dr. Lawlor's limitations both vocational experts agree that there are no jobs available in Reiman's community that would restore Reiman to an income equal to his compensation rate. Therefore, Zylstra and his Insurers have failed to carry their burden of proof.

Finally, Reiman must show that he is unable to benefit from vocational rehabilitation or that the same is not feasible under the requirements of SDCL 62-4-53. Rick Ostrander testified that Reiman would not benefit from retraining. Jim Carroll on the other hand found one training program which he felt Reiman could utilize to restore Reiman to a

comparable wage to that which he earned as a body repairman. It is noteworthy that Carroll was unable to predict whether Reiman could successfully complete this program. While predicting success is never assured, the Department agrees with Rick Ostrander's opinion that Reiman is unlikely to benefit from this program. Even if Reiman was physically able to work at this vocation, which is questionable due to inability to sit for any length of time, it is unlikely that he could successfully complete the academic requirements of this program. Reiman only completed the ninth grade on his own. He earned his GED only with the assistance of his wife because he has difficulty in reading and writing. Such limitations would make Reiman's success in the program doubtful.

As a result of this analysis, the Department finds that Reiman is permanently and totally disabled under the "odd lot" provisions of SDCL 62-4-53.

Conclusion:

In conclusion, the Department finds that Reiman's work activities are a major contributing cause of the current condition of his knees and need for bilateral knee replacement surgeries. Reiman's knee replacement injuries are not due to his willful misconduct. Auto Owners is responsible for the cost of Reiman's claims. Reiman is permanently and totally disabled under the "odd lot' doctrine as a result of his work activities.

Reiman shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Zylstra and the Insurers shall have an additional 20 days from the date of receipt of Reiman's 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, Reiman shall submit such stipulation together with an Order consistent with this Decision.

Dated this _30th_ day of January, 2014.

_/s/ Donald W. Hageman_____
Donald W. Hageman
Administrative Law Judge