SOUTH DAKOTA DEPARTMENT OF LABOR
Division of Labor and Management

ROBERT LAFAYETTE, **Claimant,** **v.** **TRADITIONAL HOME BUILDERS,** **Employer, and** **MEDICAL ASSURANCE, INC.,** **Insurer.**	**HF 67, 2003/04** **DECISION**

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Margo Tschetter Julius, of Julius & Simpson, L.L.P., represents LaFayette. Mark E. Salter, of Cutler & Donahoe, L.L.P., represents Employer/Insurer.

Issue

Lafayette suffered a work-related injury to his knee on February 19, 2001, while working for Employer. He slipped, twisted, felt a pop and experienced immediate pain and swelling in his left knee. Employer/Insurer accepted this claim as compensable and paid medical expenses, including two surgeries on the medial cartilage of Lafayette's left knee, as well as benefits related to an impairment rating. After reaching maximum medical improvement (MMI), Lafayette fell at home on August 15, 2002. Following this second fall, which was not work-related, Lafayette returned to his doctor. He was diagnosed at that time as having a significant anterior cruciate ligament (ACL) tear which would require reconstructive surgery.

The current issue is whether Claimant's February 19, 2001, injury to his knee remains a major contributing cause of his current condition and need for treatment.

Facts

Following his February 2001 fall, Lafayette first saw his personal doctor who referred him to Dr. Rand Schleusener, an orthopedic surgeon. Dr. Schleusener first saw Lafayette on February 22, three days after his initial injury, and has been his treating doctor since that time.

Dr. Schleusener testified by his April 27, 2004, deposition.

Dr. Schleusener's February 22 note includes, as an objective sign of injury, that Lafayette had some fluid in the knee, "mild effusion".

Dr. Schleusener performed a Lachman's test, which looks for abnormal laxity of the knee and is designed to look at the integrity of the ACL. Dr. Schleusener testified that the knee joint normally just hinges back and forth. With a ruptured ACL, the knee will displace on the frontal plane.

The Lachman's test was normal. Dr. Schleusener testified concerning the significance of the normal Lachman's test, "I didn't think he had a significant ligament injury. I didn't think he disrupted his ACL."

Dr. Schleusener performed a McMurray's maneuver, in bending and twisting the knee he could reproduce popping and pain in the knee. The knee was not gliding normally. Dr. Schleusener felt the locking and catching was probably caused by a cartilage tear or a loose body in the knee. Dr. Schleusener diagnosed a cartilage tear. According to his testimony, these symptoms do not usually indicate a torn ACL. Initially he recommended conservative care.

When Lafayette experienced popping and pain in physical therapy, Dr. Schleusener ordered an MRI. This was performed March 1, 2001. This study indicated a tear in the medial cartilage. The ACL tendon was poorly visualized. Because it was not seen very well, Dr. Schleusener could not rule out a torn ACL. He testified that the radiologist thought there was at least a partial tear of the ACL.

Dr. Schleusener recommended an arthroscopic procedure to fix the medial cartilage. He did not prescribe any treatment for the ACL.

Dr. Schleusener performed a partial medial meniscectomy on March 21, 2001. During this procedure, Dr. Schleusener looked at the ACL. He testified, "it looked like some of the fibers were torn and attenuated or lengthened, but a majority of them were intact." He could see only the front part of the ligament. He was able to grab it with a small hook and pull on it. Dr. Schleusener estimated that 80% of the fibers were intact, and there was no evidence of any severe tears. He did not believe any treatment of the ACL was warranted.

Exam notes made during a follow-up appointment on March 29 indicate the surgery appeared to be successful. The popping was gone and Lafayette was feeling better. However, in May 2001, the popping and catching in the left knee had returned. Lafayette was not complaining of pain. On exam, Dr. Schleusener could not get Lafayette to reproduce the popping and catching. "His exam was pretty normal."

A month later Lafayette complained the knee was still bothering him. He complained of pain and popping. A second MRI was performed on June 12, 2001. Dr. Schleusener testified that this scan "showed he had findings suspicious for a partial tear of his ACL, signal changes in his medial femoral condyle [where the ACL lies] consistent with the bone bruise that he'd had before, increased signal in the back of his medial meniscus consistent with another tear, and then he had a tear or increased signal in the lateral meniscus consistent with some degeneration."

Dr. Schleusener suggested another surgery. Lafayette said it was not bothering him enough to consider surgery, and he was too busy.

Lafayette returned in October with complaints of popping and catching. He had pain on the McMurray's test, which looks for cartilage tears. The Lachman's test, looking for laxity in the ACL, was normal. His options included another arthroscopic procedure, which was eventually performed on May 13, 2002. This second cartilage repair was similar to the first surgery. Dr. Schleusener testified that "I was suspicious that perhaps his ACL was giving him problems so . . . I made a more distinct effort to examine the ACL function." The ACL was intact. It was "mildly lax, meaning it was loose", but there were fibers intact. "[The ACL] was probed and I couldn't see

any stump of the ACL or torn ACL. It did appear to be a little bit loose but when I pulled on it, it seemed to be intact." "[H]e had an ACL that was a little bit sloppy, but not completely torn." Dr. Schleusener again determined that treatment of the ACL was not warranted.

Dr. Schleusener testified, "I think he was better [after the second surgery] but I don't think his knee was normal. He said it still pops, still hurts him on occasion." Dr. Schleusener did not know if these complaints were related to the meniscal injury or the lax ACL, "but it didn't seem to be bothering him enough to look into it further."

Dr. Schleusener found Lafayette at MMI on July 5, 2002. Lafayette returned on August 13 with complaints of popping and locking. Dr. Schleusener did not feel these complaints were new or different, compared to the July 5 complaints. Dr. Schleusener provided an impairment rating, based on the cartilage injury. None of this rating was based on any tear or laxity of the ACL.

On August 15, 2002, Lafayette returned to Dr. Schleusener after falling at home. He was having left knee swelling and pain. Dr. Schleusener testified, "When I examined him, he had a big swollen knee and I thought he ruptured his ACL because his Lachman's test showed no end point." This was a significant change from any prior Lachman's test.

A third MRI was conducted on August 22, 2002, which showed findings consistent with a partial tear of the ACL.

Dr. Schleusener's exam included new findings: "He had a much more sloppy knee on exam then [sic] he'd ever had before. He had a lot more swelling then [sic] he'd ever had before and that meniscus had been in that state for the last year and a half or whatever and this was a new finding."

Dr. Schleusener identified only two possible causes for Lafayette's torn ACL and need for reconstructive surgery, the 2001 fall at work, and the later August 2002 fall at home. He opined that the original fall at work was a major contributing cause of Lafayette's current condition and need for treatment. He testified,

> I understand that the burden of proof is a major contributing factor and I believe that his original injury when he slipped on the roof was a major contributing factor to his ultimate rupture of his ACL as evidenced by his ongoing symptoms. Whether they were from the meniscus or the ACL, it's hard to know. I think it may have been partially from both, but probably from his meniscus. He never had a normal meniscus and he never had a normal knee after [the first injury] and then he blows his ACL out after his knee gives way.
>
> So based on all the times I looked in his knee and all the times I examined his knee, I think he had a partial injury to his ACL that was a major cause of his ultimate rupture of his ACL.

Dr. David L. Hoversten, a board certified orthopedic surgeon, performed a records review for Employer/Insurer. He testified by his June 3, 2004, deposition.

Dr. Hoversten reviewed the records of Dr. Schleusener and Dr. Papendick (Dr. Schleusener's partner), the radiology reports of the three MRIs (March 1, 2001, June 12, 2001, and August 22, 2002), and the physical therapy notes.

Looking at Dr. Schleusener's first exam note of February 22, 2001, Dr. Hoversten pointed to the "mild effusion", testifying, "It's extremely uncommon that you can tear an anterior cruciate and have mild effusion." This, together with the stable Lachman's maneuver and the fact that Dr. Schleusener was able to bend and extend the knee throughout the McMurray's maneuver caused Dr. Hoversten to conclude at the time of Dr. Schleusener's initial exam, "the ACL is probably fine and it's the meniscus that got hurt." He agreed that the popping in the knee is consistent with a cartilage tear.

Dr. Hoversten also found it significant in Dr. Schleusener's note two weeks later that Lafayette denied any giving way of the knee and "On exam he has no effusion." Dr. Hoversten testified, "With a significant ACL tear we usually have a lot of effusion and swelling for at least four to six weeks after it's torn. So we're two weeks later and the effusion is basically gone. This would say to me that the ACL had minor or no injury."

Dr. Hoversten testified that he found nothing in Dr. Schleusener's evaluation of the ACL during the first surgery, on March 21, 2001, through the June 12, 2001, MRI to indicate instability of Lafayette's ACL was the source of his continued knee complaints.

Based on Dr. Schleusener's October 19, 2001, exam notes, Dr. Hoversten opines that the Lachman's test was normal, with an endpoint, so the ACL was functioning.

Dr. Schleusener noted no effusion and "ligamentous exam is normal" in his March 8, 2002, exam notes. Dr. Hoversten testified that a lot of ACL instability would produce effusion during the course of treatment. In his opinion, because there was no effusion, the ACL was not the problem.

Dr. Schleusener performed the second surgery on May 13, 2002, and examined the ACL again. Dr. Hoversten testified, according to these records, there is again no reason to believe Lafayette's ACL was the reason for his problems.

Dr. Hoversten also points to the fact that on July 2, 2002, Dr. Schleusener found Lafayette at MMI soon thereafter and returned him to work without restrictions.

Then, according to Dr. Hoversten, things changed significantly after the August 2002 fall at home. Dr. Hoversten testified the ACL would not normally degenerate further "without another significant injury." He opined Lafayette's ACL tear was not the result of the 2001 work-related fall; but was the result of a second traumatic event, the fall in August 2002.

Dr. Hoversten concluded that the August 2002 fall was the cause of Lafayette's need for ACL reconstruction, and, without this fall or any other acute injury, ACL reconstruction would have remained unnecessary.

It is significant to note where the two doctors agree.

Dr. Hoversten agreed with Dr. Schleusener that the ACL was permanently weakened by the 2001 work-related fall. He described the ACL as being "composed of thousand of small fibers that run longitudinal, almost like a rope." He testified,

> When you have a tear that's like 15 or 20 percent[,] the torn fibers do sort of heal back together. They're thicker. They're a little fatter. This is the redundancy that Dr. Schleusener

talked about on his second exam. So there was healing of them[,] but they're no longer strong and tight. They no longer add the full support the way the normal ones do. So they are functioning, but their functioning is never normal.

Hoversten agreed with Dr. Schleusener that following a partial ACL tear, the strength of the knee is not normal, and would be more susceptible to further injury. He agreed that the partial ACL tear played some role in Lafayette's August 2002 injury. The ACL had been weakened by the earlier work-related fall and less force would have been required to tear the ACL in August 2002.

Dr. Hoversten testified on cross exam, "My opinion is that the prior injury was a contributing factor, but that it was a relatively small factor. And in my opinion the fall and the traumatic event to his knee was **the** major factor of his injury. And on that part I guess I would disagree with Dr. Schleusener." (emphasis added).

However, Dr. Hoversten could not testify whether the August 2002 fall alone, without the prior injury, would have been sufficient to tear Lafayette's ACL:

Q. Do you know or have any evidence that the force to the knee, that was inflicted upon the knee in Mr. Lafayette's fall in August of 2002 wouldn't have been sufficient to tear a completely normal ACL anyway?
A. I don't know the answer.

Analysis

Claimant has the burden of proving all elements necessary to qualify for compensation. Day v. John Morrell & Co., 490 NW2d 720, 724 (SD 1992).

"In order to collect worker's compensation benefits, [Lafayette] must establish a causal relationship between his injury and his employment." Gilchrist v. Trail King Industries, Inc., 2000 SD 68 at ¶7, 612 NW2d at 3-4 (citations omitted).

SDCL 62-1-1(7)(a) provides the definition of "injury" for the purposes of South Dakota workers' compensation.

(7) [O]nly injury arising out of and in the course of the employment[.] . . . 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[.]

Lafayette must prove: (1) that he suffered a work-related injury to his ACL; and (2) that his February 2001 work-related injury was a major contributing cause of his August 2002 ACL rupture and his need for reconstructive surgery.

The doctors do not dispute that Lafayette suffered a torn ACL in the course of his employment, and that the initial tear to the ACL had made Lafayette's knee weaker and more susceptible to injury. Where they disagree is whether Lafayette's initial work-related tear was a major contributing cause of his ultimate ACL tear and his current need for ACL reconstruction.

The two medical opinions must be closely examined to determine whether Lafayette established by a preponderance of the medical evidence that his employment was a major contributing cause of his current condition and need for treatment.

Dr. Schleusener has been Lafayette's treating doctor since three days after his initial work-related fall. He has performed Lafayette's two surgeries and has had the benefit of several examinations, including two examinations of the ACL during the two surgeries.

In comparison, Dr. Hoversten did not ever talk to or examine Lafayette. He did not read Lafayette's deposition testimony. He did not review Dr. Schleusener's deposition testimony. His involvement was limited to an examination of the written records and the three MRI reports.

Dr. Hoversten could only evaluate Lafayette's condition through Dr. Schleusener's written notes. At one point in his testimony, he agrees that it is a close question and acknowledges his opinion is only as good as the records which form the foundation on which it is based:

> [W]e don't have an accurate scientific pre-injury stability test of his knee. And Dr. Schleusener's exams are, you know, looking for obvious discrepancies or loosenesses of the knee. So that, you know, I talked in terms before about millimeters, like maybe if there's displacement up to six or eight it's not so bad. If it's over a centimeter or more it's obviously loose. Well, there are the gray zones in the middle. And I don't have any, you know, clear feeling, not having examined him before, and Dr. Schleusener doesn't clearly delineate this in the note, if there was like a teeny bit of looseness or not. Most of his reports all indicate the knee is tight. The knee is stable. The knee had no other findings. So, you know, I basically have to go by what Dr. Schleusener has said.

Dr. Schleusener has the advantage in having personally examined Lafayette, and having personally observed the condition of his ACL on a number of occasions. Dr. Hoversten's opinion was based on a weaker foundation.

In addition, Dr. Hoversten's interpretation of what constitutes a "major contributing cause" appears to have placed a greater burden on Lafayette. Dr. Hoversten agrees that Lafayette's initial fall did play some role in his ultimate injury; however, in his testimony, he does not clearly separate his opinion that Lafayette's 2001 work injury is not a major contributing cause of his current condition and need for treatment, from his opinion that his 2002 fall at home was **the** major contributing cause of his ACL tear. This injects some confusion into his opinion.

On questioning from counsel for Employer/Insurer, Dr. Hoversten testified:

Q. Doctor, do you have an opinion concerning whether Mr. Lafayette's original injury of February 19, 2001, is **the** major contributing factor giving rise to his ACL injury in August of 2002?
A. I think **the** major factor is the fall in August of 2002.
Q. Do you believe that his original work-related injury **then is not a** major contributing factor to his current need for ACL reconstruction?
A. I would not consider it a major factor. (emphasis added.)

Dr. Schleusener testified more convincingly, clarifying his understanding of the correct standard of proof:

> Well, [Dr. Hoversten is] disagreeing with me and he does - - his words are that the work injury of 2001 is not responsible for the complete tear of the anterior cruciate ligament, and, you know, again, it's the - - it's the legal terminology that I would defer to you guys and I have no qualms about that, that his instability doesn't show up until he fell again in 2002, but his ACL was not normal. And as I understand the law, it says a major contributing factor, and there can be more than one, major contributing factor. So based on that, I think - - I mean, his ACL wasn't normal and he fell and he popped it completely off and - - so that's how we disagree, I think.

Dr. Schleusener's opinion is accepted. Dr. Hoversten's opinion is disregarded. "The trier of fact is free to accept all of, part of, or none of, an expert's opinion." Hanson v. Penrod Constr. Co., 425 NW2d 396, 398 (SD 1988).

Lafayette has met his burden of proving by a preponderance of the medical evidence that his 2001 work injury was a major contributing cause of his ultimate ACL tear, his current condition, and his current need for treatment.

Counsel for Lafayette shall submit proposed Findings of Fact and Conclusions of Law, and an Order, consistent with this Decision, within 10 days of the receipt of this Decision. Counsel for Employer/Insurer shall have an additional 10 days from the date of receipt of Lafayette's proposed Findings of Fact and Conclusions of Law to submit objections. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Lafayette shall submit such stipulation together with an Order consistent with this Decision.

Dated: October 28, 2004.

SOUTH DAKOTA DEPARTMENT OF LABOR

Randy S. Bingner
Administrative Law Judge