SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

CARLIN JEWETT, SR.,

Claimant,

v. **DECISION**

REAL TUFF, INC.,

Employer,

and

ACUITY, A MUTUAL INSURANCE COMPANY,

Insurer.

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. Wesley W. Buckmaster or Buckmaster Law Offices, P.C., represents Claimant, Carlin Jewett, Sr. (Claimant). Michael S. McKnight of Boyce, Greenfield, Pashby & Welk, L.L.P., represents Employer, Real Tuff, Inc. (Employer), and Insurer, Acuity, A Mutual Insurance Company (Insurer). A hearing was held in the matter on November 3, 2009 in Selby, South Dakota. Testifying at the hearing were Carlin Jewett, Sr. (Claimant), Florence Caldwell Jewett, Robert Marker, and Jerry Ohman.

ISSUES

1. Whether Claimant suffered a work-related injury to his right knee on August 1, 2006, and whether that injury is a major contributing cause of Claimant's disability, impairment, or need for treatment?

2. Whether Claimant suffered a work-related injury to his left knee on July 29, 2008, and whether that injury is a major contributing cause of Claimant's disability, impairment, or need for treatment?

3. Whether Claimant suffered cumulative trauma to both his knees over the course of his employment with Employer and is a major contributing cause of Claimant's disability, impairment, and need for treatment?

FACTS

Claimant is a 49 year-old resident of Mobridge, South Dakota. Claimant grew up in White Horse, South Dakota and attained his GED in about 1982. Claimant worked on and off as a rancher/laborer in the White Horse / Eagle Butte area prior to serving as a police officer in Eagle Butte. In 1986, Claimant was incarcerated for a federal offense. Claimant spent much of his prison sentence in a Michigan federal prison. While incarcerated, Claimant took up welding and became a certified welder in 1992.

Claimant was released in 1996 and returned to South Dakota. Claimant started working for Employer in October 1996 as a welder. Employer's business is located in Mobridge. Employer was in the business of manufacturing and selling steel farm products or livestock equipment. Employer manufactured livestock feeders, corral panels, gates, trailers, squeeze chutes, and alleys, as well as miscellaneous products of that same category. Employer stopped manufacturing equipment on April 21, 2009, when the manufacturing plant was destroyed in a fire.

Claimant could build or assist building most of the products. Claimant was assigned to build the regular bale feeders, the skirted bale feeders, and the feed bunks. Both bale feeders are designed to hold a round hay bale and are constructed with 3 or 4 steel hoops or rings with the top two rings separated by a series of steel bars, attached at a slant. The skirted bale feeders are the same as the regular bale feeders with the addition of a metal "skirt" or ring of sheet metal that covers the bottom rings. Claimant spent most of his time welding together the rings and bars that comprised the bale feeders. Until 2005, Claimant also had to bend the sheet metal skirts for the skirted bale feeders. The feed bunks are comprised of sheet metal pieces welded into a four-sided trough with attached legs.

Claimant spent about three days per week, primarily during the winter months, building the bale feeders. Claimant would spend one day laying out and bending the skirts for the skirted bale feeders. The next couple days would be spent piecing together the feeders. Claimant worked with at least one other person when constructing the feeders. Claimant could build about 15 regular bale feeders per day or 15 – 20 skirted

bale feeders in two days. Much of Claimant's work, from 1996 to 2003, required Claimant to be kneeling on the concrete shop floor. Claimant knelt on the floor to piece together the rings and the bars of the feeders. He also knelt on the floor to join the parts of the skirt together and to bend the skirts. Claimant spoke with Employer on a number of occasions about getting the work process up and off the concrete floor and onto tables. Employer did not provide knee protection to Claimant and Claimant did not ask for any knee guards or pads.

In November 2001, Claimant started having problems with his left knee. Claimant reported to his doctor that his left knee was bothering him. Claimant reported that he had been kicked in the knee as a young child and had swelling at that time. At that time, Dr. Henderson reported, "[n]ow when the weather changes or when he walks a lot he has pain in it but no swelling. He has no locking or giving way." Claimant's doctor prescribed Celebrex and later physical therapy. Claimant's doctor recommended that Claimant not work on his knees on the floor and prescribed a latex brace for him to wear. Claimant found that he was allergic to latex and had to stop wearing the brace. The physical therapy and Celebrex alleviated Claimant's symptoms.

On January 22, 2002, Claimant was arrested for a parole violation. Claimant had failed to report his current residence in violation of his parole. Claimant was incarcerated until May 22, 2002. Claimant returned to work for Employer on July 2, 2002 and continued to work there until the business burned down on April 21, 2009.

On June 4, 2002, just after being released from jail due to his parole violation, Claimant saw Dr. Gluscic with Mobridge Orthopedic Surgery Specialists. Dr. Gluscic reported that Claimant had twisted his knee ten days previous while at home. Claimant was using crutches at that time and a knee immobilizer. An MRI scan was taken of Claimant's knee on June 6, 2002. Dr. Peters, the radiologist, reported that Claimant had a partial tear of the lateral meniscus and moderate joint effusion. Dr. Holte, with the Mobridge Orthopedic Surgery Specialists, read the MRI and saw no internal derangement. When Claimant saw Dr. MacDougall on June 25, 2002, Claimant was still

using a cane for walking but noted that his knee had improved. Claimant's symptoms improved over time with the use of physical therapy and the prescription drug Vioxx.

On December 13, 2002, Claimant again saw Dr. Henderson for his left knee. Claimant had bumped his knee on a jig at work and it started to swell about two days after the injury. Dr. Henderson noted that Claimant had a reduced range of motion and considerable swelling. Claimant was told to avoid kneeling at work for a week and was prescribed Vioxx. On December 20, 2002, Dr. Henderson noted that Claimant's range of motion was normal and that the knee appeared to be stable. The effusion (swelling) present at the previous appointment was no longer there. Claimant had continuing symptoms in that knee and was diagnosed with degenerative arthritis in his left knee and a possible meniscal tear. Claimant went off his medications soon thereafter.

Sometime in 2003, in conjunction with an inspection report from OSHA (Occupational Safety Health Administration), Employer allowed the employees to build tables and jigs for holding the product off the floor during assembly. Employer also provided knee pads, rubber mats, and other safety equipment at the request of the employees and OSHA. In 2005, Employer purchased a roller machine that bent the metal skirts Claimant used on the feeders.

With the changes, Claimant spent less time kneeling on the floor and more time in a crouched position. Claimant's typical posture for welding the feeders, after 2003, was to weld the joints from a seated position on a small rolling stool. The lowest part of the feeder, when set on the jig, sat off the ground about 18 inches. After making the welds on the outside of the feeder, Claimant would crawl under the bottom ring and sit on another stool that was located inside the ring. While inside or under the feeder, Claimant would make more welds. Typically, Claimant would then move from a crouched and seated position to a standing position to make the top welds. Claimant moved up and down, and in and out of the jigs, numerous times each day while making these feeders.

Employer paid Claimant on an hourly basis plus commission based upon the number of feeders or bunks constructed. Claimant kept detailed records of the number and type of equipment he produced each day. Neither Claimant nor Employer could locate the piece records for 2001, so both parties made general estimates on the numbers.

Claimant and Employer estimated the amount of time Claimant spent crawling on the floor or in and out of jigs making the various feeders and bunks. Claimant estimated that between 1997 and 2002, he spent 475 days crawling on the floor; and from 2003 to 2008 he spent 245 days crawling on the floor or crawling in and out from under the jigs. According to Claimant's records, Claimant spent about 726 days working directly on his knees in an 11 year time frame. Employer's estimates are significantly less than Claimant's. However, Employer admits that Claimant worked on his knees or crawling in and out of the jigs, mostly during the winter months when the feeders were being built. Claimant spent less time on his knees after the jigs and tables were built. Employer also provided knee pads and rubber floor mats after 2003.

On August 1, 2006, Claimant was working on a corral panel and picked it up to flip it over when his right knee "snapped back" and "popped." Claimant immediately began to feel a sharp pain in his knee. Claimant reported this injury to Employer immediately. Claimant continued to work and experienced swelling and increased pain. Claimant could not stand on his right leg and worked while sitting. Claimant iced and rested the leg but the symptoms did not subside. Claimant saw Dr. Henderson on August 3, 2006, and was referred to Mobridge Orthopedic Surgery Specialists and Dr. James Mantone.

On August 7, 2006, Claimant saw Dr. Mantone regarding his right knee. An MRI was ordered by Dr. Mantone for diagnostic purposes. The MRI revealed a "loose body" in his right knee. The diagnosis by Dr. Mantone was that of a loose body and OCD

(osteochondritis dessicans)[1] type lesion that requires surgical intervention. Surgery was performed on November 2, 2006. Dr. Mantone found that the loose body was an asymptomatic body from the joint and not a piece of bone or cartilage that needs to be put back into place. Dr. Mantone was of the opinion that Claimant could fully recover from this injury. After the surgery, Dr. Mantone found that Claimant continued to have significant atrophy of his quadriceps that causes a "give way phenomena." Dr. Mantone prescribed and recommended physical therapy to deal with that issue. Injections of Synvisc were also recommended by Dr. Mantone.

An Independent Medical Exam (IME) of Claimant was performed by Dr. Richard Farnham, a Board Certified Forensic Examiner, on March 13, 2007. Dr. Farnham was of the opinion that Claimant had reached maximum medical improvement (MMI) as of the date of the IME. Dr. Farnham was also of the opinion that the work-related injury caused the loose body in Claimant's right knee and that no other medical diagnosis or degenerative changes were caused by the incident on August 1, 2006 or were a major contributing cause for future treatment. He gave the opinion that any continuing problems, as symptomatic at the time of the IME, are the direct result of the arthroscopy and not a result of the degenerative changes. Dr. Farnham is of the opinion that Claimant's arthritic changes in his right knee are not related to Claimant's occupation. Dr. Farnham would give a 0% impairment rating to Claimant's right knee, based upon his examination.

Dr. Mantone reviewed Dr. Farnham's IME report on April 2, 2007 and disagreed with Dr. Farnham's conclusions regarding MMI and causation of injury. On June 26, 2007, Dr. Mantone still would not put Claimant at MMI, based upon his continuing symptoms and progression. Dr. Mantone kept Claimant on work restrictions of no lifting over 50 pounds, no ground work, no ladders, no kneeling or squatting and no work below waist level.

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[1] Osteochondritis dissecans. n. Separation of a portion of joint cartilage and of underlying bone, usually involving the knee. *The American Heritage Medical Dictionary* Copyright © 2007, 2004 by Houghton Mifflin Company, Published by Houghton Mifflin Company, all rights reserved.

On November 7, 2007, Employer and Insurer hired Dr. John Dowdle, a board certified orthopedic surgeon, to perform a records review of Claimant's record. Dr. Dowdle is of the opinion that Claimant suffered from degenerative osteoarthritis prior to any work related injury occurring. Dr. Dowdle surmised, upon a reasonable degree of medical certainty, that Claimant's twisting injury of August 1, 2006 caused an effusion of the right knee and that any loose body was present prior to that incident.

Employer and Insurer then arranged with Dr. Raymond Emerson of CNOS (f.k.a. Center for Neurosciences, Orthopaedics & Spine) to perform an IME on Claimant. The IME was performed on March 17, 2008. Dr. Emerson is of the opinion that Claimant suffered from degenerative arthritis in his right knee, prior to August 1, 2006. Dr. Emerson looked at the pictures taken by Dr. Mantone during surgery and is of the opinion that the loose body, because of its shape and smooth appearance, had been loose for a period of time prior to August 1, 2006. Dr. Emerson surmised that the loose body became dislodged at the time of the work-incident and created the effusion making the arthritic condition symptomatic. It is Dr. Emerson's opinion that the arthroscopic surgery was a direct result of the injury of August 1, 2006.

On January 21, 2008, Dr. Mantone reviewed Claimant's right knee. Dr. Mantone suggested the Claimant have a second opinion with an orthopedist who specializes in patellofemoral (kneecap) replacements versus total knee joint replacement. At that time, Claimant's right knee was still in significant pain and Claimant did not have full use or extension of his right knee and leg. Claimant continued to work and treat his symptoms at home with pain medications and therapies.

On July 29, 2008, while Claimant was working, he stepped backwards off the floor pad and turned to the side. Claimant felt his left knee snap and a "crunching feeling." A loud popping sound could be heard. Claimant's co-worker heard the noise from Claimant's knee and asked what had happened. The injury was reported to Employer immediately. A first report of injury was filed on August 8, 2008. Claimant was unable to see his treating physician, Dr. Mantone, until September 2, 2008. Claimant reported a "catching" sensation in his knee after the incident, as well as a continuing

pain. Claimant treated at home with ice and over the counter remedies prior to seeing Dr. Mantone.

Dr. Mantone took x-rays of the left knee which showed arthritis in the joint, similar to the right knee. The x-rays also showed changes of the medial femoral condyle. Dr. Mantone ordered an MRI of the left knee. Dr. Mantone was unsure if there was a meniscal tear or a loose body causing the pain in his left knee and the "catching" sensation; the MRI was required in order to rule out any tears to the meniscus. The Surgical Center that would perform the MRI required a preauthorization from Insurer in order to take the MRI. Insurer would not preauthorize the test to be performed and the MRI of the left knee has not been taken.

Dr. Dowdle performed an IME on Claimant on December 12, 2008. Dr. Dowdle's opinion is that it was not reasonable for Claimant to undergo an MRI of the left knee as the injury in July 2008 was a temporary aggravation of Claimant's arthritis. Dr. Dowdle found Claimant's symptoms to be consistent with his osteoarthritis. Dr. Dowdle's opinion is based upon the finding that Claimant had a possible meniscal tear in his left knee in 2002 that had not healed. Dr. Dowdle gave the opinion that Claimant's work incident on July 29, 2008 was not the cause of his pain or need for treatment. Dr. Dowdle cautioned Claimant from climbing stairs but opined that it was okay for Claimant to be welding and performing his regular job for Employer.

Employer and Insurer requested Dr. Emerson to conduct a records review of Claimant's medical chart, regarding his left knee, in February 2009. It was unclear to Dr. Emerson, from the records presented to him, whether Claimant was suffering from a meniscal tear and if so, when that tear had occurred. Dr. Emerson recommended that an MRI be taken of the left knee in order to more fully diagnose the problem. The alternatives to an MRI, according to Dr. Emerson, would be to either inject the knee or to perform an arthroscopy. Dr. Emerson did not believe Claimant's work activities contributed to the development of the arthritis in Claimant's knees.

In April 2009, Claimant had a recheck of both his knees with Dr. Mantone. In early 2009, Employer moved all of Claimant's work to tables so he did not have to kneel on the ground or crawl on his knees. The clinic notes reveal that Claimant continues to have swelling and pain in his knees, especially the right knee. The pain in both knees, as described by Claimant, was over the medial joint line, close to the patellar region. Claimant experiences swelling of his right knee more so in the evening. There is a sharp, stabbing, searing pain in his right knee. Claimant's left knee does not have the amount of pain as the right knee, but still catches regularly. Dr. Mantone offered Cortisone injections in the knees, but Claimant experienced irregular responses to past intermittent injections. Dr. Mantone again suggested to Claimant that he pursue a patellofemoral replacement (arthroplasty) of the right knee. Dr. Mantone continued to prescribe Tylenol #4, Darvocet and either Motrin or Celebrex.

Additional facts will be developed during the Analysis.

ANALYSIS & DECISION

The causation statute applicable at the time of Claimant's initial injury in August 2006, SDCL §62-1-1(7), defines injury as follows:

> "Injury" or "personal injury," only 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 Claimant has the burden of proving an injury under the above statute. The South Dakota Supreme Court has interpreted this statute on numerous occasions. Recently, the Supreme Court wrote:

> To prevail on a workers compensation claim, a claimant must establish a causal connection between [her] injury and [her] employment. That is, the injury must have its origin in the hazard to which the employment exposed the employee while doing [her] work. *Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, 20, 653 NW2d 247, 252 (citation omitted) (alteration in Rawls). Employees need not prove that their employment activity was the proximate, direct, or sole cause of their injury, only that the injury arose out of and in the course of employment. SDCL 62-1-1(7). And, an injury is not compensable unless the employment or employment related activities are a major contributing cause of the condition complained of[.] SDCL §62-1-1(7)(a); *Caldwell v. John Morrell & Co.*, 489 NW2d 353, 358 (SD 1992) (citations omitted).

Vollmer v. Wal-Mart Store, Inc., 2007 SD 25, ¶13, 729 NW 2d 377, 382 (footnote omitted). The Supreme Court has further stated that:

> [T]he 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. Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.
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> *Westergren v. Baptist Hospital of Winner*, 1996 SD 69, ¶31, 549 NW2d 390, 398 (quoting *Day v. John Morrell & Co.*, 490 NW2d 720, 724 (SD 1992)). A medical expert's finding of causation cannot be based upon mere possibility or speculation. *Deuschle v. Bak Const. Co.*, 443 NW2d 5, 6 (SD 1989). *See also Rawls v. Coleman-Frizzell, Inc.*, 2002 SD 130, ¶21, 653 NW2d 247, 252-53 (quoting *Day*, 490 NW2d at 724) (Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under [workers] compensation statutes.). Instead, [c]ausation must be established to a reasonable medical probability[.] *Truck Ins. Exchange v. CNA*, 2001 SD 46, ¶19, 624 NW2d 705, 709.

Orth v. Stoebner & Permann Construction, Inc., 2006 SD 99, ¶34. Furthermore, the Court has opined on the "level of proof" that must be shown by a claimant.

> "The burden of proof is on [Claimant] to show by a preponderance of the evidence that some incident or activity arising out of [his] employment

> caused the disability on which the worker's compensation claim is based." *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶24, 571 NW2d 376, 381. This level of proof "need not arise to a degree of absolute certainty, but an award may not be based upon mere possibility or speculative evidence." Id. To meet his degree of proof "a possibility is insufficient and a probability is necessary." *Maroney v. Aman*, 1997 SD 73, ¶9, 565 NW2d 70, 73.

Schneider v. SD Dept. of Transportation, 2001 SD 70, ¶13, 628 N.W.2d 725, 729.

ISSUE I

Whether Claimant suffered a work-related injury to his right knee on August 1, 2006, and whether that injury is a major contributing cause of Claimant's disability, impairment, or need for treatment?

Claimant was at work and in the scope of his employment when on August 1, 2006, he sustained an injury to his right knee. The treating physician, Dr. Mantone, as well as the IME doctors, Dr. Emerson, Dr. Dowdle, and Dr. Farnham, all agree that Claimant suffered an injury to his right knee on August 1, 2006. The doctors presented their opinions, with a reasonable degree of medical certainty, through their sworn depositions and IME reports.

The doctors do not agree on the extent of the injury that occurred on August 1, 2006. Claimant's surgeon, Dr. Mantone, is of the opinion that the injury dislodged a loose body in Claimant's right knee and that the injury was an aggravation of Claimant's advanced arthritis of the knee. Dr. Farnham is of the opinion that Claimant suffered from a pre-existing osteoarthritis of his right knee and that the injury that occurred on August 1, 2006, was just an aggravation of the arthritis and that no permanent impairment occurred. Dr. Farnham believes the injury caused the loose body to be dislodged and that is the cause of the need for surgery. Dr. Dowdle gave an opinion that the loose body was present prior to August 1 and the incident only caused swelling or an effusion in the knee. Dr. Emerson believes that Claimant has osteoarthritis. Based upon what he saw in the photos of Claimant's knee joint taken during the arthroscopy, Dr. Emerson is also of the opinion that, the loose body was present prior to August 1, 2006, and that it became dislodged on August 1, 2006 causing pain and swelling and is

the need for the surgery. Dr. Emerson remarked that the loose body had rounded edges instead of the hard edges typically seen on a loose piece that had just broken away.

Dr. Emerson, a board certified orthopedic surgeon, was very detailed in his reasons why he believed the loose body that was removed, was present prior to the incident. Based upon the fact that he could articulate the reasons for his opinions, I find Dr. Emerson's opinion to be more persuasive on the issue of the right knee. The preponderance of the opinions, and the more persuasive, settle on the fact that the incident on August 1, 2006 caused a loose body within Claimant's right knee to become dislodged. The doctors are of the opinion that the loose body caused the pain and swelling in Claimant's knee and is the reason for Claimant's arthroscopic surgery. The surgery removed the loose body. Claimant's right knee did not or has not returned to the condition it was in prior to the surgery. Claimant may have had arthritis in his knee prior to August 1, 2006, but according to the medical records, the right knee was asymptomatic. Claimant had not sought treatment for his right knee prior to it being injured on August 1, 2006.

Dr. Mantone has not placed Claimant at MMI for his right knee. Dr. Farnham and Dr. Emerson are of the belief that Claimant should be at MMI, based upon the fact Claimant has preexisting arthritis in his knee. Both doctors also would give Claimant a 0% impairment rating for this injury because of Claimant's prior condition. Dr. Mantone has not assigned an impairment rating to Claimant's right knee based upon the August 1, 2006 injury. The law in South Dakota regarding the treating physician's province is settled. The Supreme Court has written:

> Once notice has been provided and a physician selected or, as in the present case, acquiesced to, the employer has no authority to approve or disapprove the treatment rendered. It is in the doctor's province to determine what is necessary, or suitable and proper. When a disagreement arises as to the treatment rendered, or recommended by the physician, it is for the employer to show that the treatment was not necessary or suitable and proper.

Hanson v. Penrod Const. Co., 425 NW2d 396, 399 (SD 1988). Employer and Insurer have not shown that Dr. Mantone's opinion is not suitable or proper in regards to the

issue of MMI and the resulting impairment rating. Dr. Mantone is the treating physician and has a better understanding of what Claimant's knee condition was prior to the accident.

Under South Dakota law, insofar as a workers' compensation claimant's "pre-existing condition is concerned[,] we must take the employee as we find him." *Orth v. Stoebner & Permann Construction, Inc.*, 2006 SD 99 ¶48, 724 NW2d 586, 597 (citing *St. Luke's Midland Regional v. Kennedy*, 2002 SD 137, ¶13, 653 NW2d at 884). Claimant may have had an underlying condition of arthritis prior to August 1, 2006, but it was not symptomatic until the injury occurred. The facts show that the August 1 injury dislodged an asymptomatic loose body in Claimant's joint which cause pain, swelling, and the need for surgery. The work-related injury of August 1, 2006 is a major contributing cause of Claimant's disability, impairment and need for treatment.

ISSUE II

Whether Claimant suffered a work-related injury to his left knee on July 29, 2008, and whether that injury is a major contributing cause of Claimant's disability, impairment, or need for treatment?

Where Claimant did not have medical history on his right knee, Claimant has quite a bit of medical history on his left knee. From the records collected, Claimant admits that he was kicked in the left knee by a horse when he was a child, and suffered swelling and pain at that time. Claimant's left knee got better over time and he had full use of his knee without issue until 2001. At that time, Claimant had been working for Employer for about 5 years. Claimant had pain and swelling in his left knee and was prescribed anti-inflammatories and pain medication. Claimant's knee also improved with physical therapies and strengthening exercises. At that time, Claimant did not have any locking or give-way feeling in his left knee.

In 2002, while not employed with Employer, Claimant's left knee gave out at home. Claimant spent a number of weeks in physical therapy and used an immobilizer on his left knee. An MRI was taken of his knee at that time and Claimant's doctors

suspected that Claimant had torn his meniscus, although that diagnosis was never confirmed. No surgery or arthroscopy of the knee occurred because of that injury. Claimant's left knee improved over time and he stopped using the knee brace and immobilizer and eventually went off his pain medication.

On July 29, 2008, Claimant stepped back from his work table, off the floor pad and injured his left knee. Dr. Mantone ordered an MRI of the left knee, but Employer and Insurer did not authorize the payment for the MRI. Dr. Mantone can not give an opinion, with any degree of probability, the extent or degree of Claimant's injury to his left knee, without viewing an MRI. Dr. Mantone did say that it is very possible that the injury is an aggravation of Claimant's arthritis, but that that diagnosis is just a possibility.

Dr. Dowdle, at the request of Employer and Insurer, gave an opinion regarding Claimant's left knee. Dr. Dowdle bases his opinion upon Claimant's medical records and an examination conducted on December 12, 2008. Dr. Dowdle, in his written report, makes an opinion regarding Claimant's range of motion and the placement of Claimant's patella, among other things. These were based upon tests supposedly performed on December 12, 2008. According to Claimant's hearing testimony, Dr. Dowdle did not perform any tests upon Claimant and spoke with Claimant, from the opposite side of a desk, for about 10 minutes before concluding the meeting or examination. Claimant and his wife presented credible live testimony. The opinions contained within Dr. Dowdle's report are questionable and are not persuasive.

Dr. Emerson performed a records review on Claimant's left knee injury, at the request of Employer and Insurer. Dr. Emerson is of the opinion that if Claimant's 2002 injury had resulted in a significant meniscal tear, that Claimant would have been symptomatic between 2002 and 2008. Due to Claimant being asymptomatic for so many years, Dr. Emerson opined that Claimant likely suffered a meniscal tear in July 2008 and not in 2002. Dr. Emerson is of the opinion that arthritis and meniscal tears are often seen together, but one does not necessary cause the other. Dr. Emerson

believes that an MRI scan would be helpful in determining whether Claimant has a meniscal tear.

Again, Dr. Emerson's opinion is the more persuasive as to the diagnosis of Claimant's left knee. Dr. Emerson was of the opinion that ordering an MRI was appropriate in this case to determine the extent of Claimant's injury. Dr. Emerson further stated that the facts and medical reports indicate Claimant has osteoarthritic changes in his left knee, however, Claimant's current symptoms are not necessarily caused by the arthritis as Claimant was asymptomatic for many years prior to the injury. Furthermore, the injury on July 29, 2008 did not cause the arthritis but the injury does precipitate the need for an MRI to fully diagnosis the injury and take action to alleviate the symptoms.

Similar to Claimant's right knee, Claimant has advanced osteoarthritis in his left knee. The persuasive opinion is that Claimant suffered a work-related injury on July 29, 2008 that was independent of or not caused by his preexisting arthritic condition. The injury to Claimant's left knee is a major contributing cause of Claimant's disability, impairment or need for treatment. Until an MRI or arthroscopy or other advanced diagnostic test is performed, Claimant's medical providers will not know the extent of injury and the full treatment requirements.

Employer has argued that Dr. Mantone's order for an MRI of Claimant's left knee is not necessary, suitable, or proper. Their argument is based upon the opinion of Dr. Dowdle. Dr. Emerson has given the same opinion of Dr. Mantone, that an MRI is necessary to fully diagnose the extent of injury of Claimant's left knee. Like Issue I, Employer and Insurer have not shown that Dr. Mantone's order for an MRI of the left knee is not necessary, suitable or proper.

ISSUE III

Whether Claimant suffered cumulative trauma to both his knees over the course of his employment with Employer and is a major contributing cause of Claimant's disability, impairment, and need for treatment?

Claimant argues that his knee problems stemmed from the arthritic condition that was caused by his work for Employer. Dr. Mantone is of the opinion to a reasonable degree of medical certainty that Claimant's work for Employer, from 1996 to the date of initial injury, caused osteoarthritis to form in Claimant's knees and is a major contributing cause of Claimant's bilateral patellofemoral osteoarthritis (arthritis of the knees). Dr. Mantone bases this opinion on multiple facts: Claimant started to show signs of wear and tear on his knees in 2001; Claimant was relatively young to be having arthritic symptoms; Claimant's arthritis is centered at his knees; Claimant's worked on his knees; Claimant did not have any significant trauma to his knees; and Claimant does not have arthritis in his other joints.

Dr. Emerson, when questioned on this issue, said that there is no way to determine the specific cause of Claimant's osteoarthritis. Dr. Emerson read Claimant's complete medical history and based his opinion on that history. He also knew that Claimant's work included kneeling on the floor. He went on to opine that many people have a genetic predisposition to arthritis and that is frequently the cause of the condition. A traumatic event may cause arthritis to develop, but Dr. Emerson did not believe Claimant's reported work-related injuries were of such a degree that arthritis would develop from them. Claimant's arthritis is advanced to such a degree that any recent traumatic event would not be the cause of the arthritis. Dr. Emerson did not specifically agree or disagree with Dr. Mantone's opinion, but could not give a reason for the arthritis with a reasonable degree of medical probability.

Dr. Dowdle gave the opinion that Claimant's osteoarthritis was caused by something other than Claimant's work activities. It was Dr. Dowdle's opinion that Claimant's work may have aggravated his condition or caused swelling and pain, but that this aggravation did not cause the condition to develop. Dr. Dowdle went on to say that many office professionals have the same type of patellofemoral arthritis but do not

work on their knees. The type of work performed does not necessarily correlate with the fact that Claimant has arthritis in his knees.

Much of the hearing testimony was spent parsing the amount of time Claimant spent on his knees while employed with Employer. Claimant's personal records show that between 1997 and 2003, he spent an average of 14 hours per week kneeling on the work floor. Claimant spent more time on his knees during the winter months than in the summer and some years were busier than others. Employer estimated that before 2003, Claimant was working on his knees about 10-15 days per winter; that is estimating the day as being a six-hour work day, five days per week, and the months of November through March. Employer's estimates are less than one-half of Claimant's estimates.

The cause of Claimant's condition must be supported by a medical expert to a reasonable degree of medical probability. Dr. Mantone's opinion is based upon Claimant's testimony that he performed almost all his work while kneeling on a concrete floor, prior to 2003. This has been shown not to be the case. "The value of the opinion of an expert witness is no better than the facts upon which it is based. It cannot rise above its foundation and proves nothing if its factual basis is not true." *Johnson v. Albertson's,* 2000 SD 47, ¶25, 610 NW2d 449, 455. Whereas Claimant spent a significant amount of time kneeling on the floor at work, the majority of Claimant's work during most weeks was spent in some other physical stance. Dr. Mantone's opinion on this issue is less persuasive than Dr. Emerson's. The more persuasive medical opinion is that of Dr. Emerson who opined that osteoarthritis has any number of causes and that Claimant's condition was likely caused by something other than his work.

Based upon the above, Claimant has failed to meet his burden of proof and has not established a causal connection between his work and his medical condition of bilateral patellofemoral osteoarthritis. Claimant's employment with Employer was not a major contributing cause of Claimant's medical condition. The evidence does not prove

with any probability that Claimant's medical condition arose out of or in the course of Claimant's employment with Employer.

Claimant shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision on Issues 1 and 2. Employer and Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision on Issue 3. The initial proposals shall be submitted to the Department within twenty (20) days from the date of receipt of this Decision. The opposing parties shall have twenty (20) days from the date of receipt of the initial Proposed Findings and Conclusions to submit objections thereto or to submit their own proposed Findings and Conclusions. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Claimant shall submit such Stipulation along with and Order in accordance with this Decision.

DONE at Pierre, Hughes County, South Dakota, this 19th day of January, 2010.

SOUTH DAKOTA DEPARTMENT OF LABOR

Catherine Duenwald
Administrative Law Judge