

DAKOTA DEPARTMENT OF LABOR & REGULATION  
DIVISION OF LABOR AND MANAGEMENT

ALAN ARMSTRONG,  
Claimant,

HF No. 93, 2016/17

v.

DECISION

LONGVIEW FARMS, LLP,  
Employer,

and

TRAVELERS PROPERTY & CASUALTY,  
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 Joseph Thronson, Administrative Law Judge, on October 25, 2017, in Rapid City, South Dakota. By previous agreement of the parties, this hearing was bifurcated, and the sole issue presented was one of causation. Claimant, Alan Armstrong, was present and represented by James D. Leach, attorney at law. Employer, Longview Farms, LLP, and Insurer, Travelers Property & Casualty, were represented by Rebecca Mann, of Gunderson, Palmer, Nelson, & Ashmore, LLP.

**ISSUES PRESENTED**

- 1. Did Claimant's injury independently contribute to his disability under SDCL 62-1-1(7)(c)?**
- 2. Was Claimant's injury a major contributing factor of his disability under SDCL 62-1-1(7)(b)?**

### **3. Should the Department sustain Claimant's objection to a leading question Employer/Insurer asked Dr. Bissell?**

#### **FACTS**

At the time of the hearing, Claimant, Alan Armstrong, was 50 years old and had attended 3 years of college. Claimant spent the 15 years prior to his injury working as a hog farmer. Claimant began working for Employer, Longview Farms, LLP, on July 10, 2009 as a gilt developer<sup>1</sup>. Claimant's responsibilities were to care for the gilts until they reached 300 pounds and were ready to breed. On March 31, 2016, Claimant was scraping hog pens when his scraping tool caught on the floor causing Claimant to fall forward onto the ground. Claimant testified that he experienced unbearable pain and was unable to stand on his leg. Two coworkers helped Claimant to the breakroom where Claimant applied ice to his left knee. Claimant's ex-wife then drove Claimant to the hospital in Scotland, South Dakota.

Employer/Insurer initially treated Claimant's injury as compensable. On April 5, 2016, Claimant was seen by Dr. Michael Adler at the Orthopedic Institute in Sioux Falls. Dr. Adler recommended Claimant undergo a complete knee replacement. However, Employer/Insurer denied the surgery because it determined Claimant's knee injury was a preexisting condition.

Claimant had previously suffered two injuries to his left knee. The first was in the 1990's while Claimant was living in Texas. The Second occurred in 2005 while Claimant was employer by Schwartz Farms, Inc. At that time, Claimant sought

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<sup>1</sup> A gilt is a small female pig which has not yet given birth.

treatment from Dr. Swift in Yankton, South Dakota. In September 2005, Dr. Swift scoped the meniscus in Claimant's left knee. While performing that surgery, Dr. Swift discovered that Claimant was suffering from osteoarthritis in his left knee. Claimant was advised that he should consider undergoing a bilateral knee replacement surgery, but decided to wait and did not undergo knee surgery at that time though from time to time he was treated for pain related to his condition. After this surgery, Claimant's then employer, Schwartz Farms, Inc., denied payment for further treatment of his knee because it considered the osteoarthritis a preexisting condition not related to his injury. However, Claimant testified that he did not require any more treatment after this surgery.

Claimant's medical records note that Claimant's knee remained a source of pain up to the March 2016 injury. In June 2006, Claimant sought medical treatment for his knee and was administered a shot of Depo-Medrol. In 2013, Physician Assistant Melissa Kludt noted that Claimant had continued to complain of knee pain. Kludt also noted after a February 2015 visit that Claimant continued to struggle with knee pain and that this pain was getting progressively worse.

Because Employer/Insurer denied payment, Claimant relied on his private health insurance to undergo a knee replacement in May 2016. Dr. Adler performed this surgery. Afterwards, Claimant developed an infection, and Dr. Adler then performed a second surgery. In total, Dr. Adler performed three different surgeries on Claimant's left knee. After the third surgery failed to resolve Claimant's problems, Dr. Adler referred him to the Mayo Clinic in Rochester, Minnesota. The Clinic determined Claimant should undergo a fourth surgery. However, by this time, Claimant was no longer employed

with Employer and did not have health insurance. Claimant could not pay the \$70,000 up front cost required by Mayo Clinic and therefore did not have a fourth surgery.

Claimant filed a petition for workers' compensation benefits on January 17, 2017. To support his case, Claimant relied on the testimony of Dr. Adler. In a June 2017 deposition, Dr. Adler testified that he believed that Claimant's injury was a major contributing factor to his disability. Dr. Adler focused on the fact that Claimant was able to function adequately despite the presence of osteoarthritis in his left knee. To counter Dr. Aderler's opinion, Employer/Insurer relied on the testimony of its IME doctor, Dr. Benjamin Bissell. Dr. Bissell opined that the March 2016 injury was not a major contributing cause of Claimant's condition because of the existence of severe osteoarthritis.

## ANALYSIS

The standard for establishing eligibility for workers compensation benefits is well established:

In short, 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.

*Grauel v. S. Dakota Sch. of Mines & Tech.*, 2000 S.D. 145, ¶ 9, 619 N.W.2d 260, 263 (Citing SDCL 62-1-1(7)(a)-(b); *Steinberg v. S. Dakota Dep't of Military & Veterans Affairs*, 2000 SD 36, ¶ 29, 607 N.W.2d 596, 606.) (Emphasis original).

First, Claimant argues that under SDCL 62-1-1(7)(c), his March 2016 injury contributed independently to his condition. Alternatively, Claimant argues that under

SDCL 62-1-1(7)(b), his injury was a major contributing cause of his condition. Our Supreme Court has previously discussed when each subsection is applicable to a workers compensation case:

While both subsection (b) and subsection (c) deal with preexisting injuries, the distinction turns on what factors set the preexisting injury into motion; if a preexisting condition is the result of an occupational injury then subsection (c) controls, if the preexisting condition developed outside of the occupational setting then subsection (b) controls.

*Byrum v. Dakota Wellness Found.*, 2002 S.D. 141, ¶ 15, 654 N.W.2d 215, 218.

**1. Did Claimant's injury independently contribute to his disability under SDCL 62-1-1(7)(c)?**

In order to recover under SDCL 62-1-1(7)(c), Claimant must demonstrate that the March 2016 injury independently contributed to his condition. As a preliminary matter, there must be a previous compensable injury for SDCL 62-1-1(7)(c) to apply. Claimant previously suffered an injury to his left knee in 2005. However, Claimant does not establish that this injury was the cause of his osteoarthritis. On the contrary, evidence indicates that the 2005 injury was not a major contributing cause of claimant's disability at that time. Claimant's previous employer had considered Claimant's condition as preexisting due to chronic osteoarthrosis and Claimant did not dispute this determination.

Even presuming the 2005 injury was a major contributing cause of Claimant's condition at that time, Claimant has not shown that his March 2016 injury contributed independently to his current condition. It is undisputed that Claimant suffered from preexisting arthritis in his left knee prior to his 2016 injury. As early as 2005, Claimant was advised that he needed to undergo a bilateral knee replacement. MRI scans from

2005 indicated that Claimant had an eburnation of the tibial plateau, meaning that the cartilage in Claimant's knee had completely deteriorated resulting in bone on bone contact. Claimant's records demonstrate that he continued to suffer pain as a result of his osteoarthritis.

Claimant supports his argument that the 2016 injury independently contributed to his condition by pointing out that he was able to work without restriction prior to that incident. "Causation must be established to a reasonable medical probability, not just a possibility. When the medical evidence is not conclusive, the claimant has not met the burden of showing causation by a preponderance of the evidence." *Truck Ins. Exch. v. CNA*, 2001 S.D. 46, ¶ 19, 624 N.W.2d 705, 709. (Internal citations omitted). Here, the fact that Claimant could continue to work despite suffering from osteoarthritis does not constitute medical evidence. Dr. Adler provides no explanation as to how Claimant's injury contributed independently to Claimant's condition, especially considering that Claimant was already suffering the effects of osteoarthritis as the time of his injury. Claimant has not proven that his March 2016 injury contributed independently to his condition.

## **2. Was Claimant's injury a major contributing factor of his disability under SDCL 62-1-1(7)(b)?**

Alternatively, Claimant argues that, under SDCL 62-1-1(7)(b), his 2016 knee injury was a major contributing cause of his condition. Dr. Bissell opined that Claimant's osteoarthritis was not attributable to an acute injury, but was rather chronic and degenerative in nature. Dr. Bissell explained that a review of Claimant's medical records indicated "multiple instances over the ensuing years of ongoing osteoarthritis

symptoms, treatment, pain and contemplation of need for future knee replacements.”

Because his opinion is supported by Claimant’s medical records, the Department finds Dr. Bissell’s testimony persuasive.

The weight of the evidence establishes that Claimant’s pain and immobility were primarily due to years of severe and degenerative osteoarthritis. The fact that Claimant was able to function for over ten years with osteoarthritis was due more to his high tolerance for pain than to the nature of the condition itself.

Claimant contends that Dr. Bissell’s opinion that Claimant would “eventually” require a knee replacement is insufficient to conclude that his accident was not a major contributing cause of Claimant’s injury. However, the evidence shows that Claimant was already suffering the effects of osteoarthritis at the time of his injury. Indeed, Claimant was contemplating undergoing a knee replacement a year prior to his 2016 injury. Even Dr. Adler admitted that x-rays indicated that Claimant met the criteria for a knee replacement.:

A: “He could have gotten—he met the radiographic criteria to offer him a knee replacement ten years ago likely.”

Q: “So you would agree with me that on March 30<sup>th</sup>, the day before his work injury, he needed a total right—left knee replacement, correct?”

A: “No. I’m saying based on his X-rays, he may have needed a knee replacement. He may have met the criteria to offer him a knee replacement. I’m not saying he needed it, though.”

Despite Dr. Adler's attempt to qualify his statements, his deposition testimony establishes that, due to significant degeneration of the cartilage in his joint, Claimant was a candidate for a knee replacement before the accident.

A: "So based on x-rays, he may have qualified to offer him a knee replacement, but based on his ability to continuously do his job and his work, he didn't necessarily have to take—take the risk doing a knee replacement."

While Claimant's injury did contribute to his disability, the Department believes that the March 2016 injury was not a major contributing cause. The medical evidence demonstrates that Claimant had been suffering the effect of osteoarthritis long before he was injured at work. Among the symptoms Claimant treated for included pain, and immobility. Claimant has not met his burden under SDCL 62-1-1(7)(b) that the 2016 injury was a major contributing cause of his disability.

Claimant next argues that the infection in his knee is compensable since it was a side effect of knee surgery made necessary by Claimant's injury. Because the injury itself was not a major contributing cause of Claimant's condition, any side effects which resulted from the surgery also cannot be compensable. The infection in Claimant's knee which occurred after his surgery is not compensable.

### **3. Should the Department sustain Claimant's objection to a leading question Employer/Insurer asked Dr. Bissell?**

During the deposition of Dr. Bissell, Claimant objected to a redirect question asked by Employer/Insurer as leading. The rule governing leading questions is codified at SDCL 19-19-611:

Leading questions should not be used on direct examination except as necessary to develop the witness's testimony.

Ordinarily, the court should allow leading questions:

- (1) On cross-examination; and
- (2) When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

SDCL 19-19-611(c)(3).

“It is settled law that permitting the use of leading questions is within the discretion of the trial court... The allowance of leading questions by the trial court will not be disturbed where it is not apparent that this discretion has been abused or shown to have resulted in prejudice to the party complaining. *State v. Brown*, 285 N.W.2d 843, 845 (S.D. 1979)(Internal citations omitted). It is true that Employer/Insurer was not cross-examining Dr. Bissell at the time nor was Dr. Bissell an adverse witness. Despite this, the Department finds no prejudice in Employer/Insurer’s leading question. Employer/Insurer’s question merely summarized a point to which Dr. Bissell had previously testified; namely that Claimant’s condition was the result of a preexisting condition and not of the March 2016 injury. Dr. Bissell testified that the contents of Claimant’s medical records showed that Claimant had been suffering from osteoarthritis as far back as 2005 and had sought treatment to mitigate the pain it was causing Claimant. Dr. Bissell also gave his professional opinion, on direct examination, that Claimant’s injury was not a major contributing factor of his condition.

Claimant argues that Dr. Bissell’s answer is speculative and does not rise to the level of reasonable medical probability. However, it is Claimant who bears the burden of proving all facts essential to his case. If the Department was to adopt Claimant’s argument, it would impermissibly shift the burden to Employer/Insurer to disprove

Claimant's alleged injury. Claimant's objection to Employer/Insurer's question is overruled.

### **CONCLUSION AND ORDER**

Counsel for Employer/Insurer shall submit proposed Findings of Fact and Conclusions of Law and an Order consistent with this Decision, within 20 days of the receipt of this Decision. Claimant shall have an additional 20 days from the date of receipt of Claimant'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 Employer/Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this 1<sup>st</sup> day of February, 2018.

/s/ Joe Thronson  
Joe Thronson  
Administrative Law Judge