

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

STEVEN P. BURTIS,

HF No. 95, 2014/15

Claimant,

v.

DECISION

CITY OF SIOUX FALLS,

Employer & SELF-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 Michelle M. Faw, Administrative Law Judge, on July 19, 2017, in Sioux Falls, South Dakota. Claimant, Steven P. Burtis, was present and represented by Bram Weidenaar of Alvine Weidenaar, LLP, Law Firm. The Employer and Self-Insurer, The City of Sioux Falls was represented by Rick W. Orr of Davenport, Evans, Hurwitz & Smith, LLP, Law Firm.

Facts:

Based upon the testimony at the hearing and the record, the following facts are found by a preponderance of the evidence:

1. On and before July 28, 1999, Steven P. Burtis (Burtis or Claimant) worked for the City of Sioux Falls (Employer) which was at all times pertinent self-insured for Workers' Compensation purposes. Burtis works as a police officer.
2. July 28, 1999, Burtis injured his right knee while working for Employer. This injury occurred prior to the injury to his right knee which is the subject of this action..
3. On November, 5, 1999, Dr. Paul Reynen diagnosed Burtis with a medial meniscus tear of the right knee and performed arthroscopic surgery to remove the partially torn meniscus. During the surgery, Dr. Reynen observed significant amounts of chondral damage along the medial compartment of the knee. This damage refers to a degenerative condition affecting the cartilage of the knee which over time results in osteoarthritis. Following surgery, Burtis returned to his occupation as a patrol officer without any physical restrictions. Upon his return to work, Burtis received an impairment rating of two (2) percent to his right leg.
4. On August 9, 2011, Burtis injured his right knee while working for Employer. Following this injury, Burtis sought treatment at CORE Orthopedics and Dr. Gregg Harvison at McGreevy Clinic. Burtis did not require surgery and was released to return to work without restriction.

5. On February 21, 2012, Burtis injured his right knee while working for Employer. Burtis immediately reported this injury to Employer. Employer accepted compensability and paid medical benefits.
6. On February 29, 2012, Burtis sought medical treatment for his right knee injury from Dr. Jonathan Blake at CORE Orthopedics. Dr. Blake took a history from Burtis and examined him. An x-ray revealed degenerative joint disease in the medial compartment. Dr. Blake recommended an MRI.
7. On March 12, 2012, Burtis underwent an MRI. Dr. Miller, the radiologist, documented a degenerated meniscus and "Grade 3" chondromalacia along Burtis's medial compartment.
8. On March 21, 2012, Dr. Blake examined Burtis and noted medial joint line tenderness, a positive McMurray's test for pain and discomfort and worsening symptoms when squatting, twisting, and bending. Dr. Blake administered an injection into Burtis's right knee.
9. On April 11, 2012, Burtis returned to Dr. Blake. Dr. Blake indicated that Burtis responded well to the injection, and he recommended a custom knee brace. Burtis was returned to work with no restrictions.
10. On May 25, 2012, Burtis was fitted for a knee brace.
11. On August 8, 2012, Dr. Blake responded to a letter from Scott Cook (Cook) who was a claims examiner for Employer. Dr. Blake indicated that Burtis had reached Maximum Medical Improvement (MMI). Dr. Blake indicated that Burtis suffered an impairment of three (3) percent to his right leg.
12. On September 27, 2012, Burtis returned to CORE Orthopedics complaining of right knee pain. Dr. Kalo performed an examination and reviewed previous x-rays and diagnostic studies. He noted Burtis had a slight "bowed" shape to his leg, and explained that with such an alignment "losing the medial meniscus is kind of a kiss of death to your knee." He documented Burtis's degenerative joint disease of the medial compartment on his right knee. Dr. Kalo recommended a partial knee replacement.
13. On January 29, 2013, Dr. Raymond Emerson performed an independent review of Burtis's medical records for Employer. Dr. Emerson determined that Burtis's right knee condition was attributable to chondromalacia and resulting degenerative and arthritic changes first observed by Dr. Reynen during Burtis's 1999 knee surgery. He further stated that there was no evidence Burtis's condition was caused by the February 2012 injury. Dr. Emerson concluded the February 2012 work incident was not a major contributing cause of Burtis's degenerative knee condition and need for treatment.
14. On February 20, 2013, Cook denied any further workers' compensation benefits to Burtis following an opinion by Dr. Emerson that Burtis's right knee condition was due to pre-existing osteoarthritis.
15. On March 20, 2013, Dr. Kalo, responded to an inquiry regarding causation from Cook. Dr. Kalo opined that Burtis suffered both a chronic and acute situation.
16. In March 2013, Burtis returned to Dr. Kalo who again recommended a partial knee replacement.
17. On January 23, 2014, Burtis returned to Dr. Kalo complaining of right knee pain. Burtis decided to proceed with the partial knee replacement.

18. On April 7, 2014, Dr. Kalo performed surgery on Burtis's right knee. Following surgery, Dr. Kalo took Burtis off work for six (6) weeks. After which Burtis was put on light duty working at a desk for another six weeks.
19. On June 6, 2014, Dr. Kalo saw Burtis for the final time and released him to full duty without any restrictions.
20. In 2015, Employer retained Dr. Richard Strand to conduct an independent review of Burtis's medical records and an Independent Medical Examination (IME). Dr. Strand concurred with previous medical conclusions that Burtis suffered from degenerative joint disease in the medial compartment of his right knee since at least 1999. Dr. Strand concluded that the 2012 injury was not a major contributing cause of Burtis's condition and need for partial knee replacement. He also concluded that the 2012 injury did not contribute independently to Burtis's condition and need for partial knee replacement.

Analysis:

Issue I: Whether Steven Burtis injured his right knee when he fell while struggling with a suspect on February 21, 2012.

Both parties in this matter agree that Burtis was injured on September 27, 2012 while working for Employer. Burtis was in the process of arresting a combative suspect who fell onto Burtis's right knee. Employer accepted compensability and paid medical benefits.

Issue II: Whether the proper standard to apply Steven Burtis' right knee injury suffered while working on February 21, 2012, is Major Contributing Cause or Independent Contribution.

Burtis has had previous compensable injuries while working for Employer. Therefore, the statute that applies is SDCL §62-1-1(7)(C) which states, "[i]f 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 Major Contributing Cause standard established by SDCL §62-1-1(7)(B) will not be considered as it is not the proper standard considering Burtis's previous injuries while working for Employer. The Department is tasked with deciding if Burtis's February 21, 2012 independently contributed to his current condition and need for medical treatment.

Issue II: Whether in combination with Steven Burtis' other work-related knee injuries 2012 right knee injury contributed independently to his need for medical treatment.

The Department's first inquiry is whether Claimant's work injury on February 21, 2012, Independently contributed to his need for medical treatment including but not limited to visits with physicians, medications, injections, braces and/or surgery. The South Dakota Supreme Court has stated, "the contribution of the second injury, however slight, must

be to the *causation* of the disability.” *Enger v. FMC*, 1997 SD 70, 565 N.W.2d 79, 84. Burtis, as the claimant, 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).

“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).

Prior to the injury on February 21, 2012, Burtis was working full duty as a patrol officer for Employer. He testified that he had felt discomfort and pain in his knee and that he assumed the discomfort “was just something [he] was going to have to live with and it was kind of a new normal.” Following the injury, Burtis felt pain immediately and sought treatment. It is not disputed that Burtis suffered a work injury on February 21, 2012 while working for Employer. It is, also, not disputed that Burtis suffered previous work related injuries to his right knee while working for Employer. The matter before the Department is whether that specific injury which occurred in 2012 independently contributed to Burtis’s need for medical treatment. To make the proper conclusion the Department must consider expert medical opinion.

Dr. Jeffrey Kalo is an orthopedic surgeon who has been in practice since 1993. The majority of his practice has been arthroscopy and arthroplasty. Dr. Kalo is board certified by the American Osteopathic Board of Orthopedic Surgeons and is licensed in Minnesota, North Dakota, Iowa, and South Dakota. He examined Burtis on September 27, 2012 when Burtis came to his clinic complaining of knee pain. Burtis has previously seen Dr. Blake at the clinic, but Dr. Kalo took over Burtis’s care once Blake left the practice. After examining Burtis and reviewing his previous x-rays and diagnostic studies, Dr. Kalo then recommended a partial knee replacement. Dr. Kalo also noted that Burtis had a “bowed” shape to his lower leg and that with such an alignment “losing the medial meniscus is kind of the kiss of death to your knee.” On March 20, 2013, Dr. Kalo responded to an inquiry regarding causation from Scott Cook. In this response, Dr. Kalo concluded that Burtis’s current situation was both acute and chronic. He stated that Burtis’s condition is a “continuum of the patient’s same problem.” In his deposition testimony, Dr. Kalo clarified that in his medical opinion, while such degeneration and resulting need for surgery could be considered an inevitable result of the damage to the meniscus, the acute aspect of the injury was caused by the February 21, 2012 injury. He opined that an acute injury would damage the meniscus more. He has further concluded that Burtis has a thirty-seven percent (37%) impairment to his right lower extremity.

Employer consulted Dr. Raymond Emerson. Dr. Emerson concluded that Burtis’s February 2012 injury was not a major contributing cause of his condition. He did not

specifically state whether the injury independently contributed to Burtis's current condition. Dr. Emerson is an orthopedic surgeon who performed an independent review of Burtis's records for Employer. Dr. Emerson determined Burtis's right knee condition was attributable to chondromalacia resulting in degenerative and arthritic changes which had first been observed during the 1999 knee surgery performed by Dr. Reynen.

Dr. Richard Strand was also consulted by Employer to provide an independent records review as well as an IME of Burtis. Dr. Strand is an orthopedic surgeon with fifty years of surgical experience. He has performed between 12,000 and 14,000 orthopedic surgical procedures, including numerous partial and total knee replacements. Dr. Strand is certified in orthopedic surgery by the American Board of Orthopedic Surgery, and he is licensed to practice in both Minnesota and South Dakota. Dr. Strand also reviewed Dr. Emerson's report and Dr. Kalo's deposition testimony. Dr. Strand opined that Burtis has suffered since at least 1999 with degenerative joint disease in the medial compartment of his right knee, and that Burtis's condition would have continued to degenerate irrespective of the February 2012 injury. He did not find any evidence in Burtis's 2012 MRI of any acute or new injuries.

The Department finds Dr. Kalo's opinion the most persuasive. As Burtis's treating physician, Dr. Kalo has had the most opportunity to examine both Burtis and his medical history. The medical evidence in this case points to Burtis suffering from a long-term degeneration of the knee which was exacerbated by the loss of the meniscus in 1999. Applying the standard of independent contribution, the Department finds that while the progression of such degeneration is likely to have brought about the same result eventually, the February 2012 injury accelerated Burtis's condition. The South Dakota Supreme Court has established that acceleration of a pre-existing condition is compensable. "A pre-existing medical condition or infirmity does not disqualify a claim under the 'arising out of employment' requirement if the employment aggravated, accelerated, or combined with a condition or infirmity to produce the disability for which compensation is sought." *Orth*, citing *St. Luke's Midland Regional v. Kennedy*, 2002 SD 137, 13, 653 N.W.2d 880, 884-85. The Department concludes that the injury that occurred on February 21, 2012 independently contributed to Burtis's need for, including, but not limited to, visits with physicians, medications, injections, braces and/or surgery.

The issue has been raised regarding whether the statute of limitations bars claims to the extent related to 2009 injury. As the February 21, 2012 injury has been found to have independently contributed to Burtis's condition, the statute of limitations regarding any of the previous injuries does not affect the outcome of this matter.

Issue II: What benefits Burtis is entitled to regarding this claim for Workers' Compensation benefits.

The parties have stipulated to weekly benefit rate of \$648.00. Following surgery, Burtis incurred a deductible cost of \$2,500.00 for which he is asking for reimbursement. He was also taken off of work for six (6) weeks following surgery. At the stipulated benefit rate, this amounts to \$3,888.00 of temporary total disability payment. Burtis is also requesting permanent partial disability benefits per SDCL §62-4-6(16) which states "For

the loss of a leg, or the permanent and complete loss of its use, one hundred and sixty weeks of compensation”. Dr. Kalo has assigned Burtis a thirty-seven percent (37%) impairment to his right lower extremity. Thirty-seven percent of the one hundred and sixty weeks amounts to 59.2 weeks of benefits. The weeks of benefits at the weekly rate of \$648 amounts to a total benefit of \$38,361.60.

Conclusion:

Burtis has proven that the February 21, 2012 injury independently contributed to his need for medical treatment. Therefore, Employer is responsible for reimbursing Burtis for the cost of the deductible, six weeks of post-operative temporary total disability benefits, and 59.2 weeks of permanent partial disability benefits.

Counsel for Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer/Insurer shall have an additional twenty (20) days from the date of receipt of Claimant’s Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. 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 an Order consistent with this Decision.

Dated this 10 day of January, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/Michelle Faw/

Michelle M. Faw
Administrative Law Judge