SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

DORIS OTTEN, **HF No. 99, 2002/03**

Claimant, **DECISION**

vs.

TEA STEAK HOUSE, INC.,

Employer,

and

HIGHLANDS INSURANCE GROUP,

Insurer,

and

ANCHOR INN,

Employer,

and

INSURANCE COMPANY OF NORTH AMERICA (CIGNA),

Insurer.

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. The first hearing was held before the Division of Labor and Management on November 24, 2004, in Sioux Falls, South Dakota. Doris Otten (Claimant) appeared personally and through her attorney of record, Thomas W. Parliman. Lisa Hansen Marso represented Employer Tea Steak House and Insurer Highlands Insurance Group. Steven S. Siegel represented Employer Anchor Inn and Insurer CIGNA. This matter was reopened to take additional evidence and a second hearing was conducted on January 18, 2005, in Sioux Falls.

ISSUES

1. Aggravation/recurrence.
2. Whether Claimant is permanently and totally disabled.

FACTS

The Department finds the following facts, as established by a preponderance of the evidence:

1. At the time of the hearing, Claimant was nearly fifty-seven years old and resided in Tea, South Dakota.
2. Claimant quit high school after the tenth grade. In 1985, Claimant obtained a GED and in 1986, Claimant received a certificate from Southeast Area Vo-tech in general accounting. Claimant was unable to obtain employment as a bookkeeper.
3. Claimant's employment history consisted primarily of working in the food service industry.
4. From 1980 through October 1983, Claimant worked at the Anchor Inn as a waitress, cook, cashier and hostess.
5. Claimant sustained an injury to her right knee while working at the Anchor Inn on July 28, 1981. As Claimant was cleaning, she slipped and as she tried to steady herself, she caught her right foot behind a wall and injured her right knee. Claimant's knee was swollen and very painful.
6. Claimant was taken off work from August 3 through August 30, 1981, due to her knee injury.
7. CIGNA was the insurer on the risk at the time of the July 1981 injury.
8. Claimant's workers' compensation rate was $104.00 per week.
9. Claimant sought medical treatment from Dr. Dennis Johnson, who is now deceased.
10. By November 1981, Claimant was essentially asymptomatic and Dr. Johnson instructed Claimant to return for treatment as needed.
11. On January 13, 1982, Dr. Johnson opined Claimant had a twenty-six percent impairment to her right lower extremity.
12. In early 1982, Claimant redeveloped symptoms in her right knee. Dr. Johnson initially diagnosed Claimant with a torn right medial meniscus and recommended that Claimant undergo arthroscopic surgery on her right knee.
13. On March 29, 1982, Dr. Johnson performed arthroscopy of Claimant's right knee. Dr. Johnson's operative report stated that he found that Claimant "appeared to have intact articular surfaces and menisci, Grade I laxity of the anterior cruciate medial collateral." Dr. Johnson also stated, "[t]he knee was very thoroughly examined with the arthroscope and no significant tear was found in the menisci nor ligaments. The articular surfaces were found to be satisfactory." Dr. Johnson's post-operative diagnosis was that Claimant had a "strained, right medial meniscus."
14. CIGNA paid Claimant $4,326.40 based on Dr. Johnson's impairment rating and agreed that she had a torn medial meniscus with secondary knee instability and recurrent synovitis.
15. From 1981 to 1988, Claimant continued to experience problems with her right knee. Claimant occasionally had pain, swelling, soreness, tenderness, snapping and popping in her right knee. Claimant's problems never completely resolved.
16. Claimant periodically sought medical treatment from Dr. Johnson for right knee pain.
17. In 1988, Claimant reported to Dr. Johnson that she had been having intermittent knee symptoms since 1981.

18. Dr. Johnson noted in his medical records that Claimant would require medication and may need a knee replacement when she was in her sixties.
19. Dr. Johnson also opined that Claimant's continued knee problems were related to her 1981 injury.
20. In the early 1990s, Claimant continued to experience occasional pain and swelling in her right knee.
21. In addition to her knee problems during the 1980s and early 1990s, Claimant also had back and neck problems and surgeries for which she took pain and anti-inflammatory medications.
22. Claimant started working at the Tea Steak House in June 1998 filling in as needed, preparing salads, cashiering and working as a hostess. Later in her employment, Claimant worked primarily as a waitress.
23. Claimant did not experience any problems with her right knee while working for the Tea Steak House until late 1997.
24. Claimant suffered two injuries to her right knee in December 1997 and February 1998 while working at the Tea Steak House.
25. Highlands Insurance Group was the insurer on the risk at the time of the second and third knee injuries.
26. In December 1997, Claimant collided with another waitress and twisted her right knee. Claimant experienced immediate pain in her knee and leg, but was able to continue working. Claimant did not miss any work after this incident.
27. On January 20, 1998, Claimant sought treatment from Dr. Frank Alvine, an orthopedic surgeon. Claimant's knee was swollen and Dr. Alvine gave her an injection in the right knee.
28. On February 13, 1998, Claimant injured her right knee again while working at the Tea Steak House. Claimant tripped over a customer's hat on the floor, twisted her right knee and heard a "big pop" in her knee.
29. Claimant went to the waitress station, but she could not put any weight on her right leg. Claimant wrapped ice around her knee and called her husband to take her to the Sioux Valley Hospital Emergency Room.
30. Dr. Ellen Kroon found that Claimant had tenderness in her knee and a positive drawer sign. X-rays were taken that were "negative for acute pathology. However, she does have some old changes noted in the joint itself."
31. The positive drawer sign indicated that Claimant's knee was loose or looser than it ought to be.
32. Claimant was fitted with a knee immobilizer and was instructed to use crutches that she had at home.
33. Claimant's workers' compensation rate was $201.21 per week.
34. Claimant continued to see Dr. Alvine for treatment of her right knee. Claimant experienced significant pain in her right knee and direct weight bearing was very difficult for her.
35. On June 29, 1998, Dr. Alvine suspected Claimant had a tear of a remnant of her medical meniscus and recommended arthroscopic surgery.
36. On July 16, 1998, Dr. Alvine performed a right knee arthroscopy with medial meniscectomy. In his operative note, Dr. Alvine stated Claimant had "considerable damage to the medial femoral condyle and shaving of the medial

femoral condyle was carried out." Dr. Alvine's postoperative diagnosis was "internal derangement, right knee, with torn medial meniscus."

37. Following the surgery, Claimant experienced problems with blood clots and she treated with Dr. Leonard Gutnik for concerns of deep venous thrombosis.
38. Claimant remained off work for a period of time. By December 15, 1998, Dr. Alvine released Claimant to work full-time at the Tea Steak House.
39. On March 16, 1999, Dr. Alvine opined Claimant had a sixteen percent impairment rating due to her right knee injury. Highlands Insurance Group paid Claimant permanent partial disability benefits based on this impairment rating.
40. From 2000 through 2002, Claimant worked consistently at the Tea Steak House and she also cleaned houses.
41. During this time frame, Claimant's right knee continued to cause her difficulty and she occasionally sought treatment from Dr. Alvine.
42. In June 2001, Dr. Alvine discussed with Claimant the need for knee replacement surgery.
43. Claimant saw Dr. David Hoversten, an orthopedic surgeon, on July 14, 2000, for an independent medical examination (IME). Dr. Hoversten noted that Claimant continued to experience pain and discomfort in her right knee.
44. Dr. Hoversten diagnosed Claimant with medial compartment osteoarthritis of the right knee. Dr. Hoversten concluded Claimant would ultimately need corrective restorative surgery due to her right knee condition.
45. In September 2001, Claimant was becoming more and more limited by her pain. Once again, Dr. Alvine discussed with Claimant the possibility of undergoing a knee arthroplasty.
46. Finally, in December 2001, Claimant reached the point where she could not "work, walk or do anything." Dr. Alvine once again recommended that Claimant undergo knee replacement surgery.
47. Claimant wanted another opinion, so on January 9, 2002, Claimant saw Dr. Peter Looby, orthopedic surgeon.
48. Dr. Looby ordered x-rays, which showed moderate to severe osteoarthritic changes in Claimant's right knee.
49. Following his examination, Dr. Looby diagnosed Claimant with right knee tricompartmental osteoarthritis, worse in the medial compartment.
50. Dr. Looby recommended a total right knee replacement because all conservative treatment failed for Claimant.
51. Claimant was scheduled for knee replacement surgery, but this was denied by Highlands Insurance Group.
52. On April 16, 2002, Dr. Jerry Blow, physiatrist, performed an IME.
53. Dr. Blow found that Claimant had significant degenerative joint disease of the right knee, particularly the medial joint line.
54. Dr. Blow opined that Claimant's current knee complaints were all related to her original injury in 1981. Dr. Blow agreed that Claimant was a candidate for total right knee replacement surgery, but that her need for surgery was related to her age and the 1981 injury.
55. On December 2, 2002, Dr. Looby performed total right knee replacement surgery on Claimant.

56. Claimant participated in physical therapy, but continued to experience pain in her right knee and in the back of her leg. Claimant also continued to have grinding and popping in her right knee.
57. Claimant experienced temporary relief from her pain following the second surgery performed by Dr. Looby. After a few months, Claimant's pain returned at the same level as before the surgery.
58. Dr. Looby released Claimant to return to work at the Tea Steak House working one day a week so that she could do the ordering. Claimant experienced a significant amount of pain while she performed this job. Claimant's right knee would "pop," especially when she tried to extend her knee. Claimant's knee would "try to give out" when she tried to walk.
59. Claimant quit working in July 2003.
60. On July 14, 2003, Dr. Looby performed a right knee open debridement surgery to remove scar tissue.
61. Claimant participated in physical therapy, but experienced constant right knee pain.
62. In November 2003, Dr. Looby referred Claimant to Dr. K.C. Chang because Claimant continued to suffer from significant pain in her right knee.
63. Dr. Chang is currently Claimant's treating physician.
64. Dr. Chang diagnosed Claimant with chronic right knee pain. Dr. Chang prescribed the use of a TENS unit, physical therapy, medication and dry needling, or acupuncture. These modalities provide some temporary pain relief to Claimant, but do not completely alleviate her right knee pain.
65. On December 10, 2003, Dr. Chang took Claimant off work indefinitely.
66. Claimant has treated with Dr. Chang from November 2003 to the present.
67. On September 23 and 24, 2004, Claimant participated in a Functional Capacities Evaluation (FCE). The FCE was a valid assessment of Claimant's present functional capabilities. The FCE demonstrated that Claimant could work at the sedentary physical demand level. The FCE also showed that Claimant must sit for six hours out of an eight-hour work day.
68. Claimant suffers right knee pain on a daily basis. Claimant described her pain as a four, on a scale from one to ten. Claimant has "bad days and worse days," along with a few good days.
69. Claimant primarily sits at home throughout the day watching television, embroidering and working on her computer.
70. Claimant's right knee pain increases if she participates in certain activities, such as sitting for too long with her right leg bent or walking too much.
71. Claimant uses a walker on a daily basis to get around and even uses the walker while she is in her home.
72. Claimant wears elastic stockings on a daily basis as prescribed by Dr. Gutnik.
73. Claimant receives dry needling on a weekly basis from Dr. Chang. Claimant also uses a TENS unit to help control her right knee pain. The TENS unit helps to dull Claimant's pain, but it does not eliminate it.
74. Claimant applied for some jobs in the Sioux Falls area in November and December 2004 and early January 2005.
75. Claimant did not receive any job offers.
76. Claimant has not been employed since July 2003.

77. Claimant currently receives social security disability benefits.
78. Claimant was a credible witness at the hearing. This is based on her consistent testimony and on the ability to observe her demeanor at the hearing.
79. Other facts will be developed as necessary.

ISSUE I

WHETHER CLAIMANT'S CURRENT INJURY IS A RECURRENCE OR AN INDEPENDENT AGGRAVATION OF HER ORIGINAL WORK-RELATED INJURY?

Claimant has the burden of proving all facts essential to sustain an award of compensation. King v. Johnson Bros. Constr. Co., 155 N.W.2d 183, 185 (S.D. 1967). Claimant must prove the essential facts by a preponderance of the evidence. Caldwell v. John Morrell & Co., 489 N.W.2d 353, 358 (S.D. 1992). In order to meet this burden of proof, it is necessary that Claimant provide medical evidence. Enger v. FMC, 1997 SD 70, ¶ 18.

The last injurious exposure rule applies when dealing with successive injuries. This rule states:

> When a disability develops gradually, or when it comes as the result of a succession of accidents, the insurance carrier covering the risk at the time of the most recent injury or exposure bearing a causal relation to the disability is usually liable for the entire compensation.

Titus v. Sioux Valley Hosp., 2003 SD 22, ¶ 12. The question to resolve is "'whether the successive injury is a mere recurrence or an independent aggravation of the first injury.'" Id. at ¶ 13 (citation omitted). "'In successive injury cases, the original employer/insurer remains liable if the second injury is a mere recurrence of the first. If the second injury is an aggravation that contributed independently to the final disability then the subsequent employer/insurer is liable.'" Enger, 1997 SD 70, ¶ 13 (citation omitted).

To find that the second injury was an aggravation of the first, the evidence must show:

1. A second injury; and
2. That this second injury contributed independently to the final disability.

Paulson v. Black Hills Packing Co., 554 N.W.2d 194, 196 (S.D. 1996). To find that the second injury was a recurrence of the first injury, the evidence must show:

1. There have been persistent symptoms of the injury; and
2. No specific incident that can independently explain the second onset of symptoms.

Id. The "contribution of the second injury, however slight, must be to the *causation* of the disability." Enger, 1997 SD 70, ¶ 17. It is necessary to examine whether "a

significant occurrence, amounting to an independent contribution to the final disability, causes an onset of increased or new symptoms." Id. In order to determine whether Claimant suffered a recurrence or an independent aggravation, it is necessary to examine the medical opinions. Dr. Looby was deposed on May 18, 2004. Both Dr. Hoversten and Dr. Blow testified live at the first hearing.

Dr. Blow practices in physical medicine and rehabilitation. Dr. Blow is experienced in diagnosing and treating patients with total knee replacements. However, Dr. Blow does not perform surgery and has never performed any surgeries. Dr. Blow examined Claimant for an hour during the IME. Dr. Blow palpated Claimant's right knee and noted that Claimant had obvious arthritic changes and these changes had been developing over fifteen to twenty years.

Dr. Blow opined that Claimant's injuries in 1997 and 1998 at the Tea Steak House were not significant factors in the development of her need for knee replacement surgery, debridement surgery and current treatment. Dr. Blow also opined that the 1997 and 1998 injuries did not independently contribute to Claimant's need for surgeries and her current condition.

Dr. Blow based his opinions on a number of factors. Dr. Blow determined that Claimant suffered a significant injury in 1981, which resulted in a lot of knee pain, surgery and a substantial impairment rating. The 1981 injury then caused the degenerative process or the arthritis to begin to develop. After 1981, Claimant continued to have right knee pain with swelling and popping and continued doctor visits. By 1988, Dr. Johnson noted that Claimant already was developing evidence of some degenerative changes in her knee and that Claimant would likely require a knee replacement in her sixties. The x-ray in 1998 showed arthritic changes in Claimant's right knee and Dr. Alvine also noted there were significant arthritic changes in Claimant's right knee after surgery in July 1998. Finally, Dr. Blow indicated it usually takes about fifteen to twenty years to develop the need for a total knee replacement after a meniscectomy. Claimant had her knee replaced only four years after the July 1998 surgery. Dr. Blow stated "that rapid of need to have a total knee arthroplasty would not be secondary to just this eventual end of the tear in '98 - - or '97, '98, but something that happened many years before, which indeed happened in 1981." Dr. Blow stated, "[t]hey had to do the knee replacement because of all those arthritic changes, and I just don't think that could happen from a tear in '98, in February of '98 to July of '98."

Dr. Blow opined that Claimant's need for a total knee replacement was because of all the arthritic changes that started with the 1981 injury. Dr. Blow opined that Claimant's medial meniscus was progressively deteriorating for years and that the injury in February 1998 may have caused some fibers of the medial meniscus to tear, but that injury did not cause the whole medial meniscus to tear.

Despite the previous testimony, Dr. Blow opined that Claimant sustained a new injury to her right knee in February 1998 while working at the Tea Steak House. Dr. Blow agreed that the injuries in 1997 and 1998 contributed to Claimant's need for further medical treatment, including surgery by Dr. Alvine. Dr. Blow also agreed that Claimant had changes in her knee after the 1997 and 1998 injuries, including increased swelling, additional pain and difficulty bearing weight on her leg. Dr. Blow concluded that Claimant was treated appropriately after the 1997 and 1998 injuries, that she

reached maximum medical improvement and she is now back to her pre-injury condition, meaning before the 1997 and 1998 injuries.

Dr. Blow opined that fifteen percent of Claimant's current condition is due to hereditary predisposition, including osteoarthritis, age, weight and daily living, and that eighty-five percent of her current condition is related to the 1981 injury. Later, Dr. Blow clarified this opinion and stated that, of the eighty-five percent, ten percent of Claimant's current condition is attributed to the injuries in 1997 and 1998.

Dr. Looby is a board certified orthopedic surgeon. Fifty percent of his practice is focused on knee problems. Dr. Looby was Claimant's treating physician and performed two surgeries on Claimant's right knee, including the total right knee replacement. Dr. Looby first saw Claimant on January 9, 2002. Dr. Looby noted x-rays showed moderate to severe osteoarthritic changes in Claimant's right knee. Dr. Looby diagnosed Claimant with degenerative joint disease.

Dr. Looby was familiar with Claimant's history of injuries to her right knee in 1981, 1997 and 1998. Dr. Looby agreed that the arthroscopy in 1982 did not show significant damage to Claimant's right knee. Dr. Looby testified:

> I believe it was Dr. Johnson's impression that there had been damage to the medial meniscus. He called it a, quote, strain, unquote, of the medial meniscus but he did not think that there was tearing sufficient that it required debridement or removal of part of the meniscus and the articular cartilage surfaces at that time looked to be in good condition.

Dr. Looby considered that fact that Claimant did not have significant knee complaints for ten years prior to her 1998 injury relatively insignificant. What Dr. Looby deemed significant was that after the February 1998 injury, Claimant was unable to bend her knee at the emergency room and she had significant loss of range of motion. In addition, Claimant heard a loud pop as she tripped over the customer's hat. Dr. Looby concluded the loud pop was Claimant's meniscus tearing. Claimant also experienced significant pain with direct weight bearing. The arthroscopy on July 16, 1998, showed that Claimant's medial meniscus was severely torn.

According to Dr. Looby, Claimant sustained a new injury to her right knee on February 13, 1998. Dr. Looby opined that Claimant suffered a severe tear of her meniscus sometime between the arthroscopy in 1982 and the arthroscopy in 1998. Dr. Looby opined that the 1998 injury played a significant role in Claimant's current condition.

Dr. Looby recognized that the osteoarthritic degenerative process had been occurring in Claimant's knee for a long period of time. However, Dr. Looby confirmed that the 1998 injury "certainly didn't help the knee at all." Dr. Looby opined, "I think her subsequent injury did exacerbate her condition, speed up the course of it so that she required a total knee arthroplasty somewhat earlier than she otherwise would have."

Dr. Looby agreed with those opinions expressed by Dr. Blow that seventy-five percent of Claimant's need for total knee replacement and current condition was related to her initial work injury in 1981, ten percent of her need for surgery was related to the work injury in 1998 and fifteen percent was related to her genetic makeup, weight and activities. Dr. Looby testified:

Q: If I look at your opinion, though, regarding the percentages, you would agree with me that a major contributing cause of her need for the treatment regarding the arthroplasty, the debridement and Dr. Chang's subsequent treatment and the therapy that has been prescribed would be from the 1982 [sic] injury, correct?
A: Absolutely.
Q: And when we're looking at it in terms of major contributing cause, you would agree with me that the 1998 injury therefore would not be a major contributing cause?
A: Well, I assigned 10 percent of the causation to it. I don't know if that makes it a major contributing cause or not <u>but [the 1998 work injury] plays a role.</u> (emphasis added).

Dr. Looby's testimony established that Claimant was involved in two specific incidents at the Tea Steak House that explain the second and third onset of symptoms in her right knee. Dr. Looby recognized that the character of Claimant's right knee complaints was "quite different" after the workplace injuries at the Tea Steak House in 1997 and 1998.

Dr. Hoversten is also a board certified orthopedic surgeon. Dr. Hoversten routinely performs knee surgeries, including total knee replacements. Dr. Hoversten performed an IME of Claimant in July 2000. Based upon his review of all Claimant's medical records and history, Dr. Hoversten opined that Claimant sustained a new and substantial injury to the medial meniscus and the medial femoral condyle in either 1997 or 1998 while she was working at the Tea Steak House. Dr. Hoversten opined that the injury in 1998 contributed independently to her final condition and disability. Dr. Hoversten also concluded that these injuries were a major contributing cause of her need for total knee replacement.

According to Dr. Hoversten, Claimant's condition as she presented at the emergency room on February 13, 1998, indicated she had suffered some kind of injury to her knee. Dr. Hoversten opined that the loud pop Claimant heard as she tripped on the hat was her meniscus tearing "badly." Dr. Hoversten stated:

> Well, sometimes the tearing of the meniscus can be incremental. And it's possible the first event [in December 1997] could have been a small portion, and the second event [in February 1998] was the major tear. But it was my opinion that the second injury was the major problem and the major time when the femoral condyle was damaged and the meniscus was torn badly.

Dr. Hoversten concluded that Claimant sustained a "substantial injury" to her medial meniscus and damage to the cartilage on the inside of her right knee in one of the workplace accidents at the Tea Steak House. Dr. Hoversten noted that Dr. Alvine's arthroscopy records showed that Claimant had "pretty significant damage" to her right knee following the 1998 injury at the Tea Steak House.

Dr. Hoversten recognized that Claimant's knee was weak and that she experienced prior problems with her knee. Dr. Hoversten testified, "[w]ell, it's my belief that Doris initially had some ligamentous strain in '81, '82; but there was not a torn meniscus, there was not damage to the cartilage. And Dr. Johnson looked in the knee, and he actually didn't take out any meniscus or do anything." Dr. Hoversten noted that

Claimant was very susceptible to injury due to the condition of her knee and agreed that at some point, Claimant would have required a total knee replacement. However, Dr. Hoversten opined that the injuries in 1997 and 1998 at the Tea Steak House accelerated her need for the knee replacement.

Dr. Hoversten agreed that the 1998 injury did not cause the arthritis in Claimant's right knee. Dr. Hoversten explained, "I believe there was a little bit of arthritis present, but the injury caused it to be much, much worse arthritis and to be more painful. So there was some arthritis there." Dr. Hoversten agreed that if there was a tear caused by the 1981 injury, there would be much more contribution from the original injury. Despite this testimony, Dr. Hoversten unequivocally opined that Claimant sustained a new injury to her right knee on February 13, 1998 at the Tea Steak House, that this injury contributed independently to Claimant's final disability and that Claimant did not experience a "mere recurrence" of her original 1981 right knee injury.

The medical evidence demonstrated that Claimant suffered an aggravation in 1997 and 1998 of the 1981 original injury. This is based on the credible and persuasive testimony expressed by Dr. Looby and Dr. Hoversten. "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 N.W.2d 396, 398 (S.D. 1988). It is true that all three physicians are well-qualified. But, Dr. Looby and Dr. Hoversten are board certified orthopedic surgeons and have many years of experience diagnosing, treating and performing surgeries on conditions similar to Claimant's. Dr. Looby's and Dr. Hoversten's testimony was more persuasive than the opinions expressed by Dr. Blow.

Claimant suffered an original injury to her right knee on July 28, 1981, while working at the Anchor Inn. Claimant was diagnosed with a strained, right medial meniscus. Dr. Johnson did not find a significant tear in the medial meniscus. Over sixteen years later, Claimant suffered a separate and new injury to her right knee in December 1997 and on February 13, 1998. Claimant sustained a severely torn right medial meniscus. All three physicians unequivocally opined that Claimant sustained a new injury to her right knee on February 13, 1998.

Claimant's injuries in 1997 and 1998 contributed independently to her final disability. It is true that in the 1980's and early 1990's, Claimant continued to experience some knee pain. She sought medical treatment until the early 1990's. However, Claimant was able to work consistently at the Tea Steak House and any knee problems did not affect her work. Claimant credibly testified that her right knee did not hurt prior to the collision in December 1997, but after the accident, Claimant's right knee started to hurt again. Then, after the incident in February 1998, Claimant experienced significant symptoms in her right knee, which required extensive medical treatment including three surgeries. Claimant continues to suffer from severe and constant pain caused by the 1997 and 1998 injuries. Claimant's knee never returned to the condition where it was physically before the two accidents at the Tea Steak House. The two incidents in 1997 and 1998 can independently explain the second onset of Claimant's symptoms.

Claimant sustained an aggravation in 1997 and 1998 because she suffered from a second injury. More importantly, the second injury contributed independently to Claimant's final disability. As both Dr. Looby and Dr. Hoversten opined, Claimant's right knee condition was exacerbated by the subsequent injuries in 1997 and 1998. These injuries sped up the course of Claimant's condition so that she required a total knee

arthroplasty earlier than she otherwise would have with just the original 1981 injury. Based on the evidence presented, Claimant's current injury is an independent aggravation of her original work-related injury. CIGNA is not responsible for payment of benefits due to Claimant's treatment and current condition.

Highlands Insurance Group argued "should the Department determine that recurrence does not apply, then the Department should apportion benefits pursuant to SDCL 62-4-29." This statute provides:

> As to an employee who before the accident for which he claims compensation was disabled and drawing compensation under the terms of this title, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which he may have suffered.

The clear language of the statute demonstrates that it would improper to utilize apportionment under the facts of this case. The statute specifically requires that the employee be "disabled and drawing compensation" before compensation may be apportioned. Here, Claimant was not "disabled and drawing compensation" before her December 1997 and February 1998 injuries. In addition, the last injurious exposure rule applied to these facts because Claimant suffered from successive injuries. The last injurious exposure rule "provides that in successive injury cases full liability is placed upon the insurance carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability." Novak v. C.J. Grossenburg & Son, 232 N.W.2d 463, 465 (S.D. 1975) (emphasis added). Therefore, SDCL 62-4-29 cannot be applied to apportion some of Highlands Insurance Group's responsibility for benefits to CIGNA. Highlands Insurance Group is responsible for payment of all benefits to Claimant because she suffered an independent aggravation of her 1981 work-related injury when she injured her right knee in December 1997 and February 1998. This determination includes payment for all necessary and reasonable medical expenses as set forth by Claimant in Exhibit 11.

ISSUE II

WHETHER CLAIMANT IS PERMANENTLY TOTALLY DISABLED PURSUANT TO SDCL 62-4-53?

Claimant argued that she is permanently and totally disabled under the odd-lot doctrine. At the time of Claimant's injury, permanent total disability was statutorily defined by SDCL 62-4-53. This statute states:

> 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 claimant

> in the community. An employee shall introduce evidence of a reasonable, good faith work search 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.

The South Dakota Supreme Court has recognized at least two avenues by which a claimant may make the required prima facie showing for inclusion in the odd-lot category. Peterson v. Hinky Dinky, 515 N.W.2d 226, 231 (S.D. 1994). The Court stated:

> 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 fact 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 relegated to the odd-lot category,' then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made 'reasonable efforts' to find work." The burden will only shift to the employer in this second situation when the claimant produces substantial evidence that he is not employable in the competitive market. Thus, if the claimant is "obviously unemployable," he does not have to prove that he made reasonable efforts to find employment in the competitive market.

Id. at 231-32 (citations omitted). Even though the burden of production may shift to Employer, the ultimate burden of persuasion remains with Claimant. Shepard v. Moorman Mfg., 467 N.W.2d 916, 918 (S.D. 1991).

The FCE showed that Claimant can return to work at the sedentary physical demand level. All three physicians agreed that Claimant could return to work within the sedentary restrictions set forth in the FCE. Dr. Looby concluded there was no reason Claimant could not work, except for her chronic right knee pain. Dr. Hoversten recognized that Claimant suffers from a lot of pain due to her condition and this pain has "reduced her capacities a great deal."

Rick Ostrander, a vocational rehabilitation counselor for over twenty-four years, reviewed the FCE and performed a labor market survey. Based upon the FCE, Ostrander opined that Claimant is limited to less than a full range of sedentary work. Ostrander noted that Claimant needs to elevate her right leg periodically and stand up and move around throughout the day. Ostrander could not identify any transferable skills for sedentary work from Claimant's past work experience. Therefore, Claimant would be limited to unskilled sedentary work. Based upon Claimant's limitations, Ostrander opined that she was obviously unemployable. Ostrander explained:

> She is limited to less than a full range of sedentary work. . . . She has no transferable skills so we're looking at unskilled work. Unskilled work simply does

> not exist in the economy consistent with the limitations identified. For example, it's widely recognized that if we look at unskilled sedentary work that requires an individual or where an individual is required to vary their sitting and standing, by definition, about 85 percent at least of those jobs are eliminated. Unskilled sedentary work has just disappeared within our economy. It simply doesn't exist in the fashion it existed fifteen or twenty years ago. So that by itself is a major limiting factor and by itself would cause her to be unemployable.
>
> When you look at her age - - she is soon to be 57 - - issues of transferability become more difficult the older one gets. It's widely recognized and acknowledged in vocational theory that it's much more difficult for an older worker to transition to a different kind of occupation.

In addition, Ostrander opined that Claimant's pain complaints would interfere with her ability to be employed as her pain would hinder her productivity and her ability to be effective in any job. Ostrander concluded, "I don't think she has any reasonable chance of being considered for employment."

Based on Claimant's permanent physical restrictions and on Ostrander's credible testimony, Claimant has established that she is obviously unemployable due to her physical condition, coupled with her age, training and experience and the type of work available in her community. Claimant's physical condition causes her to be unable to be employed in anything other than sporadic employment resulting in an insubstantial income.

In addition, Claimant demonstrated that as a result of her work-related knee injuries, she experiences severe, continuous and debilitating pain such that she is obviously unemployable. Due to her knee condition, Claimant has undergone three surgeries including a total knee replacement, physical therapy, dry needling, uses a TENS unit and takes pain medication. Despite these efforts, Claimant has not experienced significant pain relief and continues to suffer from constant pain.

As previously stated, Claimant was a credible witness. Claimant suffers from continuous right knee pain on a daily basis. At the hearing, Claimant rated her pain level at a four, but her pain significantly increases if she uses her right knee too much. This includes sitting with her leg bent or walking too much. Claimant must use a walker on a daily basis for mobility. Claimant's activities have been significantly limited due to her work-related knee injury. Claimant spends most of her day at home sitting in her recliner with her leg stretched out in front of her and elevated. Claimant primarily watches television, embroiders or works on her computer. Claimant has been unable to work since July 2003 due to her continuous pain.

Based on Claimant's credible testimony and the medical records, Claimant has established that she suffers from severe, continuous and debilitating pain such that it would make her obviously unemployable. Therefore, Claimant does not have to demonstrate "the unavailability of suitable employment by showing that [she] has made 'reasonable efforts' to find work" and was unsuccessful. Peterson, 515 N.W.2d at 231. Claimant established a prima facie showing that she is permanently and totally disabled under the odd-lot doctrine. Therefore, the burden of production shifts to Employer to show that some form of suitable employment is regularly and continuously available to Claimant within her community. "Employer must have demonstrated the existence of 'specific' positions 'regularly and continuously available' and 'actually open' in 'the

community where the claimant is already residing' for persons with *all* of claimant's limitations." Shepard, 467 N.W.2d at 920.

Both CIGNA and Highlands Insurance Group presented testimony from James Carroll, a vocational rehabilitation consultant with over twenty-four years of experience. Carroll reviewed Claimant's medical records, Claimant's deposition, Dr. Hoversten's deposition, Dr. Looby's deposition, Dr. Blow's report and the FCE. Carroll acknowledged that the FCE restricted Claimant to full-time sedentary work. Carroll used these limitations to identify positions open and available in Claimant's community, the Sioux Falls labor market.

Carroll, using the FCE and taking into account Claimant's education and work history, identified positions in Sioux Falls that he thought Claimant was capable of performing. More specifically, prior to the first hearing, Carroll identified five different employers with customer service representative positions open and available that paid at least $8.00 per hour. These employers were Citibank South Dakota, Midco Call Center, Wells Fargo, Household Bank Card and First Premiere Bank Card. Carroll also identified a position open and available at Raven Industries for full-time electronic assembler, which paid a starting wage of $8.40 per hour. Prior to the second hearing, Carroll identified five more employers with entry-level customer service representative positions open and available that paid at least $7.50 per hour. These employers included Generation Direct, Inc., L & S Teleservices, South Dakota Agricultural Statistics Services, CCC Information Services and Cigna Tel Drug. Carroll testified that all of the employers contacted would be willing to accommodate an employee who needed to elevate his or her leg and stand periodically.

Based on his labor market survey, Carroll opined there was employment available in Claimant's community within her physical capabilities as outlined by the FCE. In addition, Carroll opined these positions paid a salary equal to or exceeding Claimant's workers' compensation rate of $201.21 per week. Carroll also testified that many of the positions were available on a part-time basis and paid a salary of at least $8.00 per hour. Carroll concluded that Claimant could work in a part-time position that was within her physical capabilities and still earn her in workers' compensation benefit rate. Carroll noted that these positions were entry level in nature requiring only completion of high school diploma or GED. Carroll concluded that Claimant had the skills necessary to be employed in such positions.

Based upon Carroll's credible testimony, both CIGNA and Highlands Insurance Group demonstrated that there were specific positions open and available within Claimant's community that would meet all her limitations and pay her a suitable wage. Even though Employer satisfied its burden of production with Carroll's testimony, the ultimate burden of persuasion remains with Claimant.

In November 2004, Claimant completed applications for employment with all six employers previously identified by Carroll. Claimant received rejection letters from Citibank, Midco Call Center, Raven Industries and Household Bank Card. Claimant was interviewed twice by Household Bank Card, but was not selected for employment. In late December 2004 and early January 2005, Claimant also submitted applications for employment with Generation Direct, Inc., L & S Teleservices, South Dakota Agricultural Statistics Services, CCC Information Services and Cigna Tel Drug. Claimant did not receive any offers for employment.

After reviewing all of Claimant's applications, Carroll was critical of Claimant's efforts to find employment. For example, Carroll criticized Claimant because she left questions blank, was "very generic" in answering some questions, provided too much information concerning her right knee injury or "did very little to actually sell herself to a potential employer." Claimant credibly testified that she completed the applications to the best of her ability. She tried to be honest on the applications "to show the employer that I'm not hiding anything."

Claimant credibly testified that she wants to return to work. She worked consistently from the time she was fourteen years old until July 2003 when her right knee pain prevented her from continuing to work. Claimant made a reasonable effort to find employment as she applied for all the positions identified by Carroll. Claimant was "excited" about the possibility of employment at Household Bank Card, especially after participating in two interviews. But, Claimant was not hired. Her disappointment was evident at the hearing when she became teary discussing her excitement over the possibility of employment. Despite her efforts, Claimant has been unable to find suitable employment.

Ostrander reviewed the positions identified by Carroll and opined that two of the positions were inappropriate for Claimant. Ostrander concluded the position at the South Dakota Agricultural Statistic Services would be inappropriate because the position offered only part-time sporadic employment that would not allow Claimant to earn her workers' compensation benefit rate. In addition, Ostrander opined the position at Cigna Tel Drug was for an outbound sales position that required at least one year of call center or sales experience. Claimant's work experience would not qualify her for this position.

Ostrander opined that Claimant is not employable. Ostrander testified that Claimant does not possess the skills for most of the positions identified by Carroll. Ostrander agreed that most of the positions identified would be sedentary in nature. However, Ostrander disagreed that the positions were unskilled and testified that most of the positions were semiskilled to skilled and that Claimant does not have the transferable skills necessary to be employed in those positions. Ostrander concluded, "but for a 56 year old woman who has no call center experience and is as limited as Doris Otten is, it is clearly unrealistic to expect that she could be employed in any of these positions [as identified by Carroll]." After consideration of the vocational testimony, Claimant has met her burdens under SDCL 62-4-53.

Although Claimant has the desire to become employed and has made reasonable efforts to find employment, Claimant is obviously unemployable. Claimant demonstrated that she is obviously unemployable due to her physical condition, coupled with her age, training and experience and the type of work available in her community. In addition, Claimant established that she is obviously unemployable due to her severe, continuous and debilitating pain. Claimant has met her burden of persuasion to establish that she is permanently and totally disabled under the odd-lot doctrine. Claimant's request for permanent total disability benefits is granted. Highlands Insurance Group is responsible for payment of permanent total disability benefits to Claimant.

Counsel for Claimant and CIGNA shall submit Findings of Fact and Conclusions of Law, and an Order consistent with this Decision, and if necessary, proposed Findings and Conclusions within ten days from the date of receipt of this Decision. Counsel for

Highlands shall have ten days from the date of receipt of Claimant's and CIGNA's Findings and Conclusions to submit objections or to submit its 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, counsel for Claimant and CIGNA shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 28th day of July, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Elizabeth J. Fullenkamp
Administrative Law Judge