SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT

LEE ANDERSON, **HF No. 70, 2001/02**
Claimant,

v. **DECISION**

DAVE'S CONSTRUCTION, Inc.,
Employer,
and

ALLIED INSURANCE GROUP,
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. A hearing was held before the Division of Labor and Management on May 14, 2003, in Sioux Falls, South Dakota. Claimant, Lee Anderson, (hereafter Claimant), appeared personally and through his counsel, J.G. Shultz. Rick W. Orr represented Employer Dave's Construction, Inc., and Insurer Allied Insurance Group (hereafter Employer/Insurer).

Claimant's Petition for Hearing alleges a work-related injury which required him to undergo a left frontal craniotomy and cervical spinal cord laminectomy, thereby resulting in temporary total disability with continued disability into the future. An Order bifurcating the case was entered. The Prehearing Order identified the following issues:

1. Whether Claimant suffered an injury "arising out of and in the course of employment."
2. Whether Claimant has a compensable injury under SDCL 62-1-1(7)(b).
3. Whether Claimant provided timely notice under SDCL 62-7-10.
4. Whether Claimant's injury, if any, is due to his willful misconduct as defined by SDCL 62-4-37.

Facts:

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

In June of 1998, physicians at the Mayo Clinic diagnosed Claimant as having multiple congenital cavernous malformations or hemangiomas of the central nervous system. Cavernous malformations, as described by Dr. John Atkinson of the Mayo Clinic, are "a collection of blood vessels with interposed blood at various stages of clotting, separated by collagenous tumoral which is devoid of neurologic tissue. . . . Nobody is exactly sure what they are. They are very low flow lesions and when they tend to hemorrhage, they

are under low pressure." At issue is the compensability of these cavernous malformations and Claimant's resultant disability and need for treatment.

Claimant's Medical and Vocational History

Claimant is a Minnesota native who graduated from high school at Russell-Tyler-Ruthton High School in Tyler, Minnesota in 1991. Following high school, he attended Willmar Technological College for electronics and was employed in Willmar. He then worked at Schwans in Marshall, Minnesota and attended Southwest State University for an academic year. He attended Mankato State University (now know as Minnesota State University) and worked part time for about one year before quitting school and working in the home health care field. Claimant had at one time considered a career in nursing, but did not finish that schooling. He returned to Minnesota State University in the spring of 2000 after his surgery and ultimately completed his school at KRS, a computer business school, in March 2003.

In 1995, Claimant began working in the construction field. He worked for one season as a laborer with May Construction digging holes for the utility company. Before beginning employment with Employer in January of 1998, he worked for two additional employers working with underground utilities.

While employed with Employer, Claimant performed tasks with equipment that would cause vibrations. Claimant worked with directional boring machines, which subjected him to vibrations from the boring as well as from mixing the boring gel solution. Claimant also worked with vibrating machines that compacted dirt in trenches where utility cable was buried. Claimant also shoveled a lot of dirt by hand. He worked an average of fifty hours a week and the majority of his day involved working with vibratory equipment.

In June of 1998, Claimant experienced vision difficulty in his left eye. Initially, he believed that he had injured his eye by getting bore gel in it. He discussed the incident with his Employer who told him that he should have it checked out. Claimant was eventually referred to the McKennan Hospital Emergency Room and after a week of testing, he was told that he had cavernous malformations. Claimant sought a second opinion from the Mayo Clinic, where he was advised by Dr. Atkinson, a neurosurgeon, that he should immediately have surgery on the optic nerve to keep from losing sight in both eyes. On June 30, 1998, Claimant underwent a left frontotemporal craniotomy with biopsy for removal of a cavernous hemangioma from his left optic nerve tract. Claimant is legally blind in his left eye, but his right eye is "20/20" with a corrective lens. Approximately three weeks after the surgery, Claimant returned to work without any restrictions from his physicians.

Claimant continued to work for Employer operating the same vibratory equipment, including a jackhammer or compacter, as he operated prior to his June 1998 surgery. In February of 1999, he went to the Mayo Clinic for an appointment. He discussed his condition with his physicians. His physicians had many concerns about Claimant's

future, including whether or not Claimant should continue in the construction industry given his condition. In August of 1999, Claimant returned to the Mayo Clinic with symptoms of posterior neck pain and numbness in the left upper extremity. It appeared on that date, August 4, 1999, that the cavernous hemangioma at C2 had increased in size. Dr. Atkinson noted on August 10, 1999, that the large C2 cervically located hemangioma had been symptomatic in the past, particularly with vibration type equipment. On September 7, 1999, Claimant underwent a laminectomy for resection of this large cavernous hemangioma at C2.

On August 10, 1999, Claimant gave written notice of his work-related condition to Employer when he brought a letter from Dr. Atkinson stating that Claimant should leave his career in construction because "[Claimant] has a preexisting condition, namely cavernous hemangiomas of the nervous system, which almost certainly [has] been exacerbated by operation of heavy vibrating equipment, as [hemangiomas] are prone to hemorrhage with such maneuvers." Claimant went to Employer's insurance agency to get a First Report of Injury form. He completed the form on August 12, 1999.

August 10, 1999, was the first date that Claimant was told by Dr. Atkinson that vibratory equipment would aggravate his condition. Dr. Atkinson testified that it was in August 1999 that he was able to establish a relationship between work and the advancement of Claimant's condition. Dr. Ahlskog, Claimant's Mayo Clinic neurologist, records confirm his agreement with Dr. Atkinson.

The expert medical opinions of three neurosurgeons were received into the record. The Affidavit of Dr. Ahlskog was also received. Dr. Atkinson was "board certified" by the American Board of Neurological Surgery in November of 1992. He is an associate Professor of Neurosurgery at Mayo Medical School. Dr. Atkinson performed both of Claimant's surgeries. Dr. Atkinson testified that he found Claimant to be a "smart" and "very reliable" man in terms of Claimant following his physicians' advice and directives.

Dr. Alan Fruin, a neurological surgeon and professor at Vanderbilt University School of Medicine, opined that the surgeries done in 1998 and in 1999 were necessary to address Claimant's cavernous hemangiomas. He did not disagree with the permanent partial disability assessments done on Claimant. Dr. Fruin agreed that they were fair and accurate. Dr. Fruin agreed that Claimant's work activities with vibratory equipment aggravated Claimant's symptoms.

Dr. Mark V. Larkins, a board certified neurosurgeon, conducted an independent medical evaluation of Claimant. Employer/Insurer hired Medical Evaluation Inc., for whom Dr. Larkins works as an independent contractor. Dr. Larkins opined that Claimant's work activities were not a major contributing cause of his need for treatment. He testified that Claimant's symptoms were "unrelated" to his work, but that they were related to the minor injury on the volleyball court in 1996.

Dr. Larkins agreed that the surgeries performed in 1998 and 1999 were reasonable and necessary to treat Claimant's cavernous hemangiomas. Dr. Larkins also agreed with

the permanent partial disability assessed by the Mayo Clinic. Dr. Larkins agreed with the limitations set forth in the FCA performed by the Mayo Clinic.

Dr. Larkins was unsure of whether Claimant's eye problems presented at work. He stated that it wouldn't matter because "that sort of mechanism has [n]ever been shown to be an etiological consideration with hemorrhage from a cavernous hemangioma."

Although Dr. Larkins did not review literature specifically in preparation for his deposition in this matter, he testified credibly that he "read[s] everything that comes out."

Dr. Larkins opined that he does not believe that "doing this type of work causes these things to hemorrhage" and; therefore, he would not have recommended that Claimant change careers based on a risk of hemorrhage.

Issues One and Two

Whether Claimant suffered an injury arising out of and in the course of employment.

Whether Claimant has compensable injury under SDCL 62-1-1(7)(b).

The general rule is that a claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Bros. Constr. Co., 155 N.W.2d 193, 195 (S.D. 1967). The 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).

Claimant "must establish a causal connection between her injury and her employment." Johnson v. Albertson's, 2000 SD 47, ¶ 22. "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). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

SDCL 62-1-1(7) defines "injury" or "personal injury" as:

> "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.

There is no dispute that Claimant suffers from a preexisting condition, diagnosed as cavernous malformations. "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 Foundation, 2002 SD 141, ¶15 (citing Grauel v. South Dakota School of Mines, 2000 SD 145, ¶8, 16-17, 619 N.W.2d 260, 262-65.) The parties do not dispute that Claimant's tendency to develop cavernous malformations is a preexisting condition that did not develop within the occupational setting.

In their arguments, the parties have raised three separate issues regarding compensability. First, whether the cavernous hemangioma on Claimant left optic nerve is causally related to his employment. Second, whether the cavernous hemangioma on Claimant's cervical spine is causally related to his employment. Third, whether Claimant's undisputed need for lifetime care is compensable.

Regarding Claimant's optic nerve cavernous hemangioma, even Dr. Atkinson opined that that was not related to Claimant's work with vibratory equipment. He testified:

Q: And it's your opinion that the only lesion that is work aggravated was this one in the cervical spine?
A: That's the one that comes to mind, that's correct.

The medical evidence does not support a conclusion that Claimant's work activities were a major contributing cause of Claimant's optic nerve lesion, his need for surgery on the optic nerve, or the resultant blindness.

The issue of the compensability of the hemangioma at C2 is more complex. The evidence presented reveals that the medical community has just begun to study cavernous hemangiomas. With the evolution of MRI's and CAT scans, physicians can more easily document the condition. There is a dispute about whether trauma can cause cavernous hemangiomas to bleed or become symptomatic. Each of the

physicians who testified in this matter is board certified and very experienced in neurology.

Dr. Atkinson opined that vibrating equipment could increase Claimant's hemorrhage. He explained:

> By history it was clear he was clearly worse by his own admission that working with vibrating equipment such as the impactor he was working on was making him worse. On our evaluation neurologically he was worse. On MRI imaging the lesion was slightly larger. So whatever happened in the interim between our previous evaluation and this evaluation he was clinically worse and the imaging was worse, and by history related to the impactor itself.

Dr. Atkinson opined that Claimant's work was a major contributing cause of Claimant's need for surgery on his cervical hemangioma:

> Q: Let me make things clear about this. Because the language that our statutes require we take a hard look at is language of a major contributing cause. Is work a major contributing cause of the disability, impairment or need for treatment. How would you answer that question?
> A: In this setting I would say that it is. There is no certainty with any of this. Within clinical profile, the way he presents, trivial injury on the volleyball court, the clear demise from the time of his surgery for his optic nerve, I mean he clearly got worse, both neurologically and imaging wise, working heavy equipment and then has remained stable. I mean it would be very logical to conclude that it was a major contributor.

Dr. Atkinson supported his opinions further:

> But by his clinical history alone you could at least come to a conclusion within medical certainty that he got worse when he was working the heavy equipment. He has been stable since he has been off the heavy equipment. It would be a logical conclusion to say that heavy equipment operating made him worse. Since he has been off he has been stable.

Dr. Atkinson also stated:

> But in the interval of time working heavy vibratory equipment he clearly deteriorates both neurologically and lesion imaging. Now, can I say with certainty that the lesion, if he had been operating at a desk and answering the phone, if the lesion wouldn't have gotten bigger, the answer would be no. But I can say with a reasonable degree of certainty that working the heavy equipment during that interval of time he clearly got worse, and in the aftermath when he has abstained from that, none of the other lesions have gotten bigger and he hasn't deteriorated. So within the realm of medical certainty, with an uncertain condition, it would be my best medical contention that he deteriorated from the

> vibratory equipment. I mean that's a heavy impactor. You don't have to see a videotape of that to realize there's pretty good jarring going on there.

Dr. Atkinson testified that there is no other explanation for Claimant's worsening symptoms in August 1999 than that Claimant hemorrhaged around the cervical lesion. Dr. Atkinson agreed that cavernous hemangiomas can bleed without trauma, but that in Claimant's case his hemorrhage was related to his work:

> I mean it was my contention, based on his clinical profile, the way he presented, and particularly that part when I was stunned to see him back in August, I mean he was so much worse, that to me it was based on the best evidence before us clinically with this individual, granted, the whole potpourri of all those patients, natural history notwithstanding, in this guy he got worse with his symptoms and they fluctuated. When he was having the symptoms he got worse. And when he quit doing the work, particularly weekends or time off, the symptoms improved. So there was a clear clinical relationship. Whether that would be true for everybody, I don't know. But it was definitely true for him.

Dr. Fruin agreed that Claimant's work was aggravating Claimant's symptoms. Dr. Fruin explained that aggravating his symptoms "means that when he was using the vibrating equipment, his symptoms would become aggravated; and then they would improve when he stopped using the vibrating equipment."

Dr. Larkins disagreed that Claimant's work activities were a major contributing cause of his need for treatment of the cervical lesion. He instead opined:

> These lesions were there, they were aggravated by his work, they got better when he was laid off, they got worse again when he went back, and then it led to the surgery, and the decision was may – maybe was that obviously this person has got this sputtering course and this sort of fits into one of the modes by which we know these things – people start deteriorating, and you're better off approaching it at that point than letting it continue, and that's distinctly different than saying, well, he's doing this work and he's just going downhill because he keeps using this jackhammer, and it's making this thing get bigger and hemorrhaging. I mean, there's sort of a difference there. It's bringing it to light as opposed to causing him a permanent deficit just on the basis of the work itself. So I think there's a distinction.

He testified:

> Q: Dr. Larkins, in your opinion were his work activities at Dave's Construction a major contributing cause of his current medical condition and functional deficits?
> A: No.
> Q: And why do you say that?

A: Well, because I don't think that there's any - - he was symptomatic before this occurred. I think he had a temporary aggravation based on his activities there that resolved when he backed off from that after the surgery. They came on again when he went back. That led to his follow-up visit and subsequent surgery.
Again, I don't see where those are fixed exacerbations than more temporary.

Q: In you opinion - -

A: Because he had actually gotten better even after his ER visit by the time - - at the time that surgery was recommended it was my impression it was almost that he had gotten to the point where he was worried enough that he wanted to move ahead with that as opposed to it being horribly symptomatic at that time.

. . .

Q: In your opinion, to a reasonable degree of medical certainty, would he have needed the treatment that he had even if he had never worked at Dave's Construction?

A: Like I said before, I think I would have - - looking - - it's easy to look at it retrospectively, but I think around the time of that volleyball incident, had that been worked up more, the symptoms after that, yes, you would have ended up offering him surgical intervention based on that.

Dr. Atkinson worked with a team of doctors in treating Claimant. He and Dr. Ahlskog have tested, examined, and carefully followed Claimant's progress over the years. He has treated many patients with cavernous hemangiomas. His opinions are supported by Dr. Fruin's testimony. Dr. Atkinson's opinions and Dr. Fruin's opinions are more persuasive than Dr. Larkins. While Dr. Larkins is highly qualified, his opinions lack the foundation of Dr. Atkinson's opinions because he has not studied Claimant and his condition the way Dr. Atkinson has. Dr. Larkins' opinion that Dr. Atkinson has made an error in medical logic is not persuasive. Expert testimony is entitled to no more weight than the facts upon which it is predicated. Podio v. American Colloid Co., 162 N.W.2d 385, 387 (S.D. 1968). "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).

Dr. Atkinson could not opine that Claimant's need for lifelong follow-up care is causally related to his employment activities. Dr. Fruin and Dr. Larkins agreed that Claimant's preexisting condition requires lifelong medical observation which would be unrelated to any aggravation caused by his work activities in 1998 and 1999.

Claimant has demonstrated that his work activities were a major contributing cause of his need for treatment of the cervical spine lesion. Claimant has not demonstrated that the optic nerve lesion, surgery on that lesion, and resultant blindness are compensable.

Claimant has not demonstrated that his need for lifelong medical observation and follow-up care are compensable. Dr. Atkinson testified:

Q: [I]s the work that this man did with the impactors and so forth be a major contributing cause of the need for this lifelong treatment?

A: I don't know. I mean he has got a congenital condition, quite frankly. My own personal view is, having known him for this length of time and dealt with his condition, that I am reasonably certain beyond any medical doubt that his work contributed to the demise of that spinal cord injury, and he got worse as a result of that. But the fact that he has been stable off of it and the fact that he has got a congenital condition to grow new ones, I mean it would be a big stretch to say, particularly since the other lesions have not grown, just the spinal cord lesion, that his work contributed to the other lesions.

We didn't see any new ones develop. I mean if you had seen new ones develop during that interval of time you might say well, they may be part and parcel with the whole event of the impact of working. But in fact the lesions remained stable. His neurologic condition off the impactor has remained stable. It will be pretty far fetched. It's conceivable but it's not very probable.

This opinion does not support a finding that Claimant's need for ongoing medical care for any of his hemangiomas is compensable.

Issue Three

Whether Claimant provided timely notice under SDCL 62-7-10.

"Notice to the employer of an injury is a condition precedent to compensation." Westergren v. Baptist Hosp. of Winner, 1996 SD 69, ¶ 17, 549 N.W.2d 390, 395 (*citing* Schuck v. John Morrell & Co., 529 N.W.2d 894, 897-98 (S.D. 1995)). SDCL 62-7-10 sets the rules for providing notice:

> An employee who claims compensation for an injury shall immediately, or as soon thereafter as practical, notify the employer of the occurrence of the injury. Written notice of the injury shall be provided to the employer no later than three **business** days after its occurrence. The notice need not be in any particular form but must advise the employer of when, where, and how the injury occurred. Failure to give notice as required by this section prohibits a claim for compensation under this title unless the employee or the employee's representative can show:
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> (1) The employer or the employer's representative had actual knowledge of the injury; or
> (2) The employer was given written notice after the date of the injury and the employee had good cause for failing to give written notice within the three

> business-day period, which determination shall be liberally construed in favor of the employee.

(emphasis added). The proper test for determining when the notice period should begin has been explained: "The time period for notice or claim does not begin to run until the claimant, as a reasonable person, should recognize the nature, seriousness and probable compensable character of [the] injury or disease." Miller v. Lake Area Hospital, 1996 SD 89, ¶ 14. "Whether the claimant's conduct is reasonable is determined 'in the light of [his] own education and intelligence, not in the light of the standard of some hypothetical reasonable person of the kind familiar to tort law.'" Shykes v. Rapid City Hilton Inn, 2000 SD 123, ¶ 29 (citing Loewen v. Hyman Freightways, Inc., 1997 SD 2, ¶ 15). "The standard is based on an objective reasonable person with the same education and intelligence as the claimant's." Id. at ¶ 43.

The South Dakota Supreme Court summarized:

> The Workers' Compensation Act was enacted by the South Dakota Legislature in 1917. The purpose is to provide employees, who are injured within the scope of their employment, with reimbursement for medical care and wage benefits without having to prove the employer was at fault or negligent. Schipke v. Grad, 1997 SD 38, ¶ 11, 562 N.W.2d 109, 112. In turn, employers are "granted total immunity from suit for its own negligence in exchange for payment of workers' compensation insurance." Id. (citations omitted). However, an injured employee must also comply with the statutory notice requirements in order to recover.
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> "The purpose of the written notice requirement is to give the employer the opportunity to investigate the injury while the facts are accessible. The notice requirement protects the employer by assuring he is alerted to the possibility of a claim so that a prompt investigation can be performed." Westergren v. Baptist Hospital of Winner, 1996 SD 69, ¶ 18, 549 N.W.2d 390, 395. Therefore, "notice to the employer of an injury is a condition precedent to compensation." Westergren, 1996 SD 69, ¶ 17.

Shykes at ¶¶ 23-24.

Claimant provided notice of the potential work-relatedness of his eye problems the day that he sought medical care for his worsening vision and pain. Claimant's unrefuted testimony establishes that his employer had actual notice that Claimant thought that he had gotten boring solution ingredients in his eye. Claimant provided adequate notice of his eye problems.

There is no dispute that Claimant did not provide written notice of his alleged work-related injury in his cervical spine until August 10, 1999. Dr. Atkinson testified that he and Dr. Ahlskog did not relate Claimant's worsening symptoms to his work activities until August 10, 1999. Claimant as a reasonable person could not have known the probable potential work-related nature of his alleged injury until that time. The time

period did not begin to run until Dr. Atkinson told Clamant that his condition was related to his work activities. Claimant provided timely notice pursuant to SDCL 62-7-10.

Issue Four

Whether Claimant's injury, if any, is due to his willful misconduct as defined by SDCL 62-4-37.

SDCL 62-4-37 provides:

> No compensation shall be allowed for any injury or death due to the employee's willful misconduct, including intentional self-inflicted injury, intoxication, illegal use of any schedule I or schedule II drug, or willful failure or refusal to use a safety appliance furnished by the employer, or to perform a duty required by statue. The burden of proof under this section shall be on the defendant employer.

Employer/Insurer alleges that Claimant refused to follow medical advice when he continued to work for Employer after his diagnosis and surgery in 1998. Willful misconduct means "something more than ordinary negligence but less than deliberate or intentional conduct. Conduct is gross, willful, wanton, or reckless when a person acts or fails to act, with a conscious realization that injury is a probable, as distinguished from a possible (ordinary negligence), result of such conduct." Fenner v. Trimac Transp., Inc., 554 N.W.2d 485, 487, 1996 S.D. 121, ¶ 9 (quoting VerBouwens v. Hamm Wood Prods., 334 N.W.2d 874, 876 (S.D. 1983)).

Under South Dakota law, refusing to follow a physician's advice constitutes willful misconduct. Detling v. Tessier, 244 N.W. 538, 540 (S.D. 1932); Fenner, 554 N.W.2d at 488.

> [A]n injury aggravated or extended in time by the employee's neglect or disobedience of his physician's instructions is not compensable as to the additional period… The proposition that one may continue, or even increase, his disability by his willful and unreasonable conduct, and then claim compensation from his employer for his disability so caused, is untenable.

Fenner, 554 N.W.2d at 488 (citing Detling, 244 N.W. at 541).

In order to show that Claimant committed willful misconduct by returning to work for Employer, Employer/Insurer must first demonstrate that Claimant's doctors "instructed" him to stop working construction. Dr. Atkinson credibly testified that he did not tell Claimant that he had to stop working because working would cause further injury. Dr. Atkinson explained his August 13, 1998, letter, in which he counseled Claimant to seek some other type of employment away from his construction work. He testified:

> I mean you have the same kind of - - you make recommendations for a patient kind of like you would for anybody else even in your own family. You would say

> to this guy look, you have got a condition that might predispose you to death at some point in your life. So you probably, if I were you, should think about another line of work. That doesn't mean today or tomorrow. That means maybe you ought to think about night school, doing something else. Because either A; he gets impaired enough where he can't do this line of work, period. Or B; based on some concerns over the natural history, which is not fully defined, that I guess if you are more prone to injury of some type, then it may predispose you to hemorrhages and the like. So it might be good counsel to consider that if you are going to get worse over time maybe you ought to think about another line of work.

Dr. Atkinson credibly testified that he and his colleagues did not causally relate Claimant's worsening condition to his employment activities until August 10, 1999. He explained:

> So that was our admonition, that he stop whatever employment he was doing with construction for the two reasons I listed: A; the kind of work that he was doing had made him - - or a least immediately conceivably had made him worse. And that 2; based on the location of the lesion, the other lesions, that with or without surgery he may end up in a condition that probably may abdicate his work from physical labor or the safety of others who might depend on him operating heavy equipment. So it probably just wouldn't be a good idea. He should stop.

Dr. Atkinson testified that August of 1999 was the first time that he "made it clear that [Claimant] needed to change his vocation." Before August of 1999, Dr. Atkinson and his colleagues had "leaned him into another career choice" because of Claimant's partial blindness and his potential physical limitations. Before August of 1999, Dr. Atkinson did not tell Claimant that his occupation was making his condition worse because Dr. Atkinson and his colleagues had not made the connection between Claimant's work and his worsening physical symptoms. He explained:

> The number one item here is that the hammer is related to his worsening. I felt strongly about that. Number two, I didn't think he needed to be working on heavy equipment based on his neurologic exam alone. He had very little vision in his left eye. Which was probably doable. But then if your hand function and balance are off and you are losing some spinal cord function, I meant to me you are a liability not only for yourself to get injured on the job but also to hurt those around you. It's just not safe, really, for him or for anybody else.

If Dr. Atkinson, a board certified neurosurgeon, did not relate Claimant's work activities to his worsening condition, Claimant is not expected to do so. It is untenable to require Claimant to know what his Mayo Clinic surgeons did not. Furthermore, Dr. Atkinson credibly testified that he explained to Claimant that he should find other work that was less physically demanding because some day Claimant would be unable to perform the necessary duties, given the nature of his condition. Employer/Insurer's expert, Dr.

Larkins testified that he would not have recommended that Claimant stop construction work because it is his opinion that Claimant's work did not cause his worsening condition. Employer/Insurer has failed to demonstrate that Claimant's return to work after eye surgery was willful misconduct.

Claimant shall submit proposed Findings of Fact and Conclusions of Law, and an Order consistent with this Decision within ten (10) days from the date of receipt of this Decision. Employer/Insurer shall have ten (10) days from the date of receipt of Claimant's proposed Findings of Fact and Conclusions to submit objections thereto or to submit 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 an Order in accordance with this Decision.

Dated this _____ day of December, 2003

SOUTH DAKOTA DEPARTMENT OF LABOR

_____
Heather E. Covey
Administrative Law Judge