

**SOUTH DAKOTA DEPARTMENT OF LABOR
DIVISION OF LABOR AND MANAGEMENT**

**CHERYL TEBBEN,
Claimant,**

HF No. 92, 2003/04

v.

DECISION

**GIL HAUGAN CONSTRUCTION,
Employer,**

and

**GENERAL CASUALTY COMPANY,
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 October 5, 2004, in Sioux Falls, South Dakota. Claimant, Cheryl Tebben (hereafter Claimant) appeared personally and through her counsel, James G. Abourezk. Michael S. McKnight represented Employer Gil Haugan Construction, and Insurer General Casualty Company (hereafter Employer/Insurer).

Issue:

Whether Brian Tebben's death arose out of and in the course of his employment and was causally related to his employment or employment related activities.

Facts:

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

Cheryl and Brian Tebben were married on March 1, 1978. Brian Tebben (hereafter Tebben) died on July 28, 2003, at the age of 45, when he was declared brain dead and taken off life support. Employer was timely and appropriately notified both of his illness and death. Employer/Insurer denied that his death arose out of and in the course of his employment and that his death was causally related to his employment or employment related activities. Claimant is now seeking benefits under SDCL 62-4-12 through 62-4-22.

At the time of his illness and death, Tebben had been working construction for Employer for about three years. On July 12, 2003, Tebben fell ill, showing symptoms that included extreme sweating, vomiting and weakness. He was taken to the Sioux Falls McKennan Hospital emergency room (ER) where a CT scan was performed. The CT

scan did not reveal the cause of Tebben's symptoms. The ER doctors treated Tebben for what was assumed to be an inner ear problem and sent him home.

Tebben went back to work the following Monday. On Wednesday, July 16, he returned to the hospital with the same symptoms of sweating and vomiting. His speech was also slurred. The family doctor, Dr. Farritor, sent Tebben for an MRI at Sioux Valley Hospital's North Center. The doctors who read the MRI discovered that Tebben had suffered several small strokes, so they immediately referred him to a Sioux Falls neurologist, Dr. Gene Koob. Dr. Koob examined Tebben and said he could go home, but that he should not go to work for a week, then only on light duty after that. On Monday, June 21, Tebben returned to Dr. Koob's office. That morning he went to the Employer's office to file a workers compensation claim. Later on that day, Tebben started to sweat again, his head was hurting and he felt dizzy. On Dr. Koob's orders, Dr. Farritor performed an EKG on Tebben, which was normal. That night Tebben experienced difficulty breathing and collapsed at his home. Claimant called 911 for an ambulance and Tebben was readmitted to the hospital. On July 28, 2003, Tebben died.

The medical experts agree that Tebben's right vertebral artery was blocked at the section where the artery leaves the vertebra and enters the brain. The medical experts disagree as to the cause of this blockage.

Tebben began working for Employer in July of 2000 primarily as an equipment operator. Prior to his employment with Employer, Tebben worked for approximately 12 years in the construction industry, laying pipe and operating heavy equipment.

Tebben's medical history before his illness in 2003 included a cervical injury. As the result of a motor vehicle accident in 1984, Tebben suffered a fracture to his second cervical vertebrae at the junction of the lamina and the spinous process, a fracture commonly called a "hangman's" fracture. Tebben was treated with a "halo" collar for three months and suffered no neurological symptoms from this fracture.

Other facts will be developed as necessary.

Issue

Whether Brian Tebben's death arose out of and in the course of his employment and was causally related to his employment or employment related activities.

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 183, 185 (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 his injury and his 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:

[O]nly 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.

Tebben’s treating neurologist, Dr. Koob, believed that Tebben’s work-related activities led to the cause of Tebben’s blockage. Dr. Koob believed the blockage was caused by a dissection of Tebben’s vertebral artery. In a letter dated December 5, 2003, Dr. Koob opined:

In reference to Brian Tebben, it remains my opinion that Mr. Tebben’s cause of his stroke and eventual demise was a dissection of the vertebral artery with secondary stroke in the base of his brain. As I had discussed with the patient prior to his demise and with his wife, it was my impression that his occupation driving heavy equipment and his previous bouts of work involving having his neck extended for prolonged periods of time were both significant possibilities as to the cause of his problem.

Claimant presented the live testimony of Dr. John David Sabow, a board certified neurologist, who actively practiced neurology for nineteen years. Dr. Sabow performed

an analysis of Tebben's medical records and determined that Tebben suffered a "dissection of the vertebral artery that led to his death." Dr. Sabow opined:

Now you'll see in the records that the MRA¹ shows that the vertebral artery was blocked what they call in the mid portion of the vertebral artery and it showed reconstitution. The only way a vertebral artery can be blocked and be reconstituted is if blood comes up the other vertebral artery and then goes back down the vertebral artery that was blocked lower down. That's the only way you can have reconstitution. That immediately rules out any typical stroke like you would have from a blocked tiny blood vessel in the brain stem. You have to be looking at something lower down in the vertebral artery that for some reason got blocked but allowed the blood to come back. So you can see the vertebral -- the blood coming down from the brain back to feed the distal portion of the vertebral artery. So there was something blocked in here.

Well, that absolutely unquestionably rules out any idea of your typical atherosclerotic stroke or diabetic stroke or hypertensive stroke or any blood clot stroke. There had to be another angle.

Dr. Sabow opined that Tebben's work activities combined with his preexisting fracture of the second cervical vertebra and concurrent damage to the vertebral artery to cause the vertebral artery dissection. Dr. Sabow characterized Tebben's work activities as "an accumulation of injury, especially with the heavy equipment operating and overhead work." Dr. Sabow ruled out all the other risk factors for the type of vascular accident suffered by Tebben. Dr. Sabow concluded:

The evidence is overwhelming in this case. This man had a dissection; and he had the previously remote injury that weakened the blood vessel; and that the three years of vigorous activity requiring a lot of head movement, head and neck movement, simply accelerated the rent on the inner aspect of the vertebral artery which eventuated into further dissection; blockage of the entire vertebral artery in the mid section of the artery; and flipping off emboli that caused the initial hospitalization; and with further occlusion of the vertebral artery, eventuated in his demise. A very, very unfortunate situation.

Employer/Insurer offered the deposition opinions of Dr. Khalafalla Bushara, staff neurologist at the Minneapolis VA Medical Center and an assistant professor of neurology at the University of Minnesota. Dr. Bushara finished his residency in neurology in 1997 and maintains an active clinical practice.

Dr. Bushara examined the records from Tebben's 1984 C2 fracture and found that his fracture was in a location unlikely to damage or injure the vertebral artery. Dr. Bushara opined that Tebben's death was caused by an embolic stroke. Dr. Bushara found the reconstitution that Dr. Sabow found, but concluded that "[t]his reconstitution, Dr. Sabow

¹ Magnetic resonance angiogram

stated that this is specific for dissection, which the argument is all about here, and that is just simply not true. We see that all the time.” Dr. Bushara explained:

The reconstitution of blood flow after seeing in the same artery after a blockage indicates vertebral artery or any artery dissection is not true. That’s not specific for that. We see that with any occlusion because there are usually collaterals or blood coming from other arteries to fill the artery or bypass the occlusion.

Dr. Bushara opined that not enough tests were done to rule out an embolus from Tebben’s heart as the cause of the occlusion of his right vertebral artery. He explained:

The occlusion or the blockage in this particular artery or system of arteries can come from anywhere with embolization. It can come from the legs. Actually we see that commonly, that the clot comes from the leg going through the heart into the brain and causing blockage in the brain. And I don’t think in this case they did enough - - there weren’t studies to show where it came from.

Dr. Bushara explained:

Dissection, which is the argument here which Dr. Sabow or Dr. Koob believes in, is the artery or any vessel really has three layers, the inner layer, which is a smooth endothelium or intima, and then the middle layer connective tissue and then the outer layer with the muscle. And the inner layer or the intima, if there is a cut or a tear the blood is forced between the intima and the other layers causing the intima to swell and block the artery, and that’s the dissection.

The dissection can progress through - - the dissection can progress and move through the arteries, meaning separating the intima from the other layers of the artery and block progressively the arteries, and also can cause occlusion, formation of clot and artery to artery embolization. So that embolization happening does not automatically mean there is no dissection, if that’s what you are trying to get at with the questions. I believe that Mr. Tebben did not have a dissection based on the fact that this was not seen by - -

Q [by Claimant’s counsel]: When you say this, what does that mean?

A: The dissection was not seen by the radiologists. And we are talking about highly skilled neuroradiologists from an academic institution, this is from the University of South Dakota, looking specifically for dissection. They were asked, Please look for dissection, and they couldn’t find it. This is how I base my opinion on that.

Regarding the combination of Claimant’s 1984 fracture, Dr. Bushara opined:

I don’t believe the fracture in 1984, I don’t believe it played part of his stroke now. As I mentioned, it was in a site not typical for causing damage to the artery, and

even if there was damage there were no symptoms, no problems then detected. And after fifteen years, I mean, theoretically you can have an injury to the artery but it usually presents itself within weeks, let's say, but not after fourteen years. The theory that because he was working with heavy - - Mr. Tebben was working with heavy equipment caused the stroke, I disagree with that.

Dr. Bushara opined that Tebben died of a stroke and that the stroke was caused by embolization. Dr. Bushara opined that he did not know what the cause of the embolization was but that it was not caused by a dissection of the vertebral artery because "the MRI and MRA was examined by two radiologists who were asked to look for it, as I said, and found none. This is a common issue, that we look for dissection, if you don't find it we don't dwell on it and look for other things that are more common and pretty serious to treat too."

CONCLUSION

Dr. Koob opined that Tebben's "occupation driving heavy equipment and his previous bouts of work involving having his neck extended for prolonged periods of time were both significant possibilities as to the cause of his problem." "Medical testimony to the effect that it is possible that a given injury caused a subsequent disability is insufficient, standing alone, to establish the causal relation under workers' compensation."

Guthmiller v. South Dakota Dept. of Transp., 502 N.W.2d 586, 588 (S.D. 1993).

Because Dr. Koob opined that it was "possible" that Tebben's death was caused by his work activities, Dr. Koob's opinions do not establish that Tebben's work activities were a major contributing cause of his death.

Dr. Sabow opined that Tebben's work activities combined with his preexisting C2 vertebral injury to become a major contributing cause of his vertebral artery dissection. Dr. Bushara found it unlikely that Tebben's 1984 C2 fracture contributed to or combined with his work activities to cause Tebben's death.

Dr. Bushara opined that it is not possible that Tebben's strokes were caused by a dissection of his vertebral artery because the neuroradiologists found no evidence of a dissection. Dr. Bushara opined, "In my opinion the work activities were not a major contributing factor to Mr. Tebben's strokes." Dr. Sabow took "exception" to the opinions of Dr. Bushara, stating, "It's not solid neurology. It[] just defies good clinical neurology, period." Dr. Bushara opined that Dr. Sabow's opinions were not correct, explaining that reconstitution of the right vertebral artery above the blocked portion does not by itself mean that there has been a dissection of the blocked artery. He explained that reconstitution from collateral arteries is seen "all the time with any occlusion."

Dr. Sabow's opinions on causation of Tebben's alleged vertebral artery dissection rest on two factual assumptions, that Tebben's 1984 fracture caused weakening of the right vertebral artery and that Tebben's work activities were such that would cause damage to the vertebral artery. Dr. Bushara took exception to those assumptions. First, Dr. Bushara found that Tebben's C2 fracture was in a location not likely to cause damage to

the arteries. Second, Dr. Bushara opined that arterial injury from the 1984 fracture would have shown up soon after the fracture, not nineteen years later. Dr. Bushara further explained that Tebben's work activities were not a risk factor for vertebral artery dissection.

Dr. Bushara opined that objective radiological evidence of a dissection was specifically looked for and never found. Dr. Sabow opined that the vertebral artery is too narrow to see a dissection on radiological studies. Dr. Sabow relied upon the location of the blockage to confirm his opinion that Tebben suffered a vertebral arterial dissection. Neither neurologist was asked to explain the radiology reports and what was actually found on the radiological exams.

The South Dakota Supreme Court has held that opinion testimony by medical doctors "must be precise and well-supported to bolster [a claimant's] position" that the employment was a major contributing cause of the condition. Byrum v. Dakota Wellness Found., 2002 SD 141, ¶ 16, 654 N.W.2d 215, 219. At best, the medical opinions are not conclusive as to whether Tebben suffered a dissection of the vertebral artery, whether Tebben suffered arterial damage in the 1984 accident that combined with his work activities, whether his work activities caused an injury to his vertebral artery, and whether his work activities were a major contributing cause of his illness and death. 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). Claimant has failed to demonstrate that Tebben's death was causally related to his work activities as required by SDCL 62-1-1(7). Claimant's request for death benefits must be denied.

Counsel for Employer/Insurer 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. Counsel for Claimant 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, counsel for Employer/Insurer shall submit such Stipulation along with an Order in accordance with this Decision.

Dated this 30th day of March, 2005.

SOUTH DAKOTA DEPARTMENT OF LABOR

Heather E. Covey
Administrative Law Judge