



## CIRCUIT COURT OF SOUTH DAKOTA SIXTH JUDICIAL CIRCUIT

HUGHES COUNTY COURTHOUSE  
P.O. BOX 1238  
PIERRE, SOUTH DAKOTA 57501-1238  
(605) 773-3711  
Fax: (605) 773-6492

CHRISTINA L. KLINGER  
Hughes County Courthouse  
PO. Box 1238  
Pierre, SD 57501  
(605) 773-4014  
[Christina.klinger@ujs.state.sd.us](mailto:Christina.klinger@ujs.state.sd.us)

JESSICA PAULSEN  
Court Reporter  
(605) 773-8227  
[jessica.paulsen@ujs.state.sd.us](mailto:jessica.paulsen@ujs.state.sd.us)

Kerri Cook Huber  
Gunderson, Palmer, Nelson & Ashmore, LLP  
PO Box 8045  
Rapid City, SD 57709  
kchuber@gpna.com

Circuit Judges:  
Honorable Bobbi J. Rank  
Honorable M. Bridget Mayer  
Honorable Margo D. Northrup

Magistrate Judge:  
Honorable Tara L. Adamski

Circuit Administrator (Pierre):  
Heather E. Covey

Chesney Arend  
Sixth Circuit Law Clerk  
[Chesney.arend@ujs.state.sd.us](mailto:Chesney.arend@ujs.state.sd.us)

Michael Simpson  
Julius & Simpson, LLP  
1600 Mountain View Road, St 110  
Rapid City, SD 57702  
mike@juliussimpson.com

February 15, 2023

RE: 32CIV22-153; Menard Inc., Praetorian Ins. Co. v. Lawrence Graham

### MEMORANDUM OPINION

Menard, Inc. and Praetorian Insurance Company (collectively referred to as Employer) appeal from a decision of the South Dakota Department of Labor (Department) in favor of Lawrence Graham (Graham). The Department concluded that Graham proved his work-related injury was and remained a major contributing cause of Graham's nosebleed condition and need for medical treatment and that Employer was responsible for worker's compensation benefits. The Court heard oral argument on February 8, 2023. After reviewing the administrative record and considering the arguments of the parties, the Court now issues this Memorandum Opinion affirming the Department's decision.

### FACTS

Graham grew up in Scotland and left high school at the age of 16. Graham enlisted in the British Army on December 7, 1984 and served in the infantry and as a physical training instructor

from 1985 to 1998. As a result of this service, Graham suffered from post-traumatic stress disorder (PTSD). For four years while in the army, Graham boxed once a year for a week in a competition between various companies within his battalion. In 1997, Graham married his wife, Rana. After leaving the military, Graham worked in England as a security guard for different stores. In 2008, Graham relocated with his wife to her hometown of Rapid City, SD.

In 2011, Graham began working for Dakota Panel, which is part of Menard, Inc. During all relevant times Menard, Inc. was insured for worker's compensation purposes by Praetorian Insurance Company. On January 26, 2015 Graham was on the ground cleaning a metal roller on a laminate machine when a 13-inch-long metal safety bar weighing 2.7 pounds fell and hit him on the head. Employer completed a First Report of Injury (FRI) form on the same day. The FRI stated that Graham was changing a roll at the laminate machine when an attachment fell and hit him on the back of the head. Graham initially denied treatment but reported reoccurring headaches, dizziness, and nosebleeds within at least two days of the incident. After the incident, Graham noticed a crack in the left lens of his glasses and wore a spare pair until he could replace them. Graham reported he was not sure whether he lost consciousness upon impact, but he believed he fell forward and hit his face on the concrete floor within the machine.

There is record that Graham was seen at Community Health Center on January 27, 2015. In this note, Graham did not complain of headaches or nosebleeds. Graham's reported chief complaint was "original prior medical history." The Department relied on the note in its briefing. Graham questioned whether this note was entirely his because he asserted there was evidence that the note had information on it from another patient. The note reported an ECG, fecal occult blood test and colonoscopy were performed, and reported the patient had IBS and arthritis. There was no indication in any of Graham's other medical records that he had heart issues or IBS. The medical record was never mentioned by any of the doctors in this case. The note provided an encounter date and time, and it does provide some information that would align with Graham's past medical history, but the note did not contain a review of symptoms, did not have objective findings, did not have an assessment, and did not have a plan. The record was considered with the rest of Graham's medical records, but it was not in and of itself determinative of the issues at hand.

On January 28, 2015, Employer's resource coordinator wrote an email stating Graham had experienced a bump on the back of his head but that he was on pain medication for his arms, so he would be fine. The email also noted a few nosebleeds since the injury occurred. On February 2, 2015, a coworker took Graham to Black Hills Urgent care with a chief complaint of constant headache that began on January 26, 2015. Graham described the severity of his condition as moderate. At the clinic, Graham also reported pain, blurred vision, dizziness, nausea, and nosebleeds. He reported having 12-14 nosebleeds per day. Graham was seen by a physician assistant (PA) who did not note any wounds on Graham's scalp, face or head. The PA stated Graham was hit in the apical head with a heavy bar and that Graham was near fainting and vomiting. The PA was concerned about a possible intracranial bleed and scheduled a CT scan, which was returned normal without hemorrhaging in Graham's brain. Graham advised the PA that he did not think he passed out at the time of the accident, but he was not sure. During this visit, Graham reported taking hydrocodone-acetaminophen as needed for hand pain.

On February 3, 2015, Graham was seen at Urgent Care by another PA. The PA noted that Graham still had nosebleeds and headaches every once in a while and described his condition as mild. The exam noted mild swelling of Graham's nasal turbinates with an abnormality in his nasal mucosa/septum/turbinate. The PA discussed her opinion with Graham that she thought the

nosebleeds were unrelated to the work incident due to the locations involved. Graham was released to return to work the same day.

Graham was seen at Rapid City Community Health Center by a Certified Nurse Practitioner (CNP) on February 20, 2015. Graham's primary complaint was a cough; however, the CNP noted that Graham was struck on the head and was unsure if he lost consciousness. Graham stated he "woke up" lying on his left side. Graham and Rana reported that Graham had daily nosebleeds that they believed were related to the work injury. Rana recalled that a doctor told them Graham likely had a concussion. The CNP noted Graham had a tender area on his right lateral occiput area and had a trauma to the top and right side of the head. The CNP's exam showed Graham had a nasal malformation with a prominent nasal bridge with a slight left deviation of the distal end and there was evidence of a small amount of clotted blood in his right nares. The CNP noted a possible nasal fracture. On February 23, 2015, the CNP noted a plan to have an x-ray done of Graham's nose. The x-ray findings showed that Graham's nasal bones appeared normal with no fractures or soft tissue swelling. There was no significant nasal septal deviation, but there was moderate mucosal thickening involving the left maxillary sinus with possible air-fluid level which suggested sinusitis.

Graham returned to Community Health Center on May 5, 2015 due to hitting his head three months prior and having continued headaches and nosebleeds. Graham reported between five and six nosebleeds in a single day and that each nosebleed lasted from 5 to 10 minutes. Graham also reported dizziness, neck pain and headaches that he described as "constant with no relief with narcotic medications." The CNP recommended a sinus CT, a head CT and referral to an ear, nose and throat (ENT) specialist for the nosebleeds. The CT scan found only that there was minimal sinus mucosal thickening.

Graham was seen by ENT specialist, Dr. Jay White with Rapid City Medical Center on May 11, 2015. Dr. White noted Graham had been hit on the head at work three months prior and had recent trauma to his nose. On May 12, 2015, Dr. White performed a nasal endoscopy and cauterized areas within Graham's nose to treat the nosebleeds. On May 15, 2015, Graham reported that his nosebleeds stopped after the May 11 cauterization. It is unclear in the record when Graham's nosebleeds started again; however, he reported them as early as May 29, 2015. On May 15, 2015, Graham also reported that he continued to have left facial pain, posterior head pain and neck pain as well as blurry vision in his left eye. Graham asserted that these symptoms started after his work injury in January and were progressively getting worse. On May 28, 2015, Graham had an MRI, which revealed a single nonspecific left frontal white matter lesion. Radiology recommended another MRI in six months.

Graham was assessed by neurologist Dr. Steven Hata on July 22, 2015 for left eye blindness that developed after a concussion. Graham reported visual problems, headaches and epistaxis. Dr. Hata noted Graham was seen by an eye doctor who concluded there were no issues with his eye. Dr. Hata suspected the blindness was psychogenic and that Graham's headaches also had a psychogenic factor.

Graham had an independent medical examination (IME) with neurologist Dr. Robert MacLachlan at Neurology Associates on September 1, 2015. Graham reported he had been hit on the top of the head by a metal bar while cleaning a roller of wood laminate machine while at work. Graham was unable to remember whether he lost consciousness but did report falling forward, hitting his face on the concrete floor, chipping his glasses and swelling to his nose. Graham reported left eye vision loss, headaches, sleepiness, personality changes and nosebleeds following the work injury. Graham reported having about four nosebleeds a day and he suggested that he thought increased activity caused the nosebleeds. Graham reported nosebleeds from both nostrils that

stopped after 20 minutes. Dr. MacLachlan noted that Graham had not missed work since the injury and that he was performing a seated job of grading laminates as they passed by on a conveyor. Dr. MacLachlin opined that Graham was capable of working and that his work activity was hindered by nosebleeds, not a neurological deficit, and that Graham's left eye vision loss was embellished as the neurological examination was inconsistent. He did not believe there was a need for treatment for Graham's headaches or personality complaints and recommended that the epistaxis should be treated.

In the fall of 2015, Graham left Employer and began working at K-mart as a loss prevention manager. On October 28, 2015, Graham presented at Community Health Center with a chief complaint of left eye pain and irritation. He told the CNP that one of his coworkers sprayed chemical in his eyes on October 21, 2015 while at work. He stated that he was already having issues with limited vision in his left eye, so he was unable to discern whether he had any changes in vision. He requested a neuropsychological evaluation due to increasing irritability, increased moodiness, and needing more sleep since his original head injury. He told the CNP that he was recommended for a neuropsychological evaluation to evaluate for post-concussion syndrome.

Graham saw Dr. Scott Cherry at Regional Rehab Institute for a neuropsychology evaluation due to possible head injury with concussive syndrome and effects on February 1, 2016. Graham reported loss of consciousness and feeling dazed and confused at the time of the work injury, two to three nosebleeds per day, headaches in the left frontal region and visual loss in the left eye. Graham denied a history of head injuries. Dr. Cherry opined Graham's injury was likely impacted by his affective status, which was assessed by a questionnaire and indicated Graham was an individual who was likely to present somatic complaints of a bizarre nature that may result in psychiatric distress. Dr. Cherry's neuropsychological evaluation indicated Graham displayed a variable neurocognitive functional level not consistent with an organic brain syndrome, mild traumatic brain injury or concussion. Dr. Cherry recommended a psychiatric evaluation and psychotropic medications. On March 1, 2016, Graham once again reported having frequent nosebleeds at Community Health Center. On May 18, 2016, Graham presented at Black Hills Regional Eye Institute for vision loss in the left eye and reported he could only see "bright light" with his left eye. He was referred by his optometrist for possible nerve damage. His condition was documented as presumed functional vision loss and Visual Evoked Potentials (VEP)<sup>1</sup> testing at Vision Source Specialists was ordered. On August 1, 2016, Black Hills Regional Eye Institute reported that they were unable to reach Graham by phone, but they mailed him a letter asking him to contact Vision Source Specialists.

He returned to Community Health Center November 29, 2016 and reported that he was experiencing nosebleeds at an increased frequency. Dr. White performed an endoscopic nasal septal and turbinate biopsy with control of epistaxis on December 16, 2016 where Dr. White noted "tissue cobble stoning and mild irregularity to nasal mucosa" in the right septum and "bilateral turbinate hypertrophy." Dr. White noted that Graham had a significant nasal septal deviation on the right side of his nose. On December 28, 2016, Graham saw Dr. Howard for a follow-up. Graham reported bleeding and some pain. A follow-up nasal endoscopy was completed by Dr. White on January 30, 2017 and Graham reported nosebleeds in his left nostril about twice per day. Mr. Graham had been using a nasal rinse and applying an ointment, but Dr. White also prescribed Premarin cream for fourteen days and ordered a sinus CT which showed considerable mucosal thickening with a small

---

<sup>1</sup> VEP testing measures the signals from an individual's visual pathways by tracking the time it takes for visual stimulus to travel from the eye to the occipital cortex.

amount of fluid in the inferior frontal and ethmoid sinuses; several small retention cysts in the right sphenoid and maxillary sinuses, and a slight, rightward deviation of the anterior nasal septum.

On January 30, 2017, Dr. White noted Graham continued with complaints of nosebleed from his left nostril twice a day and performed a diagnostic nasal endoscopy procedure. On February 27, 2017, Dr. White performed a septoplasty with turbinate reduction and functional endoscopic sinus surgery.<sup>2</sup> Dr. White noted Graham's septum was deviated to the left and had considerable mucosal thickening with a small amount of fluid in the inferior frontal ethmoid. On March 9, 2017, Dr. White performed a septoplasty and bilateral turbinate submucosal resection and functional endoscopic sinus surgery. On March 27, 2017, Dr. White performed a diagnostic nasal endoscopy on Graham. On May 31, 2017, Dr. White saw Graham who continued to complain of nosebleeds. On October 11, 2017, Graham reported bilateral nosebleeds and headaches to Dr. White.

Mr. Graham and his family returned to the UK in May of 2018. He began work at Greensleeves as a lawn care specialist until five months before the worker's compensation hearing when he began work as an enforcement officer for Bristol City Council. Dr. Rob Schleiffarth, ENT specialist, conducted an IME on Graham on May 16, 2018. Dr. Schleiffarth reported that Graham stated he had been struck on the back of the head and was unsure whether he lost consciousness at the time. Graham asserted that he began having nosebleeds from the left side of his nose the next day. Graham reported that his nosebleeds occurred every other day and lasted 5 to 10 minutes until stopped by direct pressure. Dr. Schleiffarth performed a nasal endoscopy which revealed no prominent vessels or active breathing. Dr. Schleiffarth opined that the treatments Graham received were reasonable but that they were not "linked" to the work injury.

Graham filed a Petition for Hearing on August 31, 2017. Employer admitted that a work injury occurred but denied that Graham was entitled to any worker's compensation benefits. The Department held a hearing on December 17, 2021. Graham testified at the hearing before the Department. At the time of the hearing, Graham was living in England and his testimony occurred remotely via Zoom. Graham testified that prior to his injury in January 2015, he never experienced nosebleeds. Graham testified during direct examination that on January 26, 2015, he was working on the laminate machine cleaning the metal rollers to remove debris to ensure the machine was working properly when a yellow bar fell down on him and made contact with his head when he was getting up from underneath the machine. Graham testified that this was all he could remember about the accident aside from the fact that he knew the left lens of his glasses broke during the incident because they were cracked after the incident. He testified that after the incident, he "just got up and carried on." Graham also testified on direct examination that as of the date of the hearing, he still experienced about four to five nosebleeds per month lasting between 10 and 15 minutes each. Graham clarified during his testimony that he was not claiming disability, only payment of worker's compensation for medical bills associated with his nosebleeds. Graham testified during cross examination that the reason he did not seek medical treatment the day of the injury was because he was taking pain medication for an unrelated injury so he "just carried on working." He also testified during cross examination that his job with Greensleeves required him to wear protective gear while spraying weed killer and lawn fertilizer.

Rana also testified at the hearing before the Department. Rana testified that she was married to Graham since 1997 and had never observed him have nosebleeds before January 26, 2015. Rana testified that she was very concerned about her husband after he was injured at work because he was having such bad headaches and nosebleeds. She testified that he came home from work and was

---

<sup>2</sup> A septoplasty is a corrective surgical procedure to straighten a deviated nasal septum.

pale and told her he felt sick, and she stated that she observed his nose suddenly start “gushing with blood.” Rana testified during direct examination that she was very concerned about Graham’s headaches that week. She testified that she monitored him for a concussion by waking him up while he was asleep. She stated they did not go to the doctor that first night because they were worried about how they would afford it because Graham had no health insurance. Finally, Rana testified that Graham was still experiencing frequent nosebleeds at the time of the hearing. Graham was 53 years old and lived in Weston-super-Mare, England at the time of the Department hearing.

The Department found that the work-related injury from January 26, 2015, was and remained a major contributing cause of his nosebleed condition and that the medical treatment received was reasonable and necessary. The Department held that Employer was responsible for medical expenses plus interest as well as future workers’ compensation benefits. Employer timely appealed the Department’s decision. The Court heard oral argument on February 8, 2023. After fully considering the record on file and argument of the parties, the Court issues this memorandum opinion affirming the Department’s decision.

## **ISSUES**

**I. WHETHER THE DEPARTMENT ERRED IN FINDING THAT GRAHAM’S WORK INJURY WAS AND REMAINS A MAJOR CONTRIBUTING CAUSE OF HIS IMPAIRMENT AND NEED FOR TREATMENT**

**II. WHETHER THE DEPARTMENT ERRED IN FINDING GRAHAM’S MEDICAL TREATMENT WAS REASONABLE AND NECESSARY.**

## **LEGAL STANDARD**

This Court’s review of a decision from an administrative agency is governed by SDCL 1-26-36.

The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in light of the entire evidence in the record; or

(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment.

SDCL 1-26-36. When findings of fact are made based on live testimony, the clearly erroneous standard applies. *See Brown v. Douglas School District*, 2002 SD 92, ¶ 9, 650 N.W.2d 264, 267–68. Deference and great weight are given to the hearing examiner on fact questions. *Id.* at 267. The Department’s factual determinations based on documentary evidence, such as medical records and depositions, is reviewed de novo. *Hughes v. Dakota Mill and Grain, Inc.*, 2021 S.D. 31, ¶ 12, 959 N.W.2d 903, 907 (further citations omitted). Here, the Court reviews the Department’s factual findings and credibility determinations based on live testimony for clear error. The Department’s factual determinations based on documentary evidence are reviewed de novo.

## ANALYSIS

### *I. THE DEPARTMENT DID NOT ERR IN FINDING THAT GRAHAM’S WORK INJURY WAS AND REMAINS A MAJOR CONTRIBUTING CAUSE OF HIS IMPAIRMENT AND NEED FOR TREATMENT.*

Graham must prove by a preponderance of the evidence that he is entitled to worker’s compensation benefits. *Darling v. West River Masonry, Inc.*, 2010 S.D. 4, ¶ 11, 777 N.W.2d 363, 367. To be awarded benefits, an employee must first establish that he has suffered an “injury arising out of and in the course of the employment[.]” *Id.* *See also Horn v. Dakota Pork*, 2006 SD 5, ¶ 14, 709 N.W.2d 38, 41 (“Our law requires a claimant to establish that his injury arose out of his employment by showing a causal connection between his employment and the injury sustained”). “This causation requirement does not mean that the employee must prove that [his] employment was the proximate, direct, or sole cause of [his] injury; rather the employee must show that [his] employment was a ‘contributing factor’ to [his] injury.” *Orth v. Stoebner & Permann Const., Inc.*, 2006 S.D. 99, ¶ 32, 724 N.W.2d 586, 592-93 (quoting *Brown*, 2002 SD 92, ¶ 19, 650 N.W.2d at 270).

It is undisputed that Graham’s injury was work-related. There is no evidence that Graham had a pre-existing condition that caused his chronic nosebleeds. There is evidence that Graham participated minimally in annual, week-long recreational boxing tournaments during his time in the British Army, though there is no evidence that that boxing created a nosebleed let alone a nosebleed condition and Graham testified numerous times that he never experienced nosebleeds until after the January 26, 2015 work-related injury. The parties dispute whether Graham’s injury

suffered on January 26, 2015 is and remains a major contributing cause to his chronic nosebleed condition.

Graham was not required to prove that the January 26, 2015, injury was at least 50% attributable to his condition and need for treatment to show that the injury was a major contributing cause of his condition. *Hughes v. Dakota Mill and Grain Inc.*, 2021 S.D. 31, ¶ 20, 959 N.W.2d 903, 909. Nor was Graham required to prove that the January 26, 2015 injury was *the* major contributing cause of his condition and need for treatment. *Orth*, 2006 S.D. 99, ¶ 41-42, 724 N.W.2d at 595-96 (citation omitted). Instead Graham was required to prove that the January 26, 2015 injury was and remains *a* major contributing cause of his disability, impairment or need for treatment.

Causation must be established by a reasonable degree of medical probability. *Id.* Graham offered deposition testimony from Dr. White, Graham's treating physician. Employer offered the deposition testimony of Dr. Schleiffarth who conducted an IME of Graham and Erik Powers, an independent expert in biomedical engineering. Because all of the expert witnesses' testimony was presented by documentary evidence as deposition testimony or medical records, the Court reviews that evidence *de novo*. *Id.*

Dr. White was the primary treating ENT physician and surgeon for Graham from the time Graham was injured to the time he returned to the UK. Dr. White's treatments are outlined at length above. Dr. White was deposed on October 10, 2018. Dr. White testified that he conducted a general physical exam which did not point out any abnormal findings. He also testified that he conducted a nasal endoscopy which allowed Dr. White to examine Graham's nasal cavities with much more detail. The endoscopy showed evidence bilaterally of hypertrophic blood vessels on both the right and left sides of the nose which indicates inflamed and dilated blood vessels that are more likely to bleed. The endoscopy also showed significant nasal septal deviation to the right. Dr. White testified that the history Graham provided on February 2, 2015 was consistent with Dr. White's assessment. During his deposition, Dr. White stated that he found Mr. Graham's story about his injury to be believable and he expressed that he had no reason to believe that Mr. Graham was not telling him the truth about his chronic nosebleeds. Dr. White also testified that after reviewing other medical records such as the one from Dr. MacLachlan the neurologist, Graham's story remained consistent when he explained his glasses breaking and his face being injured. Dr. White testified that based on the description of the events, the bar likely hit Graham on the head and he fell to the ground and in the process the bar either hit him and he rolled over and hit his nose with the bar, or he fell to the ground and hit his face on something after the bar hit him. Dr. White testified that the nasal swelling and redness noted in Graham's February 3, 2015 exam was consistent with Graham hitting his nose the week prior. Further, Dr. White testified that he recalled at least once or twice when he was examining a different patient at the office when Graham presented at the clinic with a nosebleed and was "bleeding all over" indicating that he experienced and witnessed firsthand at least one of Graham's nosebleed episodes.

Dr. White testified that because Graham's story remained consistent and because of all the circumstances surrounding Graham's condition, Dr. White believed that Graham truly injured the top of his head. Dr. White also believed that additionally, Graham had a secondary nasal-associated trauma injury, which was a significant precipitating event that resulted in Graham's nasal problems and nosebleeds. Finally, Dr. White testified that he believed within a reasonable degree of medical probability that Graham's work injury was a major contributing cause of Graham's condition because "the findings are just consistent with the timeline, the nature of the injury, and the subsequent conditions, bleeding, pain, pressure that followed. It just fits with an inflammatory



condition of the nose, of the internal structures of the nose following some sort of trauma.” When asked why a single incident could trigger chronic nosebleeds, Dr. White explained that chronic inflammation can occur following trauma to the nose, and that chronic inflammation manifests as blood vessel dilation, which predisposes a person to bleed. Dr. White explained that in some cases, like Graham’s case, the bleeding can be severe, spontaneous, and intermittent. Dr. White also testified that he believed within a reasonable degree of medical probability that Graham’s treatment was reasonable and necessary. The Department found Dr. White’s opinion persuasive, and Dr. White’s assessment of the injury and nosebleed condition to be probable.

Dr. White’s opinion and conclusion that Graham’s work injury was a major contributing cause of Graham’s nosebleed condition is persuasive. Dr. White treated Graham’s nosebleed condition for two years and Dr. White testified that over the course of those two years, Graham’s story surrounding the event was consistent and believable. This testimony is important because Employer questioned Graham’s credibility and consistency. Further, not only was Dr. White Graham’s treating physician for over two years, Dr. White witnessed one of Graham’s nosebleeds firsthand on at least one occasion. Finally, Dr. White’s opinion is logical and consistent with the medical evidence and the testimony of Graham and his wife at the hearing.

Dr. Schleiffarth, an ENT specialist with West River Ear, Nose & Throat, saw Graham in clinic for an IME on May 14, 2018 to assess Graham’s recurrent nosebleeds. Graham reported that he had been having nosebleeds from the left nostril since he was injured at work on January 26, 2015 when he was struck in the back of the head by a metal bar. He advised Dr. Schleiffarth he was unsure whether he lost consciousness upon impact. Dr. Schleiffarth reviewed all of Graham’s medical records associated with the injury.

Dr. Schleiffarth’s report stated that in his experience, it is very rare and unlikely that the head injury to the back of Graham’s head would have caused chronic nosebleeds. Dr. Schleiffarth also reported that he believed it was unlikely that some sort of pre-existing condition and the work injury combined to cause the nosebleeds. During his July 16, 2021 deposition, Dr. Schleiffarth testified that his understanding of the injury was that Graham was hit on the top of the head with a metal bar while at work and Graham was unsure whether he lost consciousness. Dr. Schleiffarth testified during his deposition that he came to his conclusion that the work-related injury likely did not cause Graham’s nosebleeds because he did not interpret any residual trauma on his nose, there was no bone trauma or bone fractures revealed on any imaging scans, and because when Dr. Schleiffarth conducted a nasal endoscopy on Graham during the IME there was nothing to suggest there was an injury or trauma to Graham’s nose. Dr. Schleiffarth testified that the redness and inflammation inside Graham’s nose on February 3, 2015 was “potentially significant” because “traumatic injury to the nose can cause these findings.” He also testified that the timeline between Graham’s work injury and his nosebleeds supports causation.

Dr. Schleiffarth also testified during his deposition that Graham’s nosebleeds were one of the most recurrent and severe cases of nosebleeds he has dealt with out of approximately over 2,000 patients suffering from nosebleeds. He testified during his deposition and stated in his report that he treats about 10 to 15 nosebleed patients per month, and he would likely have taken the same steps for treatment, though he testified he never conducted a sinus surgery to treat nosebleeds. Finally, he testified that all his opinions were made within a reasonable degree of medical probability. During his deposition on re-cross examination, Dr. Schleiffarth stated that it was not uncommon for someone who was struck in the head to report that they were unsure whether they lost consciousness. Dr. Shleiffarth’s testimony that the timeline between Graham’s work injury and his

nosebleed supports causation which in turn supports Dr. White's opinion and conclusion that Graham's work-related injury was a major contributing cause of his nosebleed condition.

Erik Power is a registered professional mechanical engineer with experience in biomedical engineering. Power worked as a senior associate with Hayes + Associates, Inc. in Corvallis, Oregon. At the time of his report, Power was also working to complete a PhD in mechanical engineering with a concentration in biomechanics. Power submitted a report on April 2, 2019 to assess to a reasonable degree of engineering and biomechanical certainty whether the impact from a steel pipe to the back of the head would cause Graham's reported symptoms—concussion, chronic nosebleeds, headaches, and vision loss in his left eye. Power reviewed Graham's medical records and performed a physics-based biomechanical analysis and calculated the maximum possible forces and motions that would have been sustained by Graham's head during the incident. Power then compared the forces and motions against published injury tolerance limits, as well as those generated during Graham's more common everyday activities. Power concluded that the forces and motions that would have been sustained by Graham's head at the time of the injury "would have been far below published injury tolerance limits and also well within the physiological range of his everyday activities." Power concluded that Graham had a very low probability of experiencing even a mild concussion from the impact.

During his August 24, 2021 deposition, Power testified that it is not his practice to review medical records or deposition testimony of medical doctors in their entirety, but he has a nurse on staff in his office that highlights pieces of the medical records and testimony that would be most relevant for his analysis such as height and weight of the plaintiff and any evidence of external injury. Power testified about concussions and the requisite force needed to cause a concussion, but he also testified that he had been unaware that Graham's treatment was primarily for recurrent and seemingly uncontrollable nosebleeds. On direct examination, Power testified that he was not rendering any medical opinions and no specific causation opinions. Power's testimony is less persuasive than Dr. White's opinion and Dr. Schleiffarth's opinion because he is not a medical professional who is capable of rendering an opinion to a reasonable degree of medical probability. Thus, Power's analysis is given significantly less weight when determining whether Graham has met the burden of proof to show that his work related injury was a major contributing cause of his nosebleed condition.

Graham was deposed on December 8, 2018. Graham testified that the injury occurred when he was working on the laminator laminating wood. He testified that something got stuck on the metal rolls, so he had to get the roll clean and he was underneath the machine when the metal safety bar fell and hit him on the head, causing him to fall over, and that's all he could remember. He testified that he did not remember falling to the ground after the incident. He testified that he took eight dydramol pills per day for headaches and that he never had headaches before the incident at work. He testified he experienced headaches every single day and his headaches and PTSD made it hard for him to sleep more than three and a half hours per night. Graham also testified that he was experiencing nosebleeds four or five times a week at the time of his deposition. Graham also testified during the evidentiary hearing. Employer calls Graham's credibility into question by asserting that his testimony during the Department's evidentiary hearing was inconsistent with his deposition testimony and the submitted medical reports. Specifically, Employer argues that Graham's testimony regarding where he was hit on the head, whether he hit his face on something after the bar hit him, and whether or not he lost consciousness was inconsistent. Employer ultimately questions whether Graham's injury at work could have happened in the manner that Graham reports it happened. Employer provides this argument because the testimony from the two ENT

physicians indicates that it would be less likely that the work-related injury caused the recurrent and chronic nosebleeds if Graham did not actually hit his nose and face during the fall.

“Witness credibility is a question of fact.” *Baier v. Dean Kurtz Const., Inc.*, 2009 S.D. 7, ¶ 12, n. 1, 761 N.W.2d 601, 604-05. “Even where specific credibility findings are absent, we defer to the Department’s overall assessment of the weight of the evidence when it is based upon live witness testimony.” *Billman v. Clarke Machine, Inc.*, 2021 S.D. 18, ¶ 28, 956 N.W.2d 812, 820. When findings of fact are made based on live testimony, the clearly erroneous standard applies. *See Brown*, 2002 SD 92, ¶ 9, 650 N.W.2d at 267–68. “A finding is ‘clearly erroneous’ when the reviewing court is left with the definite and firm conviction that a mistake has been committed.” *Eagle Ridge Estates Homeowners Ass’n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 12, 827 N.W.2d 859, 864 (further citations omitted).

The Department did not make a blanket-statement finding on Graham’s credibility, but the Department did make a specific finding that Graham’s account of how he broke his glasses was credible. The Department also made a finding that while Graham did state he was hit on the head or the top of the head on February 2, 2015—a different date than the reported work-related injury—the variations in his account of the injury over time have been consistent with someone who suffered an injury to the head. Based on all of the evidence presented, the Department’s findings based on Graham’s live testimony were not clearly erroneous. Employer’s primary arguments on causation center around Graham’s credibility when testifying and reporting what happened during the incident. This Court gives deference to the Department who heard Graham’s live testimony. The Court is not definitely and firmly convinced that a mistake has been committed. The Department, in relying on the documents and live testimony, found that Graham had proven by a preponderance of evidence that his January 26, 2015, injury was and continued to be a major contributing cause of prolonged need for treatment. While the Department’s ultimate decision on Graham’s credibility was based on both live testimony and documentary evidence, the Court’s review of the hearing transcript, deposition transcript, and medical records support Graham’s credibility, also.

It follows that Graham proved by a preponderance of the evidence that his January 26, 2015 injury was and remains a major contributing cause of his chronic nosebleed condition and, continued treatment. His deposition and testimony before the Department did not critically change. His description of his symptoms has been consistent since his injury. The timing between Graham’s first nosebleed and the work-related head injury is uncanny; Graham had no issues with nosebleeds until after the head trauma he experienced at work. Following the work-related head trauma, Graham experienced chronic nosebleeds. This conclusion is supported by Dr. White’s deposition testimony and his ultimate conclusion made within a reasonable degree of medical certainty that the work-related injury is and remains a major contributing cause of Graham’s condition. Graham has proven by a preponderance of the evidence that his January 26, 2015, work-related injury was and remains a major contributing cause of his condition, and prolonged need for treatment.

## ***II. THE DEPARTMENT DID NOT ERR IN AWARDING CURRENT MEDICAL EXPENSES BECAUSE GRAHAM’S MEDICAL TREATMENT RECEIVED WAS REASONABLE AND NECESSARY.***

The Department found that Employer is responsible for the medical expenses, plus interest, as well as future medical treatment and other future worker’s compensation benefits. Employer

asserts that while Graham's treatments were reasonable and necessary following the January 26, 2015 injury, all benefits due and owing had been paid. Employer references Dr. Schleiffarth's testimony that as a result of the January 26, 2015 injury, no future medical treatment is necessary, and Graham has no limitations or reductions in his ability to work due to the injury. Employer argued that Dr. White deferred to Graham's tolerance of the nosebleed condition when considering whether future treatment was necessary which indicated that Employer's responsibility to pay for those treatments lapsed.

SDCL 62-4-1 states in relevant part: "the employer shall provide necessary first aid, medical, surgical, and hospital services, or other suitable and proper care including medical and surgical supplies, apparatus, artificial members, and body aids during the disability or treatment of an employee within the provisions of this title." Under South Dakota law, it is in the treating doctor's province to determine what treatment may be reasonable or suitable and proper given the circumstances. *Streeter v. Canton Sch. Dist.*, 2004 S.D. 30, ¶ 25, 677 N.W.2d 221, 226 (internal citations omitted). The burden is on the Employer to show that the treatment is not necessary or suitable and proper. *Stuckey v. Sturgis Pizza Ranch*, 2011 S.D. 1 ¶ 17, 793 N.W.2d 378, 387-388.

Employer did not provide evidence that past medical treatment received was unreasonable given the circumstances. Employer asserts that any additional treatment options discussed by Dr. White and Dr. Schleiffarth *may be* unreasonable or unnecessary. Dr. White stated in his deposition that he believed the treatment thus far was both reasonable and necessary. Dr. White also testified that Graham's condition was likely to continue. He suggested that the next step would be a more invasive form of nasal and sinus surgery and he listed three different procedures, all of which he stated could be necessary, depending on Graham's assessment of the costs and benefits of the procedures.

Dr. Schleiffarth testified during his deposition that he likely would have provided the same care to Graham through the same steps that Dr. White took if he was the initial treating Ear, Nose and Throat Physician. During his deposition, Dr. Schleiffarth classified the treatment as "the normal progression of treating a nosebleed." Dr. Schleiffarth reported that Mr. Graham's treatments to date (over-the-counter nasal sprays, cautery, biopsies, septal surgery, and sinus surgery) had been reasonable given Graham's symptoms. At the time of the consultation, Dr. Schleiffarth reported that he did not believe Graham had reached maximum medical improvement for his condition and suggested that a sphenopalatine artery ligation would remedy Graham's nosebleeds.

This Court determined that Graham's work-related injury on January 26, 2015 was a major contributing cause of Graham's nosebleed condition. Thus, any related medical expenses determined to be reasonable or suitable and proper by Graham's treating physician shall be paid by Employer. Employer's argument that the potentially discretionary nature of future procedures to alleviate Graham's nosebleeds eliminates Employer's need to cover the cost of surgery is not enough to overcome Employer's burden to show that said procedures may be unreasonable or not suitable and improper. Employer is responsible for the medical expenses, plus interest, as well as future medical treatment related to Graham's nosebleed condition.

## CONCLUSION

Employer argued the Department erred when it determined Graham proved by a preponderance of the evidence that his January 26, 2015, injury was and remains a major contributing cause of his chronic nosebleed condition, need for additional treatment, and potential need for surgery. Employer challenged the credibility of Graham and questioned his inconsistent testimony regarding the work-related injury, ultimately arguing that Graham's work-

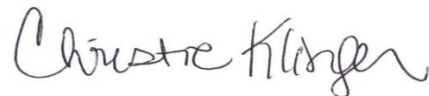
related injury did not cause his chronic nosebleed condition. Graham proved by a preponderance of the evidence that his January 26, 2015, work-related injury was and remains a major contributing cause of his condition, need for treatment, and impairment.

The Department found that Graham's testimony during the evidentiary hearing was credible and supported by testimony from Dr. White. Dr. White's deposition testimony and the medical records were supported by the evidence and was more persuasive than Dr. Schleiffarth's testimony and even more persuasive than Mr. Power's testimony regarding the biomedical mechanics of Graham's fall. Dr. White's testimony was based on a proper foundation. He is a trained ENT physician, he treated Graham, he had the greatest understanding of Graham's medical history, and he actually experienced firsthand at least one of Graham's nosebleed episodes. Graham did not critically change his testimony; he regularly reported and testified that he experienced a blow to the head and was unsure whether he lost consciousness and since then has experienced regular and frequent nosebleeds—something he had never experienced prior to the work-related injury.

Employer's argument that the potentially discretionary nature of future procedures to alleviate Graham's nosebleeds eliminates Employer's need to cover the cost of surgery is not enough to overcome Employer's burden to show that said procedures may be unreasonable or not suitable and improper. The issue of specific future treatment is left for another day, if and/or when the procedure is recommended by a treatment physician based on Graham's condition. Employer is responsible for the medical expenses, plus interest, as well as future medical treatment and other worker's compensation benefits related to Graham's January 26, 2015 work related injury. The Department's decision is affirmed, and a Judgment shall be entered consistent with this decision.

Dated this 15<sup>th</sup> day of February 2023.

BY THE COURT



---

Christina Klinger  
Circuit Court Judge