



**CIRCUIT COURT OF SOUTH DAKOTA  
SIXTH JUDICIAL CIRCUIT**

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**Re: Hughes County Civ. No. 15-317 Susan Roberts v. Casey's General Stores, Inc.,  
and EMCASCO**

**MEMORANDUM DECISION**

Susan Roberts appeals from the decision of the South Dakota Department of Labor in this worker's compensation case. The Department found that Roberts's reflex sympathetic dystrophy condition from her 2007 injury still persists, that 2011 work injury was not a major contributing cause of her current neck and headache condition, and that Roberts was not permanently and totally disabled due to either work injury. This Court affirms.

**BACKGROUND**

Susan Roberts ("Claimant") was 54 years old at the time of the South Dakota Department of Labor's ("the Department") hearing. Claimant worked as a manager and cashier for Casey's General Store, Inc. ("Employer") in Yankton, South Dakota. EMCASCO ("Insurer") is Employer's worker's compensation insurer.

### First Injury on March 6, 2007

Claimant's first injury occurred on March 6, 2007 when she was working in the kitchen of Casey's. She struck her right hand against a counter or a stainless steel sink. Her right hand then bounced and slammed between a door jam and door. Immediately, she felt pain in right hand and was unable to move her right ring finger without it locking or physically straightening it. She injured her right hand, right ring finger, and right long finger. Employer / Insurer admitted compensability.

Claimant sought treatment at Yankton Medical Clinic and was referred to Dr. Verdun of Yankton Bone, Joint, and Sports Medicine. She also saw Dr. LeeBurton, a hand specialist. Between June 2007 and February 2008, Dr. Verdun and Dr. LeeBurton performed a right finger tenovagotomy A1 pulley release surgery on her right ring finger (and a later revision of the same) and on her right middle finger. Claimant went through various therapies. Her fingers no longer triggered but still popped and continually caused pain.

In June of 2009, Claimant was complaining of right hand numbness and weakness. Repetitive motion made her symptoms worse. JMR 274. Dr. LeeBurton diagnosed Claimant with work-related carpal tunnel syndrome and performed a right carpal tunnel release. JMR 274. Insurer accepted compensability.

After surgery, Claimant still continued to have worsening pain and generally complained of right upper extremity pain. JMR 267-69. Dr. LeeBurton referred Claimant to Dr. Genoff at CNOS in Dakota Dunes for a second opinion. JMR 228-232. In December of 2009, Dr. Genoff documented that Claimant was describing the pain as tingling on the side of her right hand and fingers that would spread across the palm toward her thumb and even up her arm into the neck. JMR 229. Dr. Genoff found symptoms to be consistent with chronic pain syndrome. JMR 228. Dr. Cook and Dr. Johnson, pain specialists, agreed that Claimant had reflex sympathetic dystrophy ("RSD"), also known as complex regional pain syndrome ("CRPS"). JMR 377-81. Dr. Cook and Dr. Todd Johnson tried to treat Claimant's pain with ganglion blocks. JMR 368-80. Claimant continued to deny any left side pain or neurological problems. JMR 374. Claimant tried various treatments, therapies, ultrasound, medications, pain and aversion therapy, and nerve blocks, but she had no permanent relief of pain. Dr. LeeBurton calculated Claimant's impairment rating for her right ring finger is 59% and whole person is 6%, and her right middle finger at 11% impairment. JMR 266, 272.

In early 2010, Dr. Genoff and Dr. Johnson wanted a cervical MRI of Claimant believing that there may be a cervical component to her symptoms. JMR 374. On February 8, 2010, Dr. Genoff provided a second opinion, concurred with RSD assessment, did not consider Claimant a surgical candidate, and concurred with necessity of a cervical spine evaluation. JMR 220.

Employer / Insurer engaged Dr. Blow, a physiatrist, to conduct an independent medical examination ("IME"). In June 2010, Dr. Blow wrote a report. JMR 297-305. He opined that Claimant's RSD was work-related, but due to "her range of motion of her shoulder and neck, her history, and clinical course," there was no cervical component to explain her continued pain. Insurer denied the cervical MRI request. JMR 304.

As Claimant continued through treatments and therapies, her pain got worse. She began having shoulder pain. JMR 374. On April 13, 2010, Dr. Cook examined Claimant and notes, "NECK: the patient has pain with extension at approximately 20 degrees; pain with rotation as stated." JMR 372; 55 ("right side of the neck"). Dr. Cook basically treated Claimant monthly from July 2010 through 2013 for chronic pain throughout her body. JMR 3-70. Claimant continued to use opioid medications. Eventually, Dr. Cook also sought approval of a spinal cord stimulator. JMR 50; 57.

In response to this request, Insurer asked Dr. Blow to conduct a second IME on November 11, 2010. JMR 308-17. Claimant was experiencing pain from her wrist and elbow up into her head and neck. JMR 308. The pain was so bad that while she worked full-time without restrictions, she would cry in pain at work. JMR 308. Dr. Blow observed no hypersensitivity on her right side, and her upper extremity exam had significantly improved since June 2010, and she has good function of her right upper extremity. JMR 309. He evaluated that Claimant's hand strength was symmetrical, her hand color, texture, and temperature were symmetrical, and her nails looked good. Dr. Blow opined, "I think although [Claimant] may have had RSD in the past, it has completely resolved. She is at the end of healing for her [2007] work injuries[.]" JMR 310. Dr. Blow recommended that Claimant be weaned off of her opiate pain medications, Hydrocodone and Methadone. He recommended that she needs an electrical unit and glove for her hand but not a spinal cord stimulator. *Id.* Insurer denied the spinal cord stimulator based on Dr. Blow's November 2010 IME opining that her RSD had been resolved.

Dr. Cook disagreed with Dr. Blow and continued to treat Claimant for RSD. *See* JMR 56. Dr. Cook found differing strengths in her left and right arm, tenderness on her trapezius, and pain in her right hand. Claimant continued to complain of extreme burning pain (sometimes at 10 out of 10) to her right shoulder and right side of her neck, trouble sleeping, and swelling of her hand. *See* JMR 51-57. Dr. Cook continued to use steroid injections in the stellate ganglion nerve, and Claimant achieved temporary, minimal pain relief from these injections.

Dr. Blow examined Claimant a third time on October 5, 2011. Claimant complained of "tight and tender points in her elbow, posterior shoulder, and base of her neck[.]" and pain in her palms, fingers, and wrist. JMR 311. Claimant rated her burning and stabbing pain at 10 plus out of 10. She said it is hard to focus and

complete tasks because of the pain, she lost a significant amount of weight, she is dizzy, and she has started passing out or having “syncopal episodes,” on a weekly basis at work. Dr. Blow did not observe any swelling, but he opined that her right hand’s texture, color, moisture, nail growth, and hand strength were symmetrical. Dr. Blow reported that Claimant liked deep tissue therapy and preferred cold temperatures at home, which are *inconsistent* with RSD symptoms. JMR 316. Therefore, Dr. Blow opined that his examination findings and Claimant’s comments support his prior conclusion that Claimant’s past RSD was resolved in 2010.

### Second Injury on October 26, 2011

According to her testimony at the hearing, Claimant’s second injury occurred on October 26, 2011 when she was trying to retrieve a tote from the top of a stack of totes that were on the floor at Casey’s. HT. at 11. When she grabbed a tote from the top, 12 to 14 totes tipped over and fell on Claimant. *Id.* (also reported 27 total totes and all but 6 fell on her (JMR 321)). She could walk, so she drove herself to the clinic. She immediately sought treatment at Yankton Medical Clinic and saw Dr. Weber. *She reported that the totes hit her on the “top of her right foot, left knee, and left arm”* and “[s]he just complains of pain to her left forearm, left knee, and right foot.” JMR 321 (emphasis added). Dr. Weber assessed a mild abrasion on left forearm and diffused tenderness in her left elbow but “full range of motion noted with no paresthesias.” *Id.* Claimant’s left knee crepitated and had a positive patellar grind test, but medial and lateral ligaments remained intact. *Id.* Claimant’s right foot was tender but with no paresthesias and had full range of motion. *Id.* The “remaining limited physical exam was unremarkable.” *Id.* Dr. Weber assigned no work restrictions, ordered no tests (other than x-ray of left knee and right foot only), and believed Claimant could resume all activities as tolerated. Claimant claims that she and Dr. Weber agreed that because she was already going to see her pain doctor, Dr. Cook, in five days, that Dr. Cook would evaluate her “neck injury”. HT. at 14. *This claimed agreement was not noted in any of Dr. Weber’s records*, and Dr. Weber was not deposed.

She saw Dr. Cook on October 31, 2011 and told him that totes fell on her at work, but those medical records are also absent of any reported neck pain, neck injury, head impact, face contusion or bruising, or any shoulder injury or pain. JMR 44-45. In fact, Dr. Cook wrote that Claimant has “no change in symptoms” from her last visit on October 4, 2011. JMR 45. Dr. Cook, instead, continued to treat Claimant for her increased pain and RSD. He refilled her medications, requested a four-week follow up, and still wanted to proceed with a spinal stimulator trial. No exam, MRI, x-ray, or any test of Claimant’s neck or head was ordered.

On November 17, 2011, Claimant saw Dr. Brady at Yankton Medical Clinic and requested a note for time off because she had three syncopal episodes the day before. JMR 323 (syncopal episodes are “not terribly unusual for her”). At a follow-

up appointment, Dr. Weber opined that the syncopal episodes were not work-related. JMR 330, 332.

On November 28, 2011, Claimant visited Dr. Raval, a neurologist, who thought Claimant still had RSD. JMR 334. Claimant believed that she was passing out due to the pain. Dr. Raval assessed that the "etiology [of the syncopal spells] is not known." JMR 333.

On February 15, 2012, Claimant reported to Dr. Cook that she was "having increased headaches, and *neck pain* bilaterally that radiates across her cervical neck" (although the right side seemed worse) and radicular pain down her right arm through her triceps to her forearm and right hand. JMR 365 (emphasis added). Dr. Cook ordered an MRI done of her cervical spine because she "passes out a lot, [is] unable to drive, [and has] right arm RSD." JMR 366-67.

Claimant's first MRI was done on February 16, 2012. This MRI exposed that Claimant suffered from moderately severe degenerative disc disease in her cervical spine. JMR 216, 367. The MRI showed two disc herniations at C5-6 and C6-7, "facet hypertrophy, and degenerative joint disease at multiple levels of her cervical neck." JMR 363. On March 1, Dr. Cook opined that she "obviously has radicular pain consistent with degenerative disc disease." JMR 364. Claimant had some cervical epidural steroid injections. JMR 359-64. Dr. Cook referred Claimant to see Dr. Durward for cervical radiculopathy evaluation.

Dr. Cook also noted that Claimant would see Dr. Raval for her neurological workup of her unexplained loss of consciousness. On March 21, 2012, Claimant saw Dr. Raval again "for follow-up of neck pain" and visual symptoms like blacking out and blurred vision. JMR 335.

In none of these records does Claimant or any doctor connect totes falling on Claimant's foot, knee and arm as the cause of her neck pain. Up until May 3, 2012, no record has stated that Claimant was hit in the head, face, or neck by those totes in the prior year.

Six months after the tote incident on May 3, 2012, Claimant reported that the totes fell and hit her body in other locations than where she reported to Dr. Weber. Claimant told Dr. Braun, of Back & Nerve Center in Yankton, "on October 20, 2011 [sic] while at work a stack of grocery totes fell on her and hit her in the face, knocking her backwards to the floor. She tells [Dr. Braun] that she was pinned there and needed assistance to escape the pile of totes." JMR 264.

By referral, Claimant visited Dr. Durward, a neurosurgeon, on May 30, 2012. JMR 213-16. Dr. Durward understood that Claimant had suffered a sudden onset of the neck pain the date of her 2011 injury, and that "prior to an injury that occurred at work in October 2011, she has no neck pain at all." JMR 216. He

understood the work injury mechanism to be a "head injury at work." JMR 202. His records state, an "injury resulted from a direct blow (when trying to get totes off shelf, they fell and she tried to catch the totes)." JMR 213. In addendum note dated November 13, 2012, Dr. Durward goes on to describe that "[s]he was pulling a tote off and then all 27 of them fell down on her. She suffered extensive bruising on the right side of her body including the leg and the left side of her face and developed acutely with that fall, severe neck pain with radiation to the right arm." JMR 216. Believing the mechanism for the work injury in 2011 was a direct head injury, Dr. Durward's nurse, Will Strawn, RN, wrote that "some of [Claimant's] issues may be related to that injury as well." JMR 202.

Dr. Durward interpreted the 2012 MRI as showing "most significant C5-6 disk herniation" and encroachment, and an encroachment to "slightly lesser degree at C6-7." Dr. Durward also found a "minimal central bulge at C-4-5, which [he] believ[ed] [was] asymptomatic" and degenerative changes in those areas. JMR 205, 210. Dr. Durward opined that Claimant's significant pain is primarily coming from the C5-6 and C6-7 disks, where her degenerative changes have occurred. JMR 206. As of October 17, 2012, it was Dr. Durward's opinion that Claimant's "syndrome does appear to be related to at least one or more of the cervical degenerative disks. It appears that she was asymptomatic until she had the work injury, so the work injury appears to have precipitated a more chronic degenerating process. I think, however, she has a fairly good claim for worker's compensation." JMR 216. Based on Claimant's report of when the neck pain began (at the time of the tote incident), the way he understood Claimant was injured (a direct blow to the head), and Claimant's failure of "every conceivable conservative treatment [he] know[s] of," Dr. Durward recommended that surgical treatment was "warranted based on the work injury she had and she has a worker's compensable claim related to that." JMR 206, 208.

On November 15, 2012, Dr. Durward performed surgery to fuse Claimant's C5-6 and C6-7 with a plate. JMR 352. During surgery, Dr. Durward found, among other conditions, "moderately severe degenerative disc disease at C5-6 and C6-7." JMR 355. At the same time, Dr. Durward also did a left carpal tunnel release. JMR 357. Claimant is not making a claim for left carpal tunnel. HT. at 58.

In January 2013, Dr. Durward referred Claimant to neurologist, Dr. Grudem. JMR 202. By February 2013, Claimant began visiting Dr. Grudem for assessment and treatment of her headache migraines and chronic neck pain. Dr. Grudem understood that Claimant injury happened when "several boxes landed on her head." JMR 190. He assessed cervical dystonia and began Botox treatments for headaches and cervical radiculopathy. JMR 186-97. Dr. Grudem opined that her headaches were from her neck pain. JMR 192. Claimant denies any headaches prior to her injury; however, she admits that her maternal aunt had severe migraines. JMR 190. Claimant also had a sleep study which concluded a high frequency central apnea that can be associated with taking methadone. JMR 242.

Throughout 2013, Claimant continued monthly visits at Midwest Pain Clinic with Dr. Cook for treatment of her chronic pain syndrome, fibromyalgia pain, cervical facet disease, and migraines. *See* JMR 3-31. In August of 2013, Claimant had low back pain and had another MRI of her lumbar spine. JMR 353-54.

As of December 18, 2013, Dr. Durward opined, "I am beginning to wonder whether she has an underlying arthritic problem or soft tissue fibromyalgia-type problem and I am going to refer her to [another doctor] for an opinion and treatment." JMR 142. But by December 30, 2013, Dr. Durward wrote a short letter to Claimant's attorney responding, "Again, I do believe she did have a work injury which caused the disk changes that necessitated the surgical procedure she had." JMR 145. Dr. Durward opined that Claimant reached MMI on December 30, 2013. JMR 145.

In a short letter to the attorneys in this case dated May 19, 2014, Dr. Grudem, the neurologist assessing Claimant's headaches, wrote, "It is my opinion that, while this patient may have a genetic predisposition to occasional migraine headaches, her headache syndrome and certainly the cervical dystonia which produces significant neck pain, were caused by her work injury. I believe the migraine headaches are influenced by her neck pain." JMR 140.

Claimant met with vocational expert, Richard Ostrander to determine her capacity for employment. Ostrander issued a report on April 23, 2014. *See* JMR 233-40. Claimant completed school through 8th grade but subsequently received her GED. She has some basic computer, clerical, and keyboarding skills. She worked at Burger King for two years, worked inside the home, helped on her husband's farm, and did part-time tax preparation for H&R Block for three tax seasons from 2008 to 2010. She started working at Casey's in 2002 until her October 26, 2011 injury. She was the manager so she was ultimately responsible for every job at the store, including stocking shelves and cashiering. Due to her health, she could not resume work and was fired in February 2012. She worked for Menards for three weeks in March of 2012, but physically could not handle the work and quit. Ostrander opined that it is "reasonably likely" that Claimant is permanently totally disabled. JMR 240. This opinion is based on Claimant's account of her physical capacity, her extreme pain, lack of concentration, "dizziness, loss of balance, disorientation, and 'passing out,' difficulty with headaches, loss of strength and grip strength, clumsiness and sleep disturbance[.]" JMR 240.

The Department held a hearing on March 26, 2015. The Department concluded that Claimant's RSD persisted. AR. at 103. The Department also found that Claimant failed to prove that she was permanently and totally disabled because she could not prove that her neck pain, dizziness, syncopal episodes, and migraines resulted from a work injury. AR. at 104. While the Claimant claimed after the fact that she suffered a neck injury when the totes fell on her and that she and Dr. Weber agreed that Dr. Cook would evaluate her neck injury, the

Department did not find this credible because no medical evidence (either in Dr. Weber's or Dr. Cook's records) supported Claimant's allegation that she had any neck injury on October 26, 2011, or that Dr. Cook evaluated her neck. AR. at 100. All her initial accounts of the accident involved the totes falling on her forearm, knee, and foot, not her head, neck, shoulders, or back. Therefore, the Department did not find Claimant's neck condition to be work-related. AR. at 103. Additionally, the Department found Dr. Durward's causation opinion to be unsupported for lack of rationale or explanation for the opinion. AR. at 102.

Claimant appealed this Final Decision and presented four issues on appeal. Employer / Insurer also filed a notice of review. Resolution of Employer's / Insurer's additional issue may affect all other issues, so the Court will analyze that issue first.

### **QUESTIONS PRESENTED**

- I. Whether the Department erred when it concluded that Claimant's RSD continues to persist?
- II. Whether the Department erred when it concluded that Claimant was not permanently totally disabled under odd-lot doctrine due to her March 2007 injury and subsequent development of RSD?
- III. Whether the Department erred when it concluded that Claimant's 2011 work injury was not a major contributing cause of her current condition?
- IV. Whether Claimant gave timely notice to her Employer of her 2011 injury?
- V. Whether the Department erred in concluding that Claimant was not permanently and totally disabled due to her 2011 injury?

### **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. "We review an agency's findings of fact under the clearly erroneous standard" and "afford great weight to the findings and inferences made by the Department on factual questions." *Sorenson v. Harbor Bar, LLC*, 2015 S.D. 88, ¶ 19, 871 N.W.2d 851, 855-56 (citing *Wagaman v. Sioux Falls Constr.*, 1998 S.D. 27, ¶ 12, 576 N.W.2d 237, 240. The court's "question is not whether we would have made the same findings as the trial court, but whether we have a 'definite and firm conviction that a mistake has been made.'" *Harbor Bar*, 2015 S.D. 88, ¶ 19, 871 N.W.2d at 855-56 (citing *Isack v. Acquity*, 2014 S.D. 40, ¶ 7, 850 N.W.2d 822, 825. "We do not substitute our judgment for the Department's on the weight of the evidence or the credibility of witnesses." *Harbor Bar*, 2015 S.D. 88, ¶ 19, 871 N.W.2d at 855-56 (citations omitted). "When an agency makes factual determinations on the basis of documentary evidence, such as depositions, the matter is reviewed de novo." *Vollmer v. Wal-Mart Store, Inc.*, 2007 S.D. 25, ¶ 12, 729 N.W.2d 377, 382. "Conclusions of law and mixed questions of law and fact are fully reviewable." *Erdahl v. Groff*, 1998 S.D. 28, ¶ 15, 576 N.W.2d 15, 18 (citing *Permann v. Dep't of Labor*, 411 N.W.2d 113 (S.D. 1987)).

## ANALYSIS

### I.

#### Whether the Department erred when it concluded that Claimant's RSD continues to persist?

Employer / Insurer appeal the Department's conclusion that Claimant still suffers from RSD. The Department concluded that Claimant had "proven that her pain related to RSD persists from the March 2007 hand injury." COL 4. The Department discounted Dr. Blow's opinion because his opinion was based on the fact that some of [Claimant's] RSD symptoms were not evident on exam." *Id.* The Department also concluded that Dr. Blow ignored Claimant's complaints of continuous pain as reported to Dr. Cook, and that Claimant could only achieve temporary pain relief from treatments. *Id.*

"Even if a work-related injury is undisputed, the claimant must establish that the injury caused the current condition." *Martz v. Hills Materials*, 2014 S.D. 83, ¶ 23, 857 N.W.2d 413, 419 (citing *Vollmer*, 2007 S.D. 25, ¶ 14, 729 N.W.2d at 383); *Peterson v. Evangelical Lutheran Good Samaritan Soc.*, 2012 S.D. 52, ¶ 20, 816 N.W.2d 843, 849 ("In a workers' compensation dispute, a claimant must prove the causation elements of SDCL 62-1-1(7) by a preponderance of the evidence."). "[T]he testimony of medical professionals is crucial in establishing that a claimant's injury is causally related to the injury complained of because the field is one in which [laypersons] ordinarily are unqualified to express an opinion." *Martz*, 2014 S.D. 83, ¶ 23, 857 N.W.2d at 419 (citing *Vollmer*, 2007 S.D. 25, ¶ 14, 729 N.W.2d at 382). "The evidence necessary to support an award must not be speculative, but rather must be 'precise and well supported.'" *Martz*, 2014 S.D. 83, ¶ 23, 857 N.W.2d at 419 (quoting *Vollmer*, 2007 S.D. 25, ¶ 14, 729 N.W.2d at 382).

Employer / Insurer argue that a review of Dr. Blow's opinion and medical records support finding that Claimant's RSD in her right hand had resolved by November 11, 2010. Employer / Insurer assert that around that time, Claimant stopped complaining of right hand pain to Dr. Cook, had no swelling, no sensitivity to cold or deep tissue therapy, but had normal skin color, texture, grip strength, and was able to wear rings. Dr. Blow opined that these findings are inconsistent with ongoing RSD. Employer / Insurer argue that Dr. Blow did not ignore any of Claimant's complaints but opined that something else was causing that pain other than RSD. Dr. Blow noted that Claimant certainly has some medical issues, perhaps caused by a systemic illness, but RSD was not the cause of Claimant's pain complaints. All medical evidence was admitted as joint medical records. The court's standard for reviewing documents is *de novo*. *Vollmer*, 2007 S.D. 25, ¶ 12, 729 N.W.2d at 382.

This court concludes that the medical evidence establishes that Claimant continues to suffer chronic pain symptoms from RSD; however, Claimant fails to establish that her RSD is and remains a major contributing cause of her neck pain and migraines.

When Claimant was first diagnosed with RSD in 2009, she was several months post-op from three right hand surgeries. Throughout 2009, Claimant's symptoms were edema, hot and cold dysesthesias, and general upper right extremity pain. JMR 377-81. She received several stellate ganglion blocks which only provided temporary relief. JMR 377-81. Throughout 2010, Claimant still had median nerve pain in her arm that radiated down through her fingertips around an average of 8 out of 10 on the pain scale. She noted tingling, numbness, temperature and color changes, loss of strength, neck pain, and posterior shoulder pain as well. JMR 55-60; 98-104; 220-21; 369-75. Into 2011, she continued to have the same complaints. Her doctors hoped to have a spinal cord stimulator done to help but that was denied by Insurer. So the doctors continued to treat her with medications. JMR 47-54. A month before the tote incident, on September 6, 2011, Claimant's pain was 9 out of 10 and her symptoms were progressively worsening. JMR 47. Five days after the tote incident, Claimant reported no changes in her symptoms other than "a lot of increase in discomfort," and her pain medications were refilled. JMR 44. Within the next few months, the medical records look the same; Claimant felt extreme pain in upper right extremity. JMR 39-44. In March of 2012, after the cervical MRI, the medical records start referring to cervical radiculopathy and she started receiving cervical epidurals. But her original right arm pain continued for years after 2011. JMR 3-39. As late as September 27, 2013, Claimant was having pain spasms and swelling in her right arm and right hand. JMR 3.

Claimant has established by medical evidence that she continued to suffer from RSD in her right arm and hand long after November 2010, when Dr. Blow said her RSD had resolved. She also has established that her RSD began to cause pain on the right side of neck. On the other hand, there is also medical evidence that Claimant has degenerative disk disease in the same cervical vertebrae as where her pain is located. Claimant failed to present any medical professional's opinion or testimony which could separate the cause of her neck pain between the RSD and the cervical degenerative disease (or at least opine that RSD is a major cause). "In cases involving a preexisting disease or condition, the claimant must prove that the employment or employment related injury is *and remains* a 'major contributing cause of the disability, impairment, or need for treatment.'" *Peterson v. Evangelical Lutheran Good Samaritan Soc.*, 2012 S.D. 52, ¶ 20, 816 N.W.2d 843, 849 (citing SDCL 62-1-1(7)(b)) (emphasis added).

(7) "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: . . .  
(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[.] . . .

Claimant has established that her RSD arose out of and in the course of her employment. Her RSD was directly linked to her right hand carpal tunnel, which was caused by the hand injury on March 6, 2007. However, she is seeking permanent total disability benefits for her neck and migraine condition. For her current condition to be compensable, she has to prove that her RSD is and remains a major contributing cause of her neck pain, dizziness, migraine headaches, and need for a cervical neck fusion. No doctor has opined that her RSD is and remains a major contributing cause of her condition.

Even understanding that “[w]hether a claimant’s employment is and remains a major contributing cause of her condition *may be gleaned from the totality of a doctor’s testimony*,” Claimant has failed to present testimony or sufficient opinions within medical records for this court to find by a preponderance that all of her current condition is from her work activities. *Peterson*, 2012 S.D. 52, ¶ 29, 816 N.W.2d at 852 (emphasis added). No doctor discusses the causation effect of her degenerative disk disease on her pain, either sole cause or a major contributor with her RSD. In fact, Dr. Durward opined that her pain is related to her degenerative disk changes. JMR 216. But based on bad facts and bad foundation—believing Claimant suffered a direct blow to the neck by the totes and that she was asymptomatic for neck pain before the work injury—Dr. Durward linked the disk change to the work accident. *See infra*, Issue III; JMR 216. “[A]n expert’s opinion is entitled to no more weight than the facts it stands upon.” *Peterson*, 2012 S.D. 52, ¶ 24, 816 N.W.2d at 850 (quoting *Jewett v. Real Tuff, Inc.*, 2011 S.D. 33, ¶ 29, 800 N.W.2d 345, 352). Dr. Grudem opined that her headaches were from her neck pain. JMR 192. The failure to prove compensability of neck pain also precludes compensation for her migraine headaches.

Because Claimant failed to produce medical evidence to prove that her March 2007 hand injury, which resulted in RSD, is and remains a major contributing cause of her neck pain and migraines, especially in light of her degenerative disk disease, Claimant is not entitled to compensation benefits for those conditions. Claimant is, however, entitled to compensation benefits for her chronic pain caused by her RSD. The Department is affirmed on this issue.

## II.

### **Whether the Department erred when it concluded that Claimant was not permanently totally disabled under odd-lot doctrine due to her March 2007 injury and subsequent development of RSD?**

Claimant argues that the Department erred by denying her permanent total disability benefits resulting from her *debilitating pain* caused by her RSD. Claimant asserts that she met her burden of showing entitlement to permanent total disability benefits due to her chronic pain from the March 2007 injury, and the Department made this same conclusion (COL 4); but the Department ultimately denied benefits because Claimant did not meet her burden that her RSD symptoms alone (not combined with neck pain, passing out episodes, seizures, or migraines) resulted in permanent total disability.

“Whether a claimant is entitled to odd-lot disability benefits is a question of fact subject to review under the clearly erroneous standard.” *Kassube v. Dakota Logging*, 2005 S.D. 102, ¶ 34, 705 N.W.2d 461, 467. This Court shall give great weight to the factual findings made and inferences drawn by the agency on questions of fact and not reverse unless the court is definitely and firmly convinced a mistake has been made. *Lends His Horse v. Myrl & Roy's Paving, Inc.*, 2000 S.D. 146, ¶ 9, 619 N.W.2d 516, 519 (citing *Sopko v. C & R Transfer Co.*, 1998 S.D. 8, ¶ 7, 575 N.W.2d 225, 228). “Due to the deference given the Department, “[w]e do not substitute our judgment for that of [Department] on the weight of the evidence.” *Lends His Horse*, 2000 S.D. 146, ¶ 9, 619 N.W.2d at 519.

SDCL 62-4-53 describes the criteria for obtaining permanent total disability benefits under the odd-lot doctrine:

An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2) . . .

SDCL 62-4-53. To make the required prima facie showing of permanent total disability, the claimant can show she “is ‘obviously unemployable’; then the burden of production shifts to the employer to show that some suitable employment is actually available in claimant’s community for persons with claimant’s limitations.” *Kassube*, 2005 S.D. 102, ¶ 34, 705 N.W.2d at 468 (quoting *Petersen v. Hinky Dinky*, 515 N.W.2d 226, 231 (S.D. 1994)). Obviously unemployable can be shown in two ways:

(1) showing that “[her] physical condition, coupled with [her] education, training and age make it obvious that [s]he is in the odd-lot total disability category,” or (2) persuading the trier of fact that [s]he is in fact in the kind of continuous, severe and debilitating pain which [s]he claims.

*Kassube*, 2005 S.D. 102, ¶ 34, 705 N.W.2d at 468 (quoting *Hinky Dinky*, 515 N.W.2d at 232) (emphasis omitted). “Under this test, if the claimant is ‘obviously unemployable, [s]he will not bear the burden of proving that [s]he made reasonable efforts to find employment in the competitive market.” *Kassube*, 2005 S.D. 102, ¶ 34, 705 N.W.2d at 468; see SDCL 62-4-53 (“An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile.”).

The Department concluded that Claimant met her burden of proof that her 2007 work injury was a major contributing cause of her ongoing RSD. Therefore, the Department concluded that Claimant was entitled to benefits for her chronic pain resulting from the 2007 hand injury and RSD;<sup>1</sup> however, the Department did not conclude that Claimant was “obviously unemployable” due to her chronic pain from RSD.

Claimant failed to present a medical opinion or an vocational expert opinion that her physical condition resulting from her 2007 work injury to her right hand and resulting RSD, “in combination with the employee’s age, training and experience and the type of work available in the employee’s community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income.” Claimant has also failed to present medical evidence that her RSD renders her obviously unemployable. “[T]he testimony of medical professionals is crucial in establishing that a claimant’s injury is causally related to the injury complained of[.]” *Martz*, 2014 S.D. 83, ¶ 23, 857 N.W.2d at 419.

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<sup>1</sup> This is not a dispute on appeal, but the dispute is when the RSD resolved, if at all. Employer / Insurer paid for Claimant’s hand and finger injury, carpal tunnel and other surgeries, and even RSD for a time. They also paid permanent impairment.

Instead, the medical evidence makes it clear that Claimant's pain comes from a number of sources, i.e. right arm and hand pain, left arm pain, shoulder and neck pain, cervical disk fusion, migraines, lower back and leg pain, dizziness, sleep apnea, and fatigue. She may very well be permanently disabled,<sup>2</sup> but she has failed to connect her permanent disability to her work injuries. Claimant is seeking permanent total disability benefits due to all of her debilitating pain, and Claimant has the burden. No doctor opined that her RSD has caused any of these other pains or issues, or that her RSD alone has caused Claimant continuous or debilitating pain.

Her vocational expert opined that her condition as a whole, *including* neck pain, her "passing out" episodes, and her migraines, is what prevents her from obtaining suitable employment. There is no medical evidence whether those three conditions or her RSD are what cause her lack of concentration and focus, dizziness and disorientation, clumsiness and lack of balance. What has been established is that Claimant is not seeking any benefits from the passing out episodes. *Claimant Reply Brief* at 4. As noted later in this opinion in Issue III, Claimant failed to prove that her neck pain or migraines were caused by an employment-related injury. Claimant cannot seek compensation when she fails to prove that her condition is causally related to a work injury. SDCL 62-1-1(7). Further, the onset of Claimant's RSD was in 2009, and Claimant continued to work full-time for two years until her 2011 work injury. Claimant was never on any permanent work restrictions due to her right hand injury or her RSD.

The Department concluded that Claimant failed to prove that she was entitled to permanent total disability benefits resulting from the March 2007 work injury. The Department also concluded that Claimant failed to introduce evidence that her RSD alone prevented her from securing anything more than sporadic employment. Nothing presented or argued leaves this court firmly or definitely convinced that the Department erred. This Court affirms.

### III.

**Whether the Department erred when it concluded that Claimant's 2011 work injury was not a major contributing cause of her current condition?**

SDCL 62-1-1(7) sets forth the causal relationship that an injured worker must establish between a work-related injury and the worker's subsequent condition, impairment, or need for treatment. First, SDCL 62-1-1(7) requires an injury be established by medical evidence. *Peterson*, 2012 S.D. 52, ¶ 20, 816 N.W.2d at 849 ("The first element requires proof that the employee sustained an "injury" arising out of and in the course of the employment"). "In order for the injury to 'arise out of' the employment, the employee must show that there is a 'causal

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<sup>2</sup> Social Security Administration found her permanently and totally disabled. AR. at 52-58.

connection between the injury and the employment.” *Fair v. Nash Finch Co.*, 2007 S.D. 16, ¶ 10, 728 N.W.2d 623, 629.

There is no dispute that Claimant suffered a work-related injury to her left arm and knee, and her right foot. Instead, it is disputed whether Claimant also injured her shoulder, neck, face, or head with the totes. This involves a question of fact, reviewed for clear error.

The day of the injury, October 26, 2011, Claimant reported to Dr. Weber that “multiple totes fell on her while at work . . . that they hit the top of her right foot, left knee, and left arm. [She] states that there was a total of 27 of them, . . . all but 6 of them fell forward onto her.” JMR 321 (“She just complains of pain to her left forearm, left knee, and right foot.”) Dr. Weber assessed some bruising in these areas and “a mild abrasion noted to the left proximal forearm . . . remaining limited physical exam was unremarkable.” *Id.* Dr. Weber assigned no work restrictions, ordered no tests (except for x-ray of left knee and right foot), and believed Claimant could resume all activities as tolerated. *Id.* During the Department’s hearing, Claimant claims that she and Dr. Weber agreed that because she was already going to see her pain doctor, Dr. Cook, in five days, that Dr. Cook would evaluate her “neck injury”. Dr. Weber’s notes state nothing about this agreement. On October 31, 2011, Claimant told Dr. Cook and P.A. Welch that “she did have totes fall on her at work[,]” but he also wrote, “no [change] in symptoms[.]” JMR 45. Neither Dr. Cook nor Welch noted any complaints of a neck injury, neck pain, head impact, face abrasions, or face bruising. *See* JMR 44-45. Dr. Cook performed no exam of her head or neck, and ordered no tests of those purported injured areas.

On the other hand, in May 2012, Dr. Durward’s medical notes report that although Claimant’s complaints “outline[] an extremely confusing picture,” it appears Claimant “suffered extensive bruising on the right side of her body including the leg and the left side of her face and developed acutely with the fall, severe neck pain with radiation to the right arm.” JMR 216. On the date of injury, Dr. Weber noted no “extensive” bruising on her right side, her right leg, or her face; instead, he only noted some contusion on her left elbow, left knee, and right forefoot. *See* JMR 321. Dr. Durward described Claimant’s onset of neck pain being from a work “injury resulted from a direct blow (when trying to get totes off shelf, they fell and she tried to catch the totes.)” JMR 213. There is no evidence to support Claimant’s statement to Dr. Durward that she suffered a “direct blow” to her neck, head, shoulder, or face from the totes. During his care of Claimant, Dr. Durward found, “[Claimant] is somewhat of a poor historian[.]” JMR 210.

Again, believing Claimant suffered a head or neck injury from falling totes, Dr. Durward’s notes say that “[t]here are some anomalies noted on her MRI of the head which were [related to] a head injury at work and there is a belief that some of her issues may be related to that injury as well.” JMR 202 (date January 16, 2013). Dr. Durward also understood that Claimant had no history of neck pain but that it



suddenly manifested after the 2011 work injury. This is inconsistent with the record. Three weeks before the work injury, Claimant complained of neck pain to Dr. Blow<sup>3</sup> and had been complaining of neck pain since 2010.<sup>4</sup> Based on the mistaken belief of the extent of her injuries on October 26, 2011 (that she injured her neck), Dr. Durward opined that her neck condition was work related. JMR 145, 206. Later, Dr. Durward contradicted himself and stated, "I am beginning to wonder whether she has an underlying arthritic problem or soft tissue fibromyalgia-type problem . . ." JMR 142. Because no expert's opinion can be better than the facts on which it is based, Dr. Durward's causation opinion lacks foundation and is unpersuasive.

Claimant continued to exaggerate her injury to her next doctor, Dr. Grudem on February 15, 2013. During her first visit, before Dr. Grudem had reviewed any of Claimant's medical records, "she states that many of these symptoms [neurologic issues including headaches, neck pain, syncopal episodes, and paresthesias] came on after an injury 10/26/2011 in which several boxes landed on her head." JMR 190. This statement is inconsistent with the record. As noted above, Claimant has some neck pain before the tote incident. There is no previous medical support for Claimant's story that *boxes* landing on her *head*. Also, Claimant had experienced syncopal episodes back on October 7, 2010, again before the tote incident. JMR 58, 78 ("[Claimant's] staff [at Casey's] are having to 'pick me up off the floor when I pass out'"), 320.

In May of 2013, she enhanced her injury again by reporting to the sleep study personnel that "she sustained a neck injury at her workplace where heavy sturdy plastic totes fell on her neck." JMR 249.

Claimant's contemporaneous description of her injuries reported to Dr. Weber on October 26, 2011 included only her foot, knee, and forearm. By 2012, Claimant started reporting that her neck was also injured, and later, she reported that had suffered a direct blow to her head from the totes. Finally, in 2013, heavy totes had fallen on her neck. Each subsequent report of injuries is worse. There can be little doubt that if she told Dr. Cook on October 31, 2011 that she had injured her neck or head, as per her supposed agreement with Dr. Weber, Dr. Cook would have ordered tests and done examinations that day. Indeed, on February 15, 2012 when Claimant's medical records note for the first time that she had neck pain bilaterally (versus just right side neck pain), Dr. Cook performed a physical examination, including an examine of her neck, he assessed cervical radiculopathy and cervical degenerative joint disease, he ordered an MRI, and finally, he scheduled a follow up

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<sup>3</sup> Claimant told Dr. Blow that she continues to have pain at the base of her neck on October 5, 2011. JMR 311.

<sup>4</sup> Claimant began having shoulder pain on February 8, 2010. JMR 374. On April 13, 2010, Dr. Cook examined Claimant and notes, "NECK: the patient has pain with extension at approximately 30 degrees; pain with rotation as stated." JMR 372. Claimant continued to complain of extreme burning pain (sometimes at 10 out of 10) to her right shoulder and right side of her neck. JMR 55.

for a possible cervical epidural and a follow up with Dr. Raval for a neurological workup. JMR 366. As soon as Dr. Cook was alerted about bilateral neck pain, he acted quickly and extensively studied the condition. To further support the lack of an acute neck injury from falling totes, when Dr. Cook ordered the 2012 MRI of her cervical spine, he noted the reasons being because she “passes out a lot, [is] unable to drive, [and has] right arm RSD,” not because of a direct blow from totes to her neck. JMR 366-67.

While her medical records for four months after the tote accident fail to note any complaints of neck pain or head injury from a tote impact, Claimant testified that she had an oral agreement with Dr. Weber that Dr. Cook would treat her head or neck injury. ALJ Hageman found, “This testimony is not credible because none [of] the medical records from Roberts’ October 26, 2011, visit to the Yankton Medical Clinic or Dr. Cook’s October 31, 2011 appointment mention anything about a neck injury or pain.” FOF 34. Claimant argues that on October 26, 2011, Dr. Weber “only noted [Claimant’s] injuries to include her right foot, left knee and left arm. These doctor’s notes simply note only that for which he treated [Claimant].” Claimant Brief at 4. This argument could imply that Dr. Weber intentionally ignored her “neck or head injury” and agreed to let those injuries go untreated for five days. Claimant makes the same argument regarding Dr. Cook; that she and Dr. Cook discussed her “neck injury” but all he did was refill her Valium and pain medications and schedule a four-week follow-up; thus implying that Dr. Cook failed to treat her neck injury. Instead of contributing the absence of records containing subjective complaints or treatments of a neck injury to malpractice, it seems more reasonable and logical that Claimant did not report any neck injury to these doctors because she did not suffer a neck injury that day.

As for the “supposed agreement,” Claimant has the burden to prove that Dr. Weber and she had some agreement on October 26, 2011; however, Claimant never introduces a deposition or affidavit from Dr. Weber that such an agreement existed. All the Department could rely on was Claimant’s testimony. Claimant also has the burden to prove that Dr. Cook evaluated her neck injury on October 31, 2011; but again, Claimant failed to present medical record evidence or testimony from Dr. Cook that he evaluated her neck injury and simply failed to record it. ALJ Hageman found that the existence of such an agreement was not credible testimony. Claimant has the burden on appeal to show that the Department’s credibility determination was error, noting that this court gives deference to the Department’s credibility determination. This court does “not substitute [its] judgment for the Department’s on the weight of the evidence or the credibility of witnesses.” *Harbor Bar*, 2015 S.D. 88, ¶ 19, 871 N.W.2d at 855-56; *see Baier v. Dean Kurtz Const., Inc.*, 2009 S.D. 7, ¶ 34, 761 N.W.2d 601, 610 (“Great deference is given to the Department’s credibility determinations.”).

Based on the inconsistencies detailed above and ALJ Hageman's finding of credibility or lack thereof, the court is not firmly or definitely convinced a mistake was made nor can the court find clear error.

Claimant has failed to prove the first element, that she sustained an "injury." She cannot prove by medical evidence that she sustained an "injury" to her neck, shoulder, or head "arising out of and in the course of the employment." The injuries to her right foot and left knee and left forearm were rightfully compensated by Employer / Insurer as arising out of and in the course of her employment. However, she is not entitled to further workers' compensation benefits for her conditions related to her neck or head, including the cervical fusion surgery, neck pain, dizziness, or migraines because she failed to prove that she sustained a neck or head injury arising out of her employment.

Regarding her syncopal episodes, Dr. Weber opined that the syncopal episodes were not work-related. JMR 330, 332. Dr. Raval assessed that the "etiology [of the syncopal spells] is not known." JMR 333. Likewise, Claimant is not asking for compensation due to her passing out episodes. Claimant's Reply Brief at 4.

Regarding relatedness of Claimant's migraines, Dr. Grudem, who believed she suffered a head injury at work opined on May 19, 2014, "It is my opinion that, while this patient may have a genetic predisposition to occasional migraine headaches, her headache syndrome and certainly the cervical dystonia which produces significant neck pain, were caused by her work injury. I believe the migraine headaches are influenced by her neck pain." JMR 140. Because Claimant has failed to prove her neck pain or cervical dystonia arose out of and in the course of her employment, the migraines caused by those conditions cannot be work-related either.

#### IV.

##### **Whether Claimant gave timely notice to her Employer of her 2011 injury?**

In light of the court's ruling and affirmance of the Department, this issue is moot. *See AR.* at 103.

#### V.

##### **Whether the Department erred in concluding that Claimant was not permanently and totally disabled due to her 2011 injury?**

The only injuries Claimant has proven that she suffered from her 2011 injury were to her foot, knee, and arm. Those injuries have resolved and are not grounds for permanent total disability benefits. This issue is also affirmed.

**CONCLUSION**

For the foregoing reasons, the Department's decision is **AFFIRMED**.

*Mark Barnett*

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Honorable Mark Barnett  
Sixth Circuit Court Judge

SUPREME COURT  
STATE OF SOUTH DAKOTA  
FILED

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

JAN 30 2017

*Shirley A. Jameson-Fergel*  
Clerk

\* \* \* \*

SUSAN ROBERTS,  
Claimant and Appellant,  
  
vs.  
  
CASEY'S GENERAL STORES,  
INC. and EMCASCO,  
Employer, Insurer  
and Appellees.

ORDER DISMISSING APPEAL  
#27995

Appellant having served and filed a motion and stipulation to dismiss the appeal taken in the above-entitled matter, and the Court having considered the motion and stipulation, now, therefore, it is

ORDERED that the appeal be and it is hereby dismissed.

DATED at Pierre, South Dakota this 30th day of January, 2017.

BY THE COURT:

*David Gilbertson*  
David Gilbertson, Chief Justice

ATTEST:

Shirley A. Jameson-Fergel  
Clerk of the Supreme Court

By: *Rauna Graves*  
Chief Deputy Clerk  
(SEAL)

STATE OF SOUTH DAKOTA  
CIRCUIT COURT, HUGHES CO  
FILED  
FEB 01 2017

*Kelli Stroman* Clerk  
By *[Signature]* Deputy

STATE OF SOUTH DAKOTA  
In the Supreme Court  
I, Shirley A. Jameson-Fergel, Clerk of the Supreme Court of South Dakota, hereby certify that the within instrument is a true and correct copy of the original thereof as the same appears on record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at Pierre, S.D. this  
30<sup>th</sup> day of January, 20 17

*Rauna Graves*  
Clerk of Supreme Court  
Deputy

