SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION
DIVISION OF LABOR AND MANAGEMENT

TRINA AKIONA-LOTERBAUER, **HF No. 61, 2023/24**

Claimant,

v. **DECISION**

MENARD, INC,

Employer,

and

AIU INSURANCE CO. (NATIONAL UNION FIRE OF PITTS PA),

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor & Regulation, Division of Labor and Management pursuant to SDCL § 62-7-12 and ARSD 47:03:01. The case was heard by Michelle M. Faw, Administrative Law Judge, on October 8 and 9, 2025. Claimant, Trina Akiona- Loterbauer, was present and represented by Michael J. Simpson of Simpson Law Firm. The Employer, Menard, Inc., and Insurer, AIU Insurance Co. were represented by Justin G. Smith of Woods, Fuller, Shultz & Smith.

Background Facts:

In August 2016, Trina Akiona-Loterbauer (Loterbauer) had been working for Kmart when she was terminated from her position after getting into a physical altercation with a customer.

In 2017, Loterbauer began working for Menard, Inc. (Employer) which was insured for workers' compensation purposes at all times pertinent to this matter by AIU Insurance Co. (Insurer). Loterbauer worked as a full-time cashier, with the exception of a short period of time where she worked as a morning stocker from 5:00 a.m. until 9:00 a.m. On

March 13, 2017, Loterbauer was diagnosed with obstructive sleep apnea. On February 15, 2018, Loterbauer was diagnosed with major depressive disorder by her primary care physician. On September 2, 2020, Loterbauer was assisting a customer when she was struck on the head by a piece of lumber. She received care that same day for the injury and never sought treatment again. The medical records for her visit to the emergency room state that she was verbally abusive to the staff during her stay.

On March 5, 2022, Loterbauer work-related injury at issue in this matter occurred when Loterbauer was on a 15-minute break and slipped on the front sidewalk which was covered with ice and snow. A customer helped her up. She does not recall losing consciousness, and she believes she hit the back of her head. She was then seen on March 7, 2022, at Monument Health Urgent Care stating she fell on the ice on Saturday while working. Loterbauer complained of a generalized posterior headache that radiated to the front with movement, neck pain, feeling off balance intermittently, stiff neck, and slight photophobia and phonophobia. The examination showed no visual field deficits, no focal deficits, and normal mood, behavior, and thought content. She was diagnosed with mild concussion without loss of consciousness, acute intractable headache, and acute neck pain. She had cervical spine x-rays which showed no acute abnormality, but moderate degenerate changes were revealed. She was referred to Dr. Abbie Metzler for post-concussion follow-up.

On March 14, 2022, Loterbauer was seen by Dr. Metzler. She reported headaches, blurred vision, and feeling moody. She also reported sleeping more than usual, worsened symptoms, and body pain. Loterbauer told the doctor that she had lost consciousness when she fell. Dr. Metzler's exam showed convergence issues with Loterbauer's eyes. She diagnosed Loterbauer with a concussion without loss of consciousness and took her

off work for an additional two weeks. She also referred her to physical therapy and recommended physical rest.

On March 25, 2022, Loterbauer was seen by Marie Sexe, PT for a physical therapy evaluation. Loterbauer reported she was angry and moody, had headaches, blurred vision, neck pain, lightheadedness and other symptoms that were stopping her from living her normal life. She reported she had symptoms every day and many activities made her symptoms worse. She was also wearing sunglasses and a cap with a brim on it to shield her eyes from light. PT Sexe recommended sunglasses for photosensitivity and earplugs for phonosensitivity. She performed a vestibular/ocular motor screening test for concussion which showed significant symptoms/findings, including convergence insufficiency. PT Sexe concluded Loterbauer would benefit from skilled therapy designed to help her with her post-concussive and vestibular/ocular symptoms.

On March 28, 2022, Loterbauer was seen by Dr. Metzler who noted she was feeling the same as on the last visit. Loterbauer reported she continued to have headaches, nausea, blurred and double vision, and pressure in her head when lying down. She also tripped twice while walking for approximately ten minutes. Dr. Metzler concluded the symptoms were consistent with convergence insufficiency, and she noted that Loterbauer continued to have significant symptoms. The doctor referred Loterbauer to an eye doctor and recommended continued physical therapy.

From March 31, 2022, to April 26, 2022, Loterbauer saw PT Sexe for physical therapy five times. During that time, Loterbauer’s symptoms continued. Loterbauer was unable to tolerate bright lights or noise, and she would wear her cap and sunglasses at all times in bright light. On April 26, 2022, Loterbauer saw Dr. Metzler who noted she felt like she was making very slow progress. She still had headaches and blurred vision, but

she felt her balance was better after physical therapy. Dr. Metzler prescribed amitriptyline and continued vestibular ocular therapy.

On April 8, 2022, Loterbauer was seen by Dr. Timothy Minton. She reported symptoms of tinnitus, headaches, and photophobia. She also stated that she did not lose consciousness when she fell. Dr. Minton concluded that Loterbauer's visual system was intact. He recommended she take medication for her headaches, and she did not need to continue her therapeutic eye exercises.

Loterbauer continued to see PT Sexe for physical therapy. On May 19, 2022, PT Sexe noted that Loterbauer had seen received a new prescription and tinted glasses from her optometrist. Loterbauer reported that she felt like she was walking better and not hitting the walls as much. She continued to have headaches. She also reported high anxiety, tension, frustration, irritability, and reported general "bitchiness." She wanted to see improvement. PT Sexe noted that Loterbauer had improved in her post-concussion symptom scale with a 103/132 compared to the initial testing of 125/132. PT Sexe recommended continued physical therapy and the use of the cap and sunglasses.

On May 19, 2022, Loterbauer was also seen by Dr. Bill Holec, O.D. who noted that she had suffered post-concussion symptoms in both eyes for two months. After an exam, he noted that Loterbauer had poor patient reliability during objective testing with 22% false positives. Dr. Holec diagnosed her with post-concussive syndrome. He noted the condition was from the fall at work when she hit the back of her head. Dr. Holec recommended continued physical therapy and treatment with Dr. Metzler. He also recommended that testing be repeated in two weeks.

On May 27, 2022, Loterbauer was seen by PT Sexe who performed dry needling, electrical stimulation, and manual therapy. She recommended Loterbauer continue with sunglasses and ear plugs. That same day, Loterbauer was also seen by Dr. Metzler who

noted she continued to experience balance issues and tinnitus. Loterbauer's husband also attended the appointment and told the doctor that she had been repeating things. On exam, Loterbauer showed improved visual deficits. Dr. Metzler diagnosed concussion without loss of consciousness, and she increased Loterbauer's amitriptyline dosage. Dr. Metzler released Loterbauer to work at one to two hours per day as tolerated no more than five days per week. She recommended wearing tinted glasses and a hat to protect her eyes from bright overhead lights. She also recommended Loterbauer to have a break every sixty minutes as needed due to strain.

On June 2, 2022, Loterbauer saw Dr. Holec for a follow up. He noted Loterbauer had better patient reliability but still produced false negatives with objective testing. Dr. Holec diagnosed post-concussive syndrome and noted her visual field testing was much improved with the left eye showing almost no defects. On June 17, 2022, Loterbauer was seen by Dr. Metzler and reported migraines, tinnitus, and difficulty adjusting to her concussion eyewear. Dr. Metzler noted that she showed improvement, but Loterbauer denied any significant improvement of her symptoms overall. From June 22, 2022, to July 25, 2022, Loterbauer treated with Dr. Metzler and PT Sexe. She continued to report physical and mood symptoms that were attributed to her post-concussive syndrome. Dr. Metzler's exams did not reveal objective evidence of deficits or abnormalities.

On August 1, 2022, Loterbauer was seen by CNP Mindy Doom who noted she was working two hours per day five days per week. Loterbauer reported her work schedule was rough due to light sensitivity, noise sensitivity, tinnitus, and balance issues. CNP Doom noted Loterbauer continued to experience headaches, noise and light sensitivity, balance issues, tinnitus, mood issues, sleep disturbance, and memory difficulty. Her headaches had improved to only about fifteen minutes a day. CNP Doom noted Loterbauer experienced dizziness daily and her tinnitus was affecting both ears.

Loterbauer had been using a cane for her gait imbalance, but she was not routinely using it. CNP Doom suspected post-concussive syndrome but could not exclude underlying or contributing brain pathology, cardiac pathology, or medication side effects. CNP Doom modified Loterbauer's work limitations to four hours five days per week with breaks encouraged, access to a chair and to work sitting down as needed, cane, eyeglasses, cap, and sunglasses to be used as needed, and to avoid climbing ladders.

On August 4, 2022, Loterbauer was seen by ENT Dr. Loren Jones who noted she had new onset tinnitus and hyperacusis following a slip and fall. Loterbauer reported that she was not sure whether she lost consciousness when she fell. Dr. Jones diagnosed hearing loss of left ear with restricted hearing of right ear as well as tinnitus of both ears. He recommended an MRI of the brain and noted it was difficult to say whether the hearing loss was the result of the injury or preexisting. Loterbauer underwent an MRI on August 11, 2022, which found she had minimal white matter disease but no acute brain abnormality.

Loterbauer continued to be treated by Dr. Metzler, PT Sexe, and CNP Doom. On August 8, 2022, Loterbauer was seen by Dr. Metzler. She reported slow progression of her symptoms. Dr. Metzler's exams found no neurological red flag or other deficits. On August 24, 2022, CNP Doom saw Loterbauer who reported slight improvement. CNP Doom noted that Loterbauer had not followed up with her primary care provider to ensure that her chronic conditions were stable. She found that Loterbauer had a normal eye exam, negative Romberg's sign, normal gait, and normal psychiatric exam. CNP Doom noted that Loterbauer was struggling at work and had issues with balance. She assessed post-concussive syndrome and close head injury. CNP Doom increased Loterbauer's work restrictions to six hours per day five days per week with two of the six hours working primarily in seated position without rotating head laterally or bending. Loterbauer should

take breaks as needed, wear prescribed eyeglasses, cane, cap, and sunglasses as needed. CNP Doom told Loterbauer she should see her primary care provider to ensure her chronic medical conditions were stable.

On August 29, 2022, Loterbauer reported to PT Sexe that she had been taken off work by the workers' compensation case manager and human resources. She had been told she was getting worse and not better. On September 9, 2022, Loterbauer was again seen by PT Sexe reporting that Menards had not let her go back to work yet because of needing a chair and a cane. She had been told she could not go back to work until her neuropsychology appointment in January.

Loterbauer saw PT Sexe on September 13, 2022. She reported continued use of her cane as it builds her confidence. PT Sexe noted that Loterbauer had continued her home exercise program and stopped taking amitriptyline as she felt it did not help with the tinnitus. She was having headaches and more anxiety about the constant noise in her ears. PT Sexe noted improvement in various physical symptoms but no improvement in regard to Loterbauer's mood and irritability. She further noted that Loterbauer would be placed on independent management while she awaited further diagnostics. She recommended counseling or speech therapy evaluations.

On September 15, 2022, Loterbauer was seen by Dr. Dietrich, a rehabilitation medicine specialist. He noted her treatment history and ongoing symptoms. He also noted that he did not find objective findings of significant eye convergence deficits. He objectively found a normal squat, gait, and Romberg tests. He diagnosed her with a concussion and believed that speech therapy for cognitive retraining and cognitive therapy was reasonable. Loterbauer was released to work six-hour shifts with two fifteen-minute breaks. She was assigned light lifting restrictions, no bending, no squatting or kneeling, and no climbing. She also needed to be able to use a cane, cap, and

sunglasses. Dr. Dietrich noted that his concussion diagnoses and work restrictions were related to the work injury.

On October 31, 2022, Loterbauer was seen by Elizabeth Gebhart, CCC-SLP for a speech language pathology evaluation. Gebhart noted her history and that she had done well working five days a week for fours a day but struggled with a six hour per day schedule. Loterbauer reported that she was independently driving. Gebhart's testing revealed Loterbauer's immediate memory was low, her delayed memory was borderline, and her total score was low average. Gebhart noted that Loterbauer's below average scores may be due to a lack of best effort. Loterbauer reported an increase in her symptoms toward the end of the six-hour workday. Gebhart recommended follow-up visits for education and strategies for managing cognitive fatigue in the work environment.

On November 7, 2022, Loterbauer was seen by Dr. Dietrich who noted she appeared to be doing quite well, and most of her complaints were subjective and not substantiated by objective findings. He recommended that she complete her neuropsych test, speech therapy, and cognitive training. He also recommended her shifts at work increase from six to seven hours for two weeks and then progress to eight hours for two weeks. He opined that her diagnosis of concussion and need for restrictions were related to the work injury.

Loterbauer continued to see Gebhart. On December 8, 2022, Loterbauer was seen by Justine Ashokar, Ph.D for a neuropsychological evaluation. She reported that she lost consciousness when she fell. The testing showed some scores in the average range, but Loterbauer's scores on cognitive and memory modules indicate she struggles with working memory, immediate memory, and attention. Dr. Ashokar concluded Loterbauer's difficulties were consistent with post-concussive syndrome. She recommended

psychotherapy. Dr. Ashokar opined that the March 5, 2022, work injury is a major contributing cause of Loterbauer's mental condition and need for treatment.

On January 17, 2023, Dr. Dietrich saw Loterbauer and again diagnosed concussion. He placed her at maximum medical improvement (MMI) as she had completed physical and speech therapy for her post-concussive symptoms. He noted that she was not doing her home exercises anymore and she used her cane inconsistently. Dr. Dietrich's testing found no deficits. He noted Loterbauer's "greatest complaint is that she does not like her job, nor does she like the expectations placed on her there. She, however, is performing this job and working 8 hours per shift." He further noted her neuropsychological evaluation identified the need for psychotherapy for anxiety and depression. He referred her to counseling. Dr. Dietrich assigned Loterbauer permanent work restrictions of light lifting, no bending, no squatting, no twisting/turning, no climbing, no more than two hours pushing/pulling, and up to three to four hours of reaching, being able to use a cap and sunglasses, cane, stool as needed, and no more than 8 hours per shift five days a week. He opined that the concussion diagnosis and the permanent work restrictions were work related.

On April 17, 2023, Loterbauer was seen by Dr. Dietrich who noted she had been to three sessions of counseling. He noted on exam that she had inconsistent movement, motions and strength testing and no focal strength consistent as well as some inconsistent instability with balance. Dr. Dietrich concluded that she did not have any neurologic deficits, and he continued her with her current work restrictions. He affirmed his diagnosis of concussion with no loss of consciousness.

From March 14, 2023, to August 13, 2025, Loterbauer was seen 35 times for counseling by Valerie Frie, Ph.D., LCSW. Dr. Frie noted that Loterbauer's mood was often distrustful, frustrated, stressed, tense, unhappy, and worried. In response to a letter

from Loterbauer's attorney dated June 5, 2024, Dr. Frie opined that Loterbauer's diagnosis was adjustment disorder with anxiety with intermittent depression. Dr. Frie further opined that Loterbauer was not overstating or malingering her complaints and that the March 5, 2022, work injury is a major contributing cause of her condition and need for treatment.

On June 27, 2023, Loterbauer was seen by PT Sexe who found normal visual testing. PT Sexe noted that she would benefit from therapy to improve her perception of balance confidence, and she advised that Loterbauer's barriers to recovery consisted of chronic perception of low balance confidence. On July 11, 2023, PT Sexe's testing showed Loterbauer scored 90% or more on balance. She recommended Loterbauer discuss her fear of falling with her counselor. PT Sexe discharged Loterbauer from therapy on August 21, 2023, as she had not attended her next appointment.

On October 14, 2024, Loterbauer was seen by Dr. Jackie Gilbertson for a psychological assessment at the request of the Social Security Administration (SSA). Dr. Gilbertson noted that she exhibited memory difficulties as well as aphasia throughout the evaluation although she provided information to the best of her ability. Dr. Gilbertson diagnosed major depressive disorder/recurrent and major neurocognitive disorder due to brain injury with behavior disturbances. She concluded that Loterbauer had significant implication for brain injury which occurred in March of 2021 or 2022. She also noted difficulties Loterbauer experienced including displaying inhibition with language, and that they did not appear to have existed prior to the work injury.

On December 5, 2024, Dr. Bruce Elkins performed an Independent Medical Examination (IME) of Loterbauer at the request of Employer and Insurer. He reviewed her records and concluded that her March 5, 2022, injury was a major contributing cause of her condition temporarily. He noted that she had severe preexisting conditions which

were capable of causing her current symptoms such as a history of fibromyalgia, dry eyes, hereditary hemochromatosis, sleep apnea, and cervical spondylitic myelopathy.

Rick Ostrander issued a vocational evaluation of Loterbauer on December 8, 2023. Loterbauer submitted her Petition for Hearing to the Department of Labor & Regulation (Department) on January 25, 2024. James Miller issued his first vocational report on December 27, 2024, and his supplemental report on September 26, 2025.

More of the factual background may be explored in the analysis below.

Issues:

The issues presented at hearing are:

a. Causation
b. Benefit rate
c. Entitlement to past due indemnity benefits
d. Entitlement to payment of past and future medical and psychological benefits
e. Entitlement to permanent total disability benefits
f. Compensability

Causation:

To prevail in this matter, Loterbauer must first prove that her work-related injury is a major contributing cause of her condition. Loterbauer is "not required to prove [her] employer was the proximate, direct, or sole cause of [her] injury." *Smith v. Stan Houston Equip. Co*., 2013 S.D. 65, ¶ 16, 836 N.W.2d 647, 652. A work incident does not need to be "the" major contributing cause but need only be "a" major contributing cause. *Hughes v. Dakota Mill Grain, Inc. and Hartford Insurance*, 2021 S.D. 31, ¶ 22, 959 N.W.2d 903. "The testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion." *Day v. John Morrell & Co*., 490 N.W.2d 720, 724 (S.D. 1992). "A mental injury is compensable

only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence." SDCL § 62-1-1(7).

First the Department will consider the expert medical opinion of Dr. Dietrich. Dr. Dietrich has been practicing in the field of physical medicine and rehabilitation since 2001 and is board certified in that specialty. At his deposition on December 18, 2024, Dr. Dietrich was asked if he had a substantial amount of experience with treating concussions and post-concussive syndrome. He affirmed that he did. He is also the director of the Rapid City Concussion Project. He testified that he had ample experience, training and education to offer medical opinions regarding Loterbauer.

Dr. Dietrich saw Loterbauer on four occasions and at each one diagnosed her with a concussion. He assigned her permanent work restrictions of lifting up to 20 pounds for eight hours a day and lifting up to 50 pounds up to four hours per day, no bending, squatting, kneeling, twisting, turning or climbing, up to two hours of pushing/pulling and up to three to four hours of reaching. He recommended she work no more than eight hours a shift and be allowed to have a cap, sunglasses, a cane, stool as needed, and work no more than five days a week. He placed Loterbauer at MMI on January 17, 2023, and released her from his care as she had no physical injuries requiring treatment at that time. Dr. Dietrich also indicated on the work release form that the permanent restrictions were for a work-related injury

The Department will next consider the expert medical opinion of Dr. Elkins, an occupational medicine specialist. In Dr. Elkins's report dated December 5, 2024, he diagnosed Loterbauer with a mild concussion that was resolved within several months of her slip and fall. He concluded that there is no objective finding that establishes a causal relationship between the March 5, 2022, injury and Loterbauer's ongoing disability, impairment, or need for treatment. He opined that her work restrictions were not related

to her alleged work injury. He asserted that her reported symptoms could be related to her pre-existing conditions of fibromyalgia, hereditary hemochromatosis, sleep apnea, white-matter disease and cervical spondylitic myelopathy. Dr. Elkins suspects Loterbauer has underlying cervical spondylitic myelopathy based on the timing of her balance complaints, objective imaging, and subjective reporting. He specifically testified at hearing that untreated sleep apnea can cause fatigue, depression, anxiety, headaches, and changes which could be reflected on neuropsychological testing. In his opinion, her ongoing reported symptoms have been incorrectly attributed to a concussion. He noted that concussion symptoms are at their peak within the first hours and days after an injury and then the symptoms subside. However, Loterbauer's alleged symptoms worsened rather than improved, and she developed new symptoms of blurred vision, fatigue, memory loss, and irritability. In his report, Dr. Elkins also pointed to contradictions in Loterbauer's reports of her symptoms. During his exam, she refused to do a heel-to-toe walk even though her balance had objectively improved as indicated by her medical records. He also noted that her reported visual symptoms fluctuated over time. He does not believe she is malingering her complaints, but he believes they are caused by other diagnoses. Dr. Elkin's testified at hearing that he did not disagree with Dr. Ashokar's conclusion that Loterbauer's symptoms were consistent with a mild traumatic brain injury or with her recommendations. He believed they were also consistent with sleep apnea.

Dr. Ashokar is a neuropsychologist who has been practicing in that field and performing neuropsychological evaluations since 2015. She estimated she had performed at least 1,500 neuropsychological evaluations since 2015. She testified that while Loterbauer had some testing results in the average range, she struggled with memory and attention as well depression and anxiety. She believed Loterbauer had given full effort and her tests were valid. She did not believe Loterbauer was malingering her

complaints. Dr. Ashokar testified that Loterbauer had been let go from Menards for making mistakes with change and keeping track of money. She testified Loterbauer's difficulties with employment were consistent with her findings with regard to memory, delayed memory, and attention issues. Dr. Ashokar further testified that Loterbauer's complaints of low frustration tolerance and anger were very common with brain injury. Loterbauer had borderline results on the specific test which addressed inhibition.

Dr. Ashokar maintained her opinion that Loterbauer suffers from post-concussive syndrome. She opined that the work injury of May 5, 2022, is a major contributing cause of Loterbauer's post-concussive disorder and need for treatment. She opined that while most post-concussive syndrome patients recover within the first three months, there is a small percentage that have ongoing difficulties the rest of their lives. She expects that as Loterbauer's issues had not resolved within the first year, there are good indicators that she will have future difficulties as well. Dr. Ashokar agreed with the opinion of Dr. Frie that Loterbauer suffered from adjustment disorder with anxiety and intermittent depression. She opined that the work injury is a major contributing cause of the adjustment disorder. Dr. Ashokar recommended Loterbauer to attend psychotherapy and practice compensatory strategies to help with her auditory to visual transitions. She also recommended Loterbauer allow/request more time to complete projects, reduce quantity of work in favor of quality, focus initially on accuracy in performance rather than speed, structure activities in manageable blocks, and utilize verbal mediation techniques. She also recommended a job coach to express these recommendations to employers. She testified that her recommendations were supported by objective findings. She further testified that she was qualified to diagnose a mild traumatic brain injury from neuropsychological testing. Dr. Ashokar also testified that she did not diagnose Loterbauer as having balance problems, dizziness, numbness, fatigue, sleep difficulties,

vision problems, tinnitus, or headaches because as a psychologist she was not qualified to diagnose those issues. She is only qualified to diagnose the psychological aspects of a brain injury. She stated that she is not qualified to opine whether the physical injury is and remains a major contributing cause of the mental injury. She deferred to Loterbauer's medical providers to diagnose and treat her physical injuries.

In considering whether Loterbauer's condition is compensable she must show that she sustained a physical injury and the physical injury is and remains a major contributing cause of her alleged mental injury. Both must meet a clear and convincing standard of proof.

> The quality of proof to be clear and convincing is 'somewhere between the rule in ordinary civil cases and the requirement of our criminal procedure, that is, it must be more than a mere preponderance but not beyond a reasonable doubt.' *Brown v. Warner*, 78 S.D. 647, 107 N.W.2d 1. Its technical meaning has been expressed as 'the witnesses must be found to be credible, that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, and that their testimony is so clear, direct and weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.'

Cromwell v. Hosbrook, 81 S.D. 324, 329, 134 N.W.2d 777, 780 (1965)

Dr. Dietrich and Dr. Elkins both agree that Loterbauer sustained a concussion on March 5, 2022, when she fell at work. Dr. Elkins believes that her ongoing symptoms are related to underlying medical conditions. During his testimony, Dr. Elkins agreed that in his own practice he would refer patients with ongoing post-concussive syndrome to concussion experts like Dr. Dietrich. As an expert on concussions, Dr. Dietrich's expertise on this issue is persuasive. He noted inconsistencies in Loterbauer's reported symptoms, but still repeatedly affirmed his initial diagnosis of concussion. He placed Loterbauer at MMI and assigned her ongoing work restrictions related to the work injury. Therefore, regarding

physical nature of Loterbauer's condition, the Department concludes that the work-related injury is the major contributing cause of the treatment she has received.

Just as she has ongoing physical restrictions that were assigned to her by Dr. Dietrich, Loterbauer has ongoing mental restrictions assigned by Dr. Ashokar. Both doctors defer to each other on their individual areas of expertise. Applying her expertise in neuropsychology, Dr. Ashokar concluded Loterbauer's mental condition was consistent with post-concussive syndrome and that the March 5, 2022, work injury is a major contributing cause of her condition and need for treatment. Combining both the conclusions of Dr. Dietrich and Dr. Ashokar, the Department finds that there is clear and convincing evidence to support Loterbauer's claim that her work injury and resulting concussion/post-concussive syndrome is and remains a major contributing cause of her mental condition.

Permanent Total Disability

To make a prima facie showing that she is entitled to odd-lot benefits, Loterbauer must prove either that due to her physical condition, coupled with her education, training, and age, it is obvious that she is obviously unemployable, or 2) that she is in continuous severe and debilitating pain. *Eite v. Rapid City Area Sch. Dist. 51-4*, 2007 SD 95, ¶21, 739 N.W.2d 264, 270-71. (citations omitted). SDCL § 62-4- 53 provides

> 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.
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> 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). 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 effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

The South Dakota Supreme Court has provided two ways a claimant can make a prima facie showing of entitlement to benefits under the odd-lot category. "(1) claimant is obviously unemployable due to his or her physical condition, coupled with his or her age, training, and experience, or (2) unavailability of suitable employment by showing that he or she has made reasonable efforts to find work and was unsuccessful." *Billman v. Clarke Mach., Inc.*, 2021 S.D. 18, ¶ 25, 956 N.W.2d 812, 820.

First the Department will consider whether Loterbauer is obviously unemployable due to her physical condition, coupled with her age, training, and experience. As of the date of hearing, Loterbauer is 63 years old. She grew up in Hawaii and graduated from high school there. She has worked primarily in retail jobs. The only instance where she was fired from a job prior to her work injury was at Kmart, where she got into an argument with a customer. Loterbauer worked for Menards until she was terminated from her position on August 23, 2023, due to having made six errors in over six months totaling over $1,200. Since her termination, she has applied for and been awarded SSDI benefits. She has not searched for employment since that time. At trial, she testified that she does not want to return to work, because she does not think she would be a good coworker as she has difficulty following directions.

Loterbauer provided the expert vocational opinion of Rick Ostrander. Ostrander has been a Vocational Rehabilitation Counselor for 45 years. He considered both Dr. Dietrich's permanent restrictions and Dr. Ashokar's recommendations. He testified at hearing that the physical restrictions alone would impact someone of Loterbauer's age

with her work and education background. He concluded that with her restrictions, specifically her need for a stool, no bending, squatting, kneeling, twisting, or turning, combined with her age would prevent her from doing any of the past work she has done. He did not believe he could find any work for her for which she would have transferable skills so that she could work full-time. Although, she may have limited part time job options. He further opined that Dr. Ashokar's recommendations also limited her employability. He specifically testified that her inability to maintain attention and concentration would interfere with all types of work. He also mentioned the recommendation that she be allowed to take rest breaks and work at a slower pace with more time for projects would make her difficult to employ as all employers require productivity. If she is unable to maintain a productive pace, she would not be able to do even entry level jobs. Ostrander testified that Loterbauer's low frustration tolerance would potentially be devastating to employment. He noted in his experience of working with individuals with brain injury, one of the biggest problems was their inability to get along with others on a consistent basis. Ostrander concluded that considering her physical condition, age, training, experience and the type of work available in her community, Loterbauer is not able to secure anything more than sporadic employment resulting in an insubstantial income. He opined that a job search would be futile as he could not identify anything that fits within all her restrictions and limitations. He also testified that vocational rehabilitation was not feasible.

Employer and Insurer offered the expert vocational opinion of James Miller, a Certified Rehabilitation Counselor. In 2024, Miller completed a labor market survey in the Rapid City area based on Loterbauer's work history, aptitudes, education, and current residual functional capacities. He issued his report on December 27, 2024. In his report, he identified that the positions of cashier, retail salesperson, salesperson, and

unskilled general office clerk would be suitable for Loterbauer. He contacted fifteen employers with available positions, and three stated they could accommodate her work restrictions. He believed the employers would be able to accommodate all the restrictions. Miller concluded that the survey showed that suitable employment exists in the local labor market that matches Loterbauer's current physical capacities, skills, and would result in a sufficient average weekly wage. He issued an addendum to his report on September 26, 2025. In his second labor market survey he identified another five potential employers. During the hearing, he testified that he did not inform the potential employers of all the restrictions/recommendations provided by Dr. Dietrich and Dr. Ashokar such as reaching, bending, weight restrictions, and need for a baseball cap. Miller testified that if you offered that a potential employee has mental health issues such that they need a job coach, he thought the answer would be a hard no regardless of the job. He was also asked if the need for a job coach would make someone competitively unemployable by vocational expert standards, and he said that was correct.

The Department concludes that Loterbauer is obviously unemployable due to her physical condition, coupled with her age, training, and experience. Her mental and physical restrictions, specifically the need for a job coach, have rendered her unemployable. Employer and Insurer point to the fact that even after Dr. Dietrich assigned Loterbauer permanent work restrictions, she was able to work full-time as a cashier for Menards for eight months. However, she ultimately was let go due to mistakes. Thus, showing she could not even do the job for Employer in a satisfactory fashion. Employer and Insurer have not proven there are jobs available that would accommodate all of Loterbauer's restrictions. The Department agrees with Ostrander that a job search would be futile. Loterbauer has proven she is permanently and totally disabled under SDCL § 62-4-53.

Benefit Rate

Loterbauer did not work in the same grade of employment at the time of the injury continuously for the fifty-two-week period preceding the injury. She worked for forty weeks as a full-time cashier and as a stocker for twelve weeks. Thus, Loterbauer asserts that SDCL § 62-4-25 should be applied. The statute provides:

> As to an employee in an employment in which it is the custom to operate throughout the working days of the year, but who is not covered by § 62-4-24, the average weekly wages shall, where feasible, be ascertained by computing the total of the employee's earnings during the period the employee worked immediately preceding the employee's injury at the same grade of employment for the employer by whom the employee was employed at the time of the employee's injury, and dividing such total by the number of weeks and fractions thereof that the employee actually worked. However, if such method of computation produces a result that is manifestly unfair and inequitable or if by reason of the shortness of time during which the employee has been in such employment, or the casual nature or terms of the employment, it is impracticable to use such method, then regard shall be had to the average weekly amount which during fifty-two weeks previous to the injury was being earned by a person in the same grade, employed at the same work, by the same employer, or if there is no person so employed, by a person in the same grade, employed in the same class of employment in the same general locality.

Applying SDCL § 62-4-25, the earnings at the same grade of employment would be used. If the full-time hours are used, her average weekly wage increases from $447 per week to an average weekly wage above the state minimum of $467. Therefore, Loterbauer would be entitled to $467 per week.

Employer and Insurer argue that that Loterbauer chose to switch from cashier to stocker of her own volition. Then when she transitioned back, she did so at the request of her manager and not due to any work injuries or limitations. Therefore, they assert the correct statute to apply is SDCL § 62-4-24 which provides,

> As to an employee in an employment in which it is the custom to operate throughout the working days of the year, and who was in the employment of the same employer in the same grade of employment as at the time of the injury continuously for fifty-two weeks next preceding the injury, except for any temporary loss of time, the average weekly wage shall, where

> feasible, be computed by dividing by fifty-two the total earnings of the employee as defined in subdivision 62-1-1(6), during the period of fifty-two weeks. However, if the employee lost more than seven consecutive days during the period of fifty-two weeks, then the division shall be by the number of weeks and fractions thereof that the employee actually worked.

Employer and Insurer argue that Loterbauer's payroll records for the fifty-two weeks preceding her injury indicate an average weekly wage of $447.53, which equals a benefit rate of $413.20.

SDCL § 62-4-24 specifically states it applies to instances where an employee works for the same employer at the same grade of employment for the fifty-two weeks prior to the work-related injury. As Loterbauer did not work at the same grade for the entire fifty-two weeks prior to her injury, SDCL § 62-4-25 is the appropriate statute to apply here. Therefore, her average weekly wage is $467.

Objection Regarding Gilbertson and Kirby:

Employer and Insurer object to the inclusion of the reports of Jackie Gilbertson and Paullette Kirby. They claim the reports are irrelevant to the issues and defenses in this matter. Both reports were considered by the SSA during its separate proceedings. Loterbauer responds that the reports are relevant, and they help provide a full picture for the Department about her description of her symptoms at different times.

Workers' compensation benefits are determined under Title 62 of South Dakota Codified Law. The SSA applies federal regulations. SSA determinations are permitted in workers' compensation cases, although they are not binding. *Vilhauer v. Dixie Bake Shop*, 453 N.W.2d 842, 846 (S.D. 1990). The reports are not determinations and are merely evidence that was considered in an SSA proceeding. Further, neither Ms. Gilbertson nor Ms. Kirby were identified as experts in this matter. The Department concludes the reports are properly excluded from the record. Employer and Insurer's objection is sustained.

Conclusion:

Loterbauer has proven by clear and convincing evidence that her March 5, 2022, work injury and resulting concussion/post-concussive syndrome is and remains a major contributing cause of her mental condition and need for treatment.

Loterbauer has proven she is permanently and totally disabled under SDCL § 62-4-53.

Loterbauer's average weekly wage is $467 per week. She is entitled to past due indemnity benefits, past and future medical benefits, and past and future mental benefits that arise from her work injury.

Employer and Insurer's objection regarding the reports of Ms. Gilbertson and Ms. Kirby is sustained.

Loterbauer shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within twenty (20) days from the date of receipt of this Decision. Employer and Insurer shall have an additional twenty (20) days from the date of receipt of Loterbauer's Proposed Findings and Conclusions to submit objections thereto and/or to submit their own proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of Findings of Fact and Conclusions of Law and if they do so, Loterbauer shall submit such Stipulation along with an Order consistent with this Decision.

Dated this 14th of May 2026.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

Michelle M. Faw
Administrative Law Judge