

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

**WALMART ASSOCIATES INC,**

**HF No. 82, 2021/22**

**Employer,  
and**

**AIU INSURANCE CO.,**

**Insurer,**

**DECISION**

**v.**

**SHARI BARRY,**

**Claimant.**

This is a workers' compensation case brought before the South Dakota Department of Labor and Regulation, Division of Labor and Management, pursuant to SDCL 62-7-12 and ARSD 47:03:01. The case was heard by James E. Marsh, Administrative Law Judge, on October 13, 2023. Claimant, Shari Berry, was present and represented by David King, King Law Firm, PC, Sioux Falls. Employer, Walmart Associates, Inc., and Insurer, AIU Insurance Co., were represented by Kerri Cook Huber, Gunderson, Palmer, Nelson & Ashmore, LLP, Rapid City.

**Facts:**

Claimant was born on March 4, 1970, and 53 years old on the day of hearing. She is a high school graduate, and worked as a team lead (later termed "coach") for Employer in Sioux Falls. On April 21, 2021, she sustained an injury to her head arising out of and in the course of her employment by striking it against an opening used for putting shopping carts into the store. Employee testified: "Now, the door to go outside is like a garage door and you have to duck down in order to get outside, so I ducked down going outside. We had our break, came back in, you have to duck down. I did and I thought I had enough clearance, and I didn't. When I went up, I smacked the back of my head." She testified her head immediately hurt, and she could

feel a bump on the back of it; within a few minutes, after she came inside the store, she felt the room spinning and thought she was losing her balance. Coworkers grabbed her and assisted in getting her to the ground; an ambulance was called, and Claimant was taken to the hospital in a stretcher.

Client did not have a history of head, neck, or back injuries, concussions, difficulty with speech, headaches, or other relevant preexisting conditions or comorbidities before April 12, 2021, when she struck her head.

Medical records from the Sanford Emergency Room reveal complaints of a mild headache. She was reported to be conscious but confused, with “altered mentation,” leading the ER doctor to suspect she had a concussion. She had trouble answering questions such as who and where she was, and this continued for several hours. She was ultimately discharged with a referral to a concussion clinic and instructions to avoid significant concentration. She could take Tylenol or ibuprofen for her headache.

On April 14, 2021, claimant saw Dr. Heidi Feistner, her primary care doctor, complaining of significant headaches and trouble sleeping. She reported light bothering her and having nausea. Dr. Feistner noted claimant was holding her head because of her headache, took her off work until claimant saw their concussion team, and prescribed Zofran for nausea.

Insurer accepted the claim. Employee sought medical treatment following the injury with physiatrist Dr. Mark Diamond beginning April 16, 2021. Dr. Diamond’s examination revealed Claimant became dizzy with extraocular muscle testing and strength testing, that she was unable to tandem walk secondary to balance issues and to stand on one leg bilaterally without significant loss of balance. Dr. Diamond opined she had sustained a traumatic brain injury and post-concussive syndrome. He advised her to stay in low stimulation environments, limit screen time, limit visitors, and limit loud noises and bright lights to allow her brain to rest and heal. He kept her off work until April 29, 2021.

Dr. Diamond saw a claimant again on May 14, 2021. Climate reported her return to work brought on headaches. She started experiencing significant post-concussive symptoms after only two hours. Dr. Diamond decided to start Claimant on propranolol. He kept her off work for another week and had her start 2 hour shifts three days a week. On May 27, 2021, claimant returned to Dr. Diamond reporting the medication helped, but she would still get headaches a few times a day. Dr. Diamond increased the propranolol and increased her shifts to four hours for two weeks. He prescribed Fioricet for sparing use for bad headaches.

On June 10, 2021, Claimant reported: "she feels as though headaches have improved slightly but she is having a good amount of fatigue. Headaches tend to bother her more towards the end of the day but she states that she is OK at work for the most part. I do think it's possible the Propranolol dosing has caused her to experience some fatigue although it's certainly possible this is due to the nature of her head injury."

On June 24, 2021, Claimant reported still having headaches 4 days a week. Dr. Diamond increased her work schedule to 6 hours a day. But would refer her to neurology for management if the headaches did not get better. On July 8, 2021, Patient reported her symptoms did not improve. Dr. Diamond prescribed amitriptyline, kept her on her current work schedule, and referred her to neurology.

On July 22, 2021, Dr. Diamond noted the neurology department had not yet seen her. Claimant reported difficulty in working for 6 hours, so Dr. Diamond decreased her work hours to 4 hours a day every other day. He prescribed physical therapy two days a week for four to six weeks in connection with her neck pain and headaches. Claimant started physical therapy on August 3, 2021.

Claimant developed diplopia (blurry vision) during cervical range of motion therapy. A cervical MRI was performed showing nothing remarkable. Her physical therapy did not begin until August 27, 2021, as she was to be cleared by neurology before further therapy was provided. On August 16, 2021, Dr. Diamond became concerned about Claimant's diplopia and

blurry vision with cervical rotation to the left and on palpation of C6/C7 spinous processes. He was concerned she may have some type of vertebrobasilar insufficiency. By September 16, 2021, Claimant reported her visual problems were improving, but her headaches were worsening and making her 4 hour shifts difficult. Dr. Diamond dropped her to three hour shifts a day, increased her lifting restriction, and started weaning her off propranolol but starting Sumatriptan.

On October 19, 2021, claimant saw Dr. Lisa Viola, a neurologist, for claimants post-concussive syndrome, post traumatic headaches, and dizziness, nausea, visual changes, memory difficulty, and speech impairment. Dr. Viola recommended trigger point injections, an occipital nerve block, reduced Tylenol use, and Imitrex for headache management, as well as monthly injections of Ajovy. Insurer did not approve these treatments. Dr. Viola wanted Claimant to have a brain MRI and EEG for further assessment; these were conducted on November 24, 2021 but were unremarkable. Claimant saw Dr. Viola again on February 15, 2022, reporting her headaches were present daily becoming severe five days out of the week.

On January 11, 2022, Dr. Diamond opined Employee's current condition was post-concussion syndrome/post traumatic headaches. He opined employee had no acute physical effects related to the April 12, 2021 incident that prevented her from returning to work full duty. However, he opined at that time that Claimant suffered a traumatic brain injury; he noted her headaches, and difficulties in finding words, concentrating, and focusing. He believed returning her to full time work would aggravate her headaches and make it difficult for her to do her job to the best of her ability. He acknowledged the symptoms she was experiencing could resolve in weeks, but some could linger for years.

On October 25 and 26, 2022, claimant underwent a functional capabilities assessment (FCA). The FCA identified numerous work restrictions including lift-carry, from floor, to shoulder, push/pull, hand grip, pinch grip, stand-walk, and bend-reach. She would benefit from self-paced

activity with the ability to take an occasional sit break and needing two handrails if climbing steps. She could also benefit from strength and endurance training as she fatigued quickly.

Dr. Douglas Martin, certified in family medicine, performed an independent medical examination (IME) on December 14, 2021. He met with Claimant and reviewed her medical information. He noted her diagnostic imaging on the date of injury was unremarkable. He noted Dr. Diamond's observations that Claimant's primary complaints escalated to include balance, light and noise sensitivity, brain fog and pressure sensation, as well as concerns of cognitive issues.

At this examination, Claimant said her current situation is predominated by unrelenting headaches. Such headaches could vary from all day to just a few hours and claimant had been unable to find any relief. She was working for Employer at the time of this IME operating a scanning device.

Dr. Martin agrees with Dr. Diamond that claimant suffered post-concussion syndrome, but opined that this mild brain injury should have long ago resolved. He opined that her current condition is a mental health issue, agreeing with Dr. Diamond that she does not have any acute physical effects related to her work injury preventing her from returning to work full time. He thought she should undergo cognitive behavioral therapy or focus her treatment on anxiety and depression, noting that she was undergoing stressful life events at the time including being separated from her husband and trying to quit smoking.

Dr. Martin encouraged claimant to return to work and normal activities as soon as possible. Development of other symptomatology than what she reported at her injury does not fit with the diagnosis of continued post-concussion syndrome or other brain pathology disorder. He assigned her an impairment rating of 0% attributable to the work injury.

Dr. Mark Ripperda performed a second IME on January 11, 2023. Dr. Ripperda placed in claimant at MMI and assigned a 3% whole person impairment related to sleep and a 5% whole person impairment related to headaches, a total of 8% whole person impairment. Dr.

Ripperda assessed the employee using a MoCa score, which measures cognitive impairment. Claimant scored a 17, but Dr. Ripperda felt this was inconsistent with expected results from a concussion. Dr. Ripperda explained that employee had a MoCa score of 26 out of 30 with one of her initial visits with Dr. Diamond. He explained these scores would not generally go down over the course of treatment and since employee's score did go down, he elected not to rate her in that section because he did not think it was an accurate assessment of her cognitive functioning. He went on to explain that a score of 26 out of 30, which employee scored early on with Dr. Diamond, would be expected at the early course of Claimant's concussion, but when undergoing treatment for a concussion, concussion symptoms do not generally lead to worsening cognitive function on objective tests; thus the 17 out of 30 is considered to be an accurate assessment of her cognitive function. Rather than challenge or question the employee's veracity during testing, Dr. Ripperda chose to consider Claimant's anxiety during testing. Dr. Ripperda agreed with Dr. Martin that employee suffers from depression or anxiety.

Dr. Ripperda also conducted a MIDAS questionnaire, which quantifies headaches or the disability from headaches. Dr. Ripperda commented: "so during her treatment and at least during the times she was undergoing treatment for the headaches, the headaches were reported to be occurring anywhere from three to four times per week that would interfere with function. The time that I had assessed her, you know, we're talking two years out after the actual injury - she is having more daily headaches. So whether the headache is evolved over time is certainly a possibility, but you can extrapolate enough data for when she had seen the neurologist to get a good idea of the degree and severity of the headaches based on the MIDAS evaluation based on Dr. Viola's assessment." Dr. Ripperda diagnosed bilateral occipital neuralgia, chronic migraine without aura, intractable, without status migrainosus, and post-concussive syndrome.

On March 1, 2022, Employer and Insurer petitioned the Department for an order against Employee that Employee's condition has changed and that the April 12, 2021 injury no longer is nor remains a major contributing cause of the disability or need for treatment.

Additional facts will be recited as necessary.

**Issues:**

- 1. Whether the employee's work injury no longer is nor remains a major contributing cause of the disability or need for treatment.**
- 2. Whether Employee's condition is causally connected to her work injury.**
- 3. Whether employee has evidenced she is permanently and totally disabled.**

**Analysis:**

SDCL 62-1-1(7)(b) states that "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." Once claimant proves a compensable injury, SDCL 62-7-33 provides the method for a party to assert a change in condition. The change in condition which justifies reopening and modification is ordinarily a change, for better or worse in claimant's physical condition. If a claimant proves a compensable condition under SDCL 62-1-1(7) and the employer subsequently feels claimant's condition no longer remains a major contributing cause of the disability, impairment, or need for treatment the employer may assert a change-of-condition challenge under SDCL 62-7-33 where it bears the burden of proof. *Hayes v Rosenbaum Signs & Outdoor Advertising, Inc.*, 853 N.W.2d 878, 886, 2014 SD 64, ¶29.

"A change in condition refers to a condition different from that which existed when the award was made. It must be a material and substantial change. As a general rule it must be a change in the physical condition of the employee, affecting (the Claimant's) earning capacity." *Stender v City of Miller*, 145 N.W.2d 913, 915 (S.D. 1966). "Causation must be established to a

reasonable degree of medical probability, not just possibility. The evidence must not be speculative but must be precise and well-supported.” *Darling v W. River Masonry, Inc.*, 2010 SD 4, ¶ 12, 777 N.W.2d 363, 367.

Insurer treated Claimant’s injury and resulting concussion as compensable. It argues, however, that Claimant’s current symptoms are not its responsibility, either because they never were work-related, or her condition has changed such that they are no longer work-related. Here, Claimant has established through her medical experts the connection to the degree necessary between her work injury and the conditions she has experienced since, and Insurer has not met its burden of establishing a change of condition such that Insurer would no longer be responsible for the claim.

Reviewing the relevant medical evidence and opinions on these matters, Insurer’s expert Dr. Martin admitted Claimant suffered post-concussive syndrome. He asserted, however, that any current symptoms Claimant experiences stem from her mental health and/or stresses in her life. He is not board certified in physiatry, psychiatry, or psychology. He has no experience in cognitive behavioral therapy. Nothing in the medical records or the history Claimant provided to Dr. Martin or anyone else confirms anything more as to Claimant’s life stresses than that she experienced them. Dr. Martin notes her marital problems, for example, but she was already separated from her husband at the time of her injury and had no history of symptoms at that time. While symptoms from a concussion can often resolve quickly, Dr. Diamond, the physiatrist, opined they can last for years. Dr. Ripperda described the authorities Dr. Martin used for the rate of improvement in concussions as grossly out of date – current science holds that ten to twenty percent of individuals over 40 have residual concussive effects, with age being a critical factor for post-concussive symptoms.

The symptoms to which Dr. Ripperda referred were things like fatigue, decreased attention and concentration, being off task, pain and headaches, decreased ability to withstand noise and vibration, stress, depression, anxiety, poor hand coordination, and hearing



impairments. He testified Claimant's symptoms, which included many of these things, were consistent with having a concussion injury that never resolved. He opined that Claimant's work-related injury of April 12, 2021 was a major contributing cause for the conditions he assessed in his impairment rating, and that her brain injury and limited functional abilities were permanent. The Department agrees, finding Claimant has met whatever burden it has of demonstrating Claimant has suffered a work-related injury for which her current symptoms is a major contributing cause, and that Employer and Insurer have not met their burden of establishing a change of condition relieving them of any associated liability for benefits.

SDCL § 62-4-53 sets forth the criteria for obtaining permanent total disability benefits period the statute provides, in relevant part:

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 the subdivision the 62-4-52 two. 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. The employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

*Baker v Rapid City Regional Hospital*, 2022 SD 40, ¶ 30, 978 N.W.2d 368, 378.

A claimant presents a *prima facie* showing of permanent total disability under the statute by presenting evidence: (1) Claimant is obviously unemployable due to his or her physical condition, coupled with his or her age, training and experience, or (2) of the unavailability of suitable employment by showing that he or she has made reasonable efforts to find work and was unsuccessful. *Baker*, 2022 SD 40, ¶ 31, 978 N.W.2d 368, 378.

If a claimant makes a *prima facie* showing of obviously unemployability, then the burden of production shifts to the employer to show that some suitable employment within claimant's limitations is actually available in the community. Alternatively, if a claimant is unable to show obvious unemployability, the claimant must present evidence of the unavailability of suitable employment by showing that he has made reasonable efforts to find work and was unsuccessful. The burden will only shift to the employer in this second alternative when the claimant produces substantial evidence that he is not employable in the competitive market. Then the burden shifts to the employer to show that some form of suitable work is regularly and continuously available to the claimant. Although the burden may shift amongst parties, the ultimate burden of persuasion remains with the claimant. *Baker*, 2022 SD 40, ¶ 32, 978 N.W.2d 368, 378-379.

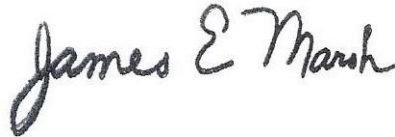
Claimant has demonstrated her obvious unemployability. Dr. Diamond opined: "returning back to full duty at this time will ... aggravate (Claimant's) posttraumatic headaches and make it difficult for her to do her job to the best of her abilities." He did add that Claimant did not experience any acute physical effects that prevented her from returning to work full duty, and returning to work would not negatively impact her recovery. Dr. Ripperda, as noted, considered her physical condition and functional capacity permanent. On February 15, 2023, Tom Audet, CRC, prepared a vocational evaluation report on Claimant. He opined that Claimant's ongoing issues with headaches, memory problems, and difficulty looking at computer screens "can affect the types of work she would perform ... Importantly, if she continues to have headaches at the rate she described, she would not be able to maintain any type of competitive employment." Employers want their employees to be reliable, productive workers. Given Ms. Barry's problems with ongoing headaches, she would not be a reliable and productive worker and would be unable to maintain a work schedule that is set by an employer." He concluded she is obviously unemployable. No contrary vocational opinion was presented. Claimant has demonstrated she is permanently and totally disabled by a preponderance of the evidence presented.

**Conclusion:**

Claimant shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision within 20 days from the date of receipt of this decision. Employer and Insurer shall have an additional 20 days from the date of receipt of Claimant'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, shall submit such stipulation along with an Order consistent with this Decision.

Dated this 1<sup>st</sup> day of February, 2024.

BY THE DEPARTMENT:

A handwritten signature in black ink that reads "James E. Marsh". The signature is written in a cursive, slightly slanted style.

James E. Marsh  
Administrative Law Judge