

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

**DAWN L. BREECE,**

**HF No. 183, 2013/14**

**Claimant,**

**v.**

**DECISION**

**1<sup>ST</sup> FINANCIAL BANK USA,**

**Employer,**

**and**

**ONE BEACON INS. / GALLAGHER  
BASSETT SRS., INC.,**

**Insurer.**

This is a workers' compensation proceeding before the South Dakota Department of Labor, pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing in the above-entitled matter was conducted on October 28, 2015, at 9 am CT, in Elk Point, South Dakota, before Sarah E. Harris, Administrative Law Judge, South Dakota Department of Labor and Regulation, Division of Labor and Management. Claimant, Dawn L. Breece, was present. She is represented by Alice S. Horneber, of Horneber Law Firm, P.C. Employer, 1<sup>st</sup> Financial Bank USA, and Insurer, One Beacon Ins. / Gallagher Bassett SRS., Inc., were represented by their attorney, Richard L. Travis, with the law firm May & Johnson, P.C.

Testifying at the Hearing was Dawn L. Breece, Norman E. Breece, Debra Peters, and Dr. Eli S. Chesen. A Stipulated Joint Medical Records Exhibit was produced. Affidavits of physicians and opinions by physicians are contained within their respective medical reports. Post-hearing briefs were submitted by the parties. The Department, having received and reviewed all evidence and arguments in this case hereby makes this Decision.

**ISSUES**

- (1) Did Claimant's physical injury cause the claimed mental injury?
- (2) Does Claimant suffer from a mental injury caused by a physical injury?
- (3) Whether Claimant is Permanently and Totally Disabled pursuant to SDCL §62-4-53.
- (4) Whether Claimant is entitled to past and future Indemnity Benefits?

(5) Whether Claimant has recovered from her physical and/or mental injury?

## FACTS

1. Dawn L. Breece (Breece) was born on December 19, 1947. At the time of hearing, Claimant was 67 years of age.
2. Breece resides in Dakota City, Nebraska, which is located approximately 34 miles from the most southeastern boarder of South Dakota.
3. Breece has a high school education.
4. Breece has been married for almost 47 years to Norman E. Breece. They have three adult sons.
5. In the early years of her marriage, Breece worked in accounts payable at Iowa Beef in Dakota City, Nebraska. Breece took some time off to raise her children. Breece worked part-time, and then full-time, at Gateway computers in Dakota Dunes, South Dakota, beginning in the 1990s for a period of six (6) years. Breece performed surveys and then worked at the on-site help desk, typing orders and sending out technicians to set up and/or replace computer parts. Breece was required to constantly speak on a telephone and type at a computer terminal. Breece's employment at Gateway ended when the business became defunct.
6. Breece was next employed by Adecco, temporary placement, which placed her back at Gateway doing the same work she had previously performed while working for Gateway.
7. On March 1, 2005, Breece began working for 1<sup>st</sup> Financial Bank USA (a credit card institution) in Dakota Dunes, South Dakota. Breece's job as customer service representative is a sedentary job which involves sitting for long periods of time at a desk with a computer station and phone. Breece worked for 1<sup>st</sup> Financial Bank USA, as a part-time employee from 8 am to 1 pm, five (5) days a week.
8. In 2012, Breece was engaged in the ViSalus nutrition program and exercised regularly. Breece cooked meals for her family, scrapbooked, did crafts, maintained a garden, read, and was active in her church teaching Sunday school, Bible school, and singing in the choir.
9. Breece suffered a compensable work-related injury to her head and left wrist on October 11, 2012, while employed as a part-time customer service representative with Employer. At the time of the accident, Breece was on a 15 minute work break and was power walking around a pond located on the 1<sup>st</sup> Financial Bank campus in Dakota Dunes. While walking, Breece was startled

when a flock of geese flew from the pond, which caused her to catching the toe of her right foot on a section of uneven concrete and fall. Breece was unable to catch herself, she fell on her left arm and hit her head on the concrete.

10. At the time of the accident, Employer was insured by One Beacon Ins. for purposes of workers' compensation, with Gallagher Bassett, Srs., Inc., as case manager.
11. Breece does not remember getting up after her fall but remembers walking back to 1<sup>st</sup> Financial Bank USA. Breece broke her glasses in the fall.
12. Breece immediately notified her supervisor of her fall and was approved to leave work. Breece got her glasses repaired and then sought treatment with Dr. Kevin Campbell, a chiropractor.
13. On October 11, 2012, when treating with Dr. Campbell, Breece reported on a scale of 1 to 10 a value of 10 for the constant sharp headache at the back of her head, radiating to the forehead. A value of 9 for the pain in the left arm. A value of 9 constant sharp cervical pain. A value of 8 constant stinging thoracic region. In Dr. Campbell's report he noted, "Examination of the head revealed no criminal abnormality or deformity. The eyes, ears, and nose were clear. The pupils were round, regular and equal and reacted to light accommodation. The cranial nerves appeared to be intact." Dr. Campbell also noted, "Examination of the cervical area noted very severe hypertonicity. The left wrist was noted to be subluxated with a degree of reduced mobility."
14. In total, Breece treated with Dr. Campbell 10 times from October 11, 2012, through January 7, 2013. Throughout treatment, Dr. Campbell noted slow improvement in Breece's symptoms.
15. On October 13, 2012, Breece sought medical treatment at the Emergency Department at Mercy Medical Center. Breece Complained of tenderness along the left superior frontal orbit area, headache on and off with pain getting worse throughout the day, left wrist/hand pain with limited movement and pain that shoots through and up her elbow. An x-ray was taken of Breece's left hand, showing no acute fracture. Breece was diagnosed with post-concussive syndrome, headache, dizziness, left wrist sprain, muscular skeletal pain. Breece was given a splint for her left wrist, and told to take Tylenol as needed and stay well hydrated for her headache. Breece was also released to return to work with no restrictions. Breece was given written information about Wrist Pain (Sprain-Strain) and Post-Concussive Syndrome, Adult.
16. On October 13, 2012, Breece returned to work. Over the next few days, Breece continued to worked on and off because of her headaches. As a result, Breece was unable to complete several of her shifts.

17. Breece reported to her primary care physician Dr. Carol Roge, for the first time on October 16, 2012. Breece complained of headache, left wrist pain, and issues with dizziness and balance. Breece also reported feeling “foggy” at work and having difficulty concentrating. Her neurological exam was normal and her musculoskeletal cervical spine exam was normal. Breece’s musculoskeletal exam of her upper extremity hand/wrist, did demonstrate some mild pain along the ulnar aspect of her hand with acute wrist flexion. Dr. Roge diagnosed Breece as having a concussion and ordered a CT scan of the head.
18. On October 18, 2012, Dr. Roge sent a note to Employer stating “Dawn has been having headaches related to her concussion. She will need to go home from work if the headaches are severe.”
19. The CT scan was performed at Mercy Medical Center on October 19, 2012. The findings were unremarkable showing no focal brain lesion, no intracranial hemorrhage, no midline shift, and no hydrocephalus.
20. On October 22, 2012, Breece had a follow-up appointment with Dr. Roge. Breece reported that her headaches are becoming more constant and worse on the left side. She reported the headaches are worse when working at the computer, texting, and reading. Breece also reported problems with concentration and problem solving at work. Breece scored a 28/30 on a Mini-Mental State Examination (MMSE) that was given by Dr. Roge. Dr. Roge found Breece to be “depressed” and she noted “post-concussion syndrome”, prescribed amitriptyline, and scheduled a follow-up for two weeks. Dr. Roge found Breece was unable to work until the recheck and discussed a psychology referral for memory work if not improving as headaches subside.
21. On October 30, 2012, Dr. Roge sent Employer a return to work form stating, “Dawn ... is not able to return to work until after re-evaluation on 11/5/12. Side effects of concussion.”
22. On November 5, 2012, Dr. Roge saw Breece again and noted she continues to complain of cognitive issues, but reported that her headaches were occurring less often and were less severe. Breece was referred to a neurologist for neuropsychiatric testing, as well as an ophthalmologist for her blurred vision.
23. Breece mistakenly scheduled an eye appointment with an optometrist rather than an ophthalmologist.
24. On November 5, 2012, Dr. Roge sent Employer a return to work form stating, “Dawn ... is not able to return to work indefinitely.”
25. Breece saw an Optometrist, Dr. Angela Spartz with Southern Hills Eye Care on November 12, 2012. Breece reported blurred vision, as well as headaches and eye strain. Breece was diagnosed with hyperopia (farsightedness), astigmatism,

vitreous floaters, dry eye syndrome, cataracts, and presbyopia (natural aging process in which there is a gradual loss of the eye's ability to change its focus to see objects that are near). Breece was prescribed new glasses.

26. On November 16, 2012, Dr. Roge's office informed the case manager about an appointment scheduled for Breece with James L. Case, neurologist at CNOS, on January 16, 2013 at 9 am.
27. Employer and Insurer retained Dr. Eli Sagan Chesen, Psychiatrist, to perform and independent medical examination (IME) on Breece. The IME was performed by Dr. Chesen on December 3, 2012.
28. On exam, Dr. Chesen noted Breece was alert and oriented to time, place, and person. He noted that her memory functioning for immediate, intermediate and remote recall was excellent; her associations were logical; her flow of speech and responsiveness to questions and comments were unremarkable; she engaged in conversation with normal social skills; there was no suggestion of pressured speech or psychomotor retardation; and she was fluent with no evidence of word-finding difficulties including aphasias of either a wernicke's or Broca's type. Dr. Chesen also noted that Breece's affect was inappropriate to her thought content, as she was calm and cooperative yet claimed to be in severe pain. Dr. Chesen concluded that he was highly suspicious of her claims of a concussion because she does not meet the criteria for the injury. Dr. Chesen after review of medical records, and examination of Breece's mental status proximate to the injury and on current examination, he concluded that Breece had a maximum medical improvement or MMI of 1 to 2 weeks post incident, and as of November 1, 2012, she should have been able to return to work, unrestricted. He diagnosed Breece as having malingering dysthymia, passive dependent personality characteristics, hypertension, reflux, arthritis, history of a concussion, and moderate stressors related to work dissatisfaction. Dr. Chesen based his determination that Breece did not suffer a concussion on the criteria that she did not display anterograde or retrograde amnesia as well as loss of consciousness. Dr. Chesen also opined that Breece's symptoms were fabricated. Dr. Chesen based his conclusions on a number of factors, to include, that Breece's scans do not show neurological damage, there were no observed focal neurological damage, Breece's lack of bruising or lacerations after the fall, her headaches and other symptoms got worse over time, and Breece's score of 28/30 (30/30) on the mini-mental state exam she was within normal limits.
29. Breece returned to Dr. Roge on December 5, 2012. Breece complained of headaches and dizziness. She reported no having "much of a life," spending the majority of her days lying in bed. She reported trouble with word finding, and not being able to remember conversations with her husband. Based on these reports, Dr. Roge referred her for neuropsychiatric testing with Dr. Michael McGrath in Sioux Falls, SD.

30. On December 6, 2012, Dr. Roge filled out a work readiness form on Breece's behalf for the Family and Medical Leave Act. She wrote that Breece is unable to perform any of her job functions due to her condition which commenced on October 11, 2012 and she has continuing headaches causing dizziness and incapacity to work. Dr. Roge stated Breece has been referred to neuropsych for evaluation and Breece's work status will be reassessed after she sees neuro for consult and is given recommendations. Dr. Roge wrote the beginning and ending dates for the period of capacity as being from 10/11/12 until she sees neuro for consult and treatment.
31. On December 14, 2012, Dr. Roge's office called the case manager about the neuropsych and neurology consults Dr. Roge made for Breece and was advised that "they will not authorize appts for doctor in Sioux falls, no further treatments until an independent exam is done."
32. In December of 2012, Employer and Insurer stopped paying weekly indemnity benefits to Breece.
33. Breece saw Michael J. McGrath, PhD, with Neuropsychology Consultants, LLC in Sioux Falls, SD on January 14, 2013. Breece reported daily headaches, made worse by computer use, as well as dizziness, left eye problems, confusion, forgetfulness, difficulty with word-finding, occasional left wrist pain, memory and concentration issues, slowed thought process and reasoning, depression, and anxiety. After running Breece through five (5) hours of testing, Dr. McGrath issued the following findings:

Based on the internal validity measures associated with WMS-IV/WAIS-IV, Mrs. Breece clearly produced valid neuropsychological test data. This is also suggested by the adequate level of performance she consistently displayed on the testing. She obtained a FSIQ of 104, which falls in the upper half of the normal range at the 61<sup>st</sup> percentile. This score would be approximately 109 in WAIS-R norms. The TOPF, combined with simple demographics, suggests a premorbid FSIQ of 98 in WAIS-IV norms. NART-R suggests premorbid WAIS-R FSIQ of 108. Her obtained FSIQ is not significantly different than either of these premorbid estimates, suggesting there has been no significant change in intellectual functioning. Immediate and short-term memory falls in the upper half of the normal range at the 58-75<sup>th</sup> percentile. All other neuropsychological tests measures are performed within normal limits, given age and education. All of the other scores are also consistent with expectations, based upon her FSIQ. The pattern of testing suggests no significant cognitive impairment and she is likely functioning at premorbid levels in this respect. She obtained a score of 8/30 on the GDS. This score is within normal limits. This is somewhat surprising, given her reports of some depressive symptoms and the chronic pain complaints. This low score may represent some cautious/defensive responding on the GDS.

Verbal comprehension is in the lower half of the normal range, consistent with estimated premorbid functioning. Vocabulary is slightly above the midpoint of the normal range. [Breece] also performs within normal limits on the Aphasia Screening Exam. Overall, there is no evidence of significant verbal impairment beyond age/education expectations.

Dr. McGrath found that there did not appear to be any impairment in terms of higher level conceptual/executive functioning and no significant attentional deficits. There was no evidence of significant memory impairment and no evidence of visual spatial impairment. These findings led Dr. McGrath to conclude that “there are no recommendations to be made at the cognitive level, given that the patient is functioning within normal limits, at least, and is likely functioning at premorbid levels. Cognitively, she should be able to resume her work duties. However, the chronic headaches, especially of exacerbated by the use of a computer, would significantly interfere with her capacity to work.” Dr. McGrath also recommended that Claimant be referred to a neurologist for a second opinion concerning medical treatment for headaches and vertigo, and that she see a psychiatrist for a possible trial of psychotropic medications other than the amitriptyline for her depression. Dr. McGrath noted that her depression may be reciprocally related to her headaches.

34. Dr. McGrath addressed Dr. Chesen’s findings at the IME because it had adversely affected Workers’ Compensation’s assistance with Breece. Dr. McGrath addressed Dr. Chesen’s belief that Breece “did not suffer a concussion.” Dr. McGrath noted “the American Academy of Neurology Guidelines for Management of Sports Concussion notes: “Concussion is a trauma-induced alteration in mental status and may or may not involve loss of consciousness. Confusion and amnesia are the hallmarks of concussion. Confusional episode and amnesia may occur immediately after the blow to the head or several minutes later.” Symptoms of concussion are also noted to include: headache, dizziness or vertigo, lack of awareness, poor attention and concentration, memory dysfunction, fatigability, irritability and low frustration tolerance, intolerance of bright lights or difficulty focusing vision, intolerance of loud noises, sometimes ringing in the ears, anxiety, and/or depressed mood, sleep disturbance.” Dr. McGrath noted that clearly Breece has a number of these symptoms since the head injury. Dr. McGrath suggests that there is a “miserable minority” of mild traumatic brain injury patients who have persistent post-concussion symptoms. Dr. McGrath states that it is not at all uncommon for patients suffering a mild traumatic brain injury to have normal brain scans and lack of focal neurological symptoms and still suffer from significant neuropsychological impairment to include post-concussive symptoms.
35. Claimant was seen by Dr. James Case of CNOS, neurologist, on January 16, 2013. Claimant reported that since October 11, 2012 she has been having headaches, dizziness, depression, and cognitive issues. Claimant reported that her headaches have improved overall in severity since the initial weeks following

her head injury, but they are still “significant”. Claimant reported that she would not be able to return to work, as the computer screen makes her feel dizzy, aggravates her headaches and she feels that she would be mixed up in attempting to speak with customer service clients. Dr. Case noted that there might be some ambivalence on her part about returning to work as, in her words, “I am 65.” Dr. Case reviewed the records of Dr. Campbell, Dr. Roge and Dr. Chesen and he was aware that Claimant had been seen by Dr. McGrath. Dr. Case ultimately determined that Claimant’s complaints were consistent with a grade I concussion, and recommended an MRI of the brain. Dr. Case also referred Claimant to physical therapy for her headaches and dizziness. Dr. Case noted that Claimant had not likely reached MMI, but did not give Claimant an impairment rating. Dr. Case also believed there was a reasonable prognosis for improving Claimant’s symptoms with the appropriate mix of therapists and therapies and depending on the results of the MRI, neuropsychological assessment, and response to therapies she might be able to anticipate a phased return to work.

36. On January 18, 2013, Dr. Roge sent Employer a return to work form stating, “Dawn ... is not able to return to work until all neurology reports are reviewed and pt is reevaluated 2/1/13.”
37. Claimant began physical therapy on January 21, 2013. In total, Claimant underwent 20 physical therapy treatments from January 21, 2013, through March 15, 2013. The therapist noted slight improvement in her balance over the course of treatment. Claimant was discharged from therapy on March 15, 2013, as she had plateaued.
38. On January 23, 2013, Claimant had an MRI at Mercy Medical Center. The MRI was normal with and without contrast.
39. On February 4, 2013, Dr. Roge sent Employer a return to work form stating, “Dawn is not able to return to work until further evaluation in four weeks.”
40. On February 18, 2013, Claimant had a follow-up visit with Dr. Case. Claimant reported that overall things are the same with headaches, cognitive complaints, energy level, and dizziness. Dr. Case prescribed Prozac and Gabapentin, and recommended that Claimant continue with physical therapy. Dr. Case recommended that physical therapy at CNOS continue with the addition of postural and myofascial release modalities for the headaches added to her regimen for an additional two weeks.
41. On February 21, 2013, Dr. Roge advised Employer regarding Claimant’s work status, “Not much improvement. Started Prozac/chemical imbalance and muscle relaxer. Needs another four weeks on therapy. Can’t do daily tasks around the house and hasn’t seen any changes since December.”



42. Claimant was terminated from employment by certified letter dated February 21, 2013, after having exhausted her FMLA benefits.
43. On February 25, 2013, Claimant had an appointment with Dr. Beth Bruening at Bruening Eye Specialists. Claimant reported headaches, dizziness, and intermittent left eye pain. Dr. Bruening determined that Claimant's dizziness and overall headaches were not related to any eye difficulties, and that the eye strain she was experiencing could be related to the new glasses she obtained from Southern Hills Eye Care on November 12, 2012. Dr. Bruening noted that Claimant showed signs of open-angle glaucoma, and scheduled a follow-up visit for additional testing of ocular alignment, stereo vision and to check her glasses for proper alignment.
44. On February 28, 2013, Claimant had a follow-up visit with Dr. Roge to discuss various test results. During the visit, Claimant requested a note stating she was not ready to go back to work. Claimant stated that if she does not return to work on Monday she is fired, even with a doctor's note. Claimant also presented Dr. Roge with a long-term disability for which, according to Dr. Roge's notes, Dr. Case would not sign. Claimant reported problems with her vision, headaches, fatigue, depression, dizziness, and cognitive issues. Dr. Roge noted no abnormalities on exam, and agreed with Dr. Case that Claimant should continue physical therapy.
45. Claimant returned to Dr. Bruening on March 7, 2013. Dr. Bruening ultimately diagnosed Claimant with convergence insufficiency, which could be related to her concussion and is likely contributing to her difficulties reading.
46. On March 7, 2013, Claimant's attorney sent a letter to Employer/Insurer, along with Dr. McGrath's report, demanding that Claimant's indemnity and medical benefits be reinstated.
47. On March 18, 2013, Claimant had a follow-up visit with Dr. Case. Claimant reported that things are overall the same, she reports her headaches as more of a nagging issue than a severe pain. Claimant also reported that she has completed physical therapy with CNOS and is now thinking of pursuing some massage and acupuncture therapy with PT Mike Luse. Dr. Case noted that Claimant "is making some progress, although she continues to experience low-grade daily headaches. She is a bright and articulate lady, and ... that she probably does not have any significant cognitive impairment as a result of her fall, although her attention and concentration may be reduced due to her psychosocial stressors and physical complaints." Dr. Case recommended that Claimant continue taking gabapentin and Prozac, instructed her in additional vertigo exercises, advised her that her plan to pursue massage therapy was reasonable, but advised against forceful chiropractic manipulation. Dr. Case discharged Claimant from care.

48. Between the time of the discharge and August 2013, Breece did not see any physicians regarding her work-related injury.
49. On August 26, 2013, Breece began treating with Dr. James Bjork of Bjork Chiropractic. Dr. Bjork uses electronic equipment which is able to adjust the spine without manipulation. Breece's reason for treatment was an aching/tingling pain in her neck.
50. Following Breece's October 12, 2012 fall, she reported the following mishaps to Dr. Bjork when seeking chiropractic treatment:
- August 26, 2013 – fell again 3-4 weeks ago, hit door way with right shoulder;
  - September 12, 2013 – helped friend move;
  - February 17, 2014 – shoveled;
  - May 20, 2014 – yard work;
  - June 13, 2014 – moved blocks;
  - September 4, 2014 – haul trees;
  - November 10, 2014 – missed last step of ladder 2 days ago
51. Breece treated with Dr. Bjork 22 times from August 26, 2013, through November 13, 2014. Breece treated for a number of symptoms over those 22 visits including headaches, shoulder pain, back pain, hip pain, and leg/foot pain.
52. On January 6, 2015, Breece treated with DR. Roge in relation to her October 11, 2012 injury. Prior to this time, Breece had not treated with Dr. Roge for her work-related injuries since February 28, 2013. Dr. Roge notes that the appointment was scheduled at the request of Breece's attorney, in order to determine the effects of her 2012 injury. Breece reported intermittent headaches that are not as severe as before, anxiety, decreased memory, improvement of overall cognitive issues, and occasional dizziness. During the January 6, 2015, appointment Dr. Roge noted post-concussion syndrome but did not recommend further treatment.
53. Since Breece's termination by Employer, she has not applied for employment.
54. Breece no longer exercises because she is unstable on her feet, thus she has been unable to maintain a healthy weight.
55. Breece has numerous medical bills which were never paid by Employer/Insurer, such as:
- James A. Bjork, DC
  - Burening Eye Specialists
  - Kevin Campbell, DC
  - CNOS (James L. Case, MD)

- Family Health Care (Carol L. Roge, MD)
- Neuropsychology Consultants, LLC (Michael J. McGrath, PhD)
- Southern Hills Eyecare
- HyVee (prescriptions)
- Mike Luse, LMT
- Siouxland Radiology Partners (CAT scan and MRI)

Additional facts may be listed in the analysis below.

## **Analysis:**

### ***Causation:***

Breece, as the claimant in a workers' compensation case, has the burden of proving all facts essential to sustain an award of compensation. *Darling v. West River Masonry Inc.*, 2010 S.D. 4, ¶ 11, 777 NW2d 363, 367. The employee's burden of persuasion is by a preponderance of the evidence. *Caldwell v. John Morrell & Co.*, 489 NW2d 353, 358 (SD 1992). SDCL 62-1-1(7) defines "injury" or "personal injury" for the purposes of workers' compensation, specifically the compensation of mental injuries is defined as:

[O]nly injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

(c) If the injury combines with a preexisting work related compensable injury, disability, or impairment, the subsequent injury is compensable if the subsequent employment or subsequent employment related activities contributed independently to the disability, impairment, or need for treatment. The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. *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. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought;*

SDCL 62-1-1 (7) (emphasis added). Thus, an employee must sustain a compensable physical injury in order for a mental injury to be compensable, and even then, only if the physical injury remains a major contributing cause of the mental injury. Therefore, the Department's inquiry is twofold: (1) did the employee sustain a physical injury and, if so, (2) did and does that physical injury remain a major contributing cause of the alleged mental disability.

The law requires the testimony of medical professionals in determining causation in cases such as this. The Court wrote in *Darling v. West River Masonry, Inc.*:

The testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and the current claimed condition “because the field is one in which laypersons ordinarily are unqualified to express an opinion.” *Vollmer*, 2007 S.D. 25, ¶14, 729 N.W.2d at 382 (quoting *Rawls v. Coleman-Frizzell, Inc.*, 2002 S.D. 130, ¶21, 653 N.W.2d 247, 252 (quoting *Day v. John Morrell & Co.*, 490 N.W.2d 720, 724 (S.D. 1992))). No recovery may be had where the claimant has failed to offer credible medical evidence that his work-related injury is a major contributing cause of his current claimed condition. SDCL 62-1-1(7). Expert testimony is entitled to no more weight than the facts upon which it is predicated. *Schneider v. S.D. Dep’t of Transp.*, 2001 S.D. 70, ¶16, 628 N.W.2d 725, 730 (citations omitted).

*Darling v. West River Masonry, Inc.*, 2010 S.D. 4, ¶13, 777 N.W.2d 363, 367.

In this case, Breece is able to sustain her burden of establishing the first prong of the statute. It is undisputed that Breece suffered a physical work-related injury as a result of her October 11, 2012 fall. Breece received workers’ compensation benefits for her injuries from October 11, 2012, through early December 2012. The Department next must determine whether Breece’s October 11, 2012 work-related injury remains a major contributing cause of her current claimed mental injury.

The Department turns to medical opinions offered in this case. Employer and Insurer rely on Dr. Chesen’s IME opinion that Breece did not suffer a concussion as a result of her work-related injury and her work injury is not a major contributing cause of her current physical and mental condition. Dr. Chesen opined that Breece’s work injury was resolved or should have been resolved no later than November 1, 2012, when she reached maximum medical improvement (MMI). Dr. Chesen has opined Breece was capable of returning to work immediately thereafter.

After being placed at MMI by Dr. Chesen and being denied further treatment, Breece continued to seek treatment on her own with Dr. Roge who referred her for neuropsychiatric testing with Dr. Michael McGrath in Sioux Falls, SD. Dr. McGrath recommended that Breece be referred to a neurologist, Dr. James Case of CNOS, for a second opinion concerning medical treatment for headaches and vertigo.

Dr. McGrath diagnosed Breece as suffering from post-concussional syndrome, and depressive disorder but has opined that Breece has “no significant cognitive impairment.” Dr. McGrath concluded after evaluating Breece on January 14, 2013, that “the pattern of the testing suggests no significant cognitive impairment and she is likely functioning at premorbid levels in this respect.” Dr. McGrath opined that cognitively Breece should be able to resume her work duties, however, the chronic headaches, especially if exacerbated by the use of computers, would significantly interfere with her capacity to work. Dr. McGrath made no recommendations at the cognitive level, given that Breece was functioning within normal limits; however, he did recommend that Breece be referred to a neurologist. Dr. McGrath also stated that if Breece is one of the “miserable minority”, she would not be expected to return to work within 1-2 weeks. Similarly, Dr. Case opined on January 16, 2013, that Breece’s symptoms were consistent with a grade one concussion, and noted that Breece had not likely reached maximum medical improvement. Dr. Case recommended that Breece get an MRI of her head, which came back normal. Dr. Case opined that with the appropriate mix of therapies Breece might be able to anticipate a phased return to work. On March 18, 2013, Dr. Case noted that Breece probably does not have any significant cognitive impairment as a result of her fall, although her attention may be reduced due to her psychosocial stressors and physical complaints. Breece was released from treatment with Dr. Case on March 18, 2013.

The Department finds that the opinions of Dr. McGrath and Dr. Case are similar to that of Dr. Chesen, in that there is no medical evidence that suggests that Breece suffered from a mental injury. “The opinion of an examining physician should be given substantial weight when compared to the opinion of a doctor who only conducts a review of medical records.” *Peterson v. Evangelical Lutheran Good Samaritan Society*, 2012 S.D. 52, ¶23, 816 NW 2d 843, 850. (citing *Darling*, 2010 S.D. 4, ¶19, 777 N.W.2d 363, 369). Neither Dr. McGrath nor Dr. Case concluded nor do the medical records show that Breece’s current condition and need for medical treatment is the direct result of her work-related injury. However, Dr. McGrath and Dr. Case both believe that Breece suffered from a concussion when she fell and hit her head, thus her work injury had not resolved as of November 1, 2012.

The Department finds Dr. McGrath’s opinion in conjunction with Dr. Case’s opinion the most persuasive. In fact, Breece was not released from treatment with Dr. Case until March 18, 2013. The preponderance of the evidence shows that Breece suffered from a concussion on October 11, 2012. As a result she reported suffering from almost constant migraine headaches for several months following the 2012 injury. Despite Breece’s reports of constant pain, there is a significant gap in Breece’s treatment from March 18, 2013, until August 26, 2013. During this time Breece did not have a single

visit with a chiropractor or doctor relating to the October 11, 2012 work injury. When Breece sought treatment with Dr. Bjork on August 26, 2013, she related the treatment to a fall “3-4 weeks ago,” where she hit her right shoulder on a doorway.

As noted above, Dr. Chesen, Dr. McGrath, and Dr. Case concluded that Breece did not suffer a mental injury as a result of the October 11, 2012, fall. However, Breece did sustain a left wrist sprain as a result of her injury and was given a splint for her wrist. Breece’s wore the left wrist splint off and on for approximately four months. Breece has since fully recovered from the injury to her left wrist. It is reasonable to infer from the extended period of time without medical treatment being sought, that Breece has fully recovered from her October 11, 2012 work injury. When taking the evidence as a whole the Department is of the opinion that Breece had fully recovered from injuries sustained in the October 2012 work injury. Breece had fully recovered as of March 18, 2013, when she was released from treatment with her neurologist, Dr. Case. Therefore, the Department finds that Breece has failed to meet her burden of establishing, that her October 11, 2012 work injury remains a major contributing cause of her claimed mental injury.

***Permanent Total Disability:***

The Department must next determine whether Breece is entitled to permanent total disability benefits (PTD). The standard for determining whether a claimant qualifies for “odd-lot” benefits is set forth in SDCL 62-4-53, which 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 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.

SDCL 62-4-53 (emphasis added).

In *McClafin v. John Morrell & Co.*, 2001 SD 86, the South Dakota Supreme Court decision discussed the burdens of proof required in odd-lot cases:

Under the odd-lot doctrine, the ultimate burden of persuasion remains with the claimant to make a prima facie showing that his physical impairment, mental capacity, education, training and age place him in the odd-lot category. If the claimant can make this showing, the burden shifts to the employer to show that some suitable work is regularly and continuously available to the claimant.

We have recognized two avenues in which a claimant may pursue in making the prima facie showing necessary to fall under the odd-lot category. First, if the claimant is “obviously unemployable,” 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. A claimant may show “obvious unemployability” by: 1) showing that his “physical condition, coupled with his education, training and age make it obvious that he is in the odd-lot total disability category,” or 2) “persuading the trier of fact that he is in the kind of continuous, severe and debilitating pain which he claims.”

Second, if “the claimant’s medical impairment is so limited or specialized in nature that he is not obviously unemployable or regulated to the odd-lot category,” then the burden remains with the claimant to demonstrate the unavailability of suitable employment by showing that he has made ‘reasonable efforts’ to find work” and was unsuccessful. If the claimant makes a prima facie showing based on the second avenue of recovery, the burden shifts to the employer to show that “some form of suitable work is regularly and continuously available to the claimant.” Even though the burden of production may shift to the employer, however, the ultimate burden of persuasion remains with the claimant.

*McClafin* at ¶ 7 (citations omitted).

For Breece to establish that she is in the odd-lot disability category, she would need to prove that “[her] physical condition, in combination with [her] age, training, and experience, and the type of work available in [her] community, causes [her] to be unable to secure anything more than sporadic employment resulting in insubstantial income.” *Wagaman v. Sioux Falls Construction*, 576 N.W.2d 237, 241 (S.D. 1998). Here, Breece has made no attempt to find employment since being terminated by Employer in February 2013. Breece has offered no evidence of the “type of work available in [her] community,” as required by the Court in *Wagaman*. Thus, even though Breece was

taken off work by Dr. Roge within weeks of the fall, no doctor has issued any specific work restrictions, or diagnosed Breece with a permanent impairment that would impact her ability to work. Breece does not have any medical opinion from a doctor that says she cannot work. Dr. McGrath opined that cognitively Claimant should be able to resume her work duties, however, the chronic headaches, especially if exacerbated by the use of computers, would significantly interfere with her capacity to work. Dr. Case, similarly, reported that he felt that a phased return to work would be possible with the “appropriate mix of therapists and therapies.” Dr. McGrath and Dr. Case’s conclusions are consistent with Dr. Chesen’s opinion that Breece is not disabled as a result of the October 11, 2012, work injury and was capable of returning to work. Consistent with these conclusions was the testimony of Breece’s friend, and registered nurse, Debra Peters. Peters testified that Breece was, in her opinion, back to normal compared to her condition immediately following the incident in 2012.

Breece has also failed to present evidence of “continuous, severe and debilitating pain” to explain her continued unemployment. Breece noted improvement in her headaches in the months and years following the accident, including during her final visit with Dr. Case on March 18, 2013, where she reported her headaches were more of a nagging issue than a severe pain. She also reported similar improvement during her last visit with Dr. Roge on January 6, 2015, where she reported that her headaches were “intermittent,” and “[n]ot as severe as before...” Breece testified during the hearing that she was pretty much back to her normal routine, including standing during church services, teaching Sunday school, singing in the choir, and acting as the Bible school director. She also testified that since the 2012 work injury she has engaged in physical activities such as hauling trees, working in the garden, shoveling, and digging holes.

Breece has not shown that she is “obviously unemployable.” Thus she must demonstrate the unavailability of suitable employment by showing that she has made ‘reasonable efforts’ to find work and was unsuccessful. Breece is unable to meet this burden. Breece admits that she has not undertaken any efforts to look for work since being terminated by Employer in February 2013. She testified that she has never looked at the classified ads, has never contacted employers regarding open positions, and has not submitted a single employment application. Breece testified that she has never met with a certified rehabilitation counselor, a licensed professional counselor, a certified disability management specialist, or a qualified rehabilitation consultant to explore employment-related opportunities. Breece does not present the behavior of someone who wishes to return to work. Breece testified that she considers herself retired at this point. Breece has not made a prima facie showing of reasonable efforts to find work, and, thus, does not fall into the odd-lot disability category. Breece has failed to meet her burden of showing that she is entitled to permanent total disability benefits due to her work injury.



***Past and Future Indemnity or Medical Expenses:***

Breece argues that she is entitled to indemnity benefits from the date they were stopped in December 2012 into the future, because she is permanently and totally disabled. The evidence, however, does not support this conclusion. As noted above, Breece has failed to meet her burden of showing that she is entitled to permanent total disability set forth in SDCL §62-4-53. Thus, Breece is not entitled to future indemnity benefits.

Employer and Insurer also argue that Breece is not entitled to past indemnity benefits based on the opinion of Dr. Chesen on December 3, 2012, that Breece was not disabled, had reached maximum medical improvement (MMI) as of November 1, 2012, and was fit to return to work immediately. Breece, however, was taken off work by Dr. Roge within weeks of the work injury. This was done based on Breece's own subjective complaints. Though Breece continued to treat past November 1, 2012, when Dr. Chesen opined that she had reached MMI, her continued treatment is supported by Dr. Case's opinion that she had not yet reached MMI. Dr. McGrath recommended that Breece be referred to a neurologist for a second opinion concerning medical treatment for headaches and vertigo. Dr. Case ultimately determined that Breece's complaints were consistent with a grade one concussion, and referred Breece to physical therapy for her headaches and dizziness. In 2013 both Dr. McGrath and Dr. Case opined that Breece was capable of returning to work, but noted that she may have some difficulty initially due to her headaches. Breece was released from treatment with Dr. Case on March 18, 2013, shortly after her last physical therapy session was completed. After Breece was released from treatment with Dr. Case an extended period of time elapsed without Breece seeking any medical treatment. As such, the Department is of the opinion that Breece reached maximum medical improvement (MMI) on March 18, 2013.

Employer has not shown by a preponderance of the evidence that the treatment by Breece's treating physicians was medically unnecessary or unreasonable. Thus, Breece is entitled to payment of past indemnity and/or medical expenses related to her October 11, 2012 work injury from December 2012 to March 18, 2013.

Employer/Insurer is responsible for reimbursement/payment of billing for Kevin Campbell, D.C. for the dates of October 11, 2012 to January 7, 2013. Employer/Insurer is responsible for reimbursement/payment of billing for CNOS (Dr. Case) and billing for Neuropsychology Consultants, LLC. Employer/Insurer is responsible only for the billing for Family Health Care that is related to Breece's October 11, 2012 work injury. Employer/Insurer is responsible for billing for Siouxland Radiology Partners for the date of x-ray on October 13, 2012, CAT SCAN on October 19, 2012, and MRI on January 23, 2013. Employer and Insurer are responsible for prescriptions from HyVee, specifically Amitriptyline HCL 10mg tabs, Fluoxetine HCL 10mg tabs and Gabapentin 300mg caps,

prescribed from October 22, 2012 to March 18, 2013. Employer is responsible for payment of billing from Bruening Eye Specialists, as this was the recommended ophthalmologist. Employer/Insurer is not responsible for payment to Southern Hills Eyecare because this was to an optometrist and not the recommended ophthalmologist. Employer/Insurer is not responsible for any medical bills that came after March 18, 2013. Those include Billing for James A. Bjork, D.C., any billing for Mike Luse, LMT as there are no medical records associated with this service, and prescriptions from HyVee after March 18, 2013. Employer and Insurer are responsible for reimbursement of the amount of medical bills paid to providers, plus interest at the Category B level. SDCL 62-1-1.3.

### **Conclusion and Order**

Breece shall submit Findings of Fact and Conclusions of Law and an Order consistent with this Decision, and if desired Proposed Findings of Fact and Conclusions of Law, within 20 days after receiving this Decision. Employer/Insurer shall have an additional 20 days from the date of receipt of Breece's Findings of Fact and Conclusions of Law to submit Objections and/or Proposed Findings of Fact and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, Employer and Insurer shall submit such stipulation together with an Order consistent with this Decision.

Dated this 26<sup>th</sup> day of May, 2016.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

/s/ Sarah E. Harris  
Sarah E. Harris  
Administrative Law Judge