

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

**RODNEY WALN,**

**HF No. 84, 2006/07**

**Claimant,**

**v.**

**DECISION**

**K-MART,**

**Employer,**

**and**

**SEDGWICK CMS,**

**Insurer.**

This is a workers' compensation proceeding brought before the South Dakota Department of Labor pursuant to SDCL 62-7-12 and ARSD 47:03:01. A hearing was held before the Division of Labor and Management on November 25, 2008, in Pierre, South Dakota. Lee C. "KIT" McCahren represented Claimant. Sandra Høglund Hanson represented Employer and Insurer.

***Issues:***

Causation (SDCL 62-1-1(7))  
Permanent Total Disability (SDCL 62-4-53)

***Facts:***

Based upon the testimony at the hearing and the record, the following facts are found by a preponderance of the evidence:

1. Rodney Waln (Waln) was born June 2, 1965 in Aurora, Colorado.
2. Waln attended high school in Cheyenne, Wyoming.
3. Waln was involved in a car accident when he was approximately 20 years old. As a result of that accident, Waln suffered a brain injury and temporary amnesia. After the injury, Waln required vocational rehabilitation.

4. After graduating from high school, Waln attended a community college in Cheyenne for one year, studying electronics and general studies. He also attended US Truck Driving School in Colorado and received a commercial driver's license after graduating from that school. At the time of hearing, Waln still held that commercial driver's license. Waln also attended a two-year program of law enforcement sciences in Pennsylvania.
5. Between 1985 and 2006, Waln worked for twenty-four (24) different employers. Waln's work history indicates that he held each of these jobs for less than one year, on average. Some of these positions were entry-level or unskilled to semi-skilled jobs.
6. Waln began working at K-Mart's store in Pierre, SD, as an asset protection officer less than a year prior to July, 2006.
7. At approximately 5:30 p.m. on July 6, 2006, Waln confronted a young man and woman who he suspected of shoplifting. Waln began escorting them to the back of the store where the property asset office was located when the young man assaulted him.
8. Waln has told varying accounts of the July, 2006 attack to several medical providers since the incident. He did not mention in his initial accounts as he did in later versions, that he was knocked unconscious or struck his head on the floor. In later accounts, his attack tended to be portrayed more violently. However, most of Waln's version indicated that the incident began with the attacker striking him with his fists in the face and that his memory after the initial blows was vague. There is no dispute that Waln sustained multiple bruises to his eye, jaw and ear on his face during the altercation.
9. A witness of the July 2006 attack, observed a portion of the attack from a location six aisles away. The witness did not see how the attack began but heard the commotion. When Waln and the assailant came into view, the witness saw the assailant strike Waln with his fist. He described the punch as a "glancing blow". He also observed much pushing and shoving. After the attack, the witness found Waln's eye glasses, a necklace and a pair of earrings on the floor where the attack apparently began.
10. A preponderance of the testimony and medical evidence indicates that Waln was struck multiple times in the face by the suspected shoplifter, that he struck his head on something hard and that after the initial blow or blows, he was rendered to a state of semi-consciousness.
11. Sedgwick CMS (Sedgwick) insured K-Mart for purposes of workers' compensation on July 6, 2006.

12. After the attack on July 6, 2006, Waln finished his work shift during which he completed a report of the incident. Waln later did not recall completing this report.
13. Waln first sought medical treatment for his injuries from the attack at the St. Mary's Healthcare Emergency Room in Pierre, SD (ER) at 9:30 p.m. Personnel at the ER did not diagnose a brain injury or trauma. ER personnel did not perform a Glasgow Coma Scale. The medical records noted that Waln had a laceration to his inner ear canal in addition to facial bruises.
14. On July 14, 2006, Waln went to see his primary treating physician, Dr. Holland (Holland). Waln complained of fatigue, dizziness, agitation, and loss of appetite, Holland ordered an MRI of Waln's brain. The MRI was performed on July 14, 2006. On July 17, 2006, Holland advised Waln that his MRI was normal.
15. On July 25, 2006, Waln underwent an EEG, which was also normal. Waln reported that he was feeling better but still complained of mental confusion.
16. On August 14, 2006, Waln went to Capital Area Counseling for medication management. Waln had called and left (8) eight messages from the night before to that morning. He also called several times to report his medication was "not making him feel right." The counselor explained to Waln and his wife that his initial message had stated, "My name is Bradley Room and I need to speak to you about my medication." The counselor also questioned Waln about calling eight times overnight. Waln told her he thought he had called only twice. The counselor noted Waln appeared "to be fixated on his anxiety." The counselor diagnosed Waln with panic disorder with agoraphobia.
17. Waln returned to Holland on August 16, 2006. Holland had spoken with the counselor at Capital Area Counseling about Waln's "somewhat bizarre" behavior. Holland reviewed Waln's records noted that Waln had a normal neurological exam, normal MRI, normal EEG, and that he had attempted to have Waln seen by a neurologist.
18. Since the July 6, 2006 attack, Waln has received treatment from several physicians on a regular basis including neurologists and psychiatrists for the health problems that he has experienced since the attack.
19. On September 5, 2006, Waln saw Dr. Hata, a neurologist. Hata's impression was that Waln suffered from post-concussion syndrome and possible posttraumatic stress disorder (PTSD).

20. Waln saw Dr. Volbrecht (Volbrecht), a neuropsychologist on August 12, 2008. Volbrecht administered several tests to Waln. Waln's scores on attention and concentration, language, visual perception/construction, verbal learning and memory, visual learning and memory ability, and executive functioning were in the less than 5 percentile.
21. Volbrecht found that Waln suffered from the late effects of intracranial injury, panic disorder and major depressive disorder. She also found his processing speed to be significantly impacted.
22. Since the July 2006 attack, Waln has experienced a number of health problems and behavioral changes. Waln began suffering anxiety attacks which he first believed to be seizures. Waln's sense of smell and taste has changed. He no longer likes the taste of tobacco and dislikes the smell of chicken and other foods that he previously enjoyed. He has suffered a loss of cognitive function including the area of attention, concentration and problem solving. Waln is no longer interested or capable of driving a vehicle. Waln now experiences episodes of memory loss and confusion. Waln has become introverted, depressed and exhibits bizarre behavior.
23. After the July 6, 2006, incident Waln was discharged from his job by K-Mart for falsifying records.
24. At the time of the attack, Waln was working 40 hours a week and paid \$11.25 per hour.
25. Dr. John David Sabow (Sabow), a neurologist from Rapid City, testified on Waln's behalf at the hearing. Sabow testified that he had reviewed the neuropsychological testing and Waln's medical records in detail. Based upon Sabow's review of those documents, Sabow opined about Waln's head injuries and the cause of Waln's current medical condition.
26. Sabow opined that Waln suffered an altered state of consciousness during the attack. Sabow identified two important syndromes experienced by Waln that indicated brain trauma. One was the loss of affinity for tobacco and some types of foods. The second was a laceration in Waln's inner ear canal. Sabow stated that the laceration is an important indicator of a basilar skull fracture.
27. Sabow opined that the Waln's memory loss, anxiety, change of behavior, withdrawal from friends and family, mental confusion and cognitive problems including problems with recall and problem solving, since the July 2006 attack, are all symptomatic of a brain injury.

28. Sabow opined that the injury sustained by Waln during the July 2006 attack, was superimposed on Waln's previous brain injury to cause a disproportionate change to Waln's cognitive and neurobehavioral functions. Sabow also opined that Waln's anxiety disorder amplifies his cognitive problems. Consequently, the day to day fluctuation of Waln's anxiety causes a corresponding fluctuation of his cognitive test scores.
29. Sabow concurred with the opinion of Dr. Hata who had concluded that Waln suffered from chronic anxiety and possible post-concussion syndrome. Sabow stated that these two conditions are among the most common symptoms suffered by patients with traumatic brain injuries.
30. Sabow opined that it was his medical opinion that Waln sustained a minor traumatic brain injury, a possible basilar skull fracture and post-traumatic stress as a result of the July 6, 2006 assault. Sabow opined that Waln's injuries are permanent
31. Sabow opined that neurological abnormalities are very rarely detected with medical imaging provided by EEGs, CAT scans and MRIs. Consequently, patients with minor brain injuries often fall through the cracks in the early part of the diagnostic regimes conducted by ERs and family practitioners.
32. Sabow opined that minor brain injuries impact socially and neurobehavioral. He stated that they impact personal relationships. Sabow testified that these patients experience cognitive problems, like memory and putting memories together to solve problems or perform a task. Sabow testified that neurobehavioral problems can vary widely especially when combined with a prior brain injury.
33. Sabow opined that Waln is permanently unemployable unless his mother is with him showing him what to do at the time. Sabow testified that Waln is not capable of even basic repetitive jobs without supervision as a result of his work-related injury. Sabow testified that Waln's condition is permanent.
34. During Sabow's testimony at the hearing, Waln offered a book into evidence titled Textbook of Traumatic Brain Injury.<sup>1</sup> Sabow testified that the text is a professional treatise, that it is authoritative, and that it supports his testimony and conclusions in this case. K-Mart and Sedgwick objected to the admission of the textbook into evidence. The

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<sup>1</sup> Textbook of Traumatic Brain Injury, Edited by Jonathan M. Silver, M.D., Thomas W. McAllister M.D., and Stuart C. Yudofsky, M.D. Copyright © 2005, Published by American Psychiatric Publishing, Inc.

- Department of Labor deferred ruling on the objection until its decision in this matter is rendered.
35. On September 22, 2008, Waln was evaluated by Dr. Jones-Thurman (Thurman), a neurophysiologist and Dr. Davis (Davis), a psychiatrist on behalf of K-Mart and Sedgwick. Their conclusions were based on their testing interviews and review of Waln's prior medical records.
  36. Thurman noted that Waln seemed quite impaired during his neuropsychological testing, but during his interview, "he appeared to be an entirely different person, using language and displaying cognitive abilities that were quite inconsistent with his appearance during initial testing."
  37. Thurman concluded that these tests and evaluation showed Waln has chronic anxiety and depressive symptoms related to his longstanding personality makeup, rather than any single event on July 6, 2006, complicated by chronic difficulty in his interpersonal relationships. Some exaggeration of symptoms was also likely." When taking the MMPI-2, Waln's response pattern was unusual, suggesting he may have been consciously trying to distort the test results. Neither the MCMI-III nor the MMPI-2 provided evidence of PTSD or a traumatic brain injury.
  38. Davis diagnosed Waln as a malingerer<sup>2</sup>, with possible anxiety disorder, possible schizoid, schizotypal and dependent personality traits, a history of brain trauma as a teenager, a history of back injuries, and problems related to general life stressors. Waln satisfied three of the four criteria for malingering: presenting in a medicolegal context, a marked discrepancy between his claimed disability and the objective findings, and his lack of cooperation in his testing (i.e., inconsistencies and exaggerations so extreme as to invalidate tests, failure to disclose important information about his past).
  39. Davis noted several inconsistencies in Waln's reports of what happened during the July 6, 2006 incident.
  40. Davis also concluded that Waln does not suffer from PTSD because: he did not experience the type of event which could cause PTSD; there is no indication Waln's reaction to the July 6, 2006, incident was "intense fear, helplessness, or horror;" and his records do not document symptoms of PTSD.
  41. Based on the evaluations performed by Jones-Thurman and himself, Davis opined that Waln's symptoms were inconsistent with brain trauma.

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<sup>2</sup> Welch v. Automotive Co., 528 NW2d 406, 408 (SD 1995) defines a malingerer as someone who feigns or intentionally exaggerates disability in order to draw compensation benefits.

He concluded that Waln does not need any treatment as a result of the July 6, 2006 incident.

42. Davis testified on behalf of K-Mart and Sedgwick at the hearing. Davis testified that his opinion was based in large part on the fact that the ER personnel did not diagnose brain injury and did not perform a Glasgow Coma Scale analysis upon Waln during his initial treatment. Davis explained that whenever emergency medical technicians EMTs or ER personnel see a person with any suspicion of brain trauma.
43. Davis believed Waln's work history, pre-dating K-Mart, was "poor or unstable . . . with regard to his being able to maintain a job, not being able to get a job."
44. Rick Ostrander (Ostrander), a rehabilitation counselor, testified as an occupational expert on Waln's behalf. Ostrander opined that Sabow's findings were consistent with other closed head injury clients with whom Ostrander had previously worked. Consequently, Ostrander's conclusions in this matter were based in large part on Sabow's diagnoses.
45. Ostrander opined that Waln is not employable within the Pierre labor market at or above his work comp benefit rate. Ostrander also testified that neither rehabilitation nor retraining could reasonably be expected to restore Waln to any type of employment. Ostrander opined that while Waln held a variety of jobs, he didn't seem to have any problem gaining employment prior to the attack at K-Mart. Ostrander opined that Waln's job search would have been diligent in any labor market.
46. Jim Carroll (Carroll), a vocational rehabilitation counselor testified as an expert on behalf of K-Mart and Sedgwick.
47. Carroll found it significant that most of Waln's treating physicians did not indicate that Waln was incapable of employment. Carroll also noted that, before coming to K-Mart, Waln was moving on from jobs much faster than the average person. Between 1985 and 2006, Waln worked for twenty-four (24) different employers, including such employers as, Domino's Pizza, Little Caesar's Pizza, and Goodwill. Waln held each of these jobs for less than one (1) year, on average, while most people stay at a job about five (5) years. Most of these positions were entry-level or unskilled to semi-skilled jobs. In such positions, employees are trained on the job in 30-180 days.
48. Carroll conducted a labor market survey of the Pierre area, Waln's home. In this survey, Carroll identified seven (7) different positions, with 22 actual job openings. These included: overnight stockers, laundry workers, fast-food workers, production-packer positions, building maintenance,

warehouse workers, and a farm worker. These positions were all in Pierre, with the exception of one position, which was outside Pierre, but within sixty (60) miles. Therefore, Carroll testified that there were many open jobs, regularly and continuously available in Waln's community, which was suitable work within his restrictions.

49. Waln has made a diligent search for work since the attack. He has applied for forty (40) or fifty (50) jobs in the Pierre, South Dakota area in that time. To date, he has not been hired by any of those employers. Many of those jobs were entry level.

50. Additional facts may be discussed in the analysis below.

### ***Analysis:***

#### ***Treatise Offered as Exhibit***

At the hearing, Waln offered the treatise, Textbook of Traumatic Brain Injury as an exhibit to be admitted into evidence. K-Mart and Sedgwick objected to the admission of the text. The Department of labor deferred ruling on the objection until it rendered its decision in this matter. During his testimony, Sabow provided foundation for the text. Sabow testified that the book is a professional treatise, that it is authoritative, and that it supports his testimony and conclusions in this case.

The admissibility of treatises is governed by SDCL 19-16-22. That statute states:

SDCL 19-16-22. (Rule 803(18)) To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice are not excluded by § 19-16-4<sup>3</sup>, even though the declarant is available as a witness. If admitted, the statements may be read into evidence but may not be received as exhibits.

(emphasis added). The South Dakota Supreme Court describes the application of the rule as follows:

We do point out, however, since such evidence is admitted pursuant to the learned treatise exception to the rule against hearsay, it is improper to admit such evidence as an exhibit to accompany the jury in its deliberations. SDCL 19-16-22. The proper method is to read the

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<sup>3</sup> SDCL 19-16-4. (Rule 802) Hearsay is not admissible except as provided by law or by chapters 19-9 to 19-18, inclusive, or by other rules prescribed by the Supreme Court.



information to the jury. The rationale for this rule is to avoid the danger that the jury might read admitted materials without an expert's guidance thereby becoming confused by technical language.

(citations omitted). Chicago, Milwaukee, St. Paul and Pacific Railroad v. Majestic Contractors, Ltd., 479 NW2d 155, 159 (SD 1991).

In this case, the application of the rule as set forth in SDCL 19-16-22 seems clear and straightforward. The text should not be received into evidence as an exhibit. K-Mart's and Sedgwick's objection is sustained.

### ***Causation***

The first legal issue posed by this case is whether the attack suffered by Waln on July 6, 2009, is a major contributing cause of his current medical condition. To answer that question, we turn to the applicable law.

The general rule is that the claimant has the burden of proving all facts essential to sustain an award of compensation. Day v. John Morrell & Co., 490 N.W.2d 720 (S.D. 1992); Phillips v. John Morrell & Co., 484 N.W.2d 527, 530 (S.D. 1992); King v. Johnson Brothers Construction Co., 155 N.W.2d 193, 195 (S.D. 1967). "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). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 N.W.2d 79, 85 (S.D. 1997).

SDCL 62-1-1(7) defines "injury" or "personal injury" 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:

- (a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; or
- (b) If the injury combines with a preexisting disease or condition to cause or prolong disability, impairment or need for treatment, the condition complained of is compensable if the employment or employment related injury is and remains a major contributing cause of the disability, impairment or need for treatment.

- (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 South Dakota Supreme Court has noted that there is a distinction between the use of the term “injury” and the term “condition” in this statute. See Grael v. South Dakota School of Mines and Technology, 2000 SD 145, ¶ 9. “Injury is the act or omission which causes the loss whereas condition is the loss produced by an injury, the result.” Id. Therefore, “in order to prevail, an employee seeking benefits under our workers’ compensation law must show both: (1) that the injury arose out of and in the course of employment and (2) that the employment or employment related activities were a major contributing cause of the condition of which the employee complained, or, in cases of a preexisting disease or condition, that the employment or employment related injury is and remains a major contributing cause of the disability, impairment, or need for treatment.” Id. (citations omitted).

Dr. Sabow and Dr. Davis have opposing opinions in this matter. Sabow concludes that Waln suffered a minor traumatic brain injury and possible basilar skull fracture as a result of the July 6, 2006, incident and that injuries have severely impacted Waln’s life. On the other hand, Davis concludes that Waln is a malingerer and that any symptoms experienced by Waln are unrelated to the July 6, 2006 incident. Dr. Sabow’s rationale is more persuasive.

Sabow’s conclusions are based on documented symptoms experienced by Waln following the July 6, 2006 attack. Waln lost his affinity for tobacco and some foods. He suffered a laceration to his ear canal during the attack. He began experiencing anxiety attacks and depression. He withdrew from family and friends. He began having trouble with personal relationships. He experienced memory loss, confusion and problem solving. He demonstrated bizarre behavior. In addition, Waln lost the ability or interest to drive. He began to have memory loss and cognitive problems.

While Waln’s credibility is suspect, it is unlikely that Waln understood the significance of many of these symptoms or was capable of fabricating them. Few lay-people know that a laceration in the ear canal and loss of affinity for tobacco are symptoms of a brain injury or basilar skull fracture. Likewise, it is not common knowledge that anxiety and withdrawal from friends are symptoms of head injuries. In fact, Waln did not initially know that he was having anxiety attacks; he thought that he was experiencing seizures.

On the other hand, Davis’ conclusions in large part are based on the fact that the ER personnel and Waln’s personal physician did not diagnose a brain injury

during their initial treatment. This rationale is based on the assumption that these medical providers' were capable of making that diagnosis. There is nothing in the record to indicate that these providers had the training, experience or competence to make such a diagnosis. In addition, Sabow testified that these types of abnormalities are rarely detected by medical imaging and are frequently misdiagnosed during initial treatment.

Davis also finds it significant that Waln had inconsistent scores on his cognitive tests. Here too, Sabow provides a credible explanation for the scores. Sabow testified that Waln's anxiety is superimposed on his cognitive disorder. Consequently, the test scores reflected the level of anxiety Waln was experiencing at the time of the tests.

If Davis' opinions are adopted here, we must conclude that Waln either fabricated all his symptoms or they resulted coincidentally from other various sources. As discussed above, it is unlikely that Waln could have fabricated all the symptoms. It also seems unlikely that they arose coincidentally immediately following his attack.

These observations lead to the conclusion that Sabow's diagnosis is more likely than not correct. Therefore, Waln has met his burden of proof. A preponderance of the evidence indicates that the July, 2006 incident resulted in a minor traumatic brain injury and basilar skull fracture, and was a major contributing cause of Waln's current anxiety, loss of cognitive function and neurobehavioral changes.

### ***Permanent Total Disability***

The next issue is whether Waln is entitled to permanent total disability benefits. SDCL 62-4-53 defined permanent total disability:

SDCL 62-4-53. 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.

The South Dakota Supreme Court has recognized at least two avenues by which a claimant may make the required prima facie showing for inclusion in the “odd-lot” category. Eite v. Rapid City Area Sch. Dist., 2007 SD 95, ¶21, 739 NW2d 264, 270.

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.

*Id.* (quoting Wise, 2006 SD 80, ¶28, 721 NW2d at 471 (citations omitted)).

As a result of Waln’s injuries, he has suffered memory loss, mental confusion, loss of cognitive function including concentration and problem solving, anxiety attacks which amplify his cognitive disorders, depression, episodes of bizarre behavior, trouble with personal relationships and withdrawal from social activities. The combined effect of all these medical problems makes clear that Waln is obviously unemployable.

These problems also support Sabows opinion that Waln is not capable of even basic repetitive jobs without supervision as a result of his work-related injury due to his cognitive and neurobehavioral problems. Likewise, Ostrander opined that Waln is not employable within the Pierre labor market at or above his workers’ compensation benefit rate. Ostrander also testified that neither rehabilitation nor retraining could reasonably be expected to restore Waln to any type of employment. Ostrander opined that while Waln held a variety of jobs, he did not seem to have any problem gaining employment prior to the attack at K-Mart.

K-Mart and Sedgwick have demonstrated that there are entry level job available in the Pierre, SD area. However, they have not shown that these jobs are suitable for an individual with Waln's medical problems. It is also worth noting that Waln has made a diligent search for work since his injury. He applied for forty or fifty jobs in the Pierre, South Dakota area. To date, he has not been hired by any of those employers. Many of these jobs were entry level.

This analysis leads to the conclusion that Waln falls within the criteria set forth in SDCL 62-4-53. Waln is permanently totally disabled.

### **Conclusion**

Waln has demonstrated that his July 6, 2006, work related injuries are a major contributing cause of his current cognitive and neurobehavioral disorders. Waln has also shown that he is permanently totally disabled as a result of those injuries.

Counsel for Waln shall submit proposed Findings of Fact, Conclusions of Law and Order consistent with this Decision, within (20) twenty days of the receipt of this Decision. Counsel for K-Mart and Sedgwick shall have an additional (10) ten days from the date of receipt of Waln's Proposed Findings of Facts and Conclusions of Law to submit objections thereto, or submit Proposed Findings of Facts and Conclusions of Law. The parties may stipulate to a waiver of formal Findings of Fact and Conclusions of Law. If they do so, counsel for Waln shall submit such stipulation together with an Order consistent with this Decision.

Dated this 21<sup>st</sup> day of May, 2009.

SOUTH DAKOTA DEPARTMENT OF LABOR

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Donald W. Hageman

Donald W. Hageman  
Administrative Law Judge