CIRCUIT COURT OF SOUTH DAKOTA
SIXTH JUDICIAL CIRCUIT

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RE: Hughes County Civ. No. 18-187: William Baker v. Rapid City Regional Hospital and Hartford Insurance

MEMORANDUM DECISION

Claimant, William Baker, appeals from the South Dakota Department of Labor's decision in favor of Rapid City Regional Hospital (RCRH or Employer) and Hartford Insurance (Insurer). The Department concluded that Claimant failed to prove by clear and convincing evidence that his work injuries were and remained a major contributing cause of his mental injuries, found that he was not totally and permanently disabled under the odd-lot doctrine, and determined that Claimant was not owed further medical expenses. Appellate briefs were submitted and the Court heard oral argument on March 14, 2019. After reviewing the administrative record and considering the arguments raised by the parties, the Court now issues this Memorandum Decision.

FACTUAL BACKGROUND

Claimant is a 56-year-old male who previously worked for Rapid City Regional Hospital. Claimant graduated from high school and has several years of post-secondary education. AR 1811

(Baker Depo. at 42-44). Claimant began working for RCRH in 1981 as a custodian in the housekeeping department. AR 1804-05 (Baker Depo. at 16-17); AR 760 (Carroll Report at 8). From 1990 until 2015, Claimant worked in various positions, including psychiatric aide, psychiatric technician, life coach, and activity coordinator at Regional West Psychiatric Hospital (Regional West), a part of RCRH. *Id*. After the work injuries at issue in this case, Claimant worked as a hand washing monitor for RCRH for a short period of time. AR 760 (Carroll Report at 8). Claimant also has a jewelry and art business where he makes various products as a hobby and for potential income. AR 1805-06 (Baker Depo. at 18-22). Claimant was terminated from employment at RCRH on November 7, 2016. AR 4019.

Work Injuries

On November 7, 2013, while working at Regional West, Claimant was hit repeatedly on both sides of his head by a psychiatric patient. AR 1814-15 (Baker Depo. at 56-57); AR 362-63 (HT at 15-16). After the patient was under control, Claimant sought medical care at the RCRH Emergency Department. AR 1815 (Baker Depo. at 58); AR 365 (HT at 18); AR 2846-48. While in the emergency room, Claimant complained of left jaw pain, a headache, dizziness, and nausea, but did not show signs of confusion or weakness. AR 2846-48. The medical record from this visit notes that the incident did not cause Claimant to lose consciousness. *Id*. The Glasgow Coma Scale was performed on Claimant and he received a perfect score for eye response, verbal response, and motor response. AR 2853. Claimant went to the emergency department again on November 9, 2013, to replace a lost prescription. AR 2833-34. The corresponding medical record from that visit showed that Claimant's CAT scan from two days prior was normal, but the clinical impression was that Claimant sustained a closed head injury. *Id*. Claimant complained of continuing pain, worse with mandibular (jaw) movement, and worsening of his chronic tinnitus (ringing in the ears). *Id*. Dr. Patrick Tibbles' noted a subacute left face and head contusion, acute assault, persistent face pain, work-related injury, and acute chronic tenderness with a possible minor concussion. *Id*. Claimant requested a note to be taken off work. *Id*. After ten days off, Claimant returned to his usual job. AR 96-97 (Transaction Summaries); AR 1814 (Baker Depo. at 53-54). Employer and Insurer paid the medical bills and temporary total disability benefits related to this incident. *Id*. Claimant did not seek further medical care related to this incident, but did report experiencing dizziness when he would stand up and memory issues. AR 1813 (Baker Depo. at 52).

On December 14, 2014, (13 months later) while he was feeding a patient at Regional West, Claimant was struck on the right side of his head by the patient. AR 2869; AR 1815 (Baker Depo. at 60). Claimant finished feeding the patient and continued working his shift until someone could relieve him. AR 1816 (Baker Depo. at 61-63). When he left work, Claimant laid on his couch at home and then sought medical care at the emergency department around 1:30 a.m. *Id.*; *see also* AR 2869. Claimant did not lose consciousness after he was hit, but he did complain of progressive headaches, dizziness, nausea, and speech problems. AR 2869, 2871. The emergency department performed a CAT scan, which was negative for acute intracranial injury, and Claimant was treated

for a concussion. AR 2869. Again, Claimant received a perfect score on the Glasgow Coma Scale. AR 2828. Dr. Clay Smith noted a closed head injury, concussion, headache, and nausea. AR 2870. Claimant was off work for one day and then resumed working at his normal job. AR 2676.

Medical Care after the 2014 Work Injury

On December 23, 2014, Claimant sought medical care for continued mental fogginess and dizziness. AR 2676. Dr. Carson Phillips noted that Claimant failed a convergence test at eight inches, diagnosed Claimant with post-concussive syndrome (PCS), ordered a neuropsychological evaluation, and took Claimant off work until January 2, 2015. *Id*. (noting that Dr. Theresa Hastings was present and recommended a neuropsychological evaluation, brain rest for 10 days, and neuro-ophthalmology for gaze retraining). Specifically, Dr. Phillips noted that Claimant reported symptoms of dizziness and mental fogginess that persisted for 12 days, which was indicative of PCS. *Id*. Claimant was referred to physical therapy to address his eye convergence. AR 2683. Claimant showed improvement with his convergence, concentration, and recall, but reported continued issues with dizziness. *Id.* On February 3, 2015, Dr. Daniel Berens noted that Claimant's symptoms were slowly improving and that Claimant wished to get back to his psychiatric technician role. AR 2687. Claimant was directed to start working in his normal role for four hours at a time, slowly increasing his hours to eight until he was fully released from restrictions on February 28, 2015. *Id*.

On March 31, 2015, Claimant returned to RCRH complaining of light-headedness and vertigo at the intensity he experienced after the accident, the variability of which depended on the stress level at work. AR 2695. Claimant also complained of trouble getting to sleep at night due to anxiety and trouble concentrating at work due to anxieties surrounding safety. *Id*. Dr. Blair noted that Claimant's acute anxiety with sleep disturbance could be secondary to Claimant's recent head injury or the psychological effect surrounding recent trauma and environment, which is difficult to separate, but commented that the symptoms were related to the recent event whether emotional or physical. AR 2697. Dr. Blair also noted that Claimant's specific anxiety had become more pervasive and generalized and recommended Claimant spend a couple of weeks away from work to focus on himself, cognitive rest, and sleep as the most immediate concern. *Id*.

On April 17, 2015, Claimant saw Dr. Blair at RCRH where he continued to report struggles with sleep, anxiety, guilt, irritability, fear, and some post-concussive symptoms in concentration and recall. AR 2701. Dr. Blair stated that these symptoms are related to his work and seem to have more of a psychological component than a physical one. *Id*. Notably, after being four months out from the incident, Claimant continued to suffer from situational vertigo, even after vestibular rehabilitation, which led Dr. Blair to think that the symptoms, in large part, met the spectrum for PTSD. *Id*. Dr. Blair commented on Claimant's continued deficits in his neuropsychological testing and how the risk of subsequent injury, which is high, contributed to Claimant's fears, anxiety, concentration, and the physical symptoms associated with those. *Id.* Dr. Blair noted that Claimant

said he would like to continue working, but seemed relieved when Dr. Blair discussed how his current work may no longer be appropriate for him. *Id*.

Specialists

On December 26, 2014, Dr. Hastings completed a neuropsychological evaluation of Claimant. AR 534-538. Dr. Hastings noted Claimant's symptoms, including nausea, balance problems, dizziness, visual problems, fatigue, sensitivity to light and noise, numbness, tingling, mental fogginess, difficulty with concentrating and memory, irritability, sadness, feeling more emotional, nervousness, drowsiness, sleeping more than usual, and trouble falling asleep. AR 535 (Hastings 12/26/14 Report at 2). Claimant reported short-term memory problems and issues with organizing himself. *Id.* Claimant's short-term memory, verbal and visual attention were found to be severely impaired. AR 535-36 (Hastings 12/26/14 Report at 2-3). Claimant's oral and psychomotor processing speeds were severely impaired as well, while his ability to strategize was moderately impaired. *Id*. The results also showed that Claimant scored in the severe range for anxiety. AR 537 (Hastings 12/26/14 Report at 4).

Based on his symptoms, Dr. Hastings reported that Claimant was "on the severe end of what we call a mild concussion," noting his prior concussion from the November 2013 work incident. *Id.* (also documenting Claimant's report of a previous concussion when he was eight years old). Dr. Hastings concluded that Claimant should not return to work at this time because it would place him at great risk for a second head injury that could cause permanent brain damage or death. AR 537 (Hastings 12/26/14 Report at 4).

Claimant began seeing Dr. Steven Hata, a neurologist, in February of 2015 and continued to do so throughout 2016. In February of 2015, Dr. Hata noted Claimant's PCS was mainly manifested by cognitive impairment that was improving with time; Claimant's vertigo was improving with time; and Claimant had some mild cognitive symptoms related to his head trauma based on neuropsych testing completed by Dr. Hastings in December of 2014. AR 2692. Dr. Hata also noted that "patients [who] develop posttraumatic syndrome after a concussion actually have a higher risk of having these symptoms if the concussion was mild rather than very severe." *Id.* Dr. Hata stated that Claimant would be expected to improve within up to a year's timeframe and that neurological testing should be repeated three to four months after his injury. *Id*.

Dr. Hasting completed a follow-up round of testing in April of 2015. Dr. Hastings listed Claimant's symptoms, which were similar to those reported in his last evaluation, including dizziness; light and noise sensitivity; memory, word finding, and attention problems; inability to multitask; increased need for sleep; tinnitus; headaches; poor concentration; and increased irritability. AR 2480 (Hastings 4/14/15 Neuropsychological Evaluation Report at 2). Claimant also felt like he had PTSD symptoms from the attacks based on his reports of easily flinching if someone makes a quick movement near him followed by a "full body rush of anxiety." *Id.*

Dr. Hastings reported the following findings: Claimant's verbal attention, memory for recall of stories, and multi-tasking moved from mildly impaired to average; his 20-minute delayed recall of list learning moved from the severe range to the mildly impaired range; and his psychomotor processing speed, auditory working memory, and mental control moved from severely impaired to moderately impaired. AR 2484 (Hastings 4/14/15 Neuropsychological Evaluation Report at 4). Claimant's neurocognitive tasks that remained severely impaired included list learning over several trials, visual attention, oral processing speed, and attention and concentration tasks whether auditory or visual. *Id*. Dr. Hastings noted that Claimant was developing secondary anxiety and depression, which are common in individuals with post concussive syndrome, and traumatic stress from the work incidents at Regional West. *Id*.

Claimant next saw Dr. Hata on April 23, 2015, and reported increased anxiety after returning to work, increased dizziness and vertigo, and cognitive deficits as shown in his neuropsych testing with Dr. Hastings. AR 2704. As part of Claimant's assessment, Dr. Hata noted PCS with traumatic brain injury manifested by abnormalities in neuropsychological testing, with some improvement; anxiety disorder, which developed into PTSD (or the Claimant actually has PTSD from being struck and now has developed anxiety); and signs of sleep apnea. AR 2706. Dr. Hata referred Claimant to a psychiatrist for drug treatment related to his anxiety and PTSD and recommended psychotherapy; recommended that Claimant not work on the locked ward or with direct patient care until he recovers from post concussive syndrome; ordered a follow-up appointment in three months; and noted that neuropsychological testing could be repeated, but would have to wait a minimum of six months. *Id*.; AR 2159.

Claimant followed-up with Dr. Hata on July 23, 2015, and reported symptoms of agoraphobia, stating that he could not stand crowded situations, or a lot of noise or activity going on around him. AR 2792. Dr. Hata also noted that Claimant had significant PTSD since he wanted to withdraw from activities and social interactions which cause him anxiety. *Id*. In his assessment of Claimant, Dr. Hata noted that Claimant reported dizziness when talking about things related to his independent medical examination (IME) (discussed further below) and when he gets stressed out. AR 2794. Dr. Hata concluded that Claimant's manifested tremors were most likely due to anxiety, and that Claimant's sleep apnea is not work-related, but possibly contributed to his neurocognitive symptoms. *Id.* Dr. Hata recommended that Claimant complete a sleep study. *Id.* He also discussed using a stimulant to help with Claimant's scattered thought processes and issues with attention and concentration, but deferred to Dr. Hamlyn since that could increase his anxiety. *Id.* Finally, Dr. Hata discussed getting a second opinion by Dr. Cherry, a neuropsychologist. *Id.*

Claimant next saw Dr. Hata again on August 21, 2015. AR 2161-62. During this visit, Dr. Hata commented that Claimant still suffered from mild cognitive impairment, but opined that Claimant's symptoms, other than anxiety and PTSD, are getting better and would improve over time. AR 2162. Specifically, Dr. Hata described Claimant's PTSD symptoms as "severe" and noted that he disagreed with Claimant's IME, discussed in detail below, which stated that

Claimant's PTSD symptoms had resolved. *Id.* Dr. Hata requested that Claimant's neuropsychological testing be repeated in one year, along with follow-up since it takes a long time for traumatic brain injuries to heal. *Id.* In the interim, Dr. Hata deferred to Dr. Hastings or Dr. Hamlyn since Claimant's main problems were psychiatric and psychological. *Id*.

Almost a year later, in July of 2016, Dr. Hata recounted Claimant's history and noted that he still reports dizziness and headaches when he is upset or stressed, still suffers from agoraphobia, and had been off work since June of 2015. AR 2777. In his assessment of Claimant, Dr. Hata noted that Claimant's PCS was manifested by dizziness, headaches, cognitive impairment, and visual symptoms. AR 2779. Dr. Hata also included Claimant's previous PTSD diagnosis, which was documented in Dr. Hastings' notes, during the assessment. *Id.*; *see also* AR 540 (Hastings 4/14/15 Evaluation Report at 2 (documenting Claimant's previous PTSD diagnosis from Bonnie Riggenbach)); AR 555 (Hastings 8/18/15 Progress Note (reporting that Claimant checked with his previous therapist and found out he was diagnosed with depression, not PTSD as he previously reported)). Dr. Hata noted that Claimant's cognitive problems make him depressed and anxious, and depression and anxiety, in turn, make Claimant's cognitive symptoms worse. *Id.* Dr. Hata concluded that "the medical complexity is very high due to the intertwining of his psychiatric problems and head trauma." *Id.* Dr. Hata also commented on Claimant's high level of stress due to current litigation. *Id.*

Dr. Hata had previously referred Claimant to Dr. Harry Hamlyn, a psychiatrist, in May of 2015. Dr. Hamlyn noted Claimant's PTSD and PCS diagnoses and commented: "It certainly does sound as though he suffers from posttraumatic stress disorder, and depression unspecified plus he has the post concussive syndrome which is contributing to his dizziness and anxiety symptoms." AR 2714-16. Dr. Hamlyn, who saw Claimant on a monthly basis through August of 2015, took Claimant off work for six months, starting in July of 2015. AR 2717, 2734, 2745, 2747. He also prescribed various different medications to address Claimant's PTSD, depression, and anxiety symptoms. *Id*. Dr. Hamlyn wrote a letter on October 22, 2015, releasing Claimant from work restrictions, but also stating Claimant should not work in a healthcare field or hospital. AR 2248. Dr. Hamlyn felt it would be beneficial for Claimant to get involved in a different kind of work. *Id*. However, in November of 2015, Dr. Hamlyn concluded that Claimant was not capable of working any type of job at that point, and that his work status would need to be reassessed at his follow-up appointment in January of 2016. AR 521.

When Dr. Hamlyn next saw Claimant in January of 2016 he noted that Claimant continued to report symptoms of depression, anxiety, and irritability, and was very upset on the day of the appointment because his caseworker through workers' compensation came to the appointment. AR 2773. Claimant requested that Dr. Hamlyn not speak with the caseworker and did not let him come into the room during the appointment. *Id*. Dr. Hamlyn did not think Claimant was able to work any kind of job and requested a medication review in three months. AR 2774.

Claimant saw Dr. Hamlyn again in July of 2016 and reported that he is frustrated with workers' compensation issues and has a lot of anxiety in general, noting that his anxiety gets worse when he does anything related to workers' compensation. AR 2781. Claimant reported panic symptoms and panic attacks and stated he still had depression, but felt that the medications helped. *Id*. In a letter dated the same day as the appointment, Dr. Hamlyn took Claimant off work for another six months due to his posttraumatic stress disorder and depressive disorder. AR 155. In his letter, Dr. Hamlyn noted that Claimant continued to have symptoms of anxiety and depression that interfere with his ability to work. *Id.* Dr. Hamlyn concluded that Claimant was not capable of working at any job and recommended that Claimant be reassessed in January of 2017. *Id*.

Dr. Hastings, the neuropsychologist who performed neuropsychological evaluations on Claimant in December of 2014 and April of 2015, as discussed above, began seeing Claimant for psychotherapy and treatment related to his diagnoses of PTSD, PCS, depression, and anxiety in July of 2015. AR 154 (Hastings 12/18/15 letter). She continued to see Claimant a few times per month through September of 2017. AR 636 (Hastings 9/5/17 Progress Report). According to the medical records, Dr. Hastings, Dr. Hamlyn, and Dr. Hata all kept in contact regarding Claimant's treatment.

Expert Opinions and Reports

Dr. Thomas Gratzer, a psychiatrist and IME for Employer and Insurer, completed an independent psychiatric evaluation of Claimant on June 27, 2015. AR 664. After interviewing Claimant and reviewing his medical records, Dr. Gratzer diagnosed Claimant with PTSD, in remission; anxiety disorder n.o.s.; depressive disorder n.o.s.; and noted a history of alcohol abuse. AR 679 (Gratzer 7/16/15 Report at 16). Dr. Gratzer determined that Claimant had psychiatric conditions that predated the December 2014 injury, but he agreed that Claimant developed psychiatric sequelae as a result of the physical stresses of the December 2014 injury, specifically noting that Claimant's PTSD symptoms worsened after said injury according to Claimant's own account as well as his medical records. AR 680 (Gratzer 7/16/15 Report at 17). Dr. Gratzer believed that, at the time of the evaluation, Claimant's anxiety and depressive symptoms were improving with his medication regimen. AR 682-83 (Gratzer 7/16/15 Report at 19-20). Dr. Gratzer opined that the December 2014 injury did not remain a major contributing cause to Claimant's *current* psychiatric state, as his anxiety disorder and PTSD recurrence were in remission at the time of the evaluation. *Id*.

Throughout his report, Dr. Gratzer noted Claimant's anger and irritability surrounding the circumstances of the evaluation and Claimant's reluctance to answer certain questions. AR 682 (Gratzer 7/16/15 Report at 19). Dr. Gratzer reported that while Claimant was irritable during the interview, he did not show objective manifestations of PTSD such as avoidance of trauma related thoughts, negative alterations in cognitions or mood, negative trauma related emotions, alienation, or other signs of alteration in arousal and reactivity (e.g. self-destructive or reckless behavior,

hypervigilance, or exaggerated startle response). *Id.* Dr. Gratzer did not believe that Claimant was disabled from working as a result of any psychiatric condition, whether related to the December 2014 work injury or not. AR 683 (Gratzer 7/16/15 Report at 20). At the time of this evaluation, Claimant was working in a light duty position, which Dr. Gratzer agreed was necessary pending the healing of his minor traumatic brain injury (TBI), due to the risk of re-injury, and noted that the TBI was separate from any psychiatric condition. *Id.* Dr. Gratzer recommended that Claimant receive ongoing psycho-pharmacological treatment with Dr. Hamlyn related to his December 2014 injury, for one year, but determined that Claimant did not have a permanent partial disability or impairment from a psychiatric standpoint as a result of said injury. AR 684 (Gratzer 7/16/15 Report at 21).

Dr. Gratzer submitted a number of supplemental reports after receiving examples of Claimant's writings, additional medical records as they became available, and the jobs provided by Employer and Insurer's vocational expert, Jerry Gravatt. AR 715 (Gratzer 10/7/15 Report); AR 693 (Gratzer 6/27/16 Report at 1). In these reports, Dr. Gratzer's opinion regarding Claimant's condition and employability remained the same. Dr. Gratzer opined that Claimant would be able to work at the jobs provided by Gravatt and noted that there was no evidence to suggest that Claimant had any psychiatric restrictions. AR 689-90 (Gratzer 1/21/16 Report at 1-2); AR 693 (Gratzer 6/27/16 Report at 1). Specifically, Dr. Gratzer noted that, during his evaluation, Claimant's reported symptoms of memory loss and inability to concentrate were not present, and his recent activities—including starting a new relationship, taking a long road trip, and working in a light duty capacity—were not compatible with psychiatric impairment, inability to concentrate, or social withdrawal. AR 695 (Gratzer 6/27/16 Report at 3). Instead, Dr. Gratzer opined that these activities supported intact functioning, believed that there was evidence of secondary gain that affected Claimant's presentation and preoccupation with medicolegal issues. AR 695-96 (Gratzer 6/27/16 Report at 3-4).

In July of 2016, after evaluating Claimant on four different occasions from October of 2015 to January of 2016, Dr. Stephen Manlove completed an independent psychiatric evaluation at Claimant's request. AR 641 (Manlove 7/13/16 Report at 1). Dr. Manlove reviewed Claimant's mental health records from the 1980s, 1990s, and early 2000s, and his records from Dr. Hastings and Dr. Hamlyn. AR 647-48 (Manlove 7/13/16 Report at 7-8). Dr. Manlove concluded that Claimant's psychiatric problems are best diagnosed as PTSD with delayed expression, and detailed the reasons why Claimant met the Diagnostic and Statistical Manual (DSM V) criteria for PTSD. AR 650-51 (Manlove 7/13/16 Report at 10-11). Dr. Manlove also noted that the psychological testing done by Dr. Dewey Ertz suggested PTSD. *Id.* Dr. Manlove noted that there is little doubt that Claimant's psychological problems have significantly worsened since the assaults at work, based on Drs. Hastings, Hamlyn, and Hata's notes—all of which document PTSD and PCS and state that Claimant is unable to work—and Claimant's writings which illustrate that he is thought disordered and paranoid. *Id*. With regard to his previous mental health treatment, Dr. Manlove noted that his records show that Claimant had previous psychiatric problems, including anxiety

and depression, they were much less severe than his current problems. AR 651 (Manlove 7/13/16 Report at 11). Specifically, Dr. Manlove noted that since the assaults, Claimant psychiatric symptoms have changed and caused dramatically more disability than he had prior to the assaults. AR 653 (Manlove 7/13/16 Report at 13).

Dr. Manlove opined that Claimant was not malingering because his hypervigilance and paranoia go far beyond his workers' compensation claim. AR 651-52 (Manlove 7/13/16 Report at 11-12). He noted that Claimant feels his paranoia is rational, and if Claimant was malingering, his symptoms would not be dominating his entire life. *Id.* While some of Claimant's psychological tests were invalid due to over reporting of symptoms, Dr. Manlove explained that those test results, read together with other test results, do not suggest malingering, but do suggest PTSD. *Id.* Dr. Manlove believes that Claimant is partially permanently disabled (22% based on the Psychiatric Impairment Rating Scale (PIRS)) due to the November 2013 and December 2014 incidents, which resulted in cumulative PCS and PTSD. AR 653 (Manlove 7/13/16 Report at 13). Dr. Manlove noted that, while Claimant's PCS was improving, his PTSD was worsening and he was unable to maintain employment *at this time* because of the neuropsychiatric problems related to both conditions. *Id*

On September 28, 2016, after reviewing the independent psychiatric evaluation completed by Dr. Manlove and additional medical records from Claimant's past and present treatment, Dr. Gratzer reaffirmed his previous opinions and suggested that Claimant may be suffering from borderline personality disorder (BPD). AR 699-706 (Gratzer 9/28/16 Report at 1-8). Dr. Gratzer opined that Claimant's paranoia is not a symptom of PTSD, and instead, suggested that Claimant's PTSD was chronic and longstanding and would predate and be unrelated to the work injuries. AR 706-09 (Gratzer 9/28/16 Report at 8-11). Further, Dr. Gratzer believed that Claimant's PTSD is not worsening over time and opined that Claimant's anger towards his former workplace and irritability could be explained by his preexisting psychiatric conditions, including premorbid depression and anxiety; personality disorder; and secondary gain dynamics (i.e. significant focus on workers' compensation claim and perception of mistreatment by his employer). *Id.* AR 710-12 (Gratzer 9/28/16 Report at 11-13).

On December 23, 2016, Dr. Hata met with Claimant and prepared an overview of Claimant's medical and mental health history surrounding the November 2013 and December 2014 incidents at work, a review of the other available expert reports, and an update of Claimant's symptoms. AR 2472-76 (Hata 12/23/16 report). Dr. Hata noted that Claimant did not have lasting symptoms after his first concussion, but did develop headaches, dizziness, vertigo, cognitive impairment, anxiety, depression, and PTSD after his second concussion. AR 2474 (Hata 12/23/16 Report at 3). Claimant reported to Dr. Hata that he still had headaches about two times per week and non-specific dizziness, both of which are triggered by stressful situations, as well as significant deficits in memory, memory processing, and concentration when he has high levels of stress. *Id.* Dr. Hata reported that Claimant also still suffers from psychiatric issues and noted that Claimant

bought a gun and has a permit for a concealed weapon because someone broke into his house and he fears for his life. *Id.* Claimant blamed these fears on RCRH. *Id.* Dr. Hata noted a number of stressors in Claimant's life including his workers' compensation litigation, proposed federal litigation, and other financial stressors. *Id*.

With regard to Claimant's post-concussion syndrome diagnosis, Dr. Hata listed in his assessment, Claimant's headaches and non-specific dizziness, opining that because Claimant had not shown any improvement, these symptoms had reached maximum medical improvement (MMI). AR 2476 (Hata 12/23/16 Report at 5). With regard to Claimant's cognitive impairments, Dr. Hata noted that these showed a slight improvement according to Dr. Hastings' neuropsychological testing, and stated that he did not feel that these were at MMI, but deferred this question to Dr. Hastings. *Id.* Dr. Hata opined that Claimant's main symptoms, at the time of this December 2016 assessment were psychiatric, but he was unwilling to offer an opinion on how much was preexisting. *Id.* Nonetheless, Dr. Hata noted that Claimant admitted to paranoia, fear for his life and the lives of his family, and was obsessed with litigating his workers' compensation claim and expanding litigation to the federal level. *Id.* Dr. Hata thought that Claimant's "obsession with his overt hostility toward the hospital right now overshadows much of what can be assessed objectively in terms of his neuropsychological status." *Id*. Dr. Hata recommended that Claimant obtain an independent neuropsychological evaluation from Dr. Cherry, and noted that Claimant refused because he knows Dr. Cherry and dislikes him. *Id.*

Finally, Dr. Hata specifically addressed Claimant's independent psychiatric examination with Dr. Gratzer and stated that he did not agree 100% with this exam, noting that Claimant had a significant exacerbation of his PTSD following the work incidents in 2013 and 2014 manifest[ed] by paranoia and fear of being attacked physically." *Id.* Dr. Hata noted that the degree of paranoia and obsession that Claimant displayed was worse than he had ever seen before and mentioned that even the IME acknowledged that Claimant's PTSD symptoms, although preexisting, had worsened. *Id.*

After viewing Dr. Gratzer's September 2016 report; meeting again with Claimant on July 6, 2017, to obtain an updated mental status exam; and various letters and papers regarding legal actions drafted by Claimant, Dr. Manlove submitted an updated psychiatric evaluation report on July 26, 2017. AR 656-662 (Manlove 7/26/17 Report). In this report, Dr. Manlove attempted to transcribe Claimant's response to being asked about his biggest concerns in order for the reader to "get a feel for [Claimant's] thought disorder, paranoid/hypervigilance, and degree of his impairment." AR 658 (Manlove 7/26/17 Report at 2). Suffice it to say, the transcription includes a rambling list of numerous beliefs as to how RCRH is out to get Claimant and his efforts to sue them to right the wrongs committed against him, interspersed with other nonwork related events occurring in his life. *See id.* Dr. Manlove addressed Dr. Gratzer's diagnosis of borderline personality disorder (BPD), disagreeing with Gratzer's characterization, and explaining why Dr. Manlove thought Claimant did not suffer from BPD when utilizing the DSM V criteria. AR 660-

62 (Manlove 7/26/17 Report at 5-7). Dr. Manlove explained that while Claimant did have a history of mental health issues, they were not nearly as severe or debilitating as the problems he has now. AR 662 (Manlove 7/26/17 Report at 7). Dr. Manlove noted that there has been a dramatic deterioration in Claimant's mental condition since the assaults, and there are no other factors that explain this deterioration. *Id.* Dr. Manlove discounted the BPD diagnosis, noting that it was based on a "single unsupported comment" by Joe Tolson, M.S.W. AR 660 (Manlove 7/26/17 Report at 5). Dr. Manlove further noted that no other therapist or competent and seasoned psychiatrist or psychologist, including Dr. Gratzer after his initial evaluation, had diagnosed Claimant with BPD. *Id.* Dr. Manlove also pointed out that BPD requires longstanding symptoms that are not consistent with Claimant's history. *Id*.

Dr. Manlove opined that paranoia, while not a symptom of PTSD, is an extreme form of hypervigilance and pointed out that there is no information suggesting that Claimant's paranoia/hypervigilance predated the assaults. AR 662 (Manlove 7/26/17 Report at 7). In quoting the DSM V, Dr. Manlove provided: "PTSD is often characterized by a heightened sensitivity to potential threats, including those that are related to the traumatic experience and those not related to the traumatic event." *Id*. Dr. Manlove opined that this sort of evolution is not uncommon in PTSD and stated that Claimant's high anxiety resulted in a thought disorder (loose association) which makes it hard to problem solve in a rational manner. *Id.* These issues are what caused Dr. Manlove to believe that Claimant is was not employable at the time of the evaluation. *Id.*

Employer and Insurer's vocational expert, Jerry Gravatt, worked with Dr. Hamlyn from 2015 to 2017 to find suitable employment for Claimant after Dr. Hamlyn and Dr. Hata suggested that Claimant refrain from working in direct patient care or in the medical field. AR 732-50 (Gravatt 8/20/15, 9/2/15, 10/28/15, 12/17/15, 6/1/17, and 7/27/17 Reports). Meanwhile, Claimant's vocational expert, James Carroll, determined that Claimant was unemployable and that a work search would be futile. AR 752-61 (Carroll 3/14/17 Vocational Assessment). These reports, along with Claimant's various writing and litigation materials, will be discussed further in this opinion.

QUESTIONS PRESENTED

I. DID THE DEPARTMENT ERR IN FINDING THAT CLAIMANT DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT HIS WORK INJURIES ARE AND REMAIN A MAJOR CONTRIBUTING CAUSE OF HIS MENTAL CONDITION?

II. DID THE DEPARTMENT ERR IN FINDING THAT THE CLAIMANT IS NOT PERMANENTLY AND

TOTALLY DISABLED UNDER THE ODD LOT DOCTRINE?

III. DID THE DEPARTMENT ERR IN FINDING THAT EMPLOYER/INSURER ARE NO LONGER RESPONSBILE FOR ONGOING PSYCHOLOGICAL AND MEDICAL TREATMENT?

STANDARD OF REVIEW

This Court's review of a decision from an administrative agency is governed by SDCL 1-26-36.

> The court shall give great weight to the findings made and inferences drawn by an agency on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
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> > (1) In violation of constitutional or statutory provisions;
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> > (2) In excess of the statutory authority of the agency;
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> > (3) Made upon unlawful procedure;
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> > (4) Affected by other error of law;
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> > (5) Clearly erroneous in light of the entire evidence in the record; or
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> > (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
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> A court shall enter its own findings of fact and conclusions of law or may affirm the findings and conclusions entered by the agency as part of its judgment."

SDCL 1-26-36. "Agency decisions concerning questions of law . . . are fully reviewable." *Hayes v. Rosenbaum Signs & Outdoor Adver., Inc.*, 2014 S.D. 64, ¶ 7, 853 N.W.2d 878, 881. When the

issue is a question of fact the clearly erroneous standard is applied to the agency's findings, and this Court will reverse only when, after careful review, the Court is firmly convinced a mistake has been made. *Haynes v. Ford*, 2004 S.D. 99, ¶ 14, 686 N.W.2d 657, 660-61. However, when an agency makes factual determinations on the basis of documentary evidence, such as a deposition or medical records, the matter is reviewed de novo. *Id.* In this case, most of the findings were based on documentary evidence, as Claimant is the only person who testified at the hearing.

ANALYSIS

I. DID THE DEPARTMENT ERR IN FINDING THAT CLAIMANT DID NOT PROVE BY CLEAR AND CONVINCING EVIDENCE THAT A COMPENSABLE PHYSICAL INJURY IS AND REMAINS A MAJOR CONTRIBUTING CAUSE OF HIS MENTAL CONDITION?

A workers' compensation claimant has the burden of proving all facts necessary to sustain an award of compensation by a preponderance of the evidence. *Orth v. Stoebner & Permann Const. Inc*, 2006 S.D. 99, ¶ 35, 724 N.W.2d 586, 593. SDCL 62-1-1(7) sets forth the standard a claimant must meet to prevail in a workers' compensation case.[1]

A. Requirements for all Compensable Injuries

First, to prove an employment related injury occurred, a claimant must establish that he has suffered an "injury arising out of and in the course of employment." *Steinberg v. South Dakota Dept. of Military and Veterans Affairs*, 2000 S.D. 36, ¶ 11, 607 N.W.2d 596, 600. *Id.* at ¶ 33. This means that the claimant must show a causal connection between his employment and the injury sustained. *Orth*, 2006 S.D. 99, ¶ 33, 724 N.W.2d at 593. This causation requirement does not

[1] SDCL 62-1-1(7) provides:
"Injury" or "personal injury," only injury *arising out of* and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

> (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 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. (Emphasis added).

require the claimant to prove his employment was the "proximate, direct, or sole cause of his injury, rather the employee must show that his employment was a 'contributing factor' to his injury." *Id*. (other citations omitted). Importantly, the South Dakota Supreme Court has defined "injury" under this statute as "the act or omission which caused the loss." *Steinberg*, 2000 S.D. 36, ¶ 10, 607 N.W.2d at 600.

Second, in order receive compensation, the claimant must establish by medical evidence that employment or employment related activities are a major contributing cause of the "condition complained of," meaning "the resulting condition; i.e. the medical condition that resulted from the employment incident." *Id*. at ¶ 10; *see also* SDCL 62-1-1(7)(a). In this context, "condition" is defined as "the loss produced by some injury; i.e. the *result* rather than the cause." *Steinberg*, 2000 S.D. 36, ¶ 10, 607 N.W.2d at 600 (emphasis in original). The "major contributing cause language" refers to the "quantum of proof necessary to prove the resulting condition complained of from the employment related incident." *Id*. at ¶¶ 11, 13, 607 N.W.2d at 600-601.

Under SDCL 62-1-1(7)(b), if the claimant suffers from a preexisting disease or condition, the claimant must prove that the employment or employment related injury is and remains a "major contributing cause of the disability, impairment, or need for treatment." *Petersen v. Evangelical Lutheran Good Samaritan Soc.*, 2012 S.D. 52, ¶ 20, 816 N.W.2d 843, 849. Finally, under SDCL 62-1-1(7)(c), if "the injury combines with a preexisting work related compensable injury, disability, or impairment," the claimant must prove that the subsequent employment related activities contributed independently to the disability, impairment, or need for treatment." *Id*.

While a claimant does not have to prove that his work-related injury is a major contributing cause of his condition to a degree of absolute certainty, "[c]ausation must be established to a reasonable degree of medical probability, not just possibility." *Darling v. West River Masonry Inc.*, 2010 S.D. at 4, ¶ 12, 777 N.W.2d 363, 367. The evidence must be precise and well-supported, not speculative. *Id*. Further, the testimony of medical professionals is crucial in establishing the causal relationship between the work-related injury and Claimant's current claimed condition "because the field is one in which laypersons ordinarily are unqualified to express an opinion." *Id*. at ¶ 13, 777 N.W.2d at 367. However, expert testimony is entitled to no more weight than the facts upon which it is predicated. *Id*. (other citations omitted).

In short, a claimant must show: (1) a causal connection between his *injury* and employment (contributing factor test); and (2) the employment or employment conditions are a major contributing cause of the *condition* complained of (major contributing cause test).[2] *Steinberg*. 2000 S.D. 36, ¶ 16, 507 N.W.2d at 602; *Orth*, 2006 S.D. 99, ¶ 33, 724 N.W.2d at 593.

[2] The causation requirement for this second part of the test is, nonetheless, still a contributing factor analysis, with the added requirement that it be a "major" contributing factor.

B. Requirements for Compensable Mental Injuries

In 1999, SDCL 62-1-1(7) was amended and new language regarding mental injuries was added. SL 1999, ch. 261, § 2. Before this statutory addition, for a mental injury to be compensable under South Dakota Supreme Court precedent, it had to arise from a "physical incident" or a "physical accident or trauma." *Everingim v. Good Samaritan Center of New Underwood*, 1996 S.D. 104, ¶¶ 24-29, 552 N.W.2d 837, 841-842 (noting that mental stimuli that cause mental disabilities, known as mental-mental injuries, are not compensable under South Dakota workers' compensation law); *see also* 1B Larson, Workmen's Compensation Law, §§ 42.20-42.23 (describing three kinds of mental and nervous injuries: mental-physical; physical-mental; and mental-mental). The Court in *Everingim* noted that the claimant's mental injury was a result of physical, sexual touching, not the claimant's compensable back injury, but held that sexual touching could be considered a "physical trauma" that put the claimant within the physical-mental category of mental injuries described by Larson. *Id*. The Court also cited a Minnesota case that awarded benefits for mental problems suffered by a waitress who was slapped by a customer, even though no "organic" injury occurred. *Id*. at ¶¶ 30-31, 552 N.W.2d at 842 (citing *Mitchell v. White Castle Systems, Inc.*, 290 N.W.2d 753, 756 (Minn.1980). The Court noted that, like South Dakota, Minnesota does not allow workers' compensation for mental disabilities resulting from job-related stress. *Id*. at ¶ 30 (citing *Lockwood v. Independent School District No. 877*, 312 N.W.2d 294 (Minn. 1981).

The amendment to SDCL 62-1-1(7) in 1999, which came after the *Everingim* opinion was issued in 1996, provides:

> The term [injury or personal injury] 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); SL 1999, ch. 261, § 2. While there have been Supreme Court opinions since 1999 discussing mental injuries, the injuries in those cases occurred before this statutory amendment took effect. This Court has not located any South Dakota Supreme Court cases interpreting this new language, so the case at hand appears to present an issue of first impression.

Essentially, the 1999 "mental injury" amendment codified the Supreme Court's conclusion in *Everingim* that mental-mental injuries are not compensable, by requiring proof of a physical injury before a resulting mental condition could be compensable. However, the statutory amendment requires a "*compensable* physical injury," rather than adopting the "physical trauma" language used by the Court in *Everingim*. Thus, the physical, sexual touching that was found

sufficient to give rise to a compensable mental injury in *Everingim*, would no longer be sufficient under the 1999 statutory amendment because it was not found to be a *compensable* physical injury. In addition, while the legislature adopted the same quantum of proof necessary to prove a mental condition arising from a physical injury (major contributing cause), the enactment included a heightened burden of proof, requiring *clear and convincing evidence* to establish that the compensable physical injury is and remains a major contributing cause of a claimant's mental condition.

The enactment of the mental injury language after the *Everingim* case confirms that the legislature agreed that mental injuries caused solely by mental stressors should not be considered compensable under SDCL 62-1-1(7). But the legislative enactment also reflects an intention to narrow the scope of work related injury cases resulting in mental injuries that should be compensable. There is a marked distinction between the physical sexual touching that did not result in a compensable physical injury (as in *Everingim*), and being struck by patients on more than one occasion and suffering post concussive syndrome (as in the case at hand), although both resulted in the employees developing PTSD. While there is certainly a policy argument that can be made that workers subject to both types of incidents should be compensated, our legislature drew the line by compensating only mental conditions that arise from *compensable* physical injuries. The new legislation illustrates a continued desire to compensate workers with mental health conditions arising from work, but it acts as a gatekeeper by narrowing the category of physical work injuries that will result in compensation for mental health conditions.[3]

In summary, when applying the South Dakota Supreme Court precedent interpreting the provisions of SDCL 62-1-1(7) which existed prior to the 1999 amendment and are still intact, along with the new language regarding mental conditions enacted in 1999, a claimant must show:

(1) He or she sustained a compensable physical injury; and
(2) The compensable physical injury is and remains a major contributing cause of the mental condition[4] complained of, as shown by clear and convincing evidence.

[3] Notably, excluding physical trauma that does not result in a compensable physical injury does not leave employees without a remedy. Since these types of trauma would not be considered an injury covered under South Dakota's workers' compensation law, the exclusivity provision would not apply. *See e.g.*, SDCL 62-3-2; *Benson v. Goble*, 1999 S.D. 38, ¶¶ 14-15, 593 N.W.2d 402, 405-06 (holding that even though the employee claimed no physical injury, the physical assaults at work fell within the physical-mental category described in *Everingim*, barring the employee's tort claims filed against the employer under the exclusive remedy provision of workers' compensation). Since *Everingim*, the legislative amendment to SDCL 62-1-1(7) suggests that the result in *Benson* would now be different, and the exclusivity provisions of the workers' compensation statutes would no longer apply to the facts of that case. For noncompensable physical or mental stresses that cause mental injuries, the employee may now seek discrimination or common-law tort actions for mental injuries resulting from physical trauma that does not result in a compensable injury. *Id*.; *see also Everingim*, 1996 S.D. 104, ¶ 38, 552 N.W.2d at 843 (Miller, C.J., concurring specially).

[4] While the term "mental injury" is used in this particular sentence, the very next sentence in SDCL 62-1-1(7) defines a "mental injury" as "any psychological, psychiatric, or emotional *condition* for which compensation is sought."

Finally, while neither the workers' compensation statutes nor the related case law define "clear and convincing evidence," that standard is defined elsewhere in South Dakota law. To meet his burden under the clear and convincing standard, Claimant must present evidence that is "so clear, direct… weighty and convincing as to enable either a judge or jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue." *In re Setliff*, 2002 S.D. 58, ¶ 17, 645 N.W.2d 601, 606; *see also Cromwell v. Hosbrook*, 81 S.D. 324, 134 N.W.2d 777, 780 (1965). The clear and convincing standard is "more than a mere preponderance of the evidence, but not beyond a reasonable doubt." *Cromwell*, 134 N.W.2d at 780.

1. Compensable Physical Injury

There are two work injuries at play in this case. Both were physical assaults against Claimant by patients at RCRH, one in 2013 and one in 2014. To satisfy part one of the test described above, the Department must find that Claimant sustained a compensable physical injury. While the Department did not enter a specific finding as to such, the fact that Claimant sustained a compensable physical injury from the November of 2013 assault does not appear to be in dispute. Even though Employer and Insurer now downplay the November 2013 incident as "extremely minor" and argue that it "did not result in any physical harm, damage, or injury" to Claimant, they do not argue that Claimant did not actually suffer a compensable physical injury, and in fact, conceded that he did in their pre-hearing briefing. AR 4503-05 (Employer's Post Hearing Brief at 6-8); AR 96-97 (Exhibit 5 of Haraldson Affidavit (outlining medical and disability payments paid for the November 2013 incident)); AR 76-77 (Brief in Support of Mot. for SJ at 1-2 (stating that Claimant "sustained a contusion to his head when he was struck by a patient while working for Employer" and providing evidence that Employer and Insurer paid for the related medical expenses and temporary total disability benefits, in order to show that no other benefits were "due and owing" to Claimant with regard to the November 2013 injury)).

With regard to the December 2014 incident, the Department found that Claimant suffered a "work-related physical trauma." AR 4616 (Dept. Decision at 14). In so finding, the Department held that "it is enough, however, if a physical incident constitutes [a] physical accident or trauma that is clearly connected to a mental injury." AR 4794 (Dept. COL at ¶ 4). The Department did not provide a citation for this conclusion, but it was purportedly based on *Everingim*, which was cited in the Department's Decision. AR 4616 (Dept. Decision at 14).

As previously discussed, however, Claimant must show more than just a physical trauma under the new amendment, i.e., he must show he sustained a *compensable* physical injury. While the Department did not specifically find that Claimant sustained a compensable physical injury in December of 2014, the Department's decision nonetheless supports such a finding. The Department based its finding of a "physical trauma" on Dr. Gratzer's opinion that Claimant developed anxiety related to post *concussive* syndrome (PCS). AR 4616 (Dept. Decision at 14); AR 4790 (Dept. FF at ¶ 42(d)). It is also undisputed that Claimant received workers' compensation

benefits related to the December of 2014 work incident. *See* AR 4016 (Letter to Scovel from Haraldson on 9/30/16 (discussing the termination of Claimant's temporary total disability benefits on 10/14/16)); AR 4457 (Dept. Calculation of Compensation from 2014 incident). This Court finds that Claimant clearly sustained a compensable physical injury as a result of the December 2014 incident at work.

2. Major Contributing Cause

With regard to the second part of the test, Claimant must show that his compensable physical injury is and remains a major contributing cause of his mental condition. To establish causation, Claimant must show that his compensable physical injury was a contributing factor to his mental condition. *See* SDCL 62-1-1(7) (using the "arising from" language in the 1999 mental injury amendment which is consistent with the then-existing language in the first paragraph of the statute relating to injuries in general); *Orth*, 2006 SD 99 ¶ 32, 724 N.W.2d at 592-937 (referring to the contributing factor test when defining causation in the workers' compensation context).

When determining whether a mental condition arose out of the compensable physical injury, it is important to keep the definition of "injury" in mind. As discussed above, the Court has defined the word "injury," as used in the first paragraph of SDCL 62-1-1(7), as "the act or omission which caused the loss." *Steinberg,* 2000 S.D. 36 at ¶ 10, 607 N.W.2d at 600. Applying that definition here, Claimant's "injury"—the act or omission that caused his loss—was being struck at work in November of 2013 and again in December of 2014. Thus, if his mental injuries, e.g., PTSD, anxiety and depression, arose from that situation, then the contributing factor test would be met.

The definition of "injury" applied by the Court in *Steinberg* is arguably inconsistent with the definition of a "*mental injury*" in the last sentence SDCL 62-1-1(7) (enacted after *Steinberg*), defining a mental injury as synonymous with a mental "condition." The latter statutory definition appears to be more in line with the common dictionary definition of the term "injury," e.g., a particular form of hurt, damage, or loss. American Heritage College Dictionary 714 (4th ed 2007). As the Court was not addressing the compensability of mental injuries under this new statutory language in *Steinberg*, whether or how the amended statute may now affect the Court's distinction between an "injury" and a resulting "condition" is yet unknown.

Regardless of which definition is applied, the Department's findings nonetheless show that Claimant's physical injury here, whether that be the assault or his resulting concussion and PCS, was a contributing factor to Claimant's mental conditions. As the Department pointed out, even Dr. Gratzer opined that Claimant developed anxiety related to his PCS and a reoccurrence of PTSD from the 2014 injury. Dr. Gratzer specifically provided: "On balance, in my opinion, Mr. Baker developed worsening anxiety and depressive symptoms in relation to *physical stresses* of the December 11, 2014 injury in the form of an anxiety disorder n.o.s. (anxiety *related to post*

concussive syndrome) and a recurrence of posttraumatic stress disorder." AR 682 (7/16/15 Gratzer Report at 19) (emphasis added). Further, as the Department noted, all medical experts agree that Claimant did in fact suffer from PCS, PTSD, depression and anxiety after the 2014 trauma. AR 4616-17 (Dept. Decision at 14-15); AR 4790 (Dept. FF at ¶ 42(d)). Even though the Department's specific findings are not couched in these terms, the Court finds, after a de novo review of the medical records which form the basis of this finding, that Claimant's physical injury, which was undisputedly compensable, was clearly a contributing factor to his mental condition. Thus, a requisite causal connection was clearly established.

The primary issues in dispute are the characterization of Claimant's current mental health condition, and the *quantum of proof* necessary to prove causation, i.e., whether the Department erred in finding and concluding that Claimant failed to prove that his physical work injuries from 2013 and 2014 are and remain a *major contributing cause* of his current mental conditions *by clear and convincing evidence*. In its Decision, the Department appeared to acknowledge that Claimant experienced mental conditions such as PTSD, anxiety, and depression that arose from his work injuries, but the Department found these conditions "are significantly less important sources for his dysfunctional behavior than his impulses for vengeance, or his hypervigilant/paranoid fear of working around other people." AR 4618 (Dept. Decision at 16). The Department also found that these "latter conditions" were not caused by physical trauma. *Id*.

In its Conclusions of Law, rather than applying the term "major contributing" to the *cause* of Claimant's actual diagnosed mental conditions, the Department applied the term in a circular fashion: "[T]hese *conditions* [impulses for vengeance and obsessive-compulsive disorder] are the *greatest contributors* to his current mental *condition*." AR 4795-96 (Dept. COL at ¶ 10) (emphasis added). Interestingly, in this Conclusion of Law, the Department did not include a reference to Claimant's hypervigilance/paranoia, which can be a symptom of PTSD,[5] like it did in its Decision. Instead, the Department referred to Claimant's "obsessive-compulsive disorder," which was not a diagnosis contained in any of Claimant's psychiatric or psychological records. *Id***.**

In its Findings of Fact, the Department simply recited the opinions rendered by the various treating and evaluating doctors and mental health professionals in this case, then concluded that the clear and convincing evidence standard was not met because the evidence related to causation from the medical professionals was "mixed." AR 4617 (Dept. Decision at 15). However, the opinions of the medical and mental health providers were generally consistent as to the causation issue. The only divergence was by Dr. Gratzer, who opined that Claimant's PTSD was in remission, and his suggestion that a prior diagnosis of borderline personality disorder (BPD) was instead responsible for Claimant's current behaviors. Ultimately, the Department relied almost

[5] *See* AR 682 (Gratzer 7/16/15 Report at 19 (listing hypervigilance as one of the objective manifestations of PTSD)); AR 662 (Manlove 7/26/17 Report (agreeing with Gratzer's statement that paranoia is not listed as a symptom of PTSD in the DSM V, but explaining that the DSM V notes that "PTSD is often characterized by a heightened sensitivity to potential threats" and arguing that paranoia is an extreme form of hypervigilance)).

exclusively on the opinion of Dr. Hata when characterizing Claimant's current mental condition as obsessive-compulsive and paranoid, finding an insufficient causal connection between these mental conditions and his work injuries.

Issues of causation are questions of fact normally subject to clearly erroneous review, but the Department's decision as to the causation issue here was based upon documentary medical, psychiatric and psychological evidence. While the Claimant's live hearing testimony may have had some bearing on the Department's findings and conclusions as to what his current primary mental conditions are, the question of what *caused* these conditions was based on the documentary expert testimony.[6] Thus, this Court reviews the causation issue de novo. *See Haynes*, 2004 S.D. 99, ¶ 14, 686 N.W.2d at 660-61.

i. Misplaced Reliance on Dr. Hata's Testimony Regarding Causation

The Department's findings and conclusions as to causation were erroneous for several reasons. First, Dr. Hata, Claimant's treating neurologist upon whom the Department heavily relied as to Claimant's current mental conditions, made it very clear that he was not qualified to render an opinion as to Claimant's mental health diagnoses and the causes of such. Specifically, when Dr. Hata testified in his deposition that Claimant was "obsessive compulsive about litigation" and "paranoid," and that those two factors were "consuming his life," Dr. Hata labeled these conditions as psychiatric diagnoses, and emphasized that he is not qualified as a psychiatrist, and would thus defer to a psychiatrist (Dr. Manlove) for psychiatric matters or to Dr. Hastings or an independent neuropsychologist for neuropsychological matters. AR 4791 (Dept. FF at ¶ 43 (describing Dr. Hata's deposition)); AR 1879-80, 1886 (Hata Depo. at 35, 39, 61); *see also* AR 2476 (Hata 12/23/16 Report at 5). It was clearly erroneous for the Department to rely on Dr. Hata's opinion to

[6] If the Department had in fact made a credibility determination based on live testimony that affected the causation analysis, it may be appropriate to remand the issue back to the Department after a finding of error in the application of the correct legal standard. Here, the only specific findings the Department made regarding Claimant's hearing testimony pertained to Claimant's description of the 2014 work incident in question. Further, while the Department noted variations in how Claimant described the 2014 assault during his videotaped deposition, his hearing testimony, and how the incident was reported to his supervisor, this Court finds the Department's finding to be an incorrect characterization of Claimant's testimony. *See* AR 4781-82 (Dept. FF at ¶¶ 6-8). In both his deposition and at the hearing, Claimant mentioned that the patient had a cast on his arm, and testified the patient hit him on the right *side* of his head. *See* AR. 1815-16 (Baker Depo. at 60-61); AR 372, 399-400 (HT at 26, 52-53). It is unclear from where the Department derived its reference to the "right parietal" area as the "*top* of the head." AR 4604 (Dept. Decision at 2); AR 4781 (Dept. FOF ¶ 7). In any event, the severity of the 2014 assault is immaterial given the undisputed medical expert testimony that Claimant suffered mental injuries as a result of his successive physical work injuries. Thus, this Court is free to make its own findings as to causation from its de novo review of the documentary evidence that forms the basis of the causation determination.

support a finding when Dr. Hata admitted he is not qualified to provide such an opinion, and instead, deferred to the qualified mental health professionals as to this issue. [7]

Second, in its list of "conditions" which are the "greatest contributors" to Claimant's "mental health condition," the Department lists Claimant's "impulses for vengeance" purportedly based on a conclusion from Dr. Hata. AR 4618, 4620 (Dept. Decision at 16, 18); AR 4795 (Dept. COL ¶ 10). However, this reference to vengeance actually originates from Employer/Insurer, as the only time Dr. Hata referred to the term "vengeance" was in response to a leading question from Employer and Insurer's counsel:

> Q: Do you think he's trying to punish or get *vengeance* against the hospital in some way?
>
> A: Yes.

AR 1880 (Hata Depo. at 40). Similarly, Dr. Hata was asked:

> Q: So you think that he's seeking revenge against his former employer, don't you?
>
> A: That's what it basically boils down to.
>
> . . . .
>
> A: Well, revenge or redress.

AR 1885 (Hata Depo. at 60).

[7] The Department's rejection of Dr. Hastings' opinions on causation as calling for a medical opinion which she is not qualified to provide is misplaced. AR 4795 (Dept. COL ¶ 9); AR 4617 (Dept. Decision at 15 (citing *John v. Im*., 559 S.E.2d 694, 697 (Va. 2002)). In *John*, the Virginia Supreme Court rejected the opinion of a psychologist regarding the diagnosis of a traumatic brain injury as a result of an automobile accident. 559 S.E.2d at 697. Specifically, the Court said that the causation of a particular physical human injury is a component of a diagnosis, which is part of the practice of medicine. *Id.* Therefore, the expert, who was a licensed psychologist and not a medical doctor, was not qualified to state an opinion regarding the cause of the brain injury. *Id.* Here, however, the cause of Claimant's brain injury or concussion is not in dispute. Claimant was diagnosed with a concussion and PCS by medical doctors, and Hastings' reports focus on Claimant's neuropsychological symptoms that followed, and the relation of those symptoms to the diagnoses, a topic on which she is qualified to opine. AR 4183-84 (Hastings 8/15/16 Report at 1-2); AR 536 (Hasting 12/26/14 Report at 3). Further, under the analysis offered in *Engelien v. West Central Metal, et al.*, neuropsychologists are not per se disqualified from providing expert testimony on whether a brain injury is a major contributing cause of other mental conditions. *See* Hughes Co. Civ. No. 17-88 (Memorandum Decision, October 10, 2017, at 7-8). Like other experts, the opinion of the psychologist must fulfill the criteria laid out for the qualification of expert opinions and admissibility. *Id*. at 7-9. On another note, the Department could have, but did not, reject Dr. Hastings' opinions based on her purported lack of objectivity and sympathy towards Claimant. *See* AR 1886 (Hata Depo. at 61-63); AR 717 (Gratzer 5/11/17 Report (suggesting that is was "highly atypical" for a psychologist (Dr. Hastings) to attempt to facilitate Claimant's admission to inpatient treatment in California)).

Rather than a mental health condition, the concept of "vengeance," if anything, relates to Dr. Gratzer's opinion that there is "secondary gain affecting [Claimant's] presentation including preoccupation with medicolegal issues," referring also to his "anger and irritability." Notably, Dr. Gratzer did not go so far as to state that Claimant was malingering his reported symptoms. AR 695-96 (6/27/16 Gratzer Report at 3-4). Dr. Manlove, on the other hand, specifically opined that Claimant was not malingering his mental illness, setting forth his reasons for this conclusion. AR 651 (Manlove 7/13/16 Report). The Department did not enter any findings suggesting that Claimant was malingering, nor did the Department enter any findings discrediting either psychiatrist's opinions or indicating which one the Department deemed more persuasive.

All of Claimant's treating doctors, along with Dr. Gratzer, agreed with the Claimant's mental health diagnoses of anxiety, depression and PTSD, and all agreed these were causally related to his work incidents. Dr. Manlove's diagnosis focused specifically on PTSD. Only Dr. Gratzer opined that Claimant's PTSD was "in remission." Claimant's treating doctors (including Dr. Hata, who acknowledged he may not be qualified to render a psychiatric diagnosis), strongly disagreed with Dr. Gratzer's remission opinion. Notably, Dr. Gratzer, Employer/Insurer's IME, saw Claimant only once over two years prior to the hearing held in this case, whereas, Dr. Manlove, Claimant's IME, interviewed Claimant on five different occasions before rendering his opinions. Claimant's treating doctors and mental health professionals continued to see him up to the time of the hearing in this case. Therefore, the experts who were in the better position to evaluate Claimant's current condition, all found his PTSD to be increasingly worse, rather than in remission.

Further, even if Dr. Hata was qualified to offer an opinion regarding Claimant's current psychiatric conditions and their cause, his report does not support the Department's conclusions. In his written report from December 23, 2016, Dr. Hata stated:

> I do not agree 100% with [Dr. Gratzer's] exam. I do believe that the patient had a significant exacerbation of his PTSD following his assaults in 2013 and 2014, manifest[ed] by paranoia and a fear of being attacked physically. The degree of paranoia and obsession that he displays today is definitely worse than I have ever seen before. Although PTSD is a psychiatric condition and not a neurologic condition per se, *I would definitely state that his PTSD has worsened. This again was due to his assaults and being punched in the head.* Even his psychiatric IME acknowledges that his PTSD symptoms, although preexisting have been worsened.

AR 2476 (Hata 12/23/16 Report) (emphasis added). The Department selectively relied upon only certain parts of Dr. Hata's testimony, disregarding other parts, in particular, the fact that Dr. Hata disagreed with Dr. Gratzer's characterization of Claimant's current condition. Dr. Hata's conclusion, which was rendered before he viewed Dr. Manlove's first report, is actually consistent with Dr. Manlove's conclusion regarding the manifestation and progression of Claimant's PTSD

diagnosis. AR 2475 (Hata 12/23/16 Report); *see also* AR 650-52 (Manlove 7/13/2016 Report at 10-12). Given the consistent opinions regarding Claimant's current mental health condition from those in the best position to render them, the Department's disregard of Claimant's PTSD diagnosis was clearly erroneous.

ii. Physical Genesis Requirement

Employer and Insurer, along with the Department, also rely upon the deposition of Dr. Hata, when asserting that PTSD is a *psychiatric* or *psychological* condition, not attributable to a *physical cause*. AR 4620-21 (Dept. Decision at 18-19 (discussing causation in the context of whether Claimant is entitled to odd-lot benefits); Appellee's Brief at 10 (arguing that there is no physical genesis or cause for PTSD and nothing from the 2013 and 2014 work incidents indicates that they rose to the level of a major traumatic life threatening event).[8] The suggestion that PTSD can never be a compensable mental condition is not tenable when applying the language of the governing workers' compensation statute, along with the case law discussing what constitutes a contributing factor, as discussed above.

Under the amendment to SDCL 62-1-1, a claimant does not have to show that a *physical medical condition* is and remains a major contributing cause of his mental condition. Instead, a claimant must show that a *physical injury*, which must be compensable itself, is a major contributing cause of his or her mental condition. Thus, in this case, Claimant does not have to show that a concussion, post-concussive syndrome, or some other organic brain injury was "the" cause of his PTSD, depression, or anxiety. Instead, Claimant has to prove by clear and convincing evidence that his *compensable physical injury*—being struck at work—is "a" major contributing factor to his current claimed mental condition. *See Orth*, 2006 S.D. 99 at ¶ 32, 724 N.W.2d at 592-93 (citing *Brown v. Douglas Sch. Dist.*, 2002 S.D. 92, ¶ 23, 650 N.W.2d 264, 271). If an organic brain condition, such as a concussion or PCS, also arose from the same physical injury and contributed to or exacerbated his mental conditions, Claimant may also use this resulting physical condition to show that his physical injury is a major contributing cause of his current mental

[8] Employer and Insurer further argue that (1) PTSD is typically the result of a life-changing, terrifying experience, which was not the case here; and (2) Claimant's self-reported symptoms do not support a finding of PTSD from the 2013 incident because he did not seek treatment. The first argument is contrary to their own expert's opinion, the opinions of Claimant's treating doctors, and the Department's recognition of the same. *See* AR 683 (Gratzer's 7/16/15 report at 19 (stating that Claimant had a reoccurrence of PTSD in relation to the physical stresses of the December 2014 incident)); AR 4611 (Dept. FF at ¶ 42(d)). The second argument is persuasively refuted by both Dr. Hata and Dr. Manlove, who offered explanations for why Claimant may not have sought treatment in 2013. *See* AR 651, 655, 660 (Manlove 7/13/1, 9/9/16, and 7/26/17 reports (stating that that the stigma of mental health issues and lack of insight into the significance of mental health can explain why a claimant does not seek treatment right away and explaining the nature of cumulative concussions and PTSD with delayed expression)); AR 1881 (Hata Depo. at 44 (explaining that multiple concussions can make people progressively worse and noting that Claimant developed post concussive syndrome from his second concussion in 2014)). Claimant also reported in his deposition and at the hearing that he did not seek treatment for symptoms that he reported between the two incidents because he had a lack of awareness and insight and was trying to "suck it up." AR 367, 371 (HT at 20, 24); AR 1813 (Baker Depo. at 52).

condition. Thus, the mental condition may arise from either the assault itself or the resulting PCS, or from both, so long as a physical injury is found to be compensable.

The deposition of Dr. Hata illustrates the confusion surrounding causation in the context of mental conditions:

> Q. …Do you believe there's still any type of physical injury to Mr. Baker's brain or body from either the November 2013 or December 2014 events that constitutes a major contributing cause of his mental issues now.
>
> A. Well I think the best way for me to answer it is that his main problem, at least at the time I saw him on the 23rd of December, [2016] was psychiatric.
>
> Q. Psychiatric and not physical?
>
> …
>
> A. I can't give you a yes or no answer on that because it is complex. Traumatic brain injury and second concussion injury can lead to neuropsychologic problems. And trying to sort out what's organic and what's purely psychiatric is sometimes impossible.
>
> …
>
> Q. But we are asking you as a neurologist, not a psychiatrist, because I want to know if you as a neurologist see any provable objective physical injury to him now remaining from the November 2013 or December 2014 event. And my understanding is you're saying no, you can't point to anything, true?
>
> A. I can't point to anything specifically saying that second concussion syndrome is responsible for x percent of his psychiatric problems. I can't say with absolute medical certainty that his current psychiatric problems are not the cause, not caused by traumatic brain injury. This is a question that is kind of chicken-and-the-egg story. And once these things get started they tend to snowball.

AR 1878 (Hata Depo. at 31-32).

Claimant is not required to show that an organic brain injury was *the direct cause* of his mental conditions—e.g., that there is a physical nexus between a TBI or post-concussive syndrome and PTSD. Rather, the causation standard in workers' compensation cases is well settled under SDCL 62-1-1(7) as a contributing factor test ("arising out of"). The additional "major contributing cause" language requires a higher quantum of proof, where there are other potential causes of a physical or mental condition. *Steinberg*, 2000 S.D. 36, ¶¶ 11-13, 607 N.W.2d at 600-01. In such cases, a claimant must prove that the work injury was a major contributor to the resulting condition, and in cases of mental conditions, the claimant must do so by clear and convincing evidence.

Here, Dr. Hata declined to offer a percentage as to how much Claimant's physical condition resulting from his work injury contributed to his psychiatric condition, primarily because of the complexity of the question, and also because of his lack of qualifications to do so. Dr. Manlove, a qualified psychiatrist, while not offering a percentage, did opine that Claimant's November of 2013 and December of 2014 incidents are, and continue to remain, a major contributing cause of his current mental injury, i.e., PTSD. AR 655 (Manlove 9/9/16 Report). Dr. Gratzer agreed that Claimant's recurrence of PTSD (along with his anxiety and depression) was a result of his physical work stresses, but opined that the December 11, 2014 injury does not *remain* a major contributing cause to his current psychiatric status. AR 682-83 (Gratzer 7/16/15 Report at 19-20). For the reasons set forth above, this Court rejects Dr. Gratzer's contention that Claimant's PTSD was in remission.

Ultimately, as to the underlying causation issue, it is clear from the record that there was no dispute among the qualified experts that Claimant's work injuries were a major contributing cause of his PTSD. To the extent the Department interpreted the required causal connection between a compensable physical injury and a resulting mental condition too narrowly, this Court finds such interpretation to be erroneous as a matter of law. Likewise, the Department's factual findings were clearly erroneous for the reasons set forth above.

iii. Failure to Apply Preexisting Condition Subsection

Employer and Insurer also argue that Claimant failed to meet his burden because Claimant's mental conditions were preexisting. However, the fact that Claimant had preexisting mental health conditions does not bar recovery under the workers' compensation statutes. Instead, "[u]nder South Dakota law, insofar as a workers' compensation claimant's 'pre-existing condition is concerned [,] we must take the employee as we find him.'" *Orth*, 2006 S.D. 99, ¶ 48, 724 N.W.2d at 597 (citing *St. Luke's Midland Regional v. Kennedy,* 2002 S.D. 137, ¶ 13, 653 N.W.2d 880, 884). According to the Court in *Orth*, "[i]f a compensable event *contributed to* the final disability, recovery may not be denied because of the pre-existing condition, even though such condition was the immediate cause of the disability." 2006 S.D. 99, ¶ 48, 724 N.W.2d at 597 (other citations omitted). In so holding, the Court was applying SDCL 62-1-1-(7)(b), which provides 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."

Claimant stated that before the December 2014 incident, he had intermittent dizziness and increased ringing in his ears when he was emotionally upset; became angry quickly; was really anxious for most of his life; experienced issues with sleep; and reported depression—also stating that these symptoms have increased since the December 2014 incident. *See* AR 1819, 1824 (Baker Depo. at 76-79, 93). Claimant also reported seeing counselors for various reasons prior to the work

incident at issue. AR 1809-10, 1819 (Baker Depo. at 34-36, 38-40, 74-76). Recognition of Claimant's preexisting mental conditions is well documented in the record. AR 2475 (Hata's exam notes acknowledging/agreeing with Gratzer that Claimant has preexisting mental conditions); AR 650 (Manlove Report saying Claimant's psychological problems have significantly worsened since the assaults); AR 683 (Gratzer's 7/16/15 report at 19 (stating that Claimant had a *reoccurrence* of PTSD in relation to the physical stresses of the December 2014 incident)). The Department also recognized Claimant's preexisting mental conditions. *See* AR 4788, 4790, 4794 (Dept. FF at ¶¶ 38, 42(d), 49). However, in its causation analysis, the Department failed to discuss how these preexisting conditions relate to Claimant's current condition. Because of the plethora of evidence showing the Claimant had preexisting mental conditions, the Department should have applied the language of SDCL 62-1-1(7)(b).

All of Claimant's treating physicians and *both* IMEs recognized Claimant's history of preexisting mental issues, and agreed that Claimant suffered *an exacerbation* of his previous mental health issues due to his work injuries in 2013 and 2014. While Dr. Gratzer believes Claimant's PTSD and anxiety is in remission, the rest of Claimant's treating doctors, Dr. Hamlyn, Dr. Hasting, and Dr. Hata, all maintained that Claimant's PTSD symptoms have progressively gotten worse after his work incidents. The records and reports from these doctors document Claimant's objective and self-reported symptoms in the three years following the December of 2014 work incident and provide a clear and convincing picture of how Claimant's compensable physical work injury combined with his preexisting mental health conditions to prolong his mental disability and need for treatment. Additionally, Dr. Manlove, who saw Claimant on five occasions in the course of his evaluations and was the last medical provider to see Claimant according to the record, came to the same conclusion as Claimant's treating doctors. While Claimant suffered from mental conditions in the past, both Dr. Hata and Dr. Manlove, along with Dr. Hastings, agreed that Claimant's mental health symptoms have significantly worsened since his work injuries to the extent that he is now in need of intense psychiatric treatment.

Notably, the record is devoid of any evidence of the Claimant seeking mental health treatment in the recent years prior to the 2013 and 2014 work incidents. There were no other causal factors for the exacerbation of Claimant's current mental health conditions identified except these work incidents. Therefore, unlike other cases where multiple causes are at play, there is no issue here in determining that the work injuries were a "major" contributing cause of the exacerbation of Claimant's current mental health condition, because there was no other contributing cause,

much less a "major" cause, that has been identified in this record.[9] *See, e.g., Orth,* 2006 S.D.99, ¶¶ 47-48, 724 N.W.2d at 597.

3. Role of Workers' Compensation Litigation in Causation Analysis

Many of Claimant's treating doctors note how his mental health condition worsened as the dispute over Claimant's workers' compensation benefits played out. While the sometimes contentious process surrounding a workers' compensation claim should not factor into the causation analysis as a matter of course, the South Dakota Supreme Court has recognized situations somewhat similar to this case, involving an exacerbation of a claimant's depression after an employer and insurer denied coverage for a claimant's surgery.

In *Gilchrist v. Trail King Industries, Inc.*, the claimant, Gilchrist, suffered from depression following an injury at work (a torn rotator cuff). 2000 S.D. 68, 612 N.W.2d 1. The Court rejected the employer's argument that depression is not compensable if it is based upon "alleged treatment due to the handling of a claim for compensation." *Id.* at ¶18, 612 N.W.2d at 6. Instead, the Court agreed with Gilchrist and determined that the Department erred when it found that there could only be one cause of his depression, i.e. his employer's denial of his surgery. *Id.*[10] The Court found the medical testimony by two psychiatrists who had either evaluated or treated Gilchrist, supported a finding of a significant causal relationship between Gilchrist's work injuries and his subsequent depression. In citing the statements offered by these psychiatrists, the Court described how the injuries, themselves, were causally related to the depression and how the subsequent difficulties Gilchrist encountered with regard to the termination of his work, his insurance, and the failure to obtain a surgical correction contributed to and aggravated his psychological condition. *Id.* at ¶¶ 21-22, 612 N.W.2d at 6-7. The Court also noted in *Gilchrist*, that there was evidence of Gilchrist's depression even before his surgery was denied by the employer. *Id.* at ¶ 23.

Such was the case here. Claimant's doctors noted his PTSD stemming from his work injuries even before he was required to submit to an IME and prior to Employer's termination of his benefits. But in addition to Claimant's physical work injuries, it is clear in this case that the particularly contentious process of the workers' compensation claims and subsequent related and unrelated litigation resulted in a progressive deterioration of Claimant's mental health, prolonging his disability. AR 2779 (Hata 7/6/16 Note at 4); AR 2474-76 (Hata 12/23/16 Note); AR 1879, 1884

[9] While Dr. Gratzer points to a prior diagnosis of borderline personality disorder (BPD) by one of Claimant's prior mental health providers *ten years prior* to the work incidents at issue, suggesting BPD as a preexisting condition responsible for Claimant's current behaviors; this Court finds Dr. Manlove's explanation persuasive as to why Dr. Gratzer's reliance upon such diagnosis by a provider who was not even a licensed psychiatrist or psychologist is misplaced. *See* AR 699-706 (Gratzer 9/28/16 Report at 1-8); AR 660-62 (Manlove 7/26/17 Report at 5-7).

[10] While the Court was not applying the current language of SDCL 62-1-1(7) in *Gilchrist,* the general analysis and acknowledgment of the workers' compensation claim process constituting a contributing factor toward a claimant's depression is nonetheless relevant to the discussion in the case at hand.

(Hata Depo. at 34-36, 54); AR 514, 518, 522, 525 (Hamlyn 7/13/15, 8/10/15, 1/19/16, and 7/8/16 Notes); AR 4185 (Hastings 8/15/16 Report at 3); *see generally* AR 546-637 (Hastings Therapy Notes 7/2/15 through 9/5/17 (documenting Claimant's focus on litigation, mental deterioration, and increased paranoia due to RCRH's actions and workers' compensation issues)). As Dr. Manlove explained, PTSD can cause people to become sensitive to situations similar to the underlying traumatic event, as well as situations unrelated to the event. AR 662 (Manlove 7/26/17 Report at 7). For Claimant, his perceived mistreatment over his workers' compensation case and his other perceived violations by his Employer with respect to his general working conditions, and Employer's response or lack thereof to the work incidents in question, has further aggravated his mental health condition. Even if these perceptions by Claimant have no merit, no one disputes that he holds these beliefs and that they arose from his compensable physical work injuries. The medical and psychological evidence clearly and convincingly shows that Claimant's continued pursuit of litigation surrounding his workers' compensation claim has contributed to the deterioration of his mental health.

In viewing the record as a whole, the Court finds the opinions of Claimant's treating physicians and mental health professionals, along with Dr. Manlove's opinions, regarding Claimant's current mental health condition and the underlying cause thereof, to be more persuasive than those of Dr. Gratzer. Therefore, this Court finds and concludes that Claimant has met his burden of proving by clear and convincing evidence that his compensable physical work injuries were and remain a major contributing cause of his current mental condition.

II. DID THE DEPARTMENT ERR IN FINDING THAT THE CLAIMANT IS NOT PERMANENTLY AND TOTALLY DISABLED UNDER THE ODD LOT DOCTRINE?

Claimant contends that he is entitled to permanent, total disability benefits under the odd-lot doctrine. Under the odd-lot doctrine:

> [A] workers' compensation claimant must show that [his] physical condition, in combination with [his] age, training, and experience, and the type of work available in [his] community, causes [him] to be unable to secure anything more than sporadic employment resulting in insubstantial income.

Haynes v. Ford, 2004 S.D. 99, ¶ 15, 686 N.W.2d 657, 661 (quoting *Enger v. FMC*, 1997 SD 70, ¶ 21, 565 N.W.2d 79, 85); *see* SDCL 62-4-53.[11] A claimant can make a prima facie showing of a permanent total disability by establishing either that: "1) he is obviously unemployable; or 2) suitable employment is unavailable." *Id.* (citing *Petersen v. Hinky Dinky*, 515 N.W.2d 226, 231-32 (S.D.1994)).

First, obvious employability may be established by: "(1) showing that [claimant's] 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 fact in the kind of continuous, severe and debilitating pain which he claims." *Baier v. Dean Kurtz Const., Inc*., 2009 S.D. 7, ¶25, 761 N.W.2d 601, 608 (citing *Fair v. Nash Finch Co*., 2007 SD 16, ¶ 19, 728 N.W.2d 623, 632-33) (internal citations omitted). If a claimant shows that he is obviously unemployable, the burden shifts to the employer and insurer to show that some suitable employment is actually available in a claimant's community for people with the claimant's limitations. *Id*.

"Second, if the claimant's medical impairment is so limited or specialized in nature that he is not obviously unemployable or relegated 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." *Sandner v. Minnehaha County*, 2002 S.D. 123, ¶ 10, 652 N.W.2d 778, 783 (other citations omitted). If a claimant makes a reasonable effort to find employment and is unsuccessful, the burden shifts to the employer to show that "some form of suitable work is regularly and continuously available to the claimant." *Id. "Even though the burden of production may shift to an employer and insurer, the ultimate burden of persuasion remains with the claimant*." *Id.* at ¶ 10, 652 N.W.2d at 783 (emphasis in original). The claimant maintains this burden of persuasion under either method of proving a permanent total disability.

"The test to determine whether a prima facie case has been established is whether there are 'facts in evidence which if unanswered would justify persons of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain.'" *Sandner*, 2002 S.D. 123, ¶ 13, 652 N.W.2d at 783 (quoting *Rosen's Inc. v. Juhnke*, 513 N.W.2d 575, 577 (S.D. 1994)). "Whether a claimant makes a prima facie case to establish odd-lot total disability inclusion is a question of

[11] SDCL 62-4-53 provides: An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. 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.

fact." *Baier*, 2009 S.D. 7, ¶ 28, 761 N.W.2d at 609. This Court gives "great weight to the findings and inferences made by the Department and will only overrule the Department's factual findings if they are clearly erroneous." *Id*. (citing *Spitzack v. Berg Corp*., 532 N.W.2d 72, 75 (S.D.1995)).

A. Interpretation of the Odd-Lot Statute

In applying the above requirements for establishing a permanent total disability, the Department first noted that Claimant is not asserting that he is in continuous, severe, and debilitating pain, nor has he attempted to find work with other employers. AR 4619 (Dept. Decision at 17). Thus, the Department held that in order to prove he falls under the odd-lot category, Claimant must prove he is unemployable "due to his age, education, training, and *any mental conditions for which his 2013 and 2014 physical traumas were a major contributing cause*." *Id*. (emphasis added). The Department did not cite any legal authority from which it derived this language as the test for determining obvious unemployability, and this Court finds the Department's test to be erroneous under the governing statute and legal precedent.

1. Obvious Unemployability

The statutory list of factors related to the first test for obvious unemployability speaks only to an employee's *physical* condition. It does not mention an employee's *mental* condition. *See* SDCL 63-4-53. Thus, arguably, under the current odd-lot statute, a claimant may not establish a permanent total disability when the claimant's disability is based only on symptoms or limitations resulting from a mental condition. However, the language in the current odd-lot statute was derived from case law analyzing the concept of what constitutes a total permanent disability. When interpreting this exact language, the Court has also included an employee's *mental capacity*, along with an employee's physical impairment, age, training, experience, and type of work in his community. *See Lends His Horse v. Myrl & Roy's Paving, Inc.*, 2000 S.D. 146, ¶ 10, 619 N.W.2d 516, 519; *Wagaman v. Sioux Falls Const*., 1998 S.D. 27, ¶21, 576 N.W.2d 237, 241; *Petersen v. Hinky Dinky*, 515 N.W.2d 226, 231 (S.D. 1994); *Tiensvold v. Universal Transport, Inc.*, 464 N.W.2d 820, 822 (S.D.1991).

Whether the absence of mental capacity or a reference to mental conditions in the statutory list of factors was an oversight or by design is unknown. However, this Court cannot add or omit words from a statute. Instead, the Court must rely on the plain language of the statute in determining legislative intent. *See Wise v. Brooks Const. Services*, 2006 S.D. 80, ¶ 35, 721 N.W.2d 461, 473 (holding that "[t]he intent of a statute is determined from what the Legislature said, rather than what the courts think it should have said"). Notably, the odd-lot statute, SDCL 62-4-53, was amended in 1999, the very same year that the Legislature amended SDCL 62-1-1(7) to include the mental condition language when defining which work injuries are compensable. Since the laws within a chapter must be construed together, the reasonable inference is that if the Legislature wanted to include a reference to mental conditions in the list of factors relating to a permanent

total disability, it would have done so, especially since both statutes were amended in the same year.

This Court has been unable to locate any South Dakota cases addressing the current odd-lot statute in the context of a claim based primarily or solely upon an employee's compensable mental condition. The odd-lot statute would have been in effect at the time of the injuries at issue in the *Gilchrist* case discussed, *supra*, Section I(B)(3), which pertained to an employee claiming total disability from severe depression. But the Court's analysis pertained to causation and whether Gilchrist refused or neglected medical care. *Gilchrist v. Trail Kind Industries, Inc*., 2000 S.D. 68, 612 N.W.2d 1. The Court did not have an occasion to address whether or how the odd-lot statute may apply to the facts of that case, as it appears the parties had agreed that Gilchrist was totally disabled. *See Gilchrist v. Trail King Industries, Inc*., 2000 S.D. 67, ¶ 12, 612 N.W.2d 10, 14 (related tort case referring to the Department's ruling in the workers' compensation proceeding).

In *Wagaman v. Sioux Falls Const*, the Court resolved whether the claimant's somatoform disorder could be considered along with his shoulder injury when determining if claimant was entitled to odd-lot benefits. *See* 1998 S.D. 27 at ¶¶ 24-25, 33-34, 576 N.W.2d at 242-43. Somatoform disorder is a psychological disorder where a person experiences *pain* to a greater degree than one who does not suffer from the disorder. *Id*. at ¶ 9, n. 2, 576 N.W.2d at 240. While the current odd-lot statute was not in effect at the time of Wagaman's work injury, the Court, relying upon common law precedent, held that even if the claimant's somatoform disorder was not caused by his work injury, it should be considered along with his work-related injury in determining his compensation—i.e. whether or not he is "obviously unemployable" under the odd-lot doctrine. *Id*. However, unlike the present case, the *Wagaman* case was analyzed under the second method of proving obvious unemployability—i.e. whether Wagaman suffered from "continuous, severe, and debilitating *pain*." *Id*. at ¶ 27, 576 N.W.2d at 242 (emphasis added). It is not clear from *Wagaman* whether other mental conditions that manifest in physical symptoms can be considered when determining obvious unemployability under the first test, which considers a claimant's *physical* condition. Nonetheless, the *Wagaman* case does illustrate that the Department erred in considering only those conditions causally related to Claimant's work injuries in its odd-lot analysis.

Here, unlike the somatoform disorder in *Wagaman*, the record does not illustrate that Claimant's current mental condition results in the kind of pain that would fall under the second test for obvious unemployability. The Department correctly noted that Claimant was not asserting such pain. AR 4619 (Dept. Decision at 17). Likewise, even if physical symptoms of mental conditions were considered under the first test for obvious unemployability, the Claimant failed to make a prima facie showing through either his own testimony or through medical evidence, that any of the physical manifestations of his current mental condition, along with his age, training and experience, and work available in his community, renders him obviously unemployable.

2. Good-faith Work Search

However, even if the first avenue of establishing a permanent total disability is not available to a claimant whose disability is based primarily on a mental condition, Claimant may nonetheless show that he is entitled to odd-lot benefits. Cases involving non-pain related mental conditions appear to fall more squarely under the second avenue of establishing a permanent total disability, i.e., where a claimant's medical impairment is limited or specialized in nature. In such case, a claimant may demonstrate the unavailability of suitable employment with a showing that he has made reasonable efforts to find work and was unsuccessful. *Baier*, 2009 S.D. 7, ¶ 25, 761 N.W.2d at 608; *Sandner*, 2002 S.D. 123, ¶ 10, 652 N.W.2d at 783.

In *Sandner*, when the Court discussed whether the claimant met his met his ultimate burden of persuasion, the Court noted that "Sandner was required to introduce evidence of a reasonable, good faith work search effort *unless the medical or vocational findings show such efforts would be futile*." *Id*. at ¶ 22, 652 N.W.2d at 784 (quoting this additional language in SDCL 62-4-53) (emphasis added). This additional statutory language suggests that a claimant may make a prima facie showing of either a good faith work search *or its futility*. The Supreme Court has not yet discussed whether the latter phrase in SDCL 62-4-53 is simply a reference back to the prima facie showing of obvious unemployability, or whether this is another avenue by which a claimant can make a prima facie showing of a permanent total disability, untethered to the list of factors set forth for showing obvious unemployability. If it is the latter, then presumably, a claimant may rely upon his mental condition, as in the case here, to make a showing that a good faith work search would be futile.

This Court construes the additional language in the odd-lot statute pertaining to good faith work searches to allow such a claimant to alternatively make a prima facie showing by medical or vocational findings that a good faith work search would be futile given his particular mental condition. Whether or not a claimant ultimately prevails will depend on whether he satisfies his ultimate burden of persuasion.

B. Department's Decision and Standard of Review

In this case, the Department found that Claimant was not permanently disabled under the odd-lot doctrine. In so holding, the Department considered the following factors as set forth in statute: Claimant is 55 years old, has worked in various capacities for Employer from 1981 to 2015, and has some post-secondary education. AR 4619 (Dept. Decision at 17). While Claimant is disabled according to the Social Security Administration, the Department noted that this determination is persuasive but not binding on the court. *Id*. (citing *Vilhauer v. Dixie Bake Shop*, 453 N.W.2d 842, 846 (S.D. 1990)). The Department found that Dr. Hata's opinions "shed the most light" on the effect that Claimant's mental conditions have on his employability, referring to his anger, desire for vengeance, obsessiveness and PCS, none of which the Department found to be

caused by his "physical traumas." AR 4620 (Dept. Decision at 18). The Department also cited Hata's opinion that Claimant could have continued working as a hand wash monitor, a regularly available position that addresses Claimant's biggest needs – "to keep his contact with co-workers structured and limited, and to avoid direct patient care." *Id.* The Department also considered Claimant's actions after his injury—i.e. driving across the country, writing "volumes of things attacking those he sees as the source of his troubles," and continuing to work for months after the 2014 incident "despite feeling intense paranoia, anxiety, depression, and stress." *Id*.

The Department next considered, and rejected, the opinions regarding unemployability offered by Claimant's vocational expert, James Carroll.[12] The Department noted that Carroll's opinions were "based on the observation that Claimant's doctors opined that he cannot work, and this inability to work was driven by PTSD, PCS, anxiety, and depression produced by his physical traumas." AR 4620 (Dept. Decision at 18 (purportedly rejecting Carroll's opinion because it did not coincide with the Department's causation determination). The Department also noted that both Dr. Hata and Dr. Gratzer thought Claimant could work. *Id.* Ultimately, the Department concluded that it was not clear whether Claimant's mental issues are truly disabling, and even if they are, the Department relied on its conclusion (addressed and overturned in Issue I) that "the greatest causes of Claimant's impairment and/or disability—his explosive anger, his paranoia, and his obsession with vengeance—were not *caused* by his physical traumas of 2013 and 2014." AR 4620-21 (Dept. Decision at 18-19). With regard to Claimant's PTSD (which may be the source of his paranoia as explained by Dr. Manlove), the Department likewise based its ruling on its conclusion that the PTSD was not *caused* by Claimant's physical work traumas. *Id.*

The Department's ruling is not clear as to whether it found a failure by Claimant to make even a prima facie showing or whether it found that Claimant failed to carry his ultimate burden of persuasion. As there was no discussion or analysis of the burden shifting and evidence offered by Employer and Insurer of suitable work available to Claimant with his limitations, the Department's ruling is best construed as a finding that Claimant failed to make a prima facie showing of a permanent total disability. It is clear that the Department's finding in this regard was primarily based on its underlying conclusion that Claimant failed to prove that his current mental conditions affecting his employability were caused by his work incidents.

The medical evidence offered in this case as to *causation* of mental conditions was all documentary and thus subject to a de novo review. However, unlike the causation issue which must be based on expert medical testimony, Claimant's live testimony does have a significant bearing on the odd-lot analysis, which considers Claimant's actual vocational abilities. The Department's findings of fact as to this issue appear to be based, at least in part, on Claimant's testimony. AR 4620 (Dept. Decision at 18 (noting tasks Claimant has been able to accomplish

[12] The Department incorrectly stated that Carroll concluded Claimant is incapable of being retrained. AR 4620 (Dept. Decision at 18). That conclusion is not contained in Carroll's report. AR 752-761. Claimant did not offer any expert opinion that he is unable to benefit from vocational rehabilitation or that it is not feasible. *See* SDCL 62-4-53.

after his 2014 work incident as noted above)). In entering such findings, the Department had the opportunity to view the Claimant's demeanor and presentation during his live testimony. Moreover, even though the Department did not enter a specific credibility finding, Claimant's live testimony as to his vocational abilities formed the basis of the opinions regarding his employability. Additionally, the opinions regarding Claimant's vocational abilities were also based in large part on the experts' observations of Claimant and his self-reported capabilities in contexts outside of the hearing. Claimant's credibility as to what types of activities he could or could not do, despite his mental health diagnoses, was best weighed by the finder of fact who observed him firsthand. Because the Department's ultimate findings on the odd-lot issue appear to be based on both documentary and live testimony, this Court reviews them under the clearly erroneous standard.

C. Odd-Lot Analysis

After a de novo review of the medical and vocational evidence, this Court finds that Claimant offered medical and vocational evidence from Dr. Manlove and James Carroll, which *if unanswered*, constituted a sufficient *prima facie* showing that a work search would be futile due to Claimant's compensable mental conditions. The burden thus shifted to Employer and Insurer to provide proof of suitable work available to Claimant despite his mental health conditions. This Court finds, based on its de novo review of the documentary evidence provided by Employer and Insurer, that they likewise produced sufficient evidence to meet their burden of production in response to Claimant's evidence. The question then becomes whether Claimant carried his ultimate burden of persuasion in establishing a permanent total disability. A recap of this evidence is set forth below.

1. Work restrictions by Claimant's treating doctors

Some of Claimant's doctors have opined as to Claimant's ability to work, at least at the time in which a particular report or letter was written. For instance, in April of 2015, Dr. Hata, his neurologist, recommended that Claimant not work on the locked ward at RCRH or with direct patient care. AR 2159.

Dr. Hamlyn, his psychiatrist, recommended that Claimant not work for six months starting in July of 2015. AR 2717. However, on October 22, 2015, Dr. Hamlyn released Claimant from all work restrictions, with the exception of refraining from working in a healthcare field or hospital. AR 2248. One month later, in November of 2015, Dr. Hamlyn issued a letter stating that Claimant could not work any job at that point. AR 521. Although that letter did not give an explanation as to what had changed in that short time span, Dr. Hamlyn reassessed Claimant in January, and again in July of 2016, and concluded that Claimant was not capable of working due to his PTSD and depressive disorder. At this July of 2016 visit, Claimant reported anxiety in general, but noted that his anxiety gets worse when he does anything related to his workers' compensation claim. AR

2781. Dr. Hamlyn recommended that Claimant be reassessed in January of 2017. AR 155 (Hamlyn 7/8/16 letter). The record does not, however, include any evidence showing that Claimant was reassessed by Dr. Hamlyn, or that Dr. Hamlyn's work restriction was renewed.

In September of 2015, Dr. Hastings, Claimant's treating psychologist, rendered an opinion that at that time, Claimant was experiencing symptoms that prevent him from being able to concentrate, remember and carry out normal desk-job tasks. AR 4181 (Hastings 9/29/15 Letter). However, she could not make a determination as to a partial permanent disability, since his last neuropsychological evaluation was in April of 2015, and stated that she would need to conduct another evaluation to determine if there was improvement in Claimant's brain functioning. *Id*. Dr. Hastings wrote a letter to Claimant's counsel updating his status in August of 2016, referencing his PTSD and current symptoms of stress; fear of being assaulted if he visits certain places where he might run into adult males while he is alone; and vulnerability in such situations resulting in anxiety attacks, dizziness, headaches, and blurred vision. AR 4143-85 (Hastings 8/15/16 letter). In this update, even though Claimant did not have another neuropsychological evaluation, Hastings opined that Claimant has a permanent *partial* disability, but did not state that he is incapable of working. *Id*. Moreover, she explains that Claimant has become more agitated and paranoid "*due to anxiety over treatment by RCRH and the ongoing litigation*." *Id*. However, she further notes that Claimant "has always been a gentle man and has never posed a threat to me or my staff," and that he is "well-liked by my staff." *Id*.

2. Vocational Experts

In October of 2015, following a meeting with Dr. Hamlyn, Employer and Insurer's vocational expert, Jerry Gravatt, sent a follow-up letter to Dr. Hamlyn offering examples of low stress jobs with no patient contact that would potentially be appropriate for Claimant, such as a sterilization technician, an assembly operator, a dental lab tech, a factory worker, and a jewelry polisher. AR 737 (Gravatt 10/28/25 Report). On December 17, 2015, Gravatt sent a letter to Employer and Insurer's counsel outlining additional jobs that would be part-time to full-time with limited public or co-worker contact. AR 738 (Gravatt 12/17/15 Report at 1). These positions were not within or related to the medical field, included unskilled or semi-skilled tasks that require little to no training, and fell within the light to medium physical demand categories. *Id*. The report provided eleven job positions including inventory control, a janitorial position, a backroom associate at a retail store, a laundry worker, and two delivery driver positions. AR 738-41 (Gravatt 12/17/15 Report at 1-4). Some of the positions listed wage information, while others did not. Gravatt offered another report outlining similar positions in June of 2017, including a production assembler, a press operator, and a mailroom clerk. AR 742-43 (Gravatt 6/1/17 Report).

Meanwhile, in March of 2017, Claimant's vocational expert, James Carroll, submitted a report outlining his review of Claimant's medical and psychological records, various legal pleadings, the videotaped deposition of Claimant, and his interview with Claimant in February of

2017. AR 753 (Carroll 3/14/17 Report at 1). Carroll's report notes that "[a]ll of [Claimant's] treating medical/psychological practitioners including Dr. Hata, Dr. Hastings, Dr. Hamlyn and Dr. Manlove have rendered the opinion that Mr. Baker is in need of intensive psychiatric treatment and that he is not capable of employment of any kind." AR 761 (Carroll 3/14/17 Report at 9). Carroll also noted that Dr. Gratzer's opinion that Claimant's anxiety and PTSD were in remission has been rebutted by the previously named practitioners. *Id*. In his vocational opinion, Carroll opined that Claimant is "unemployable and that a job search would be futile." *Id*. Carroll also concluded that, based on the severity of Claimant's psychological conditions, Carroll did not think Claimant was capable of holding any type of employment. *Id.* Carroll did not mention any impressions or observations of Claimant during his own interview in reaching these conclusions.

There are several issues with Carroll's report which this Court finds to be problematic. First, contrary to Carroll's suggestion otherwise, other than Dr. Hata's recommendations as to the type of employment suitable for Claimant, there is no evidence in the record that Dr. Hata opined that Claimant could not work in any capacity. As noted by the Department, Dr. Hata offered opinions during his deposition in December of 2016 suggesting instead that Claimant was employable. Carroll failed to note Dr. Hata's statement that Claimant could work as a handwashing monitor and that he would not prohibit Claimant from trying the jobs that Mr. Gravatt offered. AR 1876-77 (Hata Depo. at 24-28). In addition, Dr. Hata offered his own description of jobs that he thought would be appropriate for the Claimant, e.g., undemanding, not a lot of interaction with people, and physical rather than intellectual jobs. *Id*. Dr. Hata agreed that Claimant's obsession with litigation would be a "road block" to Claimant going back to work and that Claimant needed intensive psychiatric care, but did not opine that Claimant was completely incapable of working. AR 1879 (Hata Depo. at 35-36). Dr. Hata further qualified this opinion by emphasizing that Claimant should not be involved with extensive litigation at this time. AR 1879, 1884 (Hata Depo. at 35, 54). Even though Dr. Hata deferred to other doctors with regard to Claimant's psychiatric diagnoses and the causation of such, he was certainly qualified to render opinions, based on his interactions with Claimant as his treating neurologist, as to Claimant's vocational limitations. The Department did not err in relying upon Dr. Hata's opinion as to these issues.

Second, Carroll's characterization of Dr. Hastings' opinions is also inaccurate. Dr. Hastings did not render an opinion that Claimant "is not capable of employment of any kind." Rather, her opinion, as set forth above, is that Claimant has a permanent *partial* disability.

Third, Carroll's report failed to take Dr. Gratzer's lengthy subsequent reports into account. In these reports, Dr. Gratzer specifically focuses on Claimant's vocational abilities and points out legitimate reasons why Dr. Hamlyn's and Dr. Hastings' opinions are suspect. In his January 21, 2016, letter, Dr. Gratzer notes that it is unclear why Dr. Hamlyn initially released Claimant to return to work, then removed him from work completely just one month later, based on Claimant's reported severe psychiatric symptoms. Gratzer notes that Hamlyn did not document any objective symptoms or changes to Claimant's mental health treatment plan. AR 690 (Gratzer 1/21/16

Report). Instead, Dr. Hamlyn's scheduling of a psychiatric follow-up in three months suggested a lack of acute treatment needs. *Id*.

Dr. Gratzer issued another letter in June of 2016 after reviewing Claimant's video deposition and further records from Drs. Hastings and Hamlyn, as well as Gravatt's job search results. AR 693-97 (Gratzer 6/27/16 Report). Dr. Gratzer noted that Claimant's demeanor at his deposition in April of 2016 was consistent with his demeanor during Gratzer's evaluation in June of 2015, where he presented as agitated and angry about the circumstances of the interview. *Id.* at 694. Dr. Gratzer also noted that Claimant's lengthy road trip to Oregon, Claimant's new relationship, Dr. Hastings' observations of Claimant (unremarkable mental status exams including mood, intact attention and concentration), and her repeated references to his normal demeanor, conduct and memory, along with Claimant's long detailed letters,[13] show that Claimant's subjective complaints are not supported by objective evidence. *Id.* at 695. Rather, Dr. Gratzer opined that Claimant has demonstrated the ability to engage in sustained concentration and focus, problem solving, decision making and other aspects of executive functioning. *Id*. Dr. Gratzer further opined that there is evidence of "secondary gain" affecting Claimant's presentation, given his preoccupation with medicolegal issues. *Id*. at 695-96. Ultimately, Dr. Gratzer noted that Claimant would benefit from a return to work from a psychiatric standpoint, as employment would provide him structure, support, reduce financial stress, and promote social contact. *Id*. at 696. All of these observations by Dr. Gratzer are supported by the record.

As to Dr. Manlove's disability rating and opinion as to Claimant's employability, the Court first notes as a starting premise, that he did not find Claimant to be totally disabled. In fact, he assigned a *partial* disability rating of 22%. AR 653 (Manlove 7/13/16 Report). Second, as Dr. Gratzer notes, Dr. Manlove did not "delineate the basis for his disability rating based on a Workers' Compensation Schedule."[14] AR 712 (Gratzer 9/28/16 Report). Third, when noting moderate impairment in concentration and following complex instructions, Dr. Manlove refers to Claimant's difficulty in understanding the forms used by various organizations he has been involved with, and the reasons for such, noting in particular Claimant's failure to grasp that workers' compensation

[13] Beginning in June of 2015, Claimant filed complaints with various agencies such as the South Dakota Attorney General's Office, the South Dakota Board of Nursing, the South Dakota Department of Health, OSHA, and the Joint Commission on Health Care Accreditation—all related to the treatment he received by RCRH employees and by others involved with his workers' compensation claim. Claimant has also filed small claims and federal civil actions against people he worked with at RCRH and filed a protection order against Employer and Insurer's counsel. These writings were very readable at first, but became more frantic and hard to understand as time went on. Nonetheless, the fact that Claimant is able to research the law around these claims and agencies and draft letters and complaints using a computer, shows that he is able to concentrate and produce a substantial written work, even if the work is frantic or hard to follow at times. While the readability of the writings supports Claimant's mental deterioration, the writings, themselves, do not support a claim that he is totally disabled. Claimant's writings may not be to the level you would expect from an attorney or other professional navigating these agencies, but his ability to do so at even a lower-level shows that he is able to complete work-related tasks.

[14] *See* SDCL 62-1-1.2 (requiring the Guides to the Evaluation of Permanent Impairment, Sixth Edition to be used when determining impairment under the chapter).

is a no fault system. AR 652 (Manlove 7/13/16 Report). Notably, Dr. Manlove found no deficit in Claimant's ability to travel to new environments without supervision, and the moderate impairment noted with regard to Claimant's social functioning was specifically related to his previous relationships with *coworkers at RCRH*. *Id*. Out of the six areas of function considered, the only one in which Dr. Manlove found Claimant to be totally impaired was the area of "Adaptation," which referenced his anxiety, paranoia and thought disorder. *Id*.

However, in Dr. Manlove's conclusion, he notes that while Claimant's PTSD seems to be worsening, Claimant's post concussive syndrome *appears to be improving*. AR 653. Finally, as to the permanency of Claimant's disability, Dr. Manlove's opinion was far from certain, couched in the following terms: "Though I hope he will improve with therapy, we have not seen much improvement yet, so it seems likely that his disability will be permanent." *Id*.

Both of Claimant's treating doctors, Dr. Hastings and Dr. Hata, have opined that Claimant is in need of further psychiatric treatment. AR 1879 (Hata Depo. at 35); AR 636 (Hastings 9/5/17 Progress Note). Also, Dr. Hamlyn had recommended a reassessment of Claimant in January of 2017, but there is no evidence in the record of such. AR 155. This leaves open the question of whether Claimant has reached maximum medical improvement (MMI) as to his psychiatric issues.

Dr. Hata opined that Claimant had reached MMI for his neurological complaints, e.g., headaches and dizziness; but recommended further testing to see if Claimant has reached MMI for his neuropsychological or cognitive impairments, e.g., memory and concentration, as Dr. Hastings had noted through her testing that Claimant's cognitive function is still improving. AR 1882-83 (Hata Depo. at 48-52). However, because of his concerns with regard to Dr. Hastings' objectivity, Dr. Hata recommended a different neuropsychologist, Dr. Cherry, for a further exam. AR 1883 (Hata Depo. at 49, 61-63). Claimant refused to see Dr. Cherry, so whether he is at MMI for his cognitive issues is also indeterminate based on this record. *Id.* Notably, the Supreme Court has recognized that factors that may indicate malingering include a claimant's lack of cooperation during evaluations, which in this case may apply to Claimant's refusal to undergo a further evaluation as recommended by his treating physician. *See Streeter v. Canton School Dist*., 2004 S.D. 30, ¶ 19, 677 N.W.2d 221, 225.

While impairment ratings are not necessarily required when seeking permanent disability benefits under the odd-lot doctrine, given the lack of convincing medical testimony or evidence showing that Claimant's limitations are *permanent,* or that he has a permanent impairment rating hindering his ability to hold any job, Claimant has not persuaded this Court that he is permanently and totally disabled. "Temporary disability, total or partial" is defined as "the time beginning on the date of injury… and continuing until the employee attains complete recovery or until a specific loss become ascertainable, whichever comes first." SDCL 62-1-1(8). The medical evidence has shown that Claimant has clearly not attained a complete recovery, but he has failed to carry his burden of establishing a specific and ascertainable permanent loss.

Thus, the Department had ample support in the record to ultimately reject both Mr. Carroll's vocational assessment, and Dr. Manlove's opinion as it relates to Claimant's unemployability, and in particular, as to whether a job search would be futile for Claimant.

3. Suitable Employment

Despite these problems with regard to the persuasiveness of Carroll's and Dr. Manlove's conclusions, they were nonetheless sufficient, *if they had gone unanswered*, to overcome the low hurdle of a *prima facie* showing that a work search would be futile for Claimant. Thus, the burden of production shifted to Employer and Insurer to show that some form of suitable employment is available in Claimant's community. The evidence produced included available jobs in the community in conjunction with limitations that Claimant's doctors provided throughout Claimant's treatment. At oral argument Claimant's counsel argued that the jobs Employer and Insurer provided did not satisfy their burden because Employer and Insurer's expert, Mr. Gravatt, did not call each employer to see if the employer would accommodate all of Claimant's restrictions. *See Eite v. Rapid City Area School Dist. 51-4, 2007 S.D. 95, ¶¶ 26-28, 739 N.W.2d 264, 273* (citing *Kurtz v. SCI*, 1998 S.D. 37, ¶ 21 n. 6, 576 N.W.2d 878, 885) (explaining that the Court and the Department have discounted vocational expert testimony when the expert failed to inform prospective employers of a claimant's physical limitations or left out significant pieces of information regarding claimant's abilities when inquiring about available jobs); *see also Rank v. Lindbloom*, 459 N.W.2d 247, 250 n. 1 (S.D. 1990); *Kester v. Colonial Manor of Custer*, 1997 SD 127, ¶ 44-45, 571 N.W.2d 376, 383. These cases do not stand for the proposition that an employer is required to contact each employer, so long as an expert's listing of available jobs takes into account a claimant's actual limitations.

Here, in addition to the initial reports referenced above, Gravatt provided a supplemental report on July 27, 2017, after Claimant's vocational expert purportedly questioned whether some of the jobs provided in the June 2017 report would pay Claimant's workers' compensation rate of $500.89 per week or $12.52 per hour. AR 744 (Gravatt 7/27/15 Report at 1). Specifically, if an employer failed to offer or refused to disclose wage information, Gravatt used information from the United Stated Department of Labor to offer an estimate of starting and median wages for the position. AR 744-47 (Gravatt 7/27/17 Report at 1-4). Gravatt's supplemental report included additional jobs and noted in the report how each job was aligned with the limitations offered by Claimant's medical professionals and met Claimant's workers' compensation rate. *Id*.

Notably, in this case, it is very hard to articulate what *specific permanent* limitations Claimant has in the context of a work scenario. Although not permanent restrictions, both Dr. Hamlyn and Dr. Hata suggested that Claimant should not work in health care or direct patient care. Dr. Hata also offered his own description of the type of jobs that he thought would be appropriate for Claimant, i.e. undemanding, not a lot of people interaction, and physical rather than intellectual. These restrictions are consistent with the jobs Mr. Gravatt provided. AR 738-41 (Gravatt 12/17/15

Letter); AR 742-43 (Gravatt 6/1/17 Letter); AR 744-50 (Gravatt 7/27/17 Letter). During his deposition, Dr. Hata noted that Claimant has issues with concentration and a lack of interpersonal skills, but also said that he would not prohibit Claimant from seeking employment at any of the jobs offered by Mr. Gravatt, even though he may not be successful at some. AR 1876-77 (Hata Depo. at 21, 24-27). The jobs identified by Gravatt were consistent with the limitations and descriptions offered by Claimant's doctors. Employer and Insurer sustained their burden of showing suitable employment.

4. Claimant's Failure to Engage in a Work Search

Even though the burden of production shifted to Employer and Insurer, the burden of persuasion remained with Claimant. Since Mr. Carroll's contention that a job search would be futile is suspect, Claimant failure to introduce any additional evidence to support that argument. However, the record is devoid of such evidence, including any evidence that Claimant tried to or even desired to find employment. It is undisputed that Claimant made no efforts whatsoever to find work. Claimant did not apply for the jobs offered by Mr. Gravatt (Employer and Insurer's vocational expert), did not sign up with job services, nor did he look into or apply to any education or retraining programs. AR 404, 435 (HT at 57, 88). During the Hearing, when Claimant's attorney asked him why he had not looked for a job, the following testimony was offered:

A: I applied for Social Security disability.

Q: So you think you're disabled?

A: I believe I am.

Q: And why?

A: There's a lot of reasons.

Q: Does it have anything to do with doctors' reports?

A: It does.

AR 434 (HT at 87). Claimant failed to offer any specific reasons as to why he did not attempt to find alternative work after he was terminated from RCRH.[15] Notably, during his deposition, Claimant said he didn't know how he could possibly work around people because of his significant personality change, yet he agreed with Employer and Insurer's counsel that there are jobs that don't require dealing with people. AR 1808 (Baker Depo. at 30-31). Nonetheless, Claimant would

[15] Claimant was terminated from his employment at RCRH on November 7, 2016, after he exhausted all types of leave available to him under RCRH's policies and all applicable laws—specifically referencing the Americans with Disabilities Act and Family Medical Leave Act. AR 2105 (RCRH 11/7/16 Letter).

not say whether he intended to return to work, and instead said that he hadn't thought about it and was more concerned with surviving day to day and leaving South Dakota because he fears for his safety. *Id*. (Baker Depo. at 31-32).

5. Conclusion

The record in this case is replete with references that illustrate that Claimant's mental health conditions, i.e., his paranoia, stress, anxiety and depression, along with any related physical manifestations (sweating, dizziness, headaches, etc.), are situational. Even in Dr. Manlove's last report dated July 26, 2017, after meeting again with Claimant, his conclusions were tied to a particular context: "His hypervigilance about his safety has evolved into paranoia *about various health care related systems* in South Dakota and nationally that are against him and trying to hurt him." AR 662 (Manlove 7/26/17 Report).

It is also clear from the medical opinions that none Claimant's physical symptoms are the sort that would render a claimant obviously unemployable, as they can be alleviated by a change in circumstance or by medication. The medical opinions regarding Claimant's unemployability reference only his psychiatric condition. As to his mental diagnoses, this is not a case in which a claimant's mental disability is such that he cannot even get out of bed or leave his home. The context in which Claimant experiences the reported symptoms relating to his mental condition pertain mostly to scenarios regarding either this workers' compensation litigation, or to Claimant's former employer, RCRH, and any individuals associated with either. While his PTSD may be triggered by a certain type of work environment, particularly the one in which he was previously employed, there were numerous available jobs identified that would not expose Claimant to such an environment.

The Department *first* concluded that Claimant failed to show that his mental issues were truly disabling, then focused on how they are centered around Claimant's obsession with his workers' compensation litigation and efforts to seek redress for his grievances with Employer. This Court agrees. Given the very limited and specialized nature of Claimant's mental disability, the other avenue by which he could have convinced a trier of fact that he is totally and permanently disabled, was to show an unsuccessful attempt to find suitable work. Claimant failed to pursue this avenue, and ultimately, failed to meet his burden of persuasion as to his claim that a good faith work search would be futile.

Even though the Department's primary reason for denying odd-lot benefits was its finding of a lack of causation, which has now been overruled by this Court, the Department's determination that Claimant is not totally and permanently disabled is supported by the record. Claimant, now 57 years old, has some post-secondary education and a strong work record, does not have any permanent physical restrictions, and has not shown that he is incapable of being retrained or finding suitable employment in his community. While Claimant does have recurrent

mental health issues that necessitate further treatment, he has nonetheless demonstrated that he is capable of spending long hours researching, writing, and traveling independently, and can communicate and interact appropriately with other individuals when he so chooses, so long as they are not associated with Employer or these workers' compensation proceedings. Therefore, the Department's denial of odd-lot benefits was not clearly erroneous.[16]

III. DID THE DEPARTMENT ERR IN FINDING THAT EMPLOYER/INSURER ARE NO LONGER RESPONSIBLE FOR ONGOING PSYCHOLOGICAL AND MEDICAL TREATMENT?

The Department determined that "Claimant has failed to prove that his work injuries of November 7, 2013 or December 11, 2014 are or remain a major contributing cause of any continued need for treatment, whether medical, psychological, or psychiatric." AR 4796 (Dept. COL at ¶ 12). However, since the Department's causation finding is being reversed and this Court is finding that the mental condition is compensable, on remand, the Department is directed to make new findings regarding Claimant's medical treatment and any other benefits to which he may be entitled. *See Call v. Benevolent and Protective Order of Elks*, 307 N.W.2d 138, 139-140 (S.D. 1981) (holding that the Department may reserve continuing jurisdiction over an issue so long as it does not make a final award or determination with regard to the issue).

CONCLUSION

For the above reasons, this Court REVERSES the Department's finding that Claimant failed to sustain his burden of proving causation by clear and convincing evidence, but AFFIRMS the Department's determination regarding Claimant's claim for total and permanent disability under the odd-lot doctrine. The case is REMANDED to the Department to determine what medical expenses or other benefits may be due and owing to Claimant consistent with this Court's finding of causation. A corresponding Order shall be entered accordingly.

BY THE COURT

Patricia DeVaney

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Patricia J. DeVaney
Circuit Court Judge

[16] This Court would reach the same conclusion under a de novo review, if it were determined on review that the clearly erroneous standard does not apply to this determination.