

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

RAYMOND MATTHEWS,

HF No. 68, 2007/08

Claimant,

v.

DECISION

NATIONAL AMERICAN UNIVERSITY,

Employer,

and

TRAVELERS INSURANCE,

Insurer.

This is a workers' compensation case brought before the South Dakota Department of Labor, Division of Labor and Management pursuant to SDCL 62-7-12 and ARSD 47:03:01. The Department conducted a hearing on May 26, 2010, in Rapid City, South Dakota. Claimant, Raymond Matthews, is represented by Patricia Meyers. The Employer and Insurer, National American University and Travelers Insurance, are represented by Charles A. Larson.

Issues:

This case presents the following legal issues:

1. Whether the Department should strike all references, in Matthews' post-hearing brief, to Matthews receiving social security disability benefits?
2. Whether Matthews' July 31, 2006 work injury was a major contributing cause of Matthews' need for fusion surgery, related expenses and temporary total disability (TTD)?
3. Whether Matthews suffered a mental injury during his July 21, 2006 work-related fall?
4. Whether Matthews is entitled to permanent total disability benefits (PTD) as a result of his July 31, 2006 work injury?

Facts:

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

Childhood:

1. Raymond Matthews (Matthews) was born January 3, 1955.
2. Matthews' parents met while his father was a member of the U.S. military and stationed in Japan during the Korean War. Matthews' mother was Japanese.
3. Matthews' parents had a troubled marriage. The family moved from place to place as Matthews' father was transferred from place to place by the military.
4. Matthews' father joined the Carthage, Missouri police force after retiring from the military. Matthews' father rose in rank to Chief of Police.
5. Despite his position on the police force, Matthews' father was a violent alcoholic who abused both his wife and children. Eventually Mathews' parents separated when he was about 11 or 12.
6. After her separation from Matthews' father, Matthews' mother found herself alone in a foreign country and unable to care for five children.
7. About a year after his parents separated, Matthew's joined a gang. Later, he was arrested for armed robbery and placed in juvenile detention for two years.
8. When Matthews was fifteen, he was released from juvenile detention into the custody of his father.
9. Shortly after his release from juvenile detention, Matthews was arrested for grand theft auto.
10. After learning of Matthews' latest offense, Matthews' father handcuffed Matthews to a chair and then proceeded to play "Russian Roulette," with Matthews taking all the turns. Matthews left his father's home shortly thereafter.

Dr. Jekyll:

11. After leaving his father's home, Matthews lived on his own. He did not finish high school but earned enough money "flipping burgers" at Mr. Quick to pay rent on an apartment and support himself.

12. When Matthews turned eighteen, in 1973, he left Mr. Quick for a job with the Carthage Missouri Ambulance Service, a hospital-based service. He went to EMT school at Missouri Southern State College. Later, he was trained as a paramedic at the same college. Eventually, Matthews was in charge of all rescue and trauma operations, on the code blue team, and working with the surgery and ER departments. Matthews worked for the ambulance service for six years.
13. By the time Matthews was 21 years old, he'd bought and paid for his own home.
14. After working for the ambulance service, Matthews then took a job at Leggett and Platt, a manufacturing factory in Carthage, doing piece work, running welders, loading and driving trucks.
15. While working for Leggett and Platt, Matthews paid his bills and described himself as a "hard-working, nose-to the grindstone citizen".
16. Matthews left his job at Leggett and Platt in 1985-86 because the working conditions there had deteriorated.
17. Matthews met Sheila in 1985. They were married in 1987. They remain married and are raising two daughters. The oldest was born in 1995.
18. After leaving his job at Leggett and Platt, Matthews and his wife opened their own business, Matthews Remodeling and Construction. In their business, Matthews worked as an independent contractor and a subcontractor.
19. Matthews started attending the Sturgis Motorcycle Rally in 1985 where he met the owner of the Buffalo Chip Campground. Matthews and Sheila honeymooned at the Sturgis Rally in 1987.
20. In 1991, Matthews accepted a job at the Buffalo Chip Campground. He and his wife left Missouri, and moved to Sturgis where they lived at the campground. This was a year-round job.
21. Matthews started out at the campground as a crew hand but quickly moved up to crew chief/boss. He was eventually promoted to grounds foreman. In 1992, he became general manager. In this position, Matthews' job duties included planning for the next rally season, completing various construction projects, like installing water and electrical systems, and operating heavy equipment. He supervised about 200 people during the rally and lesser numbers throughout the rest of the year.
22. When the Matthews oldest child was born in 1995, they decided that they did not want to raise a family at the campground. In addition, the work was becoming more difficult due to back problems that Matthews was experiencing.

23. Matthews next took his family to a suburb of Portland, Oregon, where one of his brothers lived. There he began working for Pinkerton Security & Investigation Services. In that job, he was assigned to Intel. In order to work for Pinkerton, Matthews first had to pass an FBI background check.
24. In 1995, Matthews completed advanced certification training and Pinkerton designated him a certified security officer. In December 1995, Pinkerton recognized Matthews for exemplary customer service and dedication to the Pinkerton program.
25. In 1996, the Matthews returned to South Dakota because they did not like the urban lifestyle of Portland.
26. Upon returning to South Dakota, Matthews decided to apply for vocational rehabilitation services because his back could no longer take hard physical labor.
27. After returning from Oregon, Matthews continued to have chronic problems with his neck and back and he would get headaches. However, the pain was not constant and he experienced relief from the pain after receiving periodic treatments from his chiropractor.
28. Matthews decided to return to school with the assistance of vocational rehabilitation. On December 23, 1998, Matthews graduated from Western Dakota Technical Institute in Rapid City, South Dakota, with an Associate of Applied Science Degree in Business Management & Marketing. His overall grade point average was 3.9 and he graduated with honors. During his attendance at Western Tech, Matthews won numerous academic and scholastic awards.
29. On February 25, 2001, Matthews graduated from National American University (NAU) in Rapid City, South Dakota, with a Bachelor of Science Degree in Management Information Systems. Upon graduation, his overall grade point average was 3.78. While attending NAU, Matthews again won numerous academic and scholastic awards.
30. While at Western Dakota Tech, Matthews was the president of Phi Beta Lambda, an international business student association, and was recognized for his efforts. Matthews was the executive producer of the association's first car show, which involved more than 20 Rapid City businesses and a staff of about 30 people. Matthews was also the association's Slate Champion, receiving First Place in Computer Designed Resume class.
31. In the spring semester of 1999, Matthews received A's in his advanced composition and child and development courses at NAU. The following spring, he was recognized for his volunteer work for Head Start, working in the America Reads Program.

32. After Matthews graduated from NAU, he began working for Rice Honda selling motorcycles, ATVs and watercraft. Matthews was consistently one of the top sales people.
 33. The job at Rice Honda paid well but Matthews was required work weekends. Therefore, he began looking for a job where his weekends would be free. He began working for NAU. During the first six months of his NAU employment, Matthews also worked part-time at Rice Honda.
 34. On January 2, 2005, Matthews began working full-time for NAU. This job paid less than Rice Honda but Matthew enjoyed the job and his free weekends.
 35. Matthews' job title at NAU was Admissions Coordinator. He identified potential students. He helped advice students about what courses to take. He had a case load of about 300 students, keeping in touch with them by phone and e-mail.
- Mr. Hyde:**
36. Between 1985 and 1991, Matthews was the president of the Freedom of the Road Riders, a biker gang from Missouri. During this time, Matthews lived a biker lifestyle, which he described as blowing through a town at 120 mph after midnight being totally "sauced coming home from the strip club. Getting in a pack with 300 bikers and just flat out going as fast and as hard and as far as you can go. It's drinking until you are about to fall over and doing three lines of crank and three lines of coke and then drinking some more and then getting on a bike and riding."
 37. Matthews began abusing drugs and alcohol in about 1973. He has now been sober since 1991.
 38. Matthews married and divorced three wives prior to his marriage with Sheila.
 39. While working at the Buffalo Chip campground Matthews was not affiliated with a gang. However, he became involved with the Hells Angels who provided security for the campground in exchange for Matthews providing them with free camping.
 40. Matthews has carried a gun since 1991.
 41. Matthews had a temper prior to 2006. He would break things when he was angry. At one point, he ran a back hoe through a building because it was off-square.
 42. Matthews has called his wife names, cussing at her, breaking her belongings, and that she filed a protective order against him. Matthews' wife testified that she was addicted to drugs during this period of time.

43. Matthews has been involved in an ongoing dispute with a neighbor for a number of years. It began when Matthews sought a protective order against the neighbor's son for allegedly sexually abusing Matthews' youngest daughter. Both Matthews and his neighbor have asked for protective orders since that time.
44. Matthews' dispute with his neighbor culminated with a fight which occurred on April 7, 2009. After the fight, Matthews received several "staples" in his head at a local ER and was treated for a broken orbital socket. Matthews was arrested for this as a result of the altercation.
45. After moving to Rapid City, Matthews became a member of the Banditos motorcycle gang. Before becoming a member, Matthews was the president in a "support" club in Rapid City. As a member of these gangs, Matthews received calls from the Banditos when they needed extra bodies to fight rival gangs.
46. Matthews is no longer affiliated with a motorcycle gang or involved in any gang activities.

Medical Condition and Injury:

47. During much of his work history, Matthews suffered from pain in his neck and back, migraine and ophthalmic headaches, bilateral arm and hand numbness, and left arm pain. He also suffered from periodic depressions and had difficulty sleeping.
48. During that time, Matthews has had frequent appointments with Dr. Gruba, his chiropractor which provided temporary relief from the neck and back pain and the headaches. He took medication to help him sleep. He took Advil and anti-inflammatories for the pain and, at times, medication for his periodic bouts of depression. Matthew has also suffered from carpal tunnel syndrome in both arms.
49. In 2004, Matthews had bilateral carpal tunnel surgery.
50. Dr. Gregory Gruba D.C., has been seeing Matthews off and on since 1998. Dr. Gruba received his undergraduate degree at South Dakota State and graduated from Chiropractic College at Palmer College in 1988. Dr. Gruba has been practicing as a primary care chiropractor in Rapid City since 1989, specializing in musculoskeletal, soft tissue and bony structures. Dr. Gruba is certified to administer acupuncture, give impairment ratings, and provide independent medical examinations.
51. Matthews had an MRI of his spine on January 16, 1998, another on October 26, 2000, and an x-ray on July 28, 2006. Dr. Zavitz, M.D., compared the first two MRIs and reported no change in Matthews' spinal condition. Zavitz reported mild

to moderate degenerative changes of the mid and lower cervical spine. Alignment and cervical cord were normal.

52. On July 21, 2006, Dr. Gruba examined Matthews about complaints of neck stiffness and headache. Dr. Gruba administered a cervical spine compression test, a foramina compression test for nerve encroachment. It was negative.
53. On July 28, 2006, the condition of Matthews' spine had not deteriorated from 1998.
54. On July 31, 2006, Matthews suffered an injury while working for Employer. While walking up some stairs, Matthews fell and struck the left side of his head against the stair rail. Matthews ended up on "all fours". A co-worker on the floor above witnessed the accident.
55. Immediately after the accident, Matthews felt fuzzy, queasy, and sick to his stomach.
56. After the injury, Matthews drove home followed by the woman who had witnessed the accident. Once home, he started vomiting and his wife took him to the hospital. Matthews saw an emergency room doctor and complained of head, neck, and left arm pain and numbness. He was administered pain medication, diagnosed with neck strain and headache, and was scheduled for an MRI on the next day.
57. After the accident Matthews has experienced agitation, mood and personality changes, and aggressiveness. His depression has returned and he has become withdrawn, a "hermit".
58. On August 7, 2006, Dr. Gruba took x-rays of Matthews's spine. On January 26, 2007, Gruba stated that those x-rays revealed that the injury Matthews suffered on July 31, 2006, caused two separate changes in Matthews; spine: degenerative changes in his lower spine and significant rotation in his upper cervical spine. Prior to the injury, Matthews complained of occipital pain, but post-injury of radiating pain.
59. Dr. Gruba initially treated Matthews for a neck strain or sprain. However, Gruba changed his opinion after treating Matthews post-injury for a number of years. Gruba opined that Matthews' July 31, 2006, fall injured a disk causing nerve impingement. "[I] kind of put the pieces together after it starts to get a little worse, a little worse, a little worse. There's a disk injury. And the disk injury typically doesn't happen just from degeneration. I couldn't give you an exact date when I determined that. It looks like on August of '06, it was a positive shoulder compressive test."

60. Dr. Gruba believed that the sudden, abrupt injury to Matthews's head was just the type of event that could injure the spine, especially one already degenerating.
61. On August 24, 2006, David M. Boyer, M.D., of the Black Hills Orthopedic & Spine Center in Rapid City, examined Matthews. Boyer reviewed the previous x-rays of Matthews' spine, and concluded: "Ix]-rays of the cervical spine were taken and show C5-6, C6-C7 severe degenerative arthritis with spur formation and sclerosis." Dr. Boyer noted a 20-30% loss of lateral bending in Matthews' cervical spine.
62. Dr. Boyer ordered a repeat of an August 1, 2006, MRI which had been invalid due to movement. The MRI was done on August 28, 2006, and read by Dr. Pomeranz, a board certified, fellowship trained radiologist and neuroradiologist. Pomeranz found that Matthews suffered from mild degenerative end plate changes at various levels in the spine. Pomeranz found a "[m]ixed broad-based bulge at the C5-C6 level abuts the ventral cord and also abuts the exiting left C6 nerve root ... and abutment of the exiting left C7 nerve roots."
63. The next day, Dr. Boyer phoned Matthews with these findings and referred Matthews to an orthopedic surgeon, Rand Schleusener, M.D.
64. Matthews' headaches and neck pain persisted. He reported to Ronald Gruesbeck, M.D., a resident, at the Rapid City Regional Family Practice Residency program, that his current physical and mental problems started or restarted since his injury in July. He reported having trouble maintaining control of his emotions and temper. He worried that he was shouting at his children and neighbors. Matthews reported symptoms of depression and admitted to thoughts of suicide. Gruesbeck fears Matthews was suffering a major depression and referred Matthews to a psychiatrist.
65. Matthews began to notice that his memory and ability to concentrate deteriorated, starting slowly but building, and persisting to the present time. In November 2006, Matthews told his doctor of his memory trouble.
66. On October 10, 2006, Scott Cherry, Ph.D., of the Black Hills Rehabilitation Institute in Rapid City, met with Matthews and conducted a neuropsychological evaluation of Matthews. The referral to Dr. Cherry was made because of Matthews' neurocognitive changes.
67. Dr. Cherry administered a battery of 15 tests and personally interviewed Matthews to obtain background information and assess his mental status. The results of the evaluation revealed that Matthews' learning curve was severely impaired, recall memory moderately impaired, delayed recall and recognition severely impaired. Cherry believed the results were affected by Matthews' affective status.

68. Dr. Cherry also found Matthews' psychomotor speed severely impaired and his processing speed, visual scanning, and tracking abilities moderately impaired. Matthews' emotional function indicated significant, acute psychological distress, major depression complicated by cognitive impairment; significant, strong, pervasive anxiety which impairs his day to day functioning, and which offers the probability of irritable, erratic behavior and excessive complaints. Cherry did not know if Matthews' memory problems were due to his affective status or his brain injury. Cherry diagnosed Matthews with mild traumatic brain injury post-fall.
69. On December 4, 2006, Matthews reported to Behavior Management Systems (BMS) of Rapid City. Lisa Kautzman, a certified nurse practitioner administered a Needs Assessment and later a Psychiatric Evaluation.
70. Nurse Kautzman graduated from Jamestown College in Jamestown, North Dakota, with a Bachelor of Arts in Nursing. She worked for a number of years at West River Mental Health (now BMS) as a nurse. In 1994 she enrolled at South Dakota State University and was awarded a Masters Degree in Nursing with a dual certification as a family nurse practitioner, emphasis in mental health.
71. Nurse Kautzman's assessment indicated, "[d]epression in response to head injury leading to job loss. He went back to violent behavior with strangers following the injury, and after the injury started yelling at his kids. Prozac has helped him stop yelling, though it has brought back his insomnia and has decreased his energy and motivation, which he said it would be worth it if "I don't yell at the kids." In her assessment, Kautzman diagnoses depression, post traumatic concussive disorder. Her psychiatric evaluation diagnosis states, in part, that Matthews suffers from a mood disorder, secondary to his head and neck injury on July 31, 2006.
72. Nurse Kautzman of Behavior Management Systems (BMS) met with Matthews in December 2006 and January 2007, and then continued seeing him through September 2009. Kautzman opinion is that Matthews' 'mood instability was caused by his fall and that the fall was a major contributing cause of his symptoms.'
73. Matthew had trouble after his accident finding continuous access to healthcare. He was referred to over 20 health providers over this period of time. On February 2, 2007, Matthews was seen by Jeffrey Buckau, D.O., of Mountainside Family Practice in Rapid City. Matthews complains that "he is tired of being shuffled around by the Family Practice Residents. He just wants one doctor to help him." Matthews also talked to Baukau about his memory loss, mood swings and headaches. Buckau diagnosed Matthews with blunt head trauma, mild traumatic brain injury, and affective disorder. On February 16, 2007, Buckau added "post-concussion syndrome" to his diagnosis. His notes indicate that Matthews was experiencing neck pain, headaches, and numbness and tingling in his hands and arms.

74. On Dr. Buckau's referral, Matthews met with Marius Maxwell, M.D., on April 3, 2007. Buckau is a board certified neurosurgeon, at The Spine Center in Rapid City. On April 11, 2007, Dr. Maxwell met with Matthews. Maxwell noted that he has been treated excellently by Dr. Gruba, but that Matthews' pain is "now severe and intractable affecting activities and daily living."
75. On April 13, 2007, Dr. Maxwell performed fusion surgery on the C5-C6 and C6-C7 area of Matthews' spine.
76. Employer and Insurer refused to pay for the surgery. It was paid by Medicaid. Insurer ended all benefits December 6, 2006.
77. Follow up appointments with Dr. Maxwell showed a good recovery from surgery. On May 10, 2007, Dr. Maxwell released Matthews to return to work.
78. On June 14, 2007, attorney, Dennis W. Finch, sent Dr. Maxwell a letter. He asked Maxwell to respond to the following questions. "[W]hether or not the fall at work represents a major contributing cause to Mr. Matthews' neck pain and specifically the findings on MRI and cervical x-rays referred to in your April 11, 2007 report. Could you please let me know if you are able to express an opinion as to whether the July 31, 2006 fall at work represents a major contributing cause of the conditions you found by examination and on review of radiography?" Dr. Maxwell responded by returning Mr. Finch's letter with the hand-written note: "I believe that it did, MM."
79. In another letter to Dennis Finch dated July 30, 2007, Dr. Maxwell states that "Raymond's fall at work on July 31, 2006 is the major contributing cause for the condition found on his exam and x-rays."
80. On June 25, 2007, Matthews underwent a second neuropsychological evaluation with Dr. Cherry. Matthews' memory deficits remained. Again Dr. Cherry believed the memory assessments are higher than would be expected and are probably affected by his affective status. However, Cherry also said Matthews' emotional state is such that he will tend toward emotional lability manifested by "extreme mood swings[,] ... episodes of poorly controlled anger[,] ... confusion, distractibility, and difficulties with concentration with an indication that daily functioning has been compromised[.]"
81. Dr. Gruba believed the neck surgery Dr. Maxwell performed on Matthews was necessitated by a disk impinging on a nerve, which also caused Matthews' radicular symptoms and was caused by his injury on July 31, 2006.
82. The surgery initially relieved the pain in Matthews' neck and left arm for a while, but the symptoms eventually returned by September of 2008.

83. On October 26, 2007, Matthews reported to Paul A. Cederberg, M.D., a board certified orthopedic surgeon, hired by Employer and Insurer to examine Matthews and issue a report. Cederberg noted that Matthews currently has a ten-pound lifting restriction for at least the next 10 months. Cederberg reports that Matthews tells him he has pain in his left upper neck and global numbness in his left hand, and no sensation in his feet, showing Dr. Cederberg his feet and pointing out that he'd extracted his great toenails.
84. Dr. Cederberg opined that the cervical strain caused by his work injury on July 31, 2006, was resolved; that Matthews suffers from post-concussion syndrome of the head and multi-level degenerative disc disease of the cervical spine; and has a history of depression.
85. Dr. Cederberg testified within a reasonable degree of medical probability that Matthews did not suffer a permanent impairment from the work injury. He also opined that the fall at work was not a major contributing cause to any work limitations. Cederberg further opined that the fall was not a major contributing cause of the need for the fusion surgery because there was no structural change after the work incident, and Matthews' radicular symptoms pre-dated the fall.
86. Dr. Thomas Gratzer is trained in psychiatry. He completed his medical school training in 1989, did a four year residency in psychiatry, a one year fellowship in forensic psychiatry, and is board certified in each.
87. Dr. Gratzer did not examine Claimant, he did review Matthew' medical records and formed an opinion. Gratzer believes that Matthews had premorbid depression, anxiety, anger, dyscontrol, and irritability, which is consistent with anti-social personality disorder.
88. The criteria for anti-social personality disorder include: failure to conform to social norms, with respect to lawful behaviors, repeatedly performing acts that are grounds for arrest, deceitfulness, lying, conning others, failure to plan ahead and impulsivity, irritability and aggressiveness, repeated physical fights or assaults, reckless disregard for the safety of others, consistent irresponsibility, failure to sustain consistent work behavior or honor financial obligations and lack of remorse.
89. Dr. Gratzer did not believe that Matthews suffered cognitive sequelae that would result in any brain damage or permanent issues. All of Claimant's MRIs of the brain after July 2006 were normal.
90. Additional facts may be discussed in the Analysis of this Decision.

Analysis:***Preliminary Observations:***

In their brief, Employer and Insurer portray Matthews as a motorcycle gang member, a hoodlum, a drug and alcohol abuser with a temper, who is prone to fighting and arrest. In Matthews' briefs, he is described as an honor student, a hardworking man who was successful at every job he has taken, a man who loves his wife and children and would do anything for them. Interestingly, both of these characterizations of Matthews are accurate.

After listening to Matthews' testimony, it becomes clear that both personas, i.e., Dr. Jekyll and Mr. Hyde, have evolved from the same experience, namely Matthews' abusive childhood. Matthews began his gang activities in search of a family that could provide the emotional support that his home life lacked. For a time, his gang membership gave him that support. He found acceptance and the loyalty of the group.

Matthews' initial marriages failed, in part, because he had not experienced a stable home life and had no idea how to achieve one. When Matthews married Sheila and they began having children, he gradually began to experience the type of family life that he had always wanted.

However, it was a long difficult journey. The couple struggled through the drug addictions of both Matthews and his wife, through domestic fights and his declining health. Nevertheless, as the bonds with his wife and children strengthened, his need for, and his activity with the motorcycle gangs declined.

The majority of Matthews' testimony during the hearing was truthful and compelling, sometimes "brutally" so. He often provided answers that he knew could undermine his case. However, there were times, particularly when he testified about his gang activities, when his narrative sounded like a "well reversed script" where his exploits were clearly exaggerated. Maintaining the "bad boy" image was paramount to all other considerations. It became apparent that the gang's bad reputation, by intimidation, was as important to the defense of the gang as did the actual gang activity. Matthews displayed these nefarious exploits with as much pride as his academic awards and achievements.

In that same vein, it must be noted, that very little could be taken from the testimony of either Matthews or his neighbor as they described their fight on April 7, 2009. The testimony of both contained so much "bluster" that it was difficult to separate the hyperbole from the reality. Consequently, this episode plays very little into the final outcome of this case. Like most workers' compensation cases, the outcome is driven by the medical evidence and testimony.

Motion to Strike:

Employer and Insurer filed a Motion to Strike. They have asked the Department to strike all references of Matthews receiving social security disability benefits from Matthews' post-hearing brief. During the hearing, the Department ruled that evidence regarding Matthews' social security benefits was inadmissible because the standards for social security and workers' compensation are different. Employer and Insurer's motion is granted.

However, there is a caveat. While references to Matthews' social security benefits are irrelevant in this case, the opinions of doctors involved in those proceedings may not be. Expert testimony about Matthews' health and injuries are relevant. Testimony reflecting the social security standards is not.

Cervical Injury:

In his case, Matthews seeks compensation for his fusion surgery, related expenses and TTD until he was released to work by Dr. Maxwell. Matthews as the claimant has the burden of proving all facts essential to sustain an award of compensation. Darling v. West River Masonry, Inc., 2010 SD 4, ¶ 11, 777 NW2d 363, 367; Day v. John Morrell & Co., 490 NW2d (SD 1967). When medical evidence is not conclusive, Claimant has not met the burden of showing causation by a preponderance of the evidence. Enger v. FMC, 565 NW2d 79, 85 (SD 1997).

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

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

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

SDCL.62-1-1 (7).

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

In addition, “[t]he testimony of professionals is crucial in establishing this causal relationship because the field is one in which laymen ordinarily are unqualified to express an opinion.” Day v. John Morrell & Co., 490 N.W.2d 720, 724 (S.D. 1992). “A medical expert’s finding of causation cannot be based upon mere possibility or speculation. Instead, “[c]ausation must be established to a reasonable medical probability.” Orth v. Stoebner & Permann Const., Inc., 2006 SD 99, ¶ 34, 724 NW2d 586, 593 (citation omitted).

In this case, Dr. Gruba and Dr. Maxwell have opined that Matthews’ July 31, 2006 injury was a major contributing cause of his need for fusion surgery and Dr. Cederberg has opined that it was not. The Department finds Dr. Gruba and Dr. Maxwell’s opinions the more persuasive. First, Dr. Gruba and Dr. Maxwell were the primary treating medical providers and surgeon. Second, MRIs and x-rays were taken before and after the accident. The images taken after the accident revealed a bulge at C6-C7 that was not present in earlier images. This change in condition prompted Dr. Boyer to refer Matthews to an orthopedic surgeon. Matthews has met his burden of proof and is entitled to compensation for his fusion surgery, related expenses and TTD.

Mental Injury:

Matthews claims that he suffered a brain or mental injury as a result of his July 31, 2006 fall. He contends that this brain injury has caused a loss of cognitive ability, including a loss of memory and concentration. He also asserts that the injury caused mood swings; anger, aggression, depression, anxiety and headaches. Employer and Insurer deny that Matthews suffered such an injury. The legal analysis for this issue is the same as that stated in the previous issue, except for the burden of proof. SDCL 62-1-1 (7) defines “injury” and SDCL 62-1-1 (7) states in part:

The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any

psychological, psychiatric, or emotional condition for which compensation is sought;

SDCL 62-1-1 (7). This provision dictates that Matthews prove that his fall was a major contributing cause to his mental injury by clear and convincing evidence.

Nurse Kautzman opined that Matthews' mood instability was caused by his fall and that the fall was a major contributing cause of his symptoms. Dr. Cederberg diagnosed Matthews with post-concussion syndrome of the head. Dr. Cherry diagnosed Matthews with mild traumatic brain injury post-fall. Dr. Gratzer, the Employer and Insurer's expert, opined that Matthews' symptoms were caused by an anti-social personality disorder resulting from his abuse during childhood. Gratzer opined that these symptoms were not caused by his work injury.

Dr. Gratzer did not interview or examine Matthews. He based his opinions on a review of Matthews' social history. The Department rejects Dr. Gratzer's opinion because he misconstrued portions of that history and ignored, or was unaware, of other portions.

The criterion of an anti-social personality disorder was set forth by Employer and Insurer during their examination of Kautzman. That criteria includes: failure to conform to social norms, with respect to lawful behaviors, repeatedly performing acts that are grounds for arrest, deceitfulness, lying, conning others, failure to plan ahead and impulsivity, irritability and aggressiveness, repeated physical fights or assaults, reckless disregard for the safety of others, consistent irresponsibility, failure to sustain consistent work behavior or honor financial obligations and lack of remorse.

The first personality trait listed is the failure to conform to social norms. Matthews had no problem conforming to the social norms of school and work. He earned an associate and bachelor's degree with a nearly 4.0 grade point average as a non-traditional student. Matthews apparently maneuvered around the "pit-falls" and social mores of "academia" which are frustrating for most people. Likewise, he was successful in most of his jobs. He gained advancement and was often singled out for excellence. Matthews has been arrested a number of times. However, the worst offenses were committed when he was a juvenile and a long period of time elapsed before he was arrested again. As a child, Matthews' father was a police officer. Consequently, it is impossible to know if his criminal behavior as a juvenile was directed at the law enforcement system or his abusive father. His arrests as an adult were generally caused by a perceived threat to his family.

The next group of traits includes deceitfulness, lying and conning others. These traits suggest a person who is "sneaky" or "sly", manipulative in subtle way, one who prefers to commit his crimes undetected. There is nothing "sneaky" or subtle about Matthews. Matthews does not consciously lie. He is "brutally frank". He is much more likely to confront someone than con them.

The next traits listed are failure to plan ahead and impulsivity. There is no evidence that Matthews exhibits either of these traits. To the contrary, he returned to the classroom as a non-traditional student and earned two degrees. These actions demonstrated the ability to plan for the future and the fortitude to “stick with it”.

The next traits listed are irritability and aggressiveness, repeated physical fights or assaults. Matthews has demonstrated these traits. However, these traits are also symptomatic of a brain injury.

The last traits listed are reckless disregard for the safety of others, consistent irresponsibility, failure to sustain consistent work behavior or honor financial obligations and lack of remorse. There is no credible evidence that Matthews has exhibited any of these traits. To the contrary, he has been very successful at most of the jobs that he has held. His wife stated that Matthews is good at everything that he does. While Matthews has worked at a large number of jobs, he worked for the ambulance service for six years. He worked for Leggett and Platt for six or seven years and he worked at the Buffalo Chip for 5 rally seasons and has plausible explanations for leaving all of them. Matthews has lived on his own since he was fifteen or sixteen years and there is no evidence that he has failed to pay his bills. In fact, he paid off the mortgage on his first home by the age of 21. Finally, Matthews has voiced remorse repeatedly for yelling at his kids and fears losing his wife because of his mood changes. These are the predominate reasons why Matthews has sought treatment for his condition.

Matthews was one of the top salesmen while he worked at Rice Honda. He won an award for customer service while working for Pinkerton Security & Investigation. He organized a car show while at NAU. These accomplishments are inconsistent with the diagnosis of anti-social personality disorder. Matthews has shown by clear and convicting evidence that he sustained a mental injury as a result of his July 31, 2006 injury resulting in the loss of cognitive ability and mood instability. Therefore, he is entitled to the cost of treating that condition.

PTD:

Matthews alleges he is permanently and totally disabled under the odd-lot doctrine. The South Dakota Supreme Court discussed the odd lot doctrine in Kassube v. Dakota Logging, 2005 S.D. 102, 705 N.W.2d 461. There the Court stated:

SDCL 62-4-53 describes the criteria for obtaining permanent total disability benefits under the odd lot doctrine:

An employee is permanently and 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.

SDCL 62-4-53. See also *McClafflin v. John Morrell & Co.*, 2001 S.D. 86, ¶7, 631 N.W.2d 180, 183; *Enger*, 1997 S.D. 70, ¶21, 565 N.W.2d at 85. This Court has previously recognized two avenues to make the required prima facie showing for inclusion in the odd-lot category. 515 N.W.2d 226, 231 (SD 1994). “First, if the claimant is ‘obviously unemployable,’ then the burden of production shifts to the employer to show that some suitable employment is actually available in claimant’s community for persons with claimant’s limitations.” *Id.* (citations omitted) (emphasis in original). Obvious unemployability may be shown by:

- 1) showing that ‘his physical condition, coupled with his education, training and age make it obvious that he is in the odd-lot total disability category,’ or
- (2) persuading the trier of fact that he is in fact in the kind of continuous, severe and debilitating pain which he claims.”(citation omitted). 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 unsuccessfully made ‘reasonable efforts’ to find work.

Id. at 232 (quoting *Shepherd v. Moorman Mfg.*, 467 N.W.2d 916, 919 (SD 1991) (emphasis added). Under this test, if the claimant is “obviously unemployable,” he will not bear the burden of proving “that he made reasonable efforts to find employment in the competitive market.” *Id.* Likewise, it is only when the claimant produces substantial evidence that he is not employable in the competitive market that the burden shifts to the employer. *Id.*

Kassube, at ¶ 34-38.

Matthews is not obviously unemployable. He has a bachelor’s degree which opens up a whole range of potential jobs not available to someone less educated, it is possible that he could even work at home. Matthews has shown some cognitive loss and mood fluctuations but he has not shown that they are severe enough to make him unemployable. There is no expert testimony indicating that he is unemployable. Matthews is in pain but his doctor has released him to work with limitation. A work release is evidence that he is capable of work despite his pain. This is also consistent with Matthews’ testimony that he was physically able to work except for his mental problems.

Matthews has not made a *prima facie* case that he is obviously unemployable. Consequently, he has the burden of showing that he has made reasonable efforts to find employment in the competitive market. He has failed to make that showing. Therefore, Matthews is not entitled to PTD.

Conclusion:

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

Dated this 9th day of March, 2011.

 /s/ Donald W. Hageman
Donald W. Hageman
Administrative Law Judge