IN THE SUPREME COURT

IN THE

STATE OF SOUTH DAKOTA

WILLIAM BAKER, Appellant, vs. RAPID CITY REGIONAL HOSPITAL and HARTFORD INSURANCE, Appellees.	)	Appeal No. 29753

APPELLANT'S OPENING BRIEF

Appeal from the Sixth Circuit
Hughes County, South Dakota
The Honorable Christina L. Klinger and The Honorable Patricia DeVaney

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NOTICE OF APPEAL FILED AUGUST 25, 2021

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JURISDICTIONAL STATEMENT

This appeal arises from a Final Order After Remand from the Sixth Judicial Circuit Court dated August 20, 2021, which made final the Circuit Court's Memorandum Decision dated June 28, 2019. Notice of Appeal was filed in this court on August 25, 2021. Jurisdiction is proper pursuant to SDCL § 1-26-37.

REFERENCES

References to the Administrative Record will be AR __. References to Hearing Exhibits will be Ex. ___. References to depositions will be by deponent's last name and page number.

STATEMENT OF LEGAL ISSUES

I. Did Baker prove he was permanently and totally disabled?

The Department of Labor and the Circuit Court found that Baker did not prove he was permanently and totally disabled.

Davidson v. Horton Industries, 641 N.W.2d 138 (SD 2002)

Foltz v. Warner Transportation, 516 N.W.2d 338, 340 (SD 1994)

Billman v. Clarke Machine, Inc., 956 N.W.2d 812 (SD 2021)

Shepard v. Moorman Mfg., 467 N.W.2d 916, 920 (SD 1991)

STATEMENT OF THE CASE

This is a workers' compensation appeal from a decision of the South Dakota Department of Labor. On October 2, 2017, the Department held a hearing on William Baker's workers' compensation claim. On August 30, 2018, the Department found that Baker did not prove his work injury was a major contributing cause of his psychological

disability and that he was not entitled to permanent total disability benefits.

Claimant timely appealed to the Sixth Judicial Circuit Court. On June 28, 2019, the Circuit Court reversed the Department on causation and affirmed on disability. The Circuit Court remanded to the Department for findings on Baker's entitlement to psychological treatment benefits.

On August 25, 2020, the Department found Baker entitled to certain psychological treatment expenses. On December 23, 2020, Baker filed a Motion to Submit Additional Evidence with the Department. On February 4, 2021 this motion was denied.

On February 11, 2021, Baker timely filed an appeal to the Circuit Court of the Decision to deny the Motion to Submit Additional Evidence. That appeal was voluntarily dismissed on August 11, 2021. On August 20, 2021, the Circuit Court entered a Final Order on Remand, ordered that the June 28, 2019 Circuit Court decision was final for all purposes. On August 25, 2021, Baker filed a Notice of Appeal to this Court.

SUMMARY OF ARGUMENT

In the paragraphs below, Baker provides this Court with a detailed summary of the evidence submitted to the Department and the Circuit Court. The Circuit Court's decision that Baker proved by clear and convincing evidence that his work injury was major contributing cause of his psychological condition has not been appealed. Thus, the only question presented is whether Baker is entitled to disability benefits. Baker believes that whether reviewed under the clearly erroneous or *de novo* standard of review, a review of this evidence will show the denial of disability benefits should be reversed.

STATEMENT OF FACTS

A. Background Information

William Baker is a 59 year old man who worked for Rapid City Regional Hospital (hereafter RCRH) from 1981 to 2015, or for almost 34 years. (Ex. 66, Baker deposition 14-17). For his first nine years, Baker worked in the housekeeping department. (*Id.* 16). From 1990 until 2015 (25 years), he worked (except for several months in 1996) as a psychiatric aide/technician at Regional West Psychiatric Hospital ("the psych ward"). (*Id*. 14-17). Employment reports indicate Baker functioned well in his employment at RCRH before his work injuries. (Ex. 118, Manlove subpoena file – 0218-0236). Treating neurologist Dr. Hata testified that Baker's job as a psychiatric aide would "generally require a high degree of interpersonal skill" because these skills "would have to be sufficient enough to interact in a positive way with psychiatrically disturbed patients." (Ex. 72, Hata deposition 28).

B. Prior Mental Health Treatment/Conditions

When he was young, Baker struggled with alcohol use, and received chemical dependency treatment at age 21. (Ex. 4, Dr. Manlove reports, 001007). He has, except for one relapse, been sober since. (*Id.*). He had some psychological treatment in the early 1990's and 2000's for depression and anxiety. (*Id.*). There is no record of mental health treatment for over 10 years prior to his work injuries. (*Id.*).

C. The November 7, 2013 Assault

On November 7, 2013, while working at the psych ward, Baker was hit repeatedly on both sides of his head by a patient. (Hearing Transcript (hereafter HT) 15-16).

Baker testified they patient "started just hitting on me, both sides of my head, slapping my face." (*Id.* 15). Baker ran for help and they patient fought two other workers. (*Id.* 16). Baker developed a headache and facial pain, had contusions on his head and face, his jaw hurt and he had ringing in the ears. He went to the ER, where a CT scan of the brain was performed which showed no intracranial abnormality. A CT showed soft tissue swelling over the visualized portion of the nose and adjacent to the mandible and maxilla. (Ex. 106, 001042-43). The ER doctor diagnosed a closed head injury.

Two days later, on November 9, 2013, Baker returned to the ER. (Ex. 106, 001012). He saw Dr. Tibbles. Dr. Tibbles diagnosed: (1) Subacute left face and head contusions; (2) Acute assault; (3) Persistent face pain; (4) Work related injury; (5) Possible minor concussion. (*Id.* 001013). Tibbles ordered two weeks off of work and gave him a prescription of Percocet.

Following the work injury, Baker continued to work at the psych ward. Baker testified that he didn't follow up with medical care because he was trying to "suck it up" and work through his problems. (HT 20 and 84). He testified he had headaches, concentration problems, night terrors, vivid dreams, flashbacks, and other symptoms that he worked through. (HT 23-24).

D. The December 11, 2014 Assault

On December 11, 2014, Baker was assaulted by a patient a second time. Baker was struck in the head. (HT 25-26). Following the assault, Baker was seen in the emergency room. Ex. 106, 001048). Baker had symptoms of headache, nausea, and dizziness. (*Id.*). A CT scan of the head was completed which was negative. (*Id.*

001049). The diagnosis was: (1) closed head injury; (2) concussion; (3) headache; (4) nausea. Baker was off work for one day and then attempted to resume his position at RCRH.

E. Medical and Psychological Treatment for the Next Six Months (December 23, 2014 to June 27, 2015) – Drs. Phillips, Hastings, Ott, Blair, Hata and Hamlyn

On December 23, 2014, Baker was seen by Dr. Carson Phillips at Family Medicine Residency Clinic. (Ex. 3, 001001). Baker complained of mental fogginess and dizziness. (*Id.*). Phillips noted "convergence test[1] fails at 8 inches." (*Id.*). Dr. Phillips diagnosed Post-Concussive Syndrome. (*Id.*). Baker was taken off work for 10 days. Dr. Phillips referred Baker to neuropsychologist Dr. Hastings for neuropsychological testing.

[1] "Convergence insufficiency is a condition in which your eyes are unable to work together when looking at nearby objects." https://www.mayoclinic.org/diseases- conditions/convergence-insufficiency/symptoms-causes/syc-20352735. "Convergence insufficiency is usually diagnosed in school age children and adolescents [but] people of all ages may have convergence insufficiency diagnosed after a concussion or traumatic brain injury." *Id.*

On December 26, 2014, Hastings performed a neuropsychological evaluation[2]. (Ex. 3, 001004-001007). Hastings noted Baker continued to experience mental fogginess, dizziness, fatigue, difficulty concentrating, irritability, nausea and balance problems. (*Id.* 001005). Hastings' testing showed Baker had severe deficits in short term memory, anxiety and processing speed. (*Id.* 001006-001007). Hastings diagnosed Baker with Post-Concussive Syndrome (PCS). (*Id.*). Hastings said if Baker returned to work, he would place himself at risk for a second head injury which could result in permanent brain damage or death. (*Id.*). Dr. Hastings recommended Baker not return to work as a psychiatric technician until he was cleared by his physician. (*Id.*).

On December 30, 2014, Baker was seen by Dr. Ott at RCRH. (Ex. 101, 001034). Baker reported dizziness, blurry vision, headaches, short term memory problems, and anxiety. (*Id.*). Ott diagnosed PCS. (*Id.* 001035). Baker was taken off work until January 8, 2015. (*Id.*).

Baker eventually returned to work on a part time basis, four hours a day for 10 days. (Ex. 5, 001002). He then increased his work hours to six hours a day for two

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[2]A neuropsychological evaluation includes a series of tests designed to measure a person's cognitive abilities such as memory, attention, communication, and problem-solving, an assessment of psychological symptoms, and a review of the person's medical history. Https://my.clevelandclinic.org/departments/neurological/depts/behavioral-health/neuropsychology. These tests are used to determine whether cognitive changes are symptoms of a neurological illness or injury, a psychological condition like depression or anxiety, or just a normal part of aging and development. *Id.*

weeks. (*Id.*). By March 1, 2015, Baker was working full time. (*Id.*).

In January and February of 2015, Baker received physical therapy to treat "dizziness and vertigo symptoms as well as short term memory problems and changes in his eyesight contributing to difficulty with convergence and focus." (Ex. 100, 001000-001058).

On February 20, 2015, Baker saw Dr. Hata, a neurologist at RCRH. (Ex. 1 001009). Hata noted Baker's cognitive difficulties were improved by 75% but that he still complained of anxiety, difficulty concentrating, and irritability. (*Id.*).

On March 30, 2015, Baker saw Dr. Blair at RCRH and reported his symptoms had increased to the level of severity it was following the November, 2014 injury. (Ex. 101, 001025). Symptoms occurred both at work and outside of work. (*Id.*). Blair wrote that Baker had trouble "concentrating particularly at work due to anxieties particularly surrounding safety." (*Id.*). Blair reported that "troubles are much more pronounced after this incident than similar one in 2013." (*Id.*). Blair diagnosed acute anxiety with sleep disturbance and Blair prescribed Trazadone. (*Id.*).

On April 14, 2015, neuropsychologist Dr. Hastings performed a second neuropsychological evaluation. (Ex. 3, 001009-15). Testing showed Baker scored in the borderline range in psychomotor processing speed, auditory working memory and mental control and below average in list learning over several trials, oral processing speed, and visual attention. (*Id.* 001011-001013). Testing also showed Baker was noting acute mental health issues such as irritability, anxiety and depression, most likely a result of his PCS. Baker reported fatigue, insomnia, headache and inability to

concentrate. (*Id.* 001013).

Hastings diagnosed: Anxiety Disorder due to another medical condition (PCS), and Adjustment Disorder with Mixed Anxiety and Depression (due to assault and PCS). (*Id.* 001014).

Dr. Hastings noted Baker had made some progress neurocognitively but, he continued to have several areas of impairment. Baker was also developing secondary anxiety and depression which she believed was common in individuals with PCS. (*Id.* 001014).

Dr. Hastings believed Baker also had traumatic stress related anxiety from the two assaults he experienced at RCRH. She wrote "he easily flinches if someone makes a quick movement near him and he described the sensation as a 'full body rush of anxiety.'" (*Id.*). Hastings was concerned about Baker being placed back into the environment which caused his PCS. Hastings said Baker should not be exposed to potentially violent patients at work while he was in recovery.

On April 17, 2015, Dr. Blair noted Baker continued with high levels of anxiety associated with work and the safety of his environment. (Ex. 100, 001023). Blair noted Baker had "called off multiple days from work due to fear of repeat trauma." (*Id.*). Dr. Blair believed Baker met the criteria for Post Traumatic Stress Disorder ("PTSD") and discussed with Baker "the possibility of his work not being appropriate for him anymore." (*Id.* 001025).

On April 23, 2015, neurologist Hata diagnosed PTSD with a "brain injury manifest by abnormalities in neuropsych testing." (Ex. 1 001006). Dr. Hata

recommended Baker not work on the psychiatric locked ward due to his anxiety and PTSD. (*Id.*). Hata noted that Baker had a very high anxiety level about violent patients and him getting struck again. (*Id.*). Hata referred Baker to a psychiatrist. (*Id.*).

On May 20, 2015, Baker was seen by Dr. Hamlyn, a psychiatrist at RCRH. (Ex. 2 001001-001003). Baker reported anxiety, depression, dizziness, concentration and memory problems. (*Id.* 001003). Hamlyn noted Baker had gotten to the point of being suicidal. (*Id.* 001001). Hamlyn reported that "the last time he tried working at the psychiatric unit, he almost fainted when he was concerned that the patient might become aggressive." (*Id.*). Hamlyn diagnosed PTSD and Depression Disorder. Dr. Hamlyn continued Paxil and added Lorazepam. (*Id.*).

On May 26, 2015, Dr. Hamlyn referred Baker to Dr. Hastings for additional psychological treatment. (*Id.* 001006).

On June 17, 2015, Hamlyn again diagnosed PTSD and depression and continued the Paxil and Lorazepam. (*Id.* 001009).

F. Dr. Gratzer IME – June 27, 2015

On June 27, 2015, Baker underwent an "Independent Medical Evaluation" or IME with St. Paul, Minnesota psychiatrist Dr. Gratzer at the request of Employer/Insurer. Gratzer opined that the 2014 work injury caused an anxiety disorder and PTSD. (Ex. 5 001018). Gratzer opined that at the time of his evaluation, "his anxiety and depressive symptoms were improving on the current medication regime. . . ." (*Id.* 001018). Gratzer opined the anxiety and PTSD "were in remission at the time of the June 27, 2015

evaluation" (*Id.* 001019). Gratzer said that "Mr. Baker does not have a psychiatric condition at the present time related to the December 11, 2014 injury." (*Id.* 001019). However, Gratzer recommended that Baker received ongoing "psycho-pharmacological treatment" by Dr. Hamlyn "for a period of one year from the date of the initial evaluation by Hamlyn on May 20, 2015" and opined that this treatment is related to the work injury. (*Id.* 001020).

G. Medical and Psychological Treatment for the Next Two Years (July 10, 2015 to June 1, 2017) – Dr. Hastings, Dr. Hata and Dr. Hamlyn

On July 10, 2015, neuropsychologist Dr. Hastings noted Baker had visited work "which triggered panic attack, he became anxious, heart racing, and was extremely dizzy." (Ex. 3 001019). Hastings noted that during her session "I noticed continued symptoms of concussion: word retrieval problems, forgetting what day it was, distractability, kept starting a story and then drifting off to another story without finishing the first one." (*Id.*).

On July 13, 2015, psychiatrist Dr. Hamlyn saw Baker who was struggling with "quite a bit of anxiety." (Ex. 2, 001013). Hamlyn noted that Baker had increased anxiety and shakiness just coming into the Hospital. (*Id.*). Hamlyn increased Baker's dosage of Lorazepam. (*Id.*).

On July 23, 2015, neurologist Dr. Hata noted that Baker "has become agoraphobic." (Ex. 1 001016). Hata also noted "he can't stand crowded situations, a lot of people, noise, or a lot of activity going on around him. He says that he just wants to be in a quiet place to 'let my brain rest'." (*Id.*). Hata opined "the patient also has

significant PTSD since he wants to withdraw from activities and social interactions, which cause him anxiety." (*Id.*). Baker was animated and was talking very quickly and did not seem to be able to maintain his attention and concentration. (*Id.* 001017). Hata noted that PTSD "seems to be the primary problem now with neuro-psychiatric complaints and anxiety and PTSD complaints." Hata noted that Baker wanted to go to Community Transitions which is a traumatic brain injury rehabilitation center. (*Id.* 001016). Hata referred Baker back to Hamlyn for medication recommendations. (*Id.*).

On July 24, 2015, Hamlyn took Baker off work for six months due to his PTSD, depressive disorder and PCS. (Ex. 2 001015).

On August 7, 2015, Hastings wrote "I think it has helped him to be away from the work situation which triggers his PTSD . . . we discussed his workplace environment which triggers his PTSD and one of his biggest issues was when he had to work alone watching eight patients down the hallway by himself." (Ex. 3 001023).

On August 21, 2015, Hata saw Baker and noted that "following his most recent concussion, his symptoms in terms of psychological and psychiatric symptoms got a lot worse." (Ex. 1 001020). Hata noted Baker had an IME done by an independent psychiatrist and "this psychiatrist said that his symptoms related to his concussion were resolved." Hata wrote "I do not feel that this is correct at all." (*Id*.).

Hata diagnosed post-concussion neuropsych problems including mild cognitive impairment as documented by neuropsych testing and severe PTSD symptoms. (*Id.* 001021). Hata noted that "since his main problems are psychiatric and psychological, I

will defer to Dr. Hamlyn and Dr. Hastings." (*Id.*).

On September 29, 2015, Hastings responded to Dr. Gratzer's IME report. (Ex. 3 001031). Hastings wrote

> I do not agree with Dr. Gratzer's assessment of your mental health and/or mental condition. As detailed in my reports, you continue to have numerous symptoms of post-concussive syndrome that make it dangerous for you to return to work in an environment where you risk re-injury. Moreover, these symptoms prevent you from being able to concentrate, remember, and carry out even normal desk job tasks at this time.

(*Id.*). Hastings also wrote

> Regarding PTSD, you were traumatized by being physically assaulted twice at work, without warning, when no other co-workers were around. We have talked numerous times about the panic attacks that returning to the workplace causes you, the hyper-vigilance you experience about possibly being attacked again, re-experiencing the attacks, and avoidance you situations that trigger your anxiety about being attacked. These symptoms are clearly related to your assaults at work and constitute current PTSD, not a pre-existing condition."

(*Id.*).

On October 22, 2015, Dr. Hamlyn stated he did not feel Baker was capable of working in the healthcare field or for a hospital at that time, but felt it would be beneficial for Baker to try and get involved in a different type of work. (Ex. 2 001019).

On November 5, 2015, Hamlyn saw Baker and noted he "still has severe symptoms of anxiety and panic and also has significant symptoms of depression." Hamlyn wrote "it is very difficult for Mr. Baker to just get through his usual daily activities." (Ex. 2 001020). Hamlyn retracted his previous work release and opined "I

feel that he is still not capable of working at any type of job at this point." (*Id.*).

On December 18, 2015, Hastings wrote that "it is my belief that Mr. Baker received two concussions from two assaults on November 7, 2013, and December 11, 2014. He also began suffering PTSD from the time of the first assault and still continues to suffer from it currently." (Ex. 3 001040).

On January 12, 2016, Hastings noted that Baker's post traumatic stress anxiety was under much better control this week although he was "somewhat fearful that he might be killed over his lawsuits." (Ex. 3 001043). Hastings wrote "he cited a doctor from a few years ago who sued RCRH and ended up dead under mysterious circumstances . . .." (*Id.*).

On January 19, 2016, Dr. Hamlyn saw Baker who was having a lot of anxiety and also feeling irritable and agitated as well as suffering from depression. (Ex. 2 001021). Hamlyn wrote "he has a difficult time getting out of the house but has made some appointments today to further discuss his case." (*Id.*). Hamlyn continued to diagnose PTSD and depression. (*Id.* 001023). Hamlyn wrote "at this time, it appears that Mr. Baker is still unable to work at any type of job." Hamlyn continued the Lorazapam and Paroxetine. (*Id.*).

On June 17, 2016, Hastings noted that Baker had had panic attacks at Wal-Mart due to crowds, noise, unpredictability and uncontrollability of situation. (Ex. 3 001063). Hastings described that when Baker came in to her clinic there was a boy sitting in the front waiting room standing in the door as the patient walked in. "The boy was off to the side as patient came in the front door. Nothing ominous factually happened, but

patient responded with exaggerated startle response to seeing the boy unexpectedly. These are continued symptoms of his PTSD about being jumped and assaulted." (*Id.* 001063).

On July 6, 2016 Dr. Hata saw Baker and continued to diagnose PCS, cognitive impairment, depression and severe anxiety as well as PTSD. (Ex. 1 001030). Hata noted "the medical complexity is very high due to the intertwining of his psychiatric problems and head trauma." (*Id.*).

On July 8, 2016, Hamlyn saw Baker again and noted that he had a lot of anxiety in general "but also the anxiety gets worse when he does anything related to the workman's compensation." (Ex. 2 001024). Hamlyn wrote "at times he can have panic symptoms and panic attacks" and "he also still has depression." (*Id.*). Hamlyn continued to prescribe the Lorazapam and Paroxetine. (*Id.* 001026).

On December 23, 2016, Dr. Hata saw Baker who was continuing to complain of headaches which were triggered by stress situations, dizziness made worse by stress, and some continued difficulties in concentration and remembering when he has high levels of stress (Ex. 1 001034).

Baker described being paranoid about being attacked or killed when he walks his dog at the dog park. (*Id.*). He had bought a gun and has a permit for a concealed weapon because "somebody broke into his mother's house where he is living." (*Id.*). Hata noted Baker reported "fearing for his life" and "he blames this on Regional Health . . . he says he fears for his life and his family." (*Id.*).

Hata wrote "the patient has been consumed by his litigation and at this point

basically hatred for the hospital system." (*Id.*). Hata wrote "he rambles on about various slights and other personal complaints against the Hospital as well as trying to discuss litigation not only on his workman's compensation case but federal litigation against the Hospital." (*Id.*).

Hata diagnosed PCS. (*Id.* 001036). Hata noted Baker's cognitive impairments have shown improvement but he continued to have neurological symptoms including persistent headaches, persistent non-specific dizziness and neuro-psychiatric complaints. (*Id.*). Hata wrote that "the patient's main symptoms right now, I believe are psychiatric." (*Id.*). Hata wrote

> I am not willing to venture an opinion on how much this is pre-existing or not, other than to say that at the present time, the patient admits paranoia, fear for his life and the lives of his family members and is obsessed with litigating not only his workman's comp case but expanding litigation to the federal level with wanting to file complaints with OSHA and any other federal agency labor department as well as local voc rehab in Sioux Falls.

(*Id.*).

Hata addressed the Gratzer report. (*Id.*). Hata wrote "I do believe that the patient has had a significant exacerbation of his PTSD following his assaults in 2013 and 2014, manifest by paranoia and fear of being attacked physically." (*Id.*). Hata wrote "the degree of paranoia and obsession that he displays today is definitely worse than I have ever seen before." (*Id.*). Hata wrote that "I would definitely state that his PTSD has worsened. This again was due to his assaults and being punched in the head." (*Id.*).

On August 15, 2016, Dr. Hastings wrote Baker had anxiety and depression

secondary to a traumatic brain injury (TBI) which Dr. Hastings found common in individuals who had a TBI and Post-Concussive Syndrome. (Ex. 3 001068). Dr. Hastings opined symptoms of concussion can cause anxiety and depression and such psychological symptoms can worsen cognitive symptoms. (*Id.*). She also opined "the added effect of PTSD from two criminal assaults worsens his cognitive symptoms even more." (*Id.*).

Hastings opined Baker was suffering from acute PTSD from the two assaults. He also suffered from agoraphobia because he was afraid of being assaulted if he visited certain places, especially those where he might run into adult males when he was alone. (*Id.*).

Hastings also believed Baker was experiencing secondary traumatization due to the way he felt he has been treated by RCRH. (*Id.*). Hastings explained that he was approached by a Hospital security guard in the ER parking lot after dark and was told he was banned from the property. (*Id.*). This incident caused Baker emotional stress and triggered his PTSD because of being approached by a male while alone. (*Id.*).

Dr. Hastings said in the year and a half that she had known Baker she had observed him to become more agitated and paranoid (a symptom of PTSD) due to anxiety over treatment by RCRH and ongoing litigation. (*Id.* 001069).

On September 14, 2016, Hastings noted that Baker was experiencing dizziness daily and sometimes headache. (Ex. 3 001072). She noted "he still has panic attacks if walking through a group of men in alone due to his assaults at work." (*Id.).*

On October 3, 2016, Hastings noted that "it is hitting William really hard today

that he is disabled and what that means for his future. It has to do mainly with change in body integrity and accepting the loss of prior functioning." (Ex. 3 001078). Hastings also noted his symptoms included shortened attention span, dizziness, headaches with no discernable pattern, social instability due to his intense fear of crowds, anxiety, and erratic behavior (he used to be a very passive man but is now confrontational)." (*Id.*).

On February 17, 2017, Hastings saw Baker and discussed his paranoia and he acknowledged that he can be irritable and impulsive when he is angry. (Ex. 3 001084).

On March 23, 2017, Baker called Hastings very agitated and was not making sense and so Hastings called the police to conduct a welfare check. (Ex. 3 001086). Hastings wrote "his extremely agitated and paranoid behavior greatly concerned me." (*Id.*).

On April 4, 2017, Hastings wrote "patient is presenting as more paranoid as time goes by. He does not deny that he might be paranoid but feels he has some reason to be. This is part of his PTSD process." (Ex. 3 001089). Hastings wrote "he spent most of the hour explaining the various connections between agencies, the coordinated effort by agencies to harass him or make him go away, and the lawsuits he has going or has planned." (*Id.*). Baker asked for Hastings' assistance in getting a referral to the University of California San Francisco for in patient mental health treatment. (*Id.*). Hastings wrote "I believe he would benefit from intensive treatment because his mental health continues to deteriorate as time goes by." (*Id.*).

On April 24, 2017, Hastings discussed with Baker "the numerous letters he has been sending to me and Kari Scovel at our office and to Al Scovel at his office." (Ex. 3

001093). Hastings wrote "each letter was difficult to follow his train of thought and there was always some kind of mention of civil action if his needs were immediately [not] taken care of." (*Id.*). Hastings talked with Baker at some length and "re-directed him toward his feelings instead of toward paranoid facts about his ongoing situation." Hastings noted Baker was "tearful, open to my input, still prone toward illogical tangents." (*Id.*).

On June 1, 2017, Hastings saw Baker who was presenting with a low level undercurrent of anxiety "which is per usual when we discuss PTSD issues." (Ex. 3 001097).

H. Baker's Writings and Lawsuits – July 2015 to October 2017

Beginning in the summer of 2015, Baker began sending emails and legal complaints accusing his caseworker, RCRH employees, and the attorneys representing RCRH in the workers' compensation case of various crimes and legal violations. As time went on, the tone of these writings became increasingly paranoid, difficult to understand, and not grounded in reality.

For example, on November 16, 2016, Baker filed a Petition asking for a protection order against one of the attorneys for RCRH. (Ex. 93). Baker wrote that "the client whom Mr. Haraldson represents, I SUSPECT, is, connected to an alleged sasination [sic] thus potentially Mr. Haraldson has implicated knowledge. (*Id.* 3). In RCRH's response to the Petition, their attorney wrote "Haraldson has never harassed Baker, but Baker sends Haraldson incoherent letters and emails, harassing him for communicating with Scovel [Baker's attorney at that time]." One of these letters from Baker to

Haraldson dated October 29, 2016 contained the following paragraph:

> It seems to me, that It is now deemable, to notify the SD Ins. Division, and along with any Federal Agency, that this potential Insurance Fraud, is applicable, a Ins. Claim, can't be filed, against a ins. Company unless it's filed first place, it was Regional Health's responsibility to file the 172 questions, and the Hartford, Ins. Co. would have had to conduct an "Investigation", hence that would have included me, it should be noted, in other documents that are published by the "Hartford" one is very specific, for employer to follow and that is, employer, is to get specific detail, on what limitations, that medical provider allows. Your comments, per Dr. Gratzer, has been my physicians [sic], have never stated, thus, it was not there [sic] place, it was Hartfords, and employers place to obtain specific, limitations fo any employee.

(Ex. 36 001285).

Another example is Baker's October 31, 2016 letter to "CCMSI Corporate Headquarters" which requested milage reimbursement and an "internal audit" and ended with the following request:

> PLEASE, NOTE I continue will to seek out any SLANDEROUS, RETALIATORY, DISCRIMATIVE, RESPONSES, including all THE SLANDEROUS, responses, by DR.. THOMAS GRATZER, and Marvin Whats his face.
>
> I have enclosed, copies of Letters, to HARALDSON, RUN QUICK NOW and INFORM him, I have wrote, quick call Judy Warnke and Paula.....I know, from a pattern, you all played such tactics, Bell called on day immediately after Warnke.
>
> I repeat, CCMSI, is implicated in this scandal of Scandals, of RETALIATION, DISCRIMINATIN, HARRASSING and Direct, consistent Passiveness, KNOW THAT I KNOW!
>
> I have reviewed with RBHC Employees for Safety

> Coalition, which has been in existence for some time, as there has been a recognized pattern, by CCMSI, Warnke, and Haraldson.
>
> STOP !!!

(Ex. 37, 01291).

In November, 2016, Baker filed several small claims lawsuits against various RCRH employees with similar verbiage. For example, Baker's small claims statement against a RCRH nurse stated she

> Has continued to conspir [sic] with others in attempt to Fraudelate [sic] Me, SD DOL and the Hartford Ins. Co. As did not initiate a claim to the W/C, Hartord Ins. Co. "Adjuster" for investigation of substained [sic] Injury of Work Place Violence by patient and staff of Nov 2013 as supervisory staff, Dept. Director has never initiated workplace safety compliance standards. . .."

(Ex. 50 001027).

In June of 2017, Baker filled out a form Complaint in Federal District Court alleging violations of various statutes, including the Americans with Disabilities Act. (Ex. 117 001000-01004). Under the section "Relief (state briefly and exactly what you want the Court to do for you), Baker wrote

> Allow a permanent, life-time-restraining order, of contact, by any, current, previous, future and deceased persons of Federal Contractor Regional Health Inc. I fear for my life. Initiate all applical [sic] Whistleblower Laws (EEOC, OSHA, OFCCP, NLRB, CMS, Insurance Fraud) as identified by the U.S. Dept of Justice.

(*Id*. 001003). Baker sued six employees of RCRH, the two attorneys representing RCRH in the workers' compensation case, the workers' compensation adjuster and her supervisor. (*Id*. 001001).

On July 14, 2017, Baker filled out another form complaint in Federal Court alleging violation of "varied South Dakota laws" and again asked for a "permanent life-time protection order" and again stated "I fear for my life as well as for my family, friends, co-workers, former co-workers any witness I could identify." (Ex. 120). Baker attached a list of 26 defendants, mostly RCRH employees. (*Id*.).

Many of Baker's writings from the summer of 2015 until late 2017 were admitted into evidence. (See Exs. 17-46, 50-56, 60-64, 117, 120 and 121). Reading them in chronological order shows how Baker became more and more paranoid and irrational as time went on.

I. Dr. Manlove's Psychiatric Evaluation

On October 15, 16, and 26, 2015, and again on January 28, 2016, Dr. Manlove completed interviews with Baker at the request of Baker's counsel. (Ex. 4 001001). Manlove completed his Forensic Psychiatric Evaluation report on July 13, 2016. (*Id.*).

Manlove reviewed Baker's educational, vocational, social and socioeconomic background, outpatient mental health treatment history, completed a mental status examination, and reviewed psychological testing completed by Dr. Ertz. Dr. Manlove diagnosed: (1) PTSD with delayed expression; and Alcohol Use Disorder, Moderate, in sustained remission. (*Id.* 001010).

Dr. Manlove opined there was little doubt that Baker's psychological problems have significantly worsened since the assaults. In support of this statement, Manlove wrote:

> (1) Dr. Hastings, the psychologist who works with him regularly, had documented the symptoms of PTSD and

> Post-Concussive Syndrome she had observed. Dr. Hastings felt Baker was unable to maintain employment;
>
> (2) Dr. Hamlyn, his psychiatrist, had noted the same;
>
> (3) Dr. Hata, his neurologist, also felt Baker has PTSD and Post-Concussive Syndrome and that Baker was unable to work;
>
> (4) Baker's emails and letters gave evidence that he was thought disordered and paranoid. In his writings, he over-interpreted a host of issues, not just related to his workers' compensation claim, in paranoid ways. He discussed issues such as being stalked, being harassed and being subjected to prejudice. It was clear from his writings that he felt much of the world he had been engaged with throughout his adult life, particularly RCRH, was both actively and passively against him;
>
> (5) his description of his mental state to me suggested significant worsening of his psychiatric problems;
>
> (6) reports by previous mental health professionals he had seen suggested significant worsening of his psychiatric problems;
>
> (7) reports by previous mental health professionals he had seen suggest that, although he had previous psychiatric problems, they were much less severe than his current problems; and
>
> (8) the psychological testing completed by Dr. Ertz
>
> suggested a diagnosis of PTSD.

(*Id.* 001011).

Dr. Manlove also opined that Baker was not malingering his mental illness. Manlove explained his opinion as follows:

> A. Mr. Baker's hypervigilance and paranoia go far beyond his workers' compensation claim. He has filed complaints regarding RCRH to several

agencies not involved with the workers' compensation process.

B. Mr. Baker's display of hypervigilance and paranoia in his writings and the deposition he gave 04/20/2016 goes beyond anything he has described to either Dr. Gratzer or me. Mr. Baker feels his paranoia is rational; he is not trying to accentuate how irrational it actually is.

C. Based on the sources listed in #4 above, Mr. Baker has not functioned very well in any aspect of his life due to his preoccupation with proving his paranoid beliefs. If he were malingering, his symptoms would not be dominating h is entire life.

D. The MMPI-2-RFs done by Dr. Gratzer and Dr. Ertz are invalid, but consistent with Posttraumatic Stress Disorder. The combined MMPI-2-RF and TSI-2 do not suggest malingering, but together suggest Posstraumatic Stress Disorder.

(*Id.* 001012).

Manlove opined that Baker was also unable to maintain employment at this time due to his neuropsychiatric problems (PCS and PTSD) and that the condition was permanent. (*Id.* 001013). Specifically, Manlove believed Baker had:

1. "Mild impairment in his self-care personal hygiene as he is able to live independently and look after himself adequately, although he may look unkempt occasionally." (Ex. 4 001012).

2. A moderate impairment in his ability to perform social and recreational activities as he rarely goes to social events (due to his high anxiety level and paranoia)

and mostly when prompted by family or a close friend although he does attend meetings with attorneys and individuals such as Manlove who are involved with his case. (*Id*.)

3. No deficit in travel as he could travel to new environments without supervision as he drove to Oregon by himself. (*Id*.).

4. Moderate impairment in social functioning as his previous relationships (particularly with co-workers at RCRH) are severely strained. (*Id*.).

5. Moderate impairment in concentration, persistence, and pace as he is unable to read more than newspaper articles, finds it difficult to follow complex instructions, as evidenced by his difficulty understanding the forms of and reasoning behind the various organizations he has been involved with. Manlove noted "for instance, he does not grasp that workers' compensation is a no fault system." (*Id*.).

6. Total impairment in adaptation, resulting in him being "totally impaired in his ability to work due to his anxiety, paranoia, and thought disorder." (*Id*.).

J. Dr. Hata's December 29, 2016 Deposition

On December 29, 2016, Dr. Hata's deposition was taken. NHata was asked about the various letters and lawsuits that Baker had filed. He was directly asked whether if Baker could "do this kind of concentrated focused work on the typewriter . . . [doesn't that] . . . require a fair amount of focus and concentration." (Hata 19). Hata responded "It does, but I don't know how coherent any of this stuff is. I mean, it could be gobbledygook or it could be very coherent." After reviewing the first paragraph of a letter Baker wrote, Hata stated "I mean, a lot of it is very hard to understand because it's not quite logical in terms of following a train of thought. I mean, this is you know, he's

out – I mean he's making accusations . . . I get the drift of what he's saying, but its not – it's kind of scatterbrained." (Hata 19).

Hata stated that he felt that a hand washing position at RCRH would be appropriate for Mr. Baker but that "working without supervision, I have my doubts." (Hata 25). Hata stated that he would limit Baker to undemanding jobs "without a lot of people interaction." (Hata 27). Hata stated "I think that with his paranoid state of mind, uhmm, there's things that he may not be able to successfully perform." (*Id.*).

Hata was asked whether he could give an opinion that the work injuries continue to remain a major contributing cause of his current mental status. (Hata 32). He deferred to psychological experts. (*Id.*). Hata stated "now a psychologist or a neuropsychologist might give you a better answer. Because at this point, uhmm, as of 12/23/16 I am seeing a whole bunch of psychiatric problems. . . . I can't say that he's, you know, he's in his right mind." (Hata 32-33).

Hata stated that Baker is "in desperate need of intensive psychiatric care because I think he's obsessive compulsive and paranoid and those two factors are consuming his life, so he doesn't have a life other than being obsessive compulsive about litigation and, you know, the paranoia feeds into that." (Hata 35).

Hata testified that Baker had deteriorated since the last time he saw him which was in July of 2016 and he is "psychiatrically impaired" . . . "markedly so compared to previous visits." (Hata 52).

K. Social Security Disability Decision

On October 26, 2017, Baker, was found to be disabled and awarded Social

Security Disability benefits. (Department Findings of Fact 35). The Social Security Administration found Baker became disabled on June 16, 2015. (*Id.*).

L. James Carroll Vocational Opinions

James Carroll completed a vocational assessment for Baker. (Ex. 15 001001-001009). Carroll noted that Baker had been diagnosed with PTSD, PCS, Anxiety and Depression. (*Id.* 001009). He noted that all of his treating medical/psychological practitioners including Dr. Hata, Dr. Hastings, Dr. Hamlyn and Dr. Manlove have rendered the opinion that Baker is in need of intensive psychiatric treatment and that he is not capable of employment of any kind. (*Id.*).

Carroll noted that Dr. Gratzer conducted a one time evaluation for Employer/Insurer on June 27, 2015. (*Id.*). Dr. Gratzer opined that Baker's psychiatric conditions of Anxiety Disorder and PTSD were in remission at the time of his IME. (*Id.*). Carroll noted that every practitioner who had evaluated or followed up with Baker since that time have stated Baker's condition has worsened in terms of his psychiatric conditions. (*Id.*). Carroll noted not one of Baker's practitioners who are involved in treating Baker on an ongoing basis stated Baker's anxiety and PTSD is in remission. (*Id.*).

Carroll opined that he "would consider Mr. Baker to be unemployable and that a job search would be futile." (*Id.*). Carroll opined that, based on the severity of this psychological conditions he did not think Baker is capable of holding any type of employment, let alone any of his past work history. (*Id.*).

M. Jerry Gravatt Vocational Opinions

Employer/Insurer hired Jerry Gravatt to perform a vocational evaluation. Gravatt

identified several positions he believed were "available to Mr. Baker." (Ex. 14 001006- 001012). Gravatt did not list whether the jobs listed were full time or part time and for many of the positions, no rate of pay was listed. (*Id.*). Gravatt did not indicate that he had contacted these employers to see if they positions were available tor someone with all of the Claimant's limitations. (*Id.*).

ARGUMENT AND AUTHORITIES

I. Standard of Review

This court's standard of review in workers' compensation cases is governed by SDCL § 1-26-36. "When an agency makes factual determinations on the basis of documentary evidence, such as depositions, the matter is reviewed *de novo*." *Watertown Coop. Elevator Ass'n v. S.D. Department of Revenue*, 627 N.W.2d 167, 171 (SD 2001). "We do not substitute our judgment for the Department's on the weight of the evidence or the credibility of witnesses." *Sorenson v. Harbor Bar, LLC*, 871 N.W.2d 851, 856 (SD 2015). "Even where specific credibility findings are absent, we defer to the Department's overall assessment of the weight of the evidence when it is based upon live witness testimony." *Billman v. Clarke Machine, Inc.*, 956 N.W.2d 812 (SD 2021). "Questions of law and statutory construction are fully reviewable." *Korzan v. City of Mitchell*, 708 N.W.2d 683, 686 (SD 2006).

The issue in this case, whether Baker was entitled to permanent total disability benefits, should be reviewed *de novo*. First, the Department did not make an adverse credibility determination regarding Baker's live testimony. Second, the Department and the Circuit Court did not base their decision on Baker's live testimony but rather almost

exclusively on documentary evidence, such as medical records, the deposition testimony of Dr. Hata, and the Claimant's writings and lawsuits.

In addition, the Department and the Circuit Court's decisions are based on errors of law, which are fully reviewable.

II. Legal Authorities

In *Davidson v. Horton Industries*, 641 N.W.2d 138 (SD 2002) and *Foltz v. Warner Transportation*, 516 N.W.2d 338, 340 (SD 1994), this Court reversed Department and Circuit Court decisions denying disability benefits when the expert testimony in support of disability was compelling and the denial of benefits was based on "matters of little consequence."

In *Davidson*, this Court held that "it is simply not simply not right when seven doctors basically give a diagnosis of chronic right shoulder myofascial pain syndrome and reach a prognosis that claimant should not work for a period of time, for the hearing examiner to ignore such evidence in favor of a very brief independent medical exam conducted by a physician hired by the claimant's employer." *Davidson* at 141. This Court noted the Department's reliance on video tapes showing Davidson engaging in certain activities such as weed pulling in her garden and carrying items with her right arm was questionable. *Davidson* at 143. Davidson had readily admitted to engaging in these activities and stated she had to continue with some normal daily activities despite the pain. *Id*. The Court noted that "attacking Davidson's credibility on the basis of a few video tapes which provide only brief glimpses of activities which she admits to doing is insufficient to counter the medical testimony of [her physicians]." *Id*. The Court

concluded that "the medical conclusion of myofascial pain syndrome reached by these four physicians was not substantially challenged by Horton at the time of the [medical providers'] depositions or by these video tapes." *Id*. The Court therefore reversed the denial of disability benefits by the Department of Labor and the Circuit Court. *Id*.

Similarly, in *Foltz*, this Court noted the pivotal issue in that case – whether Foltz had suffered a loss of peripheral vision – is chiefly dependent on the medical testimony. *Foltz* at 345. The Court was critical of the Department's rejection of Foltz's testimony because it was based on "matters of little consequence" such as surveillance reports which showed Foltz driving at high speeds on interstate and county roads as well as walking in a store and eating. *Id*. The Court noted that these activities revealed little about whether Foltz had suffered a loss of peripheral vision as there was no testimony that a person suffering from peripheral vision loss would be unable to drive on interstate highways. Similarly, this Court held that Foltz's performance of some odd jobs was a matter of "little consequence" since it said nothing about his loss of peripheral vision and his psychologist had recommended that he try to do odd jobs to relieve the stress of being out of work. *Foltz* at 346.

The Court concluded that "whether Foltz has or has not sustained a loss of peripheral vision does not rely on Foltz's testimony regarding what amount to peripheral matters: exactly how many times or at what speeds he has driven alone; his bad debts and odd jobs; and being hit on the head with a tree limb nearly four years prior to his deposition." *Foltz* at 346. The Court concluded "whether there is an actual loss of peripheral vision depends most on the expert medical testimony – testimony that we

review here as though presented for the first time, since it is largely before us in documentary form." This Court reversed the decision of the Department and the Circuit Court and directed the Department to enter judgment in favor of the claimant on the question of the loss of peripheral vision. *Id*. 347.

III. Analysis

Treating neuropsychologist Dr. Hastings opined that Baker's condition worsened with time, such that as of April 4, 2017, he required intensive inpatient treatment. (Ex. 3 0011089). She wrote that he was presenting as more paranoid as time goes by,which is "part of his PTSD process." *Id*.

Treating psychiatrist Dr. Hamlyn diagnosed PTSD and took Claimant off work in the summer of 2015. (Ex. 2 001015). On November 5, 2015, Hamlyn opined it was "very difficult for Mr. Baker to get through his usual daily activities" and "I feel that he is still not capable of working any job . . .." (Ex 2 001020). Hamlyn never released Baker to work.

Drs. Hastings and Hamlyn have never implied or stated that Baker was malingering or overstating his psychological symptoms. Hamlyn saw Baker seven times from May 20, 2015 until July 8, 2016. Hastings saw Baker 41 times from December 23, 2014 until June 1, 2017. Dr. Hamlyn is an employee of Defendant RCRH and Hastings was employed by Defendant when she first saw Baker.

Psychiatrist Dr. Manlove, who examined Baker four times from October 15, 2015, until January 28, 2016, also opined that Baker was not malingering. Dr. Manlove opined that Baker was totally impaired in his ability to adapt and was "totally impaired in

his ability to work due to his anxiety, paranoia, and thought disorder." (Ex. 4 001012). Manlove believed Baker's emails and letters "are evidence that he was thought disordered and paranoid." (*Id*. 001011). Manlove noted "in his writings, he over-interpreted a host of issues, not just related to his workers' compensation claim, in paranoid ways." (*Id*.).

Dr. Hata, a neurologist who saw Baker six times, deferred to the treating psychological providers on both causation of the PTSD and the severity of the condition. (Hata 32, 39, 52). However, Hata did diagnose PTSD and in December of 2016 opined that Baker's condition had "markedly" worsened, such that "he should be going in for intensive psychiatric and psychotherapy treatment." (Hata 35 and 52). Hata stated Baker's presentation in December of 2016 "gave me the impression he was having a nervous breakdown." (Hata 31).

In the face of this evidence of worsening and debilitating PTSD symptoms. RCRH offered the opinions of IME Dr. Gratzer, who only examined Baker one time, just six months after the December 2014 injury. Gratzer agreed that Baker had PTSD as a result of the work injury but believed it was "in remission" as of the date he saw Baker. (Ex. 5, 001019).

Gratzer's "remission opinion" was not accepted by the Department of Labor or the Circuit Court. The Circuit Court held that "while Dr. Gratzer believes Claimant's PTSD and anxiety is in remission, the rest of Claimant's treating doctors, Dr. Hamlyn, Dr. Hastings, and Dr. Hata, all maintained that Claimant's PTSD symptoms have progressively gotten worse after this work incidents." (Circuit Court Decision at 26).

The Circuit Court held that these doctors records and reports "document Claimant's objective and self-reported symptoms in the three years following the December 2014 work incident and provide a clear and convincing picture of how Claimant's compensable physical work injury combined with his pre-existing mental health conditions to prolong his mental disability and need for treatment. (*Id*.).

Baker's treating providers are in a much better position to access Baker's restrictions and whether he is malingering or overstating his symptoms than one-time examiner Gratzer. Dr. Manlove, who saw Baker four times over a four month period in late 2015 and early 2016, is also in a better position to assess these issues.

Ultimately, the Circuit Court rejected Baker's disability claim based on the following reasoning:

> 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 conduct and memory, along with Claimant's long detailed letters, 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. Al of these observations by Dr. Gratzer are supported by the record.

The issue in this case is not whether Baker is incapable of having <u>any</u>

relationships or performing any activities, but whether due to his symptoms of PTSD he's incapable of consistently working in the competitive job market. Baker received regular treatment from a neurologist, a psychiatrist, and a neuropsychologist during the period of time in question (approximately three years as of the date of hearing). His psychiatrist took him off work in the summer of 2015 and never changed that opinion. His neuropsychologist believed he required inpatient psychiatric care in late 2016. Dr. Hata agreed with this recommendation. Dr. Manlove opined that Baker did not have any restriction on his ability to travel and had only mild impairment in his ability to take care of his personal hygiene and self care. He believed he had a moderate impairment in his social functioning and in concentration, persistence and pace. However, Manlove's report documents significant issues with paranoia which impacted his ability to adapt such that he was "totally impaired in his ability to work due to his anxiety, paranoia and thought disorder." (Manlove 001012).

The reasons given by Dr. Gratzer – that Claimant took a road trip to Oregon, that he had started a new relationship, and that he had written a number of "long detailed letters" are "matters of little consequence," similar to the activities discussed in *Davidson* and *Foltz*. Baker is capable of taking care of himself, traveling, entering into a new relationship and doing many other things, but is hampered in his ability to get along with others and adapt himself due to anxiety and paranoia stemming from his PTSD. He is not markedly impaired in all areas of life. It he were, he would likely be institutionalized.

Claimant's writings provide compelling evidence that his ability to adapt himself

has worsened significantly over time, such that he was markedly impaired as of the date of hearing. Claimant respectfully asks this Court to read some of the letters and emails Baker composed in 2016 and 2017. Is it realistic to expect that the person who authored these paranoid rantings would be able maintain employment on a consistent basis and interact with supervisors and co-workers, which is a requirement in even the most unskilled of employments?

Finally, Dr. Gratzer's belief that Dr. Hastings' "unremarkable mental status exams including mood, intact attention and concentration" was inconsistent with her opinions on Claimant's severe PTSD misses the mark, as Hastings' treatment notes do describe his worsening paranoia and PTSD symptomatology which is the basis of his disability claim. The fact that Baker, who trusted Dr. Hastings, would be able to have intact concentration and attention and be relaxed during her sessions is not inconsistent with the fact that he had difficulties relating to and interacting with others due to his PTSD. In any event, a close review of Dr. Hastings' treatment notes do not show that her exams are "unremarkable" but tell the story of a three year descent into severe paranoia, such that Hastings recommended that he get inpatient psychiatric care in 2016.

For these reasons, the Department of Labor and the Circuit Court should have accepted the opinions of Dr. Hamlyn, Dr. Hastings and Dr. Manlove over Dr. Gratzer's opinions on Baker's psychological condition and ability to work.

The opinions of Baker's psychological providers and Dr. Manlove were not meaningfully discredited or rebutted and should not have been disregarded. The Department of Labor's rejection of Baker's team of providers due to "matters of little

consequence" is reversible error, as it was in *Foltz* and *Davidson*.

If the Department of Labor had accepted Baker's psychological providers' (and Dr. Manlove's) opinions, then Claimant obviously proved he is unemployable. Claimant established a prima facie case that he is entitled to benefits under the odd lot doctrine. Because Baker made his prima facie case, the burden then shifted to the Employer to show that some form of suitable work was regularly and continuously available to Claimant.

Employer "may meet this burden by showing that a position is available which is not sporadic employment resulting in an unsubstantial income as defined in subdivision 62-4-52(2)." SDCL §62-4-53. Employer must demonstrate the specific position is "'regularly and continuously available and 'actually open' in 'the community where the claimant is already residing' for persons with all of claimant's limitations." *Shepard v. Moorman Mfg*., 467 N.W.2d 916, 920 (SD 1991). Employer did not meet their burden, as their vocational expert did not inform potential employees of all of Baker's limitations, such as his total inability to adapt himself due to his worsening PTSD, as described by Dr. Manlove. *Id*.

CONCLUSION

William Baker was a trusted, valued employee who did a stressful and difficult job for decades. There's no history of him having difficulties with social situations or employment. Life changed for Baker after he was assaulted twice. His life got turned completely upside down. He had a documented concussion which caused permanent symptoms. More serious, the assaults caused PTSD, which snowballed into paranoia

which led to voluminous and often incomprehensible letters, complaints, and emails which consumed his life. The psychological professionals RCRH hired and trusts to treat the public's mental health conditions all agree: Baker is disabled and needs "intensive psychiatric care". The Department and the Circuit Court's rejection of Baker's case should be reversed, since the reasons given for rejecting Baker's doctors' opinions are "matters of little consequence."

Dated this 8th day of October, 2021.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true and correct copy of Appellant's Opening Brief that was filed with the Court and that any associated attorneys were served via email to:

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Dated this 8th day of October, 2021.

JULIUS & SIMPSON, L.L.P.

By: */S/ Michael J. Simpson*

Michael J. Simpson
Attorney for Appellant

APPELLANT RESPECTFULLY REQUESTS ORAL ARGUMENT

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66, Michael J. Simpson, counsel for Appellant, does submit the following:

The foregoing brief is 30 pages in length. It is type in proportionally spaced typeface Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 9,199 words in the body of this brief.

Dated this 8th day of October, 2021, at Rapid City, South Dakota.

JULIUS & SIMPSON, L.L.P.

By: */s/ Michael J. Simpson*

Michael J. Simpson
Attorneys for Plaintiff/Appellant

APPENDIX

APPENDIX

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

WILLIAM R. BAKER,

Claimant,

HF No. 55, 2015/16

v.

DECISION

RAPID CITY REGIONAL HOSPITAL,

Employer,

and

HARTFORD INSURANCE,

Insurer.

This matter is before the Department pursuant to two petitions for workers' compensation benefits. A hearing was held October 2, 2017 to address both petitions. William R. Baker (Claimant) was represented by Al Scovel, Attorney at Law; Regional Hospital (Employer) and Hartford Insurance (Insurer) were represented by Comet Haraldson and Jennifer VanAnne, Woods, Fuller, Shultz and Smith, P.C. Claimant asserts he is entitled to permanent total disability benefits.

Facts:

1. On November 7, 2013, Claimant was struck by a patient while performing his duties for Employer.
2. The same day, Claimant went to Employer's emergency room. He said a patient struck him in the face, and his left jaw hurt. He did not lose consciousness, and had no bruising, lacerations, or signs of trauma. A CT scan was negative. A

Glasgow Coma Scale test designed to identify brain injury was done, and Claimant scored the maximum 15 points, meaning no deficits in eye movement, speech/verbal skills or motor skills could be detected.

3. Claimant returned to the emergency department two days later, saying he had lost his prescription for Naprosyn and needed another.
4. Claimant returned to full duty after a few days off, and worked until December 11, 2014 with no problems.
5. Claimant did not treat with anyone for his 2013 injury after his first emergency room visit.
6. On December 11, 2014, Claimant was struck on the right side of his face by a patient.
7. Claimant testified in his deposition that the patient struck him with the backside of his left hand. At the hearing, Claimant testified the patient hit him with his casted arm in the "right parietal" area (on top of the head.)
8. Claimant's supervisor, Tristina Weekley, testified by way of affidavit that Claimant reported having been struck in the cheek.
9. Claimant went to the emergency room early on December 12, 2014. His Glasgow Coma score was again 15. A CT scan was negative. He did not lose consciousness.
10. Claimant saw Dr. Carson at Rapid City Regional Hospital on December 23, 2014. He reported lightheadedness, weakness, thirst, nausea, and "feeling shaky." He was diagnosed with a concussion but reported to work the next day.

11. Claimant underwent a neuropsychological evaluation on December 26, 2014 with Teresa Hastings, Ph.D. at Regional Rehab Institute. Dr. Hastings concluded Claimant was on the "severe end of a mild concussion," based on such things as short term memory problems, inability to keep attention, reduced "processing speed," referring to an impaired ability to process new information, and dizziness. She found Claimant to be severely anxious, mildly depressed, and recommended he speak with his physicians about medications for that.

12. On December 30, 2014, Claimant saw Dr. Ott at Rapid City Regional Hospital for a follow up. He had a persistent headache with dizziness and nausea, and complained of both vertigo and short term memory problems. Claimant did not exhibit slurred speech.

13. In January 2015, Claimant saw Dr. Daniel Berens for care. Claimant reported headaches, nausea, and blurred vision, and Dr. Berens noted slurred speech.

14. In January 2015, Dr. Berens referred Claimant to Dr. Minton, an ophthalmologist, primarily because Claimant experienced "convergence," where the eyes move toward each other. By that time, however, Claimant had undergone a physical therapy regimen which successfully addressed the problem. Claimant added that bright light was significantly irritating, which Dr. Minton classified as photophobia. Dr. Minton also diagnosed Claimant as having a concussion.

15. On February 3, 2015, Dr. Berens noted Claimant's post concussive symptoms had improved, and he was working on modified duty.

16. Claimant began seeing Dr. Steven Hata, a neurologist, on February 20, 2015. Claimant reported he was injured in 2014 by being "punched" on the right side of his head and "immediately developed a severe headache" which went away after a couple of days. He diagnosed postconcussion syndrome (PCS), vertigo, mild cognitive disorder, and hypersomnia with sleep apnea. He recommended a second neuropsychological examination be done a minimum of three to four months later.

17. On March 30, 2015 and April 17, 2015, Claimant saw Dr. Patrick Blair, DO, a general practitioner, on referral from Dr. Berens. Dr. Blair noted anxiety "secondary to recent head injury or psychological effect surrounding recent trauma and environment. This is difficult to separate." He took Claimant off work for two weeks at the March visit. In April, he observed Claimant's continued struggle with anxiety, noting "all of these symptoms are related to his work and ... seem to have more of a psychological component than a physical one." He added his opinion that "the symptoms he is having in large part meet the spectrum for PTSD." He discussed removing Claimant from his hospital work more permanently as it was contributing to "fears, anxiety, problems with concentration, and the physical symptoms associated with those."

18. Dr. Hastings conducted a second neuropsychological examination on April 14, 2015. She concluded Claimant suffered from developing anxiety disorder due to PCS, posttraumatic stress disorder (PTSD), and adjustment disorder with mixed anxiety and developing depression. She felt he had made minor neurocognitive and physical symptom improvements.

19. On April 23, 2015, Claimant saw Dr. Hata again. Claimant reported "a great deal of anxiety" over his work in the psychiatric ward. He claimed to have occasional headaches and some dizziness, and was very anxious about his work at the psychiatric ward, as he was afraid of being attacked again. Dr. Hata recommended he no longer work in the ward "because of anxiety and posttraumatic stress disorder after being punched twice by unruly clients." He started Claimant on various medications, including Paxil (paroxetine) for anxiety and trazadone for his depression.

20. Dr. Hastings referred Claimant to Dr. Harry Hamlyn, psychiatrist, for counseling. Dr. Hamlyn met with Claimant on May 20, 2015, and agreed that Claimant likely had PTSD, PCS, and depression. He continued the paroxetine, and substituted Ativan (lorazepam) for the trazadone in connection with the depression, as the trazadone was "not helpful."

21. Claimant reported significant anxiety at the May 20 visit, saying he had been borderline suicidal, though that had passed, had low energy, slept a lot, had dizziness and vertigo, and "some difficulty trusting staff through Workman's Compensation."

22. Claimant saw Dr. Hamlyn several times over the following months. Dr. Hamlyn changed his medications a little, adding clonazepam (benzodiazepine) briefly to address Claimant's panic attacks but concluding that was not helpful, then putting him back on at the next visit with a higher dosage. On July 14, 2015, Dr. Hamlyn concluded Claimant should be taken off work completely for six months "due to" PTSD, PCS, and depression.

23. Dr. Hamlyn observed that Claimant's mental condition worsened over the ensuing months. By August 10, 2015, his recent and/or remote memory was "abnormal," his behavior agitated, though his thought processes were logical, he was not delusional, and his appearance (grooming, dress, weight, etc.) did not prompt concerns.

24. On October 22, 2015, Dr. Hamlyn released Claimant from work restrictions, though he felt that "it would be beneficial for him to get involved with a different type of work," and he was incapable of work at Rapid City Regional Hospital or any healthcare facility. Dr. Hamlyn was hopeful alternative work, coordinated by Jerry Gravatt (Gravatt), a vocational consultant working on behalf of Insurer, would help Claimant's condition. By November 5, 2015, however, Dr. Hamlyn sent a follow up letter taking Claimant off all work due to "severe symptoms of anxiety and panic," and "significant symptoms of depression."

25. Dr. Hamlyn saw Claimant for the last time on July 8, 2016. He continued to believe Claimant had PTSD and depression, but never proffered an opinion one way or the other on the cause. He did not release Claimant to any work, his last statement on that (in April 2016) being Claimant was unable to work any kind of job.

26. Claimant returned to work a few days after the 2014 incident and continued working until June 2015. He has not worked anywhere since, nor has he sought work.

27. Claimant drove by himself to Oregon and back over a fifteen day period in the fall of 2015, and made trips alone to North Dakota, Montana, and Sioux Falls after that.

28. Claimant owned an incorporated business for several years called Spirit of Success, Inc., which produced various items such as lanyards and blankets carrying the

company logo and incorporated historical photographs in custom projects. There is no indication the company made money.

29. Beginning in 2015, Claimant filed dozens of pro se lawsuits and formal complaints against many people and entities. Some of the documents involved were more than 70 pages long, and many of them required him to type steadily for hours. These pleadings showed a knowledge of pleading requirements and procedures, but often descended into irrational, incoherent rambling, apparently reflecting Claimant's fear, hate, and vengefulness.

30. The various physicians and experts involved in Claimant's case referred to various things which could have a bearing on the work-connectedness of his mental conditions. Claimant suffered a concussion with brief loss of consciousness at age eight. While he described his childhood as "idyllic," he later conceded he had experienced sexual abuse on at least one occasion, his father was abusive, and his parents divorced when he was still at home. He had problems with alcoholism and illegal drug use well into adulthood. He saw Bonnie Ringgenberg, a social worker, for sexual identity issues from 1985-1990. He was treated psychiatrically by Dr. Charles Lord and Dr. Donald Burnap for medication management in the mid 1990's. He saw Joseph Tolson, a social worker, from 2002-2004 for adjustment disorder issues; Tolson also referred in one report to Claimant suffering from borderline personality disorder. None of the records from these various providers are available.

31. Dr. Thomas Gratzer, a psychiatrist, performed an independent psychiatric evaluation of Claimant at Employer and Insurer's request on June 27, 2015, issuing a report on July 16, 2015. As additional information became available, he issued

follow up reports on October 7, 2015, January 21, 2016, June 27, 2016, September 28, 2016, May 11, 2017, and June 13, 2017.

32. Claimant participated in two Minnesota Multiphasic Personality Inventories (MMPI) since his injury: with Dr. Marvin Logel, Ph.D. on June 27, 2015, referred by Dr. Gratzer, declared invalid "due to an excessive number of infrequent responses," and with Dr. Dewey Ertz, Ed.D., referred by Dr. Manlove, in January 2016, also declared invalid. Dr. Ertz specifically noted "No concerns regarding under-reporting his symptoms were present. William displayed significant over-reporting of psychological symptoms, or inconsistently responded, by endorsing an excessive number of responses infrequently endorsed by individuals who present genuine severe psychological difficulties. He further over-reported, or inconsistently responded, by endorsing an excessive number of somatic symptoms rarely described by individuals with genuine medical concerns." Dr. Ertz had the opportunity to review Dr. Logel's data and found Claimant's responses "elevated the same validity areas."

33. Dr. Ertz also performed a Trauma Symptom Inventory (TSI) on January 27, 2016, which he declared valid. This testing suggested Claimant was "likely to present symptoms and associated features of posttraumatic stress disorder," experiences anxiety, excessive dissociation, chronic somatic reactions, both physical and psychological. Dr. Ertz believed that the inconsistencies in the MMPI testing might therefore be explained because of rapid changes in his mental status.

34. Dr. Gratzer made the following opinions and conclusions in his reports:

a. He diagnosed PTSD in remission, anxiety disorder, depressive disorder, and history of alcohol abuse.

b. These diagnoses all predated Claimant's 2013 or 2014 incidents, but he developed worsening anxiety and depressive symptoms from the physical stresses of the 2014 incident.

c. Claimant's medications were improving those conditions.

d. Claimant's 2014 injury did not remain a major contributing cause for his current psychiatric status. Dr. Gratzer conceded Claimant developed anxiety related to PCS, and a recurrence of PTSD from the 2014 injury, but believed those conditions were in remission as of July 27, 2015.

e. Claimant's psychiatric symptomatology was complex, as Claimant had had anxiety and depression requiring prolonged treatment in the past.

f. As of July 27, 2015, Claimant was not disabled from working due to his psychiatric condition, whether a product of his 2014 incident or not, nor did Claimant need psychiatric restrictions at work.

g. As of July 27, 2015, treatment should continue under Dr. Hamlyn for a year.

h. No permanent disability or impairment was attributable to the 2014 injury.

i. In his June 27, 2016 report, he added that Claimant did not develop psychiatric symptoms in 2013, as there was no evidence or documentation of such symptoms at the time.

j. He did not believe Claimant experienced true memory loss from the 2013 or 2014 incidents.

k. Claimant's Oregon trip, his new emotional relationship, Dr. Hastings' observations, Claimant's long, detailed, "highly articulate" letters, and his video deposition show he has no objective signs of mental injury, or impairment in his current abilities, to support his subjective complaints.

l. Reviewing Dr. Hastings' reports, he notes her mental status examinations were "unremarkable" – his mood was euthymic (non-depressed, reasonably positive), intact attention and concentration, normal speech and eye contact, the ability to sustainably concentrate and focus, problem solve, make decisions, and engage in executive functioning.

m. Claimant's presentation shows evidence of secondary gain – a preoccupation with medico-legal issues. His failure to apply for any work since June 2015 is consistent with that opinion.

n. Claimant could have a borderline personality disorder, manifested in intense, difficult to control anger, paranoia, dissociation, and unstable and intense interpersonal relationships.

35. Dr. Hata was deposed on December 29, 2016. In the deposition, he said:

a. He could not state whether Claimant suffered a physical injury as a result of the 2013 incident;

b. Claimant did not develop PCS in that incident – PCS emerged from the second incident in 2014;

c. Claimant had been released to work for Employer as a hand wash monitor. That position would be appropriate for him;

d. Claimant needed intense medical care because he suffers from obsessive-compulsive disorder and paranoia;

e. Given his paranoia, Claimant could try jobs that are physically undemanding and involve little interaction with people;

f. PTSD is a psychiatric, not neurologic condition;

g. Claimant's main problem at this point is psychiatric, not physical; his obsessive-compulsive disorder and paranoia are "consuming his life," manifesting themselves in the dozens of lawsuits Claimant has filed and the degree to which he dwells on them;

h. He could not say yes or no whether Claimant's injuries of 2013 or 2014 were a major contributing cause for Claimant's psychological/psychiatric condition (he would defer to a psychiatrist or neuropsychologist on that.)

i. He was reluctant to say so, but believed Dr. Hastings was motivated in part by subjective sympathy toward Claimant – this prompted him to refer Claimant for neuropsychiatric evaluation by Dr. Cherry.

36. Claimant was not evaluated by Dr. Cherry, as Claimant refused to cooperate with the examination.

37. Dr. Stephen Manlove, a psychiatrist, performed a "forensic psychiatric evaluation" of Claimant requested by Claimant's attorney. Dr. Manlove met with him on four occasions from October 2015 to January 2016. The report was completed July 13, 2016. He reached the following conclusions:

a. Claimant had PTSD with delayed expression and alcohol use disorder, moderate, in sustained remission.

b. Claimant was not malingering.

c. Claimant's two incidents caused him to be 22 % permanently disabled, a product of work-related PCS and PTSD.

d. There was "clear and convincing evidence" that the November 2013 and December 2014 incidents were, and remain, a major contributing cause of Claimant's mental injuries.

38. Dr. Manlove offered the following as "objective proof" of his opinions:

a. Psychological testing done by Dr. Ertz,

b. Observations of his treating physicians: Dr. Hamlyn and Dr. Hata, and his treating psychologist: Dr. Hastings,

c. Letters and emails written by Mr. Baker since his injuries,

d. Claimant's videotaped deposition,

e. The mental status exam Dr. Manlove performed, and

f. Claimant's work record.

39. Dr. Manlove did an updated mental status examination on July 6, 2017 and did not change any of these opinions. He commented on Dr. Gratzer's report, disagreeing that Claimant's not seeking mental health care in 2013 confirmed Claimant did not suffer mental health problems stemming from that incident; agreeing with Dr. Gratzer that paranoia is not a PTSD symptom, but asserting that hypervigilance can be, and Claimant's hypervigilance has evolved into paranoia. He agreed that Claimant is unemployable.

40. Dr. Manlove did not agree with the diagnosis of borderline personality disorder, saying, "The DSM V (Diagnostic and Statistical Manual of Mental Disorders, Fifth

Edition) criteria for Borderline Personality Disorder are as follows: A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts ... ". He proceeded to say Claimant only exhibited one of the nine indications of such a pattern.

41. Dr. Gratzer reviewed Dr. Manlove's report. He placed a greater weight on the psychiatric factors preexisting 2013 and 2014 than Dr. Manlove; for example, Dr. Gratzer found evidence of irritability and anger outbursts in Claimant's medical history before 2013 (leading Tolson to suggest Claimant might have borderline personality disorder.)

42. Additional facts will be discussed as necessary.

Discussion:

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 N.W.2d 363, 367. His burden is higher when claiming a compensable mental injury. An injury does not include a mental injury arising solely from emotional, mental, or nonphysical stress or stimuli, and is only compensable 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). It is enough, however, if a physical incident constitutes "physical accident or trauma" that is clearly connected to a mental injury. *Everingim v Good Samaritan Center,* 1996 SD 104, ¶ 34, 552 N.W.2d 837, 843.

Even if a work-related injury is undisputed, the claimant must establish that the injury caused the current condition. "The evidence necessary to support an award must not be speculative, but rather must be precise and well supported. Causation must be established to a reasonable degree of medical probability, not just possibility. The testimony of medical professionals is crucial in establishing that a claimant's injury is causally related to the injury complained of because the field is one in which laypersons ordinarily are unqualified to express an opinion." *Martz v Hills Materials,* 2014 SD 83, ¶ 23 857 N.W.2d 413, 419 (additional citations omitted.) Further, "the trier of fact is free to accept all of, part of, or none of, an expert's opinion," *Johnson v Albertson's,* 2000 SD 47, ¶ 26, 610 N.W.2d 449, 455, and "the value of the opinion of an expert witness is no better than the facts upon which they are based." *Martz,* 2014 SD 83, ¶ 31, 857 N.W.2d 413, 421 (citations omitted.)

Claimant was struck by patients at work in 2013 and 2014. The first issue to address is whether these incidents caused "physical trauma." In *Everingim,* Claimant was a victim of sexual touching when a male patient grabbed her between the legs. *Everingim v Good Samaritan Center,* 1996 SD 104, ¶ 15, 552 N.W.2d 837, 840. This touching caused her to experience panic attacks and nightmares which caused her to become fearful of going to work. *Everingim v Good Samaritan Center,* 1996 SD 104, ¶ 21, 552 N.W.2d 837, 840. Dr. Gratzer, examiner for Employer and Insurer, thought Claimant developed anxiety related to PCS, and a recurrence of PTSD from the 2014 injury, though he believed those conditions were in remission as of July 27, 2015. It is therefore concluded the Claimant suffered work-related physical trauma.

It is clear that Claimant suffers from mental conditions. All the physicians in this case have agreed Claimant suffered from PCS, PTSD, depression, and anxiety after the 2014 trauma. It is acknowledged that Dr. Gratzer believes these conditions are in remission as of July 2015.

The next step is to consider whether the 2013 or 2014 traumas caused this mental injury and continue to do so. The standards for causation on this point have changed since *Everingim*, as it must now be shown that a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. SDCL § 62-1-1(7).

"A cause which cannot be exceeded is a major contributing cause." *Orth v Stoebner & Permann Construction, Inc.*, 2006 SD 99, ¶ 42, 724 N.W. 2d 586, 596. The additional requirement in the case of the physical causation of mental injuries is "clear and convincing evidence," which means "more than a mere preponderance but not beyond a reasonable doubt ... evidence that is so clear, direct, weighty, and convincing so as to allow either a judge or jury to come to a clear conviction, without hesitancy, of the precise facts in issue." *Cromwell v Hosbrook*, 81 SD 324, 134 N.W.2d 777, 780 (1965). Here, the evidence is mixed. Dr. Hata, who was one of Claimant's treating physicians, said he could not say whether Claimant's injuries of 2013 or 2014 were, or remain, a major contributing cause for Claimant's psychological/psychiatric condition. He deferred to the neuropsychologists and psychiatrists for expertise on the point. Dr. Hastings, a neuropsychologist, has offered her opinions on causation, but they are rejected as calling for a medical opinion which she is unqualified to provide. *E.g., John v Im,* 559 S.E.2d 694, 697 (Va. 2002). Dr. Hamlyn and Dr. Manlove linked Claimant's PTSD and

anxiety to the patient attacks, and Dr. Manlove said there was clear and convincing evidence of the connection. Dr. Manlove said the connection to the original injury remains, and these conditions are ongoing, not in remission as Dr. Gratzer believes. While Dr. Gratzer acknowledges Claimant has experienced such problems, he believes they preexisted the attacks.

Dr. Hata believes Claimant is obsessive-compulsive and paranoid, and these feelings are directed at Rapid City Regional Hospital and those Claimant believes are helping them. Dr. Hata does not link these conditions, or any mental conditions Claimant experiences, to Claimant's 2013 or 2014 physical traumas, as he considers such opinions outside his expertise. That said, he sees these behaviors as "consuming" Claimant's life – so much so that he thinks there would be therapeutic value in Claimant simply abandoning the various legal cases he has started. Put another way, even if Claimant experienced the mental conditions he claims arose from his trauma, those conditions – PTSD, PCS, anxiety, depression – are significantly less important sources for his dysfunctional behavior than his impulses for vengeance, or his hypervigilant/paranoid fear of working around other people, and these latter conditions were not caused by physical trauma.

Physical trauma resulting from Claimant's 2013 and 2014 incidents was not proven by clear and convincing evidence to have been a major contributing cause for the mental conditions his experts believe constitute mental injury.

The standards for permanent total disability benefits are well-established:

> "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." SDCL 62-4-53. The burden is on the employee "to make a prima facie showing of permanent total disability.

> 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. 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.
>
> 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.
>
> *Baier v Dean Kurtz Construction, Inc.*, 2009 SD 7, ¶ 25, 761 N.W.2d 601, 608.

Claimant has not asserted he is in continuous, severe and debilitating pain rendering him obviously unemployable. He has not attempted to find work with employers besides Employer, and has not actually worked for Employer since June, 2015. If he is to establish permanent total disability, he must therefore prove he is "obviously unemployable" due to his age, education, training, and any mental conditions for which his 2013 and 2014 physical traumas were a major contributing cause.

Claimant is 55. He worked for Employer in various capacities, the last of which were psychiatric technician, then handwash monitor, from 1981 to 2015. He attended post-secondary school in the 1980's but did not get a degree. As to his condition, he starts by pointing to the disability determination by the Social Security Administration, then his physicians' opinions, and his vocational expert's report as proof of his obvious unemployability.

Social Security Administration determinations are persuasive, but not controlling authority on the question of disability. *See Vilhauer v Dixie Bake Shop*, 453 N.W.2d 842, 846 (S.D. 1990) ("The new evidence also included a new determination by the Social

Security Administration concluding that Vilhauer was totally disabled, although we recognize that such a determination is not binding on this Court.")

Dr. Hata's opinions shed the most light on the effect Claimant's physical traumas and resulting mental conditions have on his employability. He concluded Claimant's biggest problems are his anger, desire for vengeance, and obsessiveness, none of which were caused by his traumas. His PTSD is a psychological condition, not attributable to a physical cause. He thinks Claimant could have continued his work as a handwash monitor, a regularly available position that addresses Claimant's biggest employment issue, his needs to keep his contact with co-workers structured and limited, and to avoid direct patient care. He has driven alone halfway across the country, taken the time, expense and mental energy to write volumes of things attacking those he sees as the source of his troubles, and managed to work for months after his 2014 incident despite feeling intense paranoia, anxiety, depression, and stress.

Claimant's vocational expert, Jim Carroll, has concluded Claimant is unemployable and incapable of being retrained. Those opinions, however, were based on the observation that Claimant's doctors opined he cannot work, and this inability to work was driven by PTSD, PCS, anxiety and depression produced by his physical traumas. Dr. Hata, who saw him the longest, said he could work, and Dr. Gratzer thought he could work. Drs. Hamlyn and Manlove said he could not work, but they based their opinions on the foundation that Claimant suffered from PTSD caused by Claimant's physical traumas. He has mental issues and conditions, but it is not clear they are truly disabling, and even if it is assumed they were, the greatest causes for his 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. Carroll's opinion depended in large part on the assumptions that Claimant's PTSD was work-related and a major contributing cause for his permanent disability; as the Department has concluded the PTSD was not caused by physical trauma, and even if it was not a major contributing cause for him not currently working, Mr. Carroll's opinions are rejected. It is concluded that Clamant is not permanently and totally disabled as a result of those traumas. His petition will therefore be dismissed.

Counsel for Employer and Insurer is directed to prepare Findings of Fact, Conclusions of Law and an Order consistent with this ruling, along with any objections to the same, for my signature within twenty (20) days of receipt of my Decision. Counsel for Claimant shall have twenty (20) days from the receipt of Employer and Insurer's submissions to submit proposed Findings, Conclusions, Order, and Objections.

Dated this 2nd day of May, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

James E. Marsh

James E. Marsh
Staff Attorney

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

WILLIAM R. BAKER,

Claimant,

v.

RAPID CITY REGIONAL HOSPITAL,

Employer,

and

HARTFORD INSURANCE,

Insurer.

HF No. 55, 2015/16

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the South Dakota Department of Labor and Regulation, Division of Labor and Management, James E. Marsh, Staff Attorney, pursuant to SDCL § 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held October 2, 2017 to address both petitions. William R. Baker (Claimant) was represented by Al Scovel, Attorney at Law, and Michael J. Simpson, Julius & Simpson, LLP; Regional Hospital (Employer) and Hartford Insurance (Insurer) were represented by Comet Haraldson and Jennifer VanAnne, Woods, Fuller, Shultz & Smith, P.C. The Department has considered this matter based on the evidence submitted at the hearing and the parties' post-hearing briefs, and enters the following:

FINDINGS OF FACT

1. On November 7, 2013, Claimant was struck by a patient while performing his duties for Employer.

2. The same day, Claimant went to Employer's emergency room. He said a patient struck him in the face, and his left jaw hurt. He did not lose consciousness, and had no bruising, lacerations, or signs of trauma. A CT scan was negative. A Glasgow Coma Scale test designed to identify brain injury was done, and Claimant scored the maximum 15 points, meaning no deficits in eye movement, speech/verbal skills or motor skills could be detected.

3. Claimant returned to the emergency department two days later, saying he had lost his prescription for Naprosyn and needed another. He saw Dr. Tibbles, who diagnosed: (1) subacute left face and head contusions; (2) acute assault; (3) persistent face pain; (4) work related injury; (5) acute or chronic tenderness, possible minor concussion. Dr. Tibbles ordered two weeks off work and gave him a prescription of Percocet. Claimant only took a few pills because they made him tired.

4. Claimant returned to full duty after a few days off, and worked until December 11, 2014 with no problems.

5. Claimant did not treat with anyone for his 2013 injury after his first emergency room visit.

6. On December 11, 2014, Claimant was struck on the right side of his face by a patient.

7. Claimant testified in his deposition that the patient struck him with the backside of his left hand. At the hearing, Claimant testified the patient hit him with his casted arm in the "right parietal" area (on top of the head.)

8. Claimant's supervisor, Tristina Weekley, testified by way of affidavit that Claimant reported having been struck in the cheek.

9. This event did not stop Claimant from doing his work; he fed the patient until the patient's dinner was gone.

10. Claimant went to the emergency room early on December 12, 2014. His Glasgow Coma score was again 15. A CT scan was negative. He did not lose consciousness.

11. Claimant sought no additional treatment until he saw Dr. Carson Phillips at Rapid City Regional Hospital on December 23, 2014. He reported lightheadedness, weakness, thirst, nausea, and "feeling shaky." He was diagnosed with a concussion but reported to work the next day.

12. Claimant underwent a neuropsychological evaluation on December 26, 2014 with Teresa Hastings, Ph.D. at Regional Rehab Institute. Dr. Hastings concluded Claimant was on the "severe end of a mild concussion," based on such things as short term memory problems, inability to keep attention, reduced "processing speed," referring to an impaired ability to process new information, and dizziness. She found Claimant to be severely anxious, mildly depressed, and recommended he speak with his physicians about medications for that.

13. On December 30, 2014, Claimant saw Dr. Ott at Rapid City Regional Hospital for a follow up. He had a persistent headache with dizziness and nausea, and complained of both vertigo and short-term memory problems. Claimant did not exhibit slurred speech.

14. In January 2015, Claimant saw Dr. Daniel Berens for care. Claimant reported headaches, nausea, and blurred vision, and Dr. Berens noted slurred speech.

15. In January 2015, Dr. Berens referred Claimant to Dr. Minton, an ophthalmologist, primarily because Claimant experienced "convergence," where the eyes move toward each other. By that time, however, Claimant had undergone a physical therapy regimen which successfully addressed the problem. Claimant added that bright light was significantly irritating, which Dr. Minton classified as photophobia. Dr. Minton also diagnosed Claimant as having a concussion.

16. On February 3, 2015, Dr. Berens noted Claimant's post concussive symptoms had improved, and he was working on modified duty.

17. Claimant began seeing Dr. Steven Hata, a neurologist, on February 20, 2015. Claimant reported he was injured in 2014 by being "punched" on the right side of his head and "immediately developed a severe headache" which went away after a couple of days. He diagnosed postconcussion syndrome (PCS), vertigo, mild cognitive disorder, and hypersomnia with sleep apnea. He recommended a second neuropsychological examination be done a minimum of three to four months later.

18. On March 30, 2015 and April 17, 2015, Claimant saw Dr. Patrick Blair, DO, a general practitioner, on referral from Dr. Berens. Dr. Blair noted anxiety "secondary to recent head injury or psychological effect surrounding recent trauma and environment. This is difficult to separate." He took Claimant off work for two weeks at the March visit. In April, he observed Claimant's continued

struggle with anxiety, noting "all of these symptoms are related to his work and ... seem to have more of a psychological component than a physical one." He added his opinion that "the symptoms he is having in large part meet the spectrum for PTSD." He discussed removing Claimant from his hospital work more permanently as it was contributing to "fears, anxiety, problems with concentration, and the physical symptoms associated with those."

19. Dr. Hastings conducted a second neuropsychological examination on April 14, 2015. She concluded Claimant suffered from developing anxiety disorder due to PCS, posttraumatic stress disorder (PTSD), and adjustment disorder with mixed anxiety and developing depression. She felt he had made minor neurocognitive and physical symptom improvements.

20. On April 23, 2015, Claimant saw Dr. Hata again. Claimant reported "a great deal of anxiety" over his work in the psychiatric ward. He claimed to have occasional headaches and some dizziness and was very anxious about his work at the psychiatric ward, as he was afraid of being attacked again. Dr. Hata recommended he no longer work in the ward "because of anxiety and posttraumatic stress disorder after being punched twice by unruly clients." He started Claimant on various medications, including Paxil (paroxetine) for anxiety and trazadone for his depression.

21. Dr. Hastings referred Claimant to Dr. Harry Hamlyn, psychiatrist, for counseling. Dr. Hamlyn met with Claimant on May 20, 2015, and agreed that Claimant likely had PTSD, PCS, and depression. He continued the paroxetine, and substituted

Ativan (lorazepam) for the trazadone in connection with the depression, as the trazadone was "not helpful."

22. Claimant reported significant anxiety at the May 20 visit, saying he had been borderline suicidal, though that had passed, had low energy, slept a lot, had dizziness and vertigo, and "some difficulty trusting staff through Workman's Compensation."

23. Claimant saw Dr. Hamlyn several times over the following months. Dr. Hamlyn changed his medications a little, adding clonazepam (benzodiazepine) briefly to address Claimant's panic attacks but concluding that was not helpful, then putting him back on at the next visit with a higher dosage. On July 14, 2015, Dr. Hamlyn concluded Claimant should be taken off work completely for six months "due to" PTSD, PCS, and depression.

24. Dr. Hamlyn observed that Claimant's mental condition worsened over the ensuing months. By August 10, 2015, his recent and/or remote memory was "abnormal," his behavior agitated, though his thought processes were logical, he was not delusional, and his appearance (grooming, dress, weight, etc.) did not prompt concerns.

25. On October 22, 2015, Dr. Hamlyn released Claimant from work restrictions, though he felt that "it would be beneficial for him to get involved with a different type of work," and he was incapable of work at Rapid City Regional Hospital or any healthcare facility. Dr. Hamlyn was hopeful alternative work, coordinated by Jerry Gravatt (Gravatt), a vocational consultant working on behalf of Insurer, would help Claimant's condition. By November 5, 2015, however, Dr. Hamlyn

sent a follow up letter taking Claimant off all work due to "severe symptoms of anxiety and panic," and "significant symptoms of depression."

26. Dr. Hamlyn saw Claimant for the last time on July 8, 2016. He continued to believe Claimant had PTSD and depression, but never proffered an opinion one way or the other on the cause. He did not release Claimant to any work, his last statement on that (in April 2016) being Claimant was unable to work any kind of job.

27. Claimant's date of birth is June 3, 1962; he is 56 as of the date these Findings of Fact and Conclusions of Law were entered.

28. Claimant completed a high school diploma at Rapid City Central; following high school, he attended Black Hills State University, National American University, South Dakota School of Mines and Technology, and Oglala College, never completing any post-secondary degree.

29. Except for several months in 1996, Claimant worked for Employer from 1981 to 2015, or for almost 34 years. For his first nine years, Claimant worked in the housekeeping department. From 1990 until 2015, he worked as a psychiatric aide/technician at Regional West Psychiatric Hospital.

30. Claimant returned to work a few days after the 2014 incident and continued working until June 2015. He has not worked anywhere since, nor has he sought work.

31. Claimant drove by himself to Oregon and back over a fifteen-day period in the fall of 2015, and made trips alone to North Dakota, Montana, and Sioux Falls after that.

32. Claimant owned an incorporated business for several years called Spirit of Success, Inc., which produced various items such as lanyards and blankets carrying the company logo and incorporated historical photographs in custom projects. There is no indication the company made money.

33. Beginning in 2015, Claimant filed dozens of pro se lawsuits and formal complaints against many people and entities. Some of the documents involved were more than 70 pages long, and many of them required him to type steadily for hours. These pleadings showed a knowledge of pleading requirements and procedures, but often descended into irrational, incoherent rambling, apparently reflecting Claimant's fear, hate, and vengefulness.

34. Claimant's workers' compensation benefit rate has been determined to be $500.89 a week.

35. The Social Security Administration found Claimant became disabled on June 16, 2015, and awarded benefits.

36. James Carroll completed a vocational assessment for Claimant, noting that Claimant had been diagnosed with PTD, PCS, Anxiety, and Depression. He concluded Claimant was unemployable and a job search would be futile. He noted his opinion was supported by various doctors including Dr. Hata, despite Dr. Hata's opinion that there was work Claimant could do, and Dr. Hata saw Claimant more than anyone, and Dr. Hamlyn's hope that alternative work would help Claimant's condition. (Dr. Hamlyn changed his position shortly afterward, concluding Claimant was suffering "severe symptoms of anxiety and panic," and "significant symptoms of depression.")

37. Jerry Gravatt, a vocational consultant working on behalf of Insurer, attempted to coordinate a return to work when Dr. Hamlyn cleared Claimant to work, but such efforts ended when Dr. Hamlyn withdrew his work release.

38. The various physicians and experts involved in Claimant's case referred to various things which could have a bearing on the work-connectedness of his mental conditions. Claimant suffered a concussion with brief loss of consciousness at age eight. While he described his childhood as "idyllic," he later conceded he had experienced sexual abuse on at least one occasion, his father was abusive, and his parents divorced when he was still at home. He had problems with alcoholism and illegal drug use well into adulthood. He saw Bonnie Ringgenberg, a social worker, for sexual identity issues from 1985-1990. He was treated psychiatrically by Dr. Charles Lord and Dr. Donald Burnap for medication management in the mid 1990's. He saw Joseph Tolson, a social worker, from 2002-2004 for adjustment disorder issues; Tolson also referred in one report to Claimant suffering from borderline personality disorder. None of the records from these various providers are available.

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42. Dr. Gratzer made the following opinions and conclusions in his reports:

    a. He diagnosed PTSD in remission, anxiety disorder, depressive disorder, and history of alcohol abuse.

    b. These diagnoses all predated Claimant's 2013 or 2014 incidents, but he developed worsening anxiety and depressive symptoms from the physical stresses of the 2014 incident.

c. Claimant's medications were improving those conditions.

d. Claimant's 2014 injury did not remain a major contributing cause for his current psychiatric status. Dr. Gratzer conceded Claimant developed anxiety related to PCS, and a recurrence of PTSD from the 2014 injury, but believed those conditions were in remission as of July 27, 2015.

e. Claimant's psychiatric symptomatology was complex, as Claimant had had anxiety and depression requiring prolonged treatment in the past (prior to Claimant's dates of injury.)

f. As of July 27, 2015, Claimant was not disabled from working due to his psychiatric condition, whether a product of his 2014 incident or not, nor did Claimant need psychiatric restrictions at work.

g. As of July 27, 2015, treatment should continue under Dr. Hamlyn for a year.

h. No permanent disability or impairment was attributable to the 2014 injury.

i. In his June 27, 2016 report, he added that Claimant did not develop psychiatric symptoms in 2013, as there was no evidence or documentation of such symptoms at the time.

j. He did not believe Claimant experienced true memory loss from the 2013 or 2014 incidents.

k. Claimant's Oregon trip, his new emotional relationship, Dr. Hastings' observations, Claimant's long, detailed, "highly articulate" letters, and his video deposition show he has no objective signs of mental injury, or impairment in his current abilities, to support his subjective complaints.

l. Reviewing Dr. Hastings' reports, he notes her mental status examinations were "unremarkable" – his mood was euthymic (non-depressed, reasonably positive), intact attention and concentration, normal speech and eye contact, the ability to sustainably concentrate and focus, problem solve, make decisions, and engage in executive functioning.

m. Claimant's presentation shows evidence of secondary gain – a preoccupation with medico-legal issues. His failure to apply for any work since June 2015 is consistent with that opinion.

n. Claimant could have a borderline personality disorder, manifested in intense, difficult to control anger, paranoia, dissociation, and unstable and intense interpersonal relationships.

43. Dr. Hata was deposed on December 29, 2016. In the deposition, he said:

a. He could not state whether Claimant suffered a physical injury as a result of the 2013 incident;

b. Claimant did not develop PCS in that incident – PCS emerged from the second incident in 2014;

c. Claimant had been released to work for Employer as a hand wash monitor. That position would be appropriate for him;

d. Claimant needed intense medical care because he suffers from obsessive-compulsive disorder and paranoia;

e. Given his paranoia, Claimant could try jobs that are physically undemanding and involve little interaction with people;

f. PTSD is a psychiatric, not neurologic condition;

g. Claimant's main problem at this point is psychiatric, not physical; his obsessive-compulsive disorder and paranoia are "consuming his life," manifesting themselves in the dozens of lawsuits Claimant has filed and the degree to which he dwells on them;

h. He could not say yes or no whether Claimant's injuries of 2013 or 2014 were a major contributing cause for Claimant's psychological/psychiatric condition (he would defer to a psychiatrist or neuropsychologist on that.)

i. He was reluctant to say so, but believed Dr. Hastings was motivated in part by subjective sympathy toward Claimant – this prompted him to refer Claimant for neuropsychiatric evaluation by Dr. Cherry.

44. Claimant was not evaluated by Dr. Cherry, as Claimant refused to cooperate with the examination.

45. Dr. Stephen Manlove, a psychiatrist, performed a "forensic psychiatric evaluation" of Claimant requested by Claimant's attorney. Dr. Manlove met with him on four occasions from October 2015 to January 2016. The report was completed July 13, 2016. He reached the following conclusions:

a. Claimant had PTSD with delayed expression and alcohol use disorder, moderate, in sustained remission.

b. Claimant was not malingering.

c. Claimant's two incidents caused him to be 22 % permanently disabled, a product of work-related PCS and PTSD.

d. There was "clear and convincing evidence" that the November 2013 and December 2014 incidents were, and remain, a major contributing cause of Claimant's mental injuries.

46. Dr. Manlove offered the following as "objective proof" of his opinions:

a. Psychological testing done by Dr. Ertz,

b. Observations of his treating physicians, Dr. Hamlyn and Dr. Hata, and his treating psychologist Dr. Hastings,

c. Letters and emails written by Mr. Baker since his injuries,

d. Claimant's videotaped deposition,

e. The mental status exam Dr. Manlove performed, and

f. Claimant's work record.

47. Dr. Manlove did an updated mental status examination on July 6, 2017 and did not change any of these opinions. He commented on Dr. Gratzer's report, disagreeing that Claimant's not seeking mental health care in 2013 confirmed Claimant did not suffer mental health problems stemming from that incident; agreeing with Dr. Gratzer that paranoia is not a PTSD symptom, but asserting that hypervigilance can be, and Claimant's hypervigilance has evolved into paranoia. He agreed that Claimant is unemployable.

48. Dr. Manlove did not agree with the diagnosis of borderline personality disorder, saying, "The DSM V (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition) criteria for Borderline Personality Disorder are as follows: A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of

contexts ... ". He proceeded to say Claimant only exhibited one of the nine indications of such a pattern.

49. Dr. Gratzer reviewed Dr. Manlove's report. He placed a greater weight on the psychiatric factors preexisting 2013 and 2014 than Dr. Manlove; for example, Dr. Gratzer found evidence of irritability and anger outbursts in Claimant's medical history before 2013 (leading Tolson to suggest Claimant might have borderline personality disorder.)

50. To the extent that any Findings of Fact are improperly designated as such, they should be considered Conclusions of Law, and vice versa.

Based on these Findings of Fact, the Department reaches the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and the subject matter of this litigation.

2. Claimant has the burden of proving all facts essential to sustain an award of compensation.

3. Claimant's burden is higher when claiming a compensable mental injury. An injury does not include a mental injury arising solely from emotional, mental, or nonphysical stress or stimuli, and is only compensable 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.

4. It is enough, however, if a physical incident constitutes physical accident or trauma that is clearly connected to a mental injury.

5. Claimant suffered work-related physical trauma.

6. Claimant must further establish the injury caused his current condition. The evidence necessary to support an award must not be speculative, but rather must be precise and well supported. Causation must be established to a reasonable degree of medical probability, not just possibility. The testimony of medical professionals is crucial in establishing that a claimant's injury is causally related to the injury complained of because the field is one in which laypersons ordinarily are unqualified to express an opinion. Further, the trier of fact is free to accept all of, part of, or none of, an expert's opinion, and the value of the opinion of an expert witness is no better than the facts upon which they are based.

7. A cause which cannot be exceeded is a major contributing cause.

8. The additional requirement in the case of the physical causation of mental injuries is clear and convincing evidence, which means more than a mere preponderance but not beyond a reasonable doubt ... evidence that is so clear, direct, weighty, and convincing so as to allow either a judge or jury to come to a clear conviction, without hesitancy, of the precise facts in issue.

9. Dr. Hastings, a neuropsychologist, has offered her opinions on causation, but they are rejected as calling for a medical opinion which she is unqualified to provide.

10. Reviewing Dr. Hamlyn's, Dr. Manlove's, Dr. Hata's, and Dr. Gratzer's opinions on causation, they do not establish by clear and convincing evidence that Claimant's physical trauma caused his impulses for vengeance, his obsessive-compulsive

disorder; these conditions are the greatest contributors to his current mental condition.

11. Claimant has failed to prove by clear and convincing evidence that his work injuries of November 7, 2013 or December 11, 2014 are or remain a major contributing cause of a mental injury.

12. Claimant has failed to prove his 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.

13. 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. The burden is on Claimant to make a prima facie showing of permanent total disability. First, if Claimant is obviously unemployable, then the burden of production shifts to Employer and Insurer to show that some suitable employment is actually available in claimant's community for persons with claimant's limitations. 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. Second, if 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

Claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made reasonable efforts to find work.

14. Claimant has not asserted he is in continuous, severe and debilitating pain rendering him obviously unemployable; he cannot, therefore, establish permanent total disability on that basis.

15. Claimant has not attempted to find work with employers besides Employer, and has not actually worked for Employer since June 2015; he has not therefore established he is permanently and totally disabled based on completion of a good faith but unsuccessful work search.

16. Claimant must prove he is "obviously unemployable" due to his age, education, training, and any mental conditions for which his 2013 and 2014 physical traumas were a major contributing cause.

17. Social Security Administration determinations are persuasive, but not controlling authority on the question of disability.

18. Claimant is not permanently and totally disabled as a result of his 2013 and 2014 physical traumas.

19. Claimant has challenged the constitutionality of SDCL § 62-1-1(7). Employer and Insurer has objected to the challenge; that objection is overruled, but the Department as an administrative agency nonetheless lacks the jurisdiction to consider a constitutional challenge to a law it administers. The proper course for such a challenge is for Claimant to exhaust his administrative remedies and raise the issue if necessary in Circuit Court.

20. Claimant's petition for hearing should be dismissed with prejudice.

21. Let an Order issue accordingly.

22. The Department's Decision of May 2, 2018 is incorporated by this reference.

Dated this 30th day of August, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

James E. Marsh

James E. Marsh
Staff Attorney

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

WILLIAM R. BAKER,

Claimant,

HF No. 55, 2015/16

v.

ORDER

RAPID CITY REGIONAL HOSPITAL,

Employer,

and

HARTFORD INSURANCE,

Insurer.

James E. Marsh, Staff Attorney acting as Administrative Law Judge, heard this matter, reviewed Claimant's and Employer and Insurer's submissions and arguments, and issued a Decision May 2, 2018, as well as Findings of Fact and Conclusions of Law on August 27, 2018. It is hereby ORDERED that:

1. Claimant has failed to prove by clear and convincing evidence that his work-related claims of November 7, 2013 and December 11, 2014 are and remain a major contributing cause of his current mental condition, including his claim for permanent total disability benefits and need for treatment related to his mental condition;
2. Claimant has failed to prove he is entitled to medical, psychiatric, or psychological treatment related to his mental problems, and therefore any and all medical, psychiatric or psychological expenses for the treatment of Claimant's mental conditions or mental problems are hereby denied;

3. Claimant's challenge to the constitutionality of SDCL 62-1-1(7) is denied for lack of departmental jurisdiction.
4. All Claimant's claims in this matter are dismissed with prejudice.
5. The parties will bear their own costs.

Dated this 30th day of August, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

James E. Marsh

James E. Marsh
Staff Attorney

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:
>
> > (1) In violation of constitutional or statutory provisions;
> >
> > (2) In excess of the statutory authority of the agency;
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;
> >
> > (5) Clearly erroneous in light of the entire evidence in the record; or
> >
> > (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> 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

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[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.

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[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).

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[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

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.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

WILLIAM BAKER, Claimant/Appellee, v. RAPID CITY REGIONAL HOSPITAL and HARTFORD INSURANCE, Employer and Insurer/Appellants.	)	32CIV18-187 ORDER

WHEREAS, the Court having entered its Memorandum Decision on June 28, 2019, and having expressly incorporated the same herein, now, therefore, it shall be and hereby is

ORDERED, ADJUDGED, AND DECREED:

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 denying 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.

Pursuant to SDCL 1-26-32.1 and SDCL 15-6-52(a), the Court's Memorandum Decision shall act as the Court's findings of fact and conclusions of law as permitted by SDCL 1-26-36.

Dated this 28th day of June, 2019.

BY THE COURT:

Patricia DeVaney

Patricia J. DeVaney
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) ss	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

WILLIAM BAKER, Appellant, vs. RAPID CITY REGIONAL HOSPITAL and HARTFORD INSURANCE, Appellees.	)	Case No. 32CIV18-187 FINAL ORDER AFTER REMAND

WHEREAS, the Court, Patricia J. DeVaney, Circuit Court Judge, having entered its Memorandum Decision on the 28th day of June, 2019, reversing in part, affirming in part, and remanding in part to the South Dakota Department of Labor and Regulation, Division of Labor and Management, for further proceedings in accordance with the Memorandum Decision, and the Administrative Law Judge James Marsh having entered his Findings of Fact and Conclusions of Law and Order dated November 23, 2020, ruling upon the remanded issue, and neither party having appealed from the ruling upon the issue which was remanded, and Claimant having dismissed his appeal in 32CIV21-000028 (an appeal of the Department of Labor's denial of a Motion to Submit Additional Evidence),

NOW THEREFORE, the matter is ripe for this Court to enter its Final Order on Remand. It is hereby

ORDERED, that the Memorandum Decision of this Court issued June 28, 2019 is and shall be final for all purposes.

Dated this ____ day of _____, 2021.

BY THE COURT

Signed: 8/20/2021 10:46:09 AM

Christie Klinger

Circuit Court Judge

Attest:
Greene, Ashtin
Clerk/Deputy

IN THE SUPREME COURT

IN THE

STATE OF SOUTH DAKOTA

#29753

WILLIAM BAKER, Appellant.

vs.

RAPID CITY REGIONAL HOSPITAL and HARTFORD INSURANCE, Appellees.

Appeal from the Sixth Circuit
Hughes County, South Dakota
The Honorable Christina L. Klinger and The Honorable Patricia DeVaney

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APPELLEES' BRIEF

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NOTICE OF APPEAL FILED AUGUST 25, 2021

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Jurisdictional Statement

Appellant William Baker appeals from the Sixth Judicial Circuit Court's Final Order After Remand dated August 20, 2021, making final the Circuit Court's Decision dated June 28, 2019, affirming the Department of Labor's May 2, 2018 Decision that Claimant is not permanently and totally disabled. Claimant filed his Notice of Appeal on August 25, 2021.

Statement of the Issues

1. Did the Department err in finding that Claimant is not permanently and totally disabled under SDCL § 62-4-53?

   The Department determined that Claimant was not entitled to permanent total disability benefits, and that decision was affirmed by the Honorable Patricia DeVaney of the Sixth Judicial Circuit Court.

   Wagaman v. Sioux Falls Construction, 1998 S.D. 27, 576 N.W.2d 237

   Tiensvold v. Universal Transport, Inc., 464 N.W.2d 820 (S.D. 1991)

   Hendrix v. Graham Tire Co., 520 N.W.2d 876 (S.D. 1994)

   SDCL ' 62-4-53

Statement of the Case

Pursuant to SDCL ' 62-7-12, Claimant brought this worker's compensation case before the South Dakota Department of Labor, Division of Labor and Management. The worker's compensation hearing was held in this case on October 2, 2017, in Rapid City before Administrative Law Judge James Marsh on October 2, 2017. The exhibits were voluminous, with 122 exhibits, contained in Volumes 1-7, offered and received into evidence. The sole live witness to testify at hearing was Claimant William Baker. The issues tried at that hearing were (1) whether Baker met his burden to show that a

compensable physical injury is and remains a major contributing cause of a mental injury, by clear and convincing evidence; and (2) whether Baker was entitled to permanent total disability benefits.

On August 30, 2018, the Department issued a Decision determining that Claimant failed to prove by clear and convincing evidence that his work injuries of November 7, 2013 or December 11, 2014, are or remain a major contributing cause of a mental injury or any continued need for treatment, and denying Claimant's petition for permanent total disability benefits. Findings of Fact and Conclusions of Law and an Order consistent with the Department's Decision were issued by the Department on August 30, 2018. Claimant appealed to the Circuit Court on September 13, 2018.

After oral argument before the Honorable Patricia DeVaney, Sixth Judicial Circuit, the Circuit Court issued its Memorandum Decision on June 28, 2019, reversing the Department's finding that Claimant failed to sustain his burden of proving causation by clear and convincing evidence, but affirming the Department's determination that Claimant failed to meet his burden of proof on his permanent total disability claim. The Circuit Court remanded the case back to the Department to determine what medical expenses or other benefits may be due and owing to Claimant consistent with the Court's finding of causation.

On November 23, 2020, the Department entered its Order and Findings of Fact and Conclusions of Law determining that certain psychological/psychiatric treatment was reasonable and necessary. On December 23, 2020, Claimant filed a Motion to Submit Additional Evidence with the Department and Employer and Insurer filed a Response resisting the Motion. On February 4, 2021, Claimant's Motion to Submit Additional

Evidence was denied by the Department. On February 11, 2021, Claimant filed an appeal to the Circuit Court of the Department's decision denying the Motion to Submit Additional Evidence. Claimant subsequently withdrew that appeal and the appeal was dismissed on August 11, 2021.

On August 20, 2021, the Circuit Court entered a Final Order on Remand, making the June 28, 2019 Circuit Court decision final for appeal purposes. On August 25, 2021, Claimant filed a Notice of Appeal to this Court. The Circuit Court's decision on causation has not been appealed by Employer and Insurer. Therefore, the only issue on the present appeal is whether the Department erred in finding that Claimant is not permanently and totally disabled as a result of the November 7, 2013 or December 11, 2014 dates of injury.

Statement of the Facts

Claimant filed two petitions for hearing in this matter, one alleging an injury on November 7, 2013 and the other alleging an injury on December 11, 2014. From these incidents, Claimant alleged he was permanently and totally disabled.

At the time of the hearing, Claimant was 55 years old who worked as a psychiatric technician at Rapid City Regional Hospital. (Baker Depo. at pgs. 17-18). On November 7, 2013, Claimant was struck in the face by a patient while working for Employer. (AR 88-89, 91-92.) Claimant did not lose consciousness and did not have any bruising, lacerations, or signs of trauma. (AR 2845-46.) Claimant sought treatment first in the emergency room on the date of the injury. A CT scan was done which was normal, or negative. (AR 2846, 2862.) Additionally, a Glasgow Coma Scale test was performed, and he received the highest score possible, meaning there were no deficits in eye

movement, speech/verbal skills or motor skills. (AR 2852.) Baker returned to the ER two days later for the stated reason that he had "lost his prescription for Naprosyn." (HT at 48:13, 21-22.) After a few days off, Baker returned to his regular and usual duties at Rapid City Hospital where he worked thirteen months straight without any apparent problems until December 11, 2014. (HT at 50:16, 51:10; Baker Depo. at 52, 53, 59.) Baker never treated again with anyone relative to the November 9, 2013 event. (Baker Depo. at 59:3.) Dr. Steven Hata, Claimant's treating physician, testified that Claimant did not have any lasting symptoms following the first incident in November 2013. (Hata Depo. at 9.)

On December 11, 2014, Claimant was struck again on the right side of his face by a patient. (AR 2868-2869.) At Claimant's videotaped deposition, Claimant demonstrates exactly how he was struck. (AR 1868-1869.) According to his own characterization, Claimant was essentially struck once with the back of the patient's left hand in the area of Claimant's right jaw or ear area. (HT at 53:6; Baker Depo. at 61:4.) Claimant did not leave his chair, or stand up, nor did he leave the room or call for help; rather, he continued to feed the patient his dinner until it was gone. (Baker Depo. at 61:9-10.) There was no loss of consciousness. (Baker Depo. at 60:23; CI 2868.)

Claimant did not seek immediate treatment. Rather, he went to the ER the next day where he was administered the Glasgow Coma test. (HT at 54:20; Baker Depo. at 64:21.) The score was again a 15. (AR 2827.) Claimant received a head CT scan, which was negative. (AR 2830.) After the December 2014 event and a few days off, again, Baker returned to work at the hospital until late June 2015, a period of about seven

months. (HT at 56:23-25.) Claimant has not worked anywhere since he left the Employer, nor has he sought work. (FOF & 30.)

Claimant underwent a neuropsychological evaluation on December 26, 2014 with Teresa Hastings, Ph.D at Regional Rehab Institute. (FOF & 12.) Dr. Hastings stated Claimant was on the severe end of a mild concussion. (*Id*.) Claimant also treated with Dr. Steven Hata, a neurologist, and began seeing him on February 20, 2015. (FOF & 17.) Dr. Hata diagnosed Claimant with postconcussion syndrome or PCS, vertigo, mild cognitive disorder, and hypersomnia with sleep apnea. (*Id*.) Dr. Hastings conducted a second neuropsychological examination on April 14, 2015. She concluded Claimant suffered from developing anxiety disorder due to PCS, posttraumatic stress disorder, and adjustment disorder with mixed anxiety and developing depression. She felt he had made minor neurocognitive and physical symptom improvements. (FOF & 19.)

On April 23, 2015, Dr. Hata recommended Claimant no longer work in the psychiatric ward and started him on medication. (FOF & 20.) Dr. Hastings referred Claimant to Dr. Harry Hamlyn, a psychiatrist, for counseling, and he saw Claimant on May 20, 2015. Dr. Hamlyn agreed that Claimant likely had PTSD, PCS, and depression. (FOF & 21.) On July 14, 2015, Dr. Hamlyn concluded Claimant should be taken off work for six months due to PTSD, PCS and depression. (FOF& 23.) By August 10, 2015, Dr. Hamlyn thought Claimant's thought processes were logical, he was not delusional, and his appearance (grooming, dress, weight, etc.) did not prompt concerns. (FOF & 24.)

On October 22, 2015, Dr. Hamlyn released Claimant from work restrictions, though he felt that "it would be beneficial for him to get involved with a different type of work," and he was incapable of work at Rapid City Regional Hospital or any healthcare facility.

Dr. Hamlyn was hopeful alternative work, coordinated by Jerry Gravatt, a vocational consultant working on behalf of the insurer. Dr. Hamlyn unexpectedly however took Claimant off of work on November 5, 2015. (FOF & 25.)

Jerry Gravatt identified several positions available to Claimant within his qualifications and restrictions. These positions would have allowed Claimant part-time or to full-time employment with limited public and co-worker contact. None of the positions were within or related to the medical field, such as production assembler, press operator, machine operator, inventory specialist or warehouse associate/inventory control. (AR 729-750; Hearing Exhibit 14.)

Dr. Thomas Gratzer, a Board certified psychiatrist, performed an independent psychiatric evaluation of Claimant and opined that Claimant is not disabled from working as a result of his alleged psychiatric condition and does not have a disability or impairment from a psychiatric standpoint. Dr. Gratzer opined that Claimant has been able to perform intensive computer research and very extensive writings, which have been focused on his Workers' Compensation claim, statutory law, OSHA regulations, hospital regulations, as well as State and Federal law. "Mr. Baker has obviously objectively demonstrated an ability to be highly focused and concentrated in a sustained basis…Stated otherwise, Mr. Baker is highly focused on his medicolegal claim and perceptions of mistreatment by his former employer in the context of his previous work injuries, and has been engaging in extensive research and writing around these issues…These dynamics are unrelated to the work-related injuries, and PTSD in particular, and do not result in psychiatric impairment, or more specifically, total disability." (AR 709.) Dr. Gratzer further opined that Claimant's presentation showed

evidence of secondary gain – a preoccupation with medico-legal issues. His failure to apply for any work since June 2015 would be consistent with that opinion. (FOF & 42m.)

Claimant participated in two Minnesota Multiphasic Personality Inventories (MMPI) after his dates of injury – with Dr. Marvin Logel, Ph.D. on June 27, 2015, which was declared invalid "due to an excessive number of infrequent responses," and with Dr. Dewey Ertz, Ed.D., in January of 2016, which was also declared invalid. (FOF & 40.)

During the course of this litigation, Claimant filed 48 pro se lawsuits and complaints against various individuals and entities. (FOF & 33; *see* also AR 1520-1741, 1766-1796, 1906-2157.) These include suits or attempted suits against his supervisor, the occupational health nurse at the hospital, part of the legal staff at the hospital, defense counsel, the IME doctor Thomas Gratzer from Minneapolis, Regional Health's CEO, the head of his department, in addition to several others. In Claimant's own words to his attorney Al Scovel, found in psychologist Hastings's file, he states "Thats my strategy AL, file till they can't Walk!!!" (AR 4334-4335.)

Dr. Hata was deposed on December 29, 2016. Among other things, Dr. Hata testified that at the time, Claimant had been released to work for Employer as a hand washer monitor and that position would be appropriate for him. (FOF & 43c.) Given his paranoia, Dr. Hata felt that Claimant could try jobs that were physically undemanding and would involve little interaction with the general public. (FOF & 43e.) Dr. Hata testified that Claimant's main problem was psychiatric, not physical; "his obsessive-compulsive disorder and paranoia are "consuming his life," manifesting themselves in the

dozens of lawsuits Claimant has filed and the degree to which he dwells on them[.]" (FOF & 43g.)

Claimant was seen for a forensic psychiatric evaluation at the request of his attorney by Dr. Stephen Manlove, between October 2015 to January 2016. Dr. Manlove opined, among other things, that Claimant had PTSD with delayed expression and alcohol use disorder, moderate, in sustained remission. (FOF & 45.) Dr. Manlove opined that Claimant's two work injuries resulted in a 22% impairment rating.

Dr. Gratzer reviewed Dr. Manlove's report and placed a greater weight on the psychiatric factors preexisting the 2013 and 2014 dates of injury. Also, Dr. Manlove was noted to have 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. (AR 4866; Memorandum Decision at pg. 38.) As the circuit court noted, "[e]ven 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 4869; Memorandum Decision at pg. 41 (emphasis in original)); AR 662 (Manlove 7/26/17 Report (AR 638-662)). Additional facts may be developed below.

Standard of Review

The standard of review in administrative appeals is governed by SDCL ' 1-26-36. All actions regarding an agency's conclusions of law are reviewable de novo, while questions of fact are reviewed under the clearly erroneous standard. *Clausen v. Northern*

Plains Recycling, 2003 SD 63, & 7, 663 N.W.2d 685, 687; *Byrum v. Dakota Wellness Foundation*, 2002 SD 141, & 9, 654 N.W.2d 215, 217 (citation omitted). When findings of fact are based on live testimony, the clearly erroneous standard applies. *Brown v. Douglas Sch. Dist.*, 2002 SD 92, & 9, 650 N.W.2d 264, 267-68. Witness credibility is a question of fact. *Kuhle v. Lecy Chiropractic*, 2006 SD 16, & 15, 711 N.W.2d 244, 247 (citation omitted). When an agency makes a factual determination on the basis of documentary evidence, including depositions or medical records, the case is reviewed de novo. *Vollmer v. Wal-Mart Store, Inc.*, 2001 SD 25, & 12, 729 N.W.2d 377, 382.

The key question to be considered "is not whether there is substantial evidence contrary to the agency finding, but whether there is substantial evidence to support the agency finding. . . . [T]he court shall give great weight to the findings made and inferences drawn by an agency on questions of fact." *Kennedy v. Hubbard Milling Co.*, 465 N.W.2d 792, 794 (S.D. 1991) (quoting *Lawler v. Windmill Restaurant*, 435 N.W.2d 708, 711 (S.D. 1989) (Morgan J., concurring specially). To overturn a factual determination made by an administrative agency, the Court must be left with a definite and firm conviction a mistake was made. *Byrum*, 2002 SD 141, & 9, 652 N.W.2d at 217. The appellate court will not substitute its judgment for that of the Department's on the weight of the evidence or credibility of witnesses. *Gerlach v. State*, 208 SD 25, & 6, 747 N.W.2d 662, 664. "Whether a claimant is entitled to odd-lot disability benefits is a question of fact subject to review under the clearly erroneous standard." *Eite v. Rapid City Area School Dist. 51-4*, 2007 SD 95, & 21, 739 N.W.2d 264, 270 (citations omitted).

Argument and Authorities

In a workers' compensation case, the employee has the burden of proving all facts essential to compensation. *Phillips v. John Morrell*, 484 N.W.2d 527, 530 (S.D. 1992). Claimant alleges he is permanently and totally disabled under the odd-lot doctrine. Permanent total disability is governed by SDCL ' 62-4-53, which states in pertinent part:

> An employee is permanently totally disabled if the employee's physical condition, in combination with the employee's age, training, and experience and the type of work available in the employee's community, cause the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. An employee has the burden of proof to make a prima facie showing of permanent total disability. The burden then shifts to the employer to show that some form of suitable work is regularly and continuously available to the employee in the community. The employer may meet this burden by showing that a position is available which is not sporadic employment resulting in an insubstantial income as defined in subdivision 62-4-52(2). An employee shall introduce evidence of a reasonable, good faith work search effort unless the medical or vocational findings show such efforts would be futile. The effort to seek employment is not reasonable if the employee places undue limitations on the kind of work the employee will accept or purposefully leaves the labor market. An employee shall introduce expert opinion evidence that the employee is unable to benefit from vocational rehabilitation or that the same is not feasible.

This Court recognizes two avenues to make the required prima facie showing for inclusion in the odd-lot category. *Kassube v. Dakota Logging*, 2005 SD 102, ¶ 34, 705 N.W.2d 461, 468 (citation omitted). "First, if the claimant is 'obviously unemployable,' then the burden shifts to the employer to show that some suitable employment is actually available in claimant's community for persons with claimant's limitations." *Id*. (citation omitted) (emphasis in original). Obvious unemployability may be demonstrated 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." *Id*. (citations omitted). If Claimant cannot

demonstrate he is obviously unemployable, or relegated to the odd-lot category, the burden remains on him to demonstrate the unavailability of suitable employment by showing his reasonable efforts to find work were unsuccessful. *Id*. The burden does not shift to Employer unless Claimant produces substantial evidence that he is not employable in the competitive market. *Id*. (citation omitted). "Even though the burden of production may shift to an employer and insurer, the ultimate burden of persuasion remains with the claimant." *Sandner v. Minnehaha County*, 2002 SD 123, & 10, 652 N.W.2d 778, 783. "Whether a claimant makes a prima facie case to establish odd-lot disability inclusion is a question of fact." *Baier v. Dean Kurtz Constr., Inc*., 2009 SD 7, & 28, 761 N.W.2d 601, 609.

The Department determined that Claimant did not meet his burden of showing he was relegated to the odd-lot category for purposes of permanent total disability. (COL && 14, 16, 18.) The circuit court agreed and determined that the Department's denial of odd-lot benefits was not clearly erroneous. [1]

The Department and the circuit court further determined that even if Claimant were relegated to the odd-lot doctrine, he still would not be entitled to permanent total disability benefits because he had not established he is permanently and totally disabled based on completion of a good faith but unsuccessful work search. (COL & 15; AR 4868; Memorandum Decision at pg. 40.) Finally, the circuit court concluded that Employer and Insurer sustained their burden of showing suitable employment existed for

[1] The circuit court noted that it would reach "the same conclusion under a de novo review, if it were determined that the clearly erroneous standard does not apply to this determination." (AR 4870; Memorandum Decision at pg. 42.)

Claimant. (AR 4868; Memorandum Decision at pg. 40.) For the following reasons, the Department's and the circuit court's decisions should be affirmed.

1. The Department's decision denying Claimant's claim for permanent total disability benefits is not clearly erroneous and is supported by the totality of evidence in the record.

A. The burden remains on Claimant to demonstrate he has made reasonable efforts to find work were unsuccessful, and he did not meet that burden.

Claimant argues that if the Department had accepted Claimant's psychological providers' and Dr. Manlove's opinions, then he would have been able to prove he is unemployable. (Appellant's Opening Brief at pg. 29.) However, Claimant ignores the Department's finding that "Claimant has not attempted to find work with employers besides Employer, and has not actually worked for Employer since June 2015; he has not therefore established he is permanently and totally disabled based on completion of a good faith but unsuccessful job search." (FOF & 15.) The circuit court further found that because Claimant's vocational expert's opinions about whether Claimant's job search would be futile were "suspect", the record was devoid of any evidence that he tried to or even desired to find employment. (AR 4868); Memorandum Decision at pg. 40.) "It is undisputed that Claimant made no efforts whatsoever to find work." (*Id*.) Nor did Claimant apply for any of the jobs offered by Employer and Insurer's vocational expert, did not sign up for job services, or look into or apply to any education or retraining programs. (*Id*.)

The Department's and the circuit court's decisions on the permanent total disability issue were based in large part on the fact that Claimant had failed to engage in any kind of a work search. (AR 4868; Memorandum Decision at pg. 40.) In fact, the

circuit court specifically noted that Claimant's own counsel elicited the following testimony from Claimant during the hearing as to why he had not looked for a job:

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 4868; Memorandum Decision at pg. 40; HT at 87.) The circuit court concluded that: "Claimant failed to offer any specific reasons as to why he did not attempt to find alternative work after he was terminated from RCRH." (AR 4868; Memorandum Decision at pg. 40.) The circuit court further observed:

> 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.

(AR 4869; Memorandum Decision at pg. 41.) Finally, the circuit court concluded: "Given the very limited and specialized nature of Claimant's mental disability, the other avenue by which he could have convinced the 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." (*Id*.) (emphasis added.)

Claimant's argument that his writings provide evidence that he would be unable to maintain employment misses the mark. (Appellant's Opening Brief at pg. 28.) The circuit court recognized that "the fact that Claimant is able to research the law around these claims and agencies and draft letters and complaints using a computer, show that he is able to concentrate and produce a substantial written work[.]" (AR 4865; Memorandum Decision at pg. 37, n. 13.) Moreover, the circuit court noted that the writings themselves do not support a claim that Claimant is totally disabled. (*Id*.) Again, Claimant has made no argument that he conducted a good faith job search. He simply states that he believes he is disabled. (HT at 87.) As the circuit court ultimately recognized, "[t]he 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." (AR 4869; Memorandum Decision at pg. 41.)

B. Suitable work available within Claimant's restrictions that would meet his worker's compensation benefit rate was offered by Jerry Gravatt.

The circuit court concluded that there were numerous available jobs identified that would not expose Claimant to a work environment that could trigger his PTSD symptoms. (AR 4869; Memorandum Decision at pg. 41.) The circuit court recognized that although both Drs. Hamlyn and Hata suggested Claimant should not work in health care or direct patient care, Employer and Insurer's vocational expert, Jerry Gravatt, identified several jobs that were outside that line of work. Dr. Hata even offered his own

description of the type of jobs he thought would be appropriate for Claimant, which would not involve a lot of interaction with the public and would be physical positions rather than intellectual. The court found that Dr. Hata's restrictions were consistent with the jobs Mr. Gravatt provided. (AR 4867; Memorandum Decision at pg. 39; AR 738-41 (Gravatt 12/17/15 Letter); AR 742-43 (Gravatt 6/1/17 Letter); AR 744-50 (Gravatt 7/27/17 Letter)). Specifically, Dr. Hata testified 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 of the positions. (AR 4868; Memorandum Opinion at pg. 40; AR 1876-77 (Hata Depo. at 21, 24-27.)) The circuit court ultimately concluded that "[t]he 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." (AR 4868; Memorandum Decision at pg. 40.) These findings and conclusions by the circuit court are not clearly erroneous.

The circuit court accepted Jerry Gravatt's vocational expert opinions over those of Jim Carroll's vocational expert opinions, for several reasons. First, Carroll's report stated that Claimant's treating physicians had rendered opinions that Claimant was not capable of employment of any kind. (AR 761 (Carroll 3/14/17 Report at 9)). However, there is no evidence in the record to support that statement. Carroll's opinions failed to recognize that Dr. Hata said Claimant could work as a handwashing monitor and that he would not prohibit Claimant from trying jobs identified by Jerry Gravatt. (AR 4864; Memorandum Decision at pg. 36; AR 1876-77 (Hata Depo. at 24-28)). Dr. Hata did not opine that Claimant was completely incapable of working. (AR 1879 (Hata Depo. at 35-36.)

Nor did Dr. Hastings opine that Claimant was not capable of employment of any kind. She opined that Claimant has a permanent partial disability, not a total disability. Third, Carroll's report ignores Dr. Gratzer's subsequent reports and opinions which offered "legitimate reasons why Dr. Hamlyn's and Dr. Hastings' opinions are suspect." (AR 4864; Memorandum Decision at pg. 36.) Claimant takes issue with the circuit court's reasoning in accepting Dr. Gratzer's opinions about his capabilities in light of his claim that he is permanently and totally disabled:

> 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 conduct and memory, along with Claimant's long detailed letters, 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.

The circuit court specifically found that "[a]ll of these observations by Dr. Gratzer are supported by the record." (AR 4865; Memorandum Decision at pg. 37.) Even Dr. Manlove found no deficit in Claimant's ability to travel to new environments without supervision, and any impairment with his social functioning was specifically related to his previous relationships with coworkers at Employer. (AR 4866; Memorandum Decision at pg. 38.) This is the type of evidence this Court has held would be considered significant, because it is evidence that a claimant "engaged in any activity at odds with his pain or claimed limitations." *Wagaman v. Sioux Falls Construction*, 1998 S.D. 27, &30, 576 N.W.2d 237, 243 (citing *Shepherd v. Moorman Mfg.*, 467 N.W.2d 916, 920 (S.D. 1991)).

Claimant argues that the fact he can do these activities are "matters of little consequence" and that the Department's rejection of Claimant's treating physicians' opinions over those observations by Dr. Gratzer is reversible error. (Appellant's Opening Brief at pgs. 27-28.) Relying upon two cases – *Davidson v. Horton Industries*, 641 N.W.2d 138 (S.D. 2002) and *Foltz v. Warner Transportation*, 516 N.W.2d 338, 340 (S.D. 1994), he contends the Department and the circuit court should have accepted the opinions of Dr. Hamlyn, Dr. Hastings and Dr. Manlove over Dr. Gratzer's opinions on his ability to work. (Appellant's Opening Brief at pg. 28.) However, this case is distinguishable from *Davidson* and *Foltz*.

In *Davidson*, this Court determined that the findings of fact contained little about the testimony or affidavits from Claimant's treating physicians and that the Department's reliance on surveillance videotapes was questionable. 2002 SD 27, & 22, 641 N.W.2d at 142. Likewise, in *Foltz*, the Court held that contrary to the hearing examiner's findings, the employer and insurer had failed to produce any medical testimony that the claimant did not have a peripheral vision loss. 516 N.W.2d at 347. "Thus, there is no substantial evidence to support Department's finding that Folz has not suffered a loss of peripheral vision." *Id.*

The evidence in this case is much different than the evidence offered by the employer and insurer in *Folz* and *Davidson*. The Department's findings in this case contain a thorough review of the Claimant's treating physicians' opinions and statements as well as those of Dr. Gratzer. The Department's Finding of Fact & 42 detailed Dr. Gratzer's opinions set forth in 14 subsections, including, for example, Dr. Gratzer's review of Dr. Hastings' reports discussing her mental status examinations. The

Department's Finding of Fact & 43 details a specific review of Dr. Hata's deposition testimony taken on December 29, 2016. Finally, the Department's Finding of Fact && 45-48 discuss the Dr. Manlove's reports and opinions.

The circuit court, after a review of the record, concluded that "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. (AR 4867; Memorandum Decision at pg. 39.) Additionally, the circuit court noted that the opinions regarding Claimant's vocational abilities were also based in large part on the experts' direct observations of Claimant and his self-reported capabilities in contexts outside the hearing. (AR 4862; Memorandum Decision at pg. 34.) The Department and the circuit court found that Dr. Gratzer's conclusions were more persuasive and convincing – particularly in light of Claimant's live testimony. Under this record, this Court should not override that finding. Fact finders are free to reasonably accept or reject all, part, or none of an expert's opinion. *Sauer v. Tiffany Laundry & Dry Cleaner*, 2001 SD 242, & 14, 622 N.W.2d 741, 745 (citing *Goebel v. Warner Transp.*, 2000 SD 79, ¶ 33, 612 N.W.2d 18, 27 (citations omitted)).

Importantly, the circuit court recognized that "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 4861; Memorandum Decision at pg. 33) (citing AR 4620 (Dept. Decision at 18)). The circuit court noted that "[i]n entering such findings,

the Department had the opportunity to view the Claimant's demeanor and presentation during his live testimony." (AR 4862; Memorandum Decision at pg. 34.) Although Claimant argues in his opening appeal brief that "the Department did not make an adverse credibility determination regarding Baker's live testimony[,]" (Appellant's Opening Brief at pg. 23), there is no requirement that the agency make an "adverse credibility determination" in light of live testimony.

Rather, as the circuit court correctly determined, "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." (AR 4862; Memorandum Decision at pg. 34.) "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." (*Id.*)[2] Moreover, the circuit court recognized that the Department's 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." (*Id.*) Because the Department's findings on the odd-lot issue were based on both documentary and live testimony of the Claimant himself, the circuit court reviewed them under the clearly erroneous standard. (*Id.*) The circuit court ultimately determined that "[t]he Department first concluded that Claimant failed to show that his mental issues were truly disabling, then focused on how they are centered around

[2] The circuit court noted that although Dr. Hata had recommended a different neuropsychologist, Dr. Cherry, for a further examination because of his concerns about Dr. Hastings' objectivity, Claimant refused to see Dr. Cherry. (AR 4866; Memorandum Decision at pg. 38.) The Department also entered a finding that Claimant was not evaluated by Dr. Cherry, as Claimant refused to cooperate with the examination. (FOF & 44.) The court pointed out that "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." (AR 4866; Memorandum Decision at pg. 38.) (citing *Streeter v. Canton School Dist.*, 2004 SD 30, & 19, 677 N.W.2d 221, 225).

Claimant's obsession with is workers' compensation litigation and efforts to seek redress for his grievances with Employer. This Court agrees." (AR 4869; Memorandum Decision at pg. 41.)

The circuit court noted that even though the Department's primary reason for denying odd-lot benefits was its finding of a lack of causation, the Department's determination that Claimant is not totally and permanently disabled is supported by the record. (*Id*.) The court concluded that Claimant is 57 years old, has post-secondary education and a strong work record, does not have any permanent physical restrictions, and has not shown he is incapable of being retrained or finding suitable employment in his community. (*Id*.) The court found that Claimant has "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." (AR 4870; Memorandum Decision at pg. 42.)

Further, as the circuit court noted, no medical provider restricted Claimant from working full-time. In *Bonnett v. Custer Lumber Corp.*, 528 N.W.2d 393 (S.D. 1995), this Court affirmed the Department of Labor's decision that the claimant was not in severe, debilitating pain because none of the claimant's medical providers indicated the pain prevented the employee from working. *Bonnett*, 528 N.W.2d at 396. *See also Wagaman*, 1998 SD 27, & 26, 576 N.W.2d at 242 (noting all the physicians, including the claimant's expert, opined claimant was employable). *See also Hendrix v. Graham Tire Co*., 520 N.W.2d 876 (S.D. 1994) where the claimant argued he was obviously unemployable, but

this Court disagreed as he was "never completely restricted from work by any physician." *Id.* at 881 (citing *Tiensvold v. Universal Transport, Inc.*, 464 N.W.2d 820, 823 (1991) (noting claimant's physician testified he should not return to truck driving, but never opined he was disabled from other occupations); *see also Kester v. Colonial Manor of Custer*, 1997 SD 127, & 33, 571 N.W.2d 376, 382 (finding that the claimant was not in continuous severe and debilitating pain as proved by three doctors opining she was capable of working) (partially abrogated on other grounds as stated in *Holscher v .Valley Queen Cheese Factory*, 2006 SD 35, 713 N.W.2d 555, 564).

The holding in *Tiensvold* is most instructive here. There, similar to this case, the claimant's treating physician opined that the claimant should not return to driving a truck, but never testified that the claimant was disabled from employment in other occupations. *Tiensvold*, 464 N.W.2d at 823. This Court also held that the claimant "failed to establish that he has tried and could not perform other work and has failed to establish that there was no suitable occupation available to him." *Id.* at 825. Similarly, here, although Dr. Hata may have opined that Claimant should not work in a hospital or medical setting, he would not prohibit Claimant from trying jobs identified by Jerry Gravatt. (AR 4864; Memorandum Decision at pg. 36; AR 1876-77 (Hata Depo. at 24-28)). Dr. Hata did not opine that Claimant was completely incapable of working. (AR 1879 (Hata Depo. at 35-36.)

Nor can Claimant legitimately claim he is unable to work because he has made no effort to search for work and has not tried to enter the work force or rehabilitate himself in any manner. *See Wagaman*, 1998 S.D. 27, & 37, 576 N.W.2d at 244. The Department and the circuit court's decisions should be affirmed.

Conclusion

The Department did not err in holding Claimant was not permanently and totally disabled. This Court must determine that a firm and definite mistake was made in the Department's factual findings. Each factual finding of the Department on the issue of permanent total disability is supported by the record. Rapid City Regional Hospital, Employer and Hartford Insurance, Insurer respectfully request the Court affirm the Department's and the circuit court's decisions.

Request for Oral Argument

Employer and Insurer respectfully request oral argument.

Dated this 22nd day of November, 2021.

WOODS, FULLER, SHULTZ & SMITH P.C.

By_____

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Certificate of Compliance

I certify this brief complies with the requirements regarding the length of briefs imposed by Rule 32(a)(7) o the Federal Rules of Appellate Procedure. This brief was prepared using Word 2010, Times New Roman (12 point), and contains 6,228 words excluding the table of contents, table of citations, jurisdictional statement, statement of legal issues, and certificates of counsel. I have relied on the word count of the word-processing program to prepare this certificate.

Dated this 22nd day of November, 2021.

WOODS, FULLER, SHULTZ & SMITH P.C.

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Certificate of Service

I hereby certify that on the 22nd day of November, 2021, I sent via email a true and correct copy of the foregoing Appellees' Brief to the following:

Michael J. Simpson
Julius & Simpson, L.L.P.
1600 Mountain View Road, Suite 110
Rapid City, SD 57709
Attorney for Appellant

And the original and two copies of the Appellees' Brief were also mailed by first-class mail, postage prepaid on November 22, 2021, to:

Ms. Shirley A. Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070

_____
Jennifer L. Wosje

Appendix

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

WILLIAM R. BAKER,

Claimant,

v.

RAPID CITY REGIONAL HOSPITAL,

Employer,

and

HARTFORD INSURANCE,

Insurer.

HF No. 55, 2015/16

DECISION

This matter is before the Department pursuant to two petitions for workers' compensation benefits. A hearing was held October 2, 2017 to address both petitions. William R. Baker (Claimant) was represented by Al Scovel, Attorney at Law; Regional Hospital (Employer) and Hartford Insurance (Insurer) were represented by Comet Haraldson and Jennifer VanAnne, Woods, Fuller, Shultz and Smith, P.C. Claimant asserts he is entitled to permanent total disability benefits.

Facts:

1. On November 7, 2013, Claimant was struck by a patient while performing his duties for Employer.
2. The same day, Claimant went to Employer's emergency room. He said a patient struck him in the face, and his left jaw hurt. He did not lose consciousness, and had no bruising, lacerations, or signs of trauma. A CT scan was negative. A

Glasgow Coma Scale test designed to identify brain injury was done, and Claimant scored the maximum 15 points, meaning no deficits in eye movement, speech/verbal skills or motor skills could be detected.

3. Claimant returned to the emergency department two days later, saying he had lost his prescription for Naprosyn and needed another.
4. Claimant returned to full duty after a few days off, and worked until December 11, 2014 with no problems.
5. Claimant did not treat with anyone for his 2013 injury after his first emergency room visit.
6. On December 11, 2014, Claimant was struck on the right side of his face by a patient.
7. Claimant testified in his deposition that the patient struck him with the backside of his left hand. At the hearing, Claimant testified the patient hit him with his casted arm in the "right parietal" area (on top of the head.)
8. Claimant's supervisor, Tristina Weekley, testified by way of affidavit that Claimant reported having been struck in the cheek.
9. Claimant went to the emergency room early on December 12, 2014. His Glasgow Coma score was again 15. A CT scan was negative. He did not lose consciousness.
10. Claimant saw Dr. Carson at Rapid City Regional Hospital on December 23, 2014. He reported lightheadedness, weakness, thirst, nausea, and "feeling shaky." He was diagnosed with a concussion but reported to work the next day.

11. Claimant underwent a neuropsychological evaluation on December 26, 2014 with Teresa Hastings, Ph.D. at Regional Rehab Institute. Dr. Hastings concluded Claimant was on the "severe end of a mild concussion," based on such things as short term memory problems, inability to keep attention, reduced "processing speed," referring to an impaired ability to process new information, and dizziness. She found Claimant to be severely anxious, mildly depressed, and recommended he speak with his physicians about medications for that.
12. On December 30, 2014, Claimant saw Dr. Ott at Rapid City Regional Hospital for a follow up. He had a persistent headache with dizziness and nausea, and complained of both vertigo and short term memory problems. Claimant did not exhibit slurred speech.
13. In January 2015, Claimant saw Dr. Daniel Berens for care. Claimant reported headaches, nausea, and blurred vision, and Dr. Berens noted slurred speech.
14. In January 2015, Dr. Berens referred Claimant to Dr. Minton, an ophthalmologist, primarily because Claimant experienced "convergence," where the eyes move toward each other. By that time, however, Claimant had undergone a physical therapy regimen which successfully addressed the problem. Claimant added that bright light was significantly irritating, which Dr. Minton classified as photophobia. Dr. Minton also diagnosed Claimant as having a concussion.
15. On February 3, 2015, Dr. Berens noted Claimant's post concussive symptoms had improved, and he was working on modified duty.

16. Claimant began seeing Dr. Steven Hata, a neurologist, on February 20, 2015. Claimant reported he was injured in 2014 by being "punched" on the right side of his head and "immediately developed a severe headache" which went away after a couple of days. He diagnosed postconcussion syndrome (PCS), vertigo, mild cognitive disorder, and hypersomnia with sleep apnea. He recommended a second neuropsychological examination be done a minimum of three to four months later.

17. On March 30, 2015 and April 17, 2015, Claimant saw Dr. Patrick Blair, DO, a general practitioner, on referral from Dr. Berens. Dr. Blair noted anxiety "secondary to recent head injury or psychological effect surrounding recent trauma and environment. This is difficult to separate." He took Claimant off work for two weeks at the March visit. In April, he observed Claimant's continued struggle with anxiety, noting "all of these symptoms are related to his work and ... seem to have more of a psychological component than a physical one." He added his opinion that "the symptoms he is having in large part meet the spectrum for PTSD." He discussed removing Claimant from his hospital work more permanently as it was contributing to "fears, anxiety, problems with concentration, and the physical symptoms associated with those."

18. Dr. Hastings conducted a second neuropsychological examination on April 14, 2015. She concluded Claimant suffered from developing anxiety disorder due to PCS, posttraumatic stress disorder (PTSD), and adjustment disorder with mixed anxiety and developing depression. She felt he had made minor neurocognitive and physical symptom improvements.

19. On April 23, 2015, Claimant saw Dr. Hata again. Claimant reported "a great deal of anxiety" over his work in the psychiatric ward. He claimed to have occasional headaches and some dizziness, and was very anxious about his work at the psychiatric ward, as he was afraid of being attacked again. Dr. Hata recommended he no longer work in the ward "because of anxiety and posttraumatic stress disorder after being punched twice by unruly clients." He started Claimant on various medications, including Paxil (paroxetine) for anxiety and trazadone for his depression.

20. Dr. Hastings referred Claimant to Dr. Harry Hamlyn, psychiatrist, for counseling. Dr. Hamlyn met with Claimant on May 20, 2015, and agreed that Claimant likely had PTSD, PCS, and depression. He continued the paroxetine, and substituted Ativan (lorazepam) for the trazadone in connection with the depression, as the trazadone was "not helpful."

21. Claimant reported significant anxiety at the May 20 visit, saying he had been borderline suicidal, though that had passed, had low energy, slept a lot, had dizziness and vertigo, and "some difficulty trusting staff through Workman's Compensation."

22. Claimant saw Dr. Hamlyn several times over the following months. Dr. Hamlyn changed his medications a little, adding clonazepam (benzodiazepine) briefly to address Claimant's panic attacks but concluding that was not helpful, then putting him back on at the next visit with a higher dosage. On July 14, 2015, Dr. Hamlyn concluded Claimant should be taken off work completely for six months "due to" PTSD, PCS, and depression.

23. Dr. Hamlyn observed that Claimant's mental condition worsened over the ensuing months. By August 10, 2015, his recent and/or remote memory was "abnormal," his behavior agitated, though his thought processes were logical, he was not delusional, and his appearance (grooming, dress, weight, etc.) did not prompt concerns.

24. On October 22, 2015, Dr. Hamlyn released Claimant from work restrictions, though he felt that "it would be beneficial for him to get involved with a different type of work," and he was incapable of work at Rapid City Regional Hospital or any healthcare facility. Dr. Hamlyn was hopeful alternative work, coordinated by Jerry Gravatt (Gravatt), a vocational consultant working on behalf of Insurer, would help Claimant's condition. By November 5, 2015, however, Dr. Hamlyn sent a follow up letter taking Claimant off all work due to "severe symptoms of anxiety and panic," and "significant symptoms of depression."

25. Dr. Hamlyn saw Claimant for the last time on July 8, 2016. He continued to believe Claimant had PTSD and depression, but never proffered an opinion one way or the other on the cause. He did not release Claimant to any work, his last statement on that (in April 2016) being Claimant was unable to work any kind of job.

26. Claimant returned to work a few days after the 2014 incident and continued working until June 2015. He has not worked anywhere since, nor has he sought work.

27. Claimant drove by himself to Oregon and back over a fifteen day period in the fall of 2015, and made trips alone to North Dakota, Montana, and Sioux Falls after that.

28. Claimant owned an incorporated business for several years called Spirit of Success, Inc., which produced various items such as lanyards and blankets carrying the

company logo and incorporated historical photographs in custom projects. There is no indication the company made money.

29. Beginning in 2015, Claimant filed dozens of pro se lawsuits and formal complaints against many people and entities. Some of the documents involved were more than 70 pages long, and many of them required him to type steadily for hours. These pleadings showed a knowledge of pleading requirements and procedures, but often descended into irrational, incoherent rambling, apparently reflecting Claimant's fear, hate, and vengefulness.

30. The various physicians and experts involved in Claimant's case referred to various things which could have a bearing on the work-connectedness of his mental conditions. Claimant suffered a concussion with brief loss of consciousness at age eight. While he described his childhood as "idyllic," he later conceded he had experienced sexual abuse on at least one occasion, his father was abusive, and his parents divorced when he was still at home. He had problems with alcoholism and illegal drug use well into adulthood. He saw Bonnie Ringgenberg, a social worker, for sexual identity issues from 1985-1990. He was treated psychiatrically by Dr. Charles Lord and Dr. Donald Burnap for medication management in the mid 1990's. He saw Joseph Tolson, a social worker, from 2002-2004 for adjustment disorder issues; Tolson also referred in one report to Claimant suffering from borderline personality disorder. None of the records from these various providers are available.

31. Dr. Thomas Gratzer, a psychiatrist, performed an independent psychiatric evaluation of Claimant at Employer and Insurer's request on June 27, 2015, issuing a report on July 16, 2015. As additional information became available, he issued

follow up reports on October 7, 2015, January 21, 2016, June 27, 2016, September 28, 2016, May 11, 2017, and June 13, 2017.

32. Claimant participated in two Minnesota Multiphasic Personality Inventories (MMPI) since his injury: with Dr. Marvin Logel, Ph.D. on June 27, 2015, referred by Dr. Gratzer, declared invalid "due to an excessive number of infrequent responses," and with Dr. Dewey Ertz, Ed.D., referred by Dr. Manlove, in January 2016, also declared invalid. Dr. Ertz specifically noted "No concerns regarding under-reporting his symptoms were present. William displayed significant over-reporting of psychological symptoms, or inconsistently responded, by endorsing an excessive number of responses infrequently endorsed by individuals who present genuine severe psychological difficulties. He further over-reported, or inconsistently responded, by endorsing an excessive number of somatic symptoms rarely described by individuals with genuine medical concerns." Dr. Ertz had the opportunity to review Dr. Logel's data and found Claimant's responses "elevated the same validity areas."

33. Dr. Ertz also performed a Trauma Symptom Inventory (TSI) on January 27, 2016, which he declared valid. This testing suggested Claimant was "likely to present symptoms and associated features of posttraumatic stress disorder," experiences anxiety, excessive dissociation, chronic somatic reactions, both physical and psychological. Dr. Ertz believed that the inconsistencies in the MMPI testing might therefore be explained because of rapid changes in his mental status.

34. Dr. Gratzer made the following opinions and conclusions in his reports:

a. He diagnosed PTSD in remission, anxiety disorder, depressive disorder, and history of alcohol abuse.

b. These diagnoses all predated Claimant's 2013 or 2014 incidents, but he developed worsening anxiety and depressive symptoms from the physical stresses of the 2014 incident.

c. Claimant's medications were improving those conditions.

d. Claimant's 2014 injury did not remain a major contributing cause for his current psychiatric status. Dr. Gratzer conceded Claimant developed anxiety related to PCS, and a recurrence of PTSD from the 2014 injury, but believed those conditions were in remission as of July 27, 2015.

e. Claimant's psychiatric symptomatology was complex, as Claimant had had anxiety and depression requiring prolonged treatment in the past.

f. As of July 27, 2015, Claimant was not disabled from working due to his psychiatric condition, whether a product of his 2014 incident or not, nor did Claimant need psychiatric restrictions at work.

g. As of July 27, 2015, treatment should continue under Dr. Hamlyn for a year.

h. No permanent disability or impairment was attributable to the 2014 injury.

i. In his June 27, 2016 report, he added that Claimant did not develop psychiatric symptoms in 2013, as there was no evidence or documentation of such symptoms at the time.

j. He did not believe Claimant experienced true memory loss from the 2013 or 2014 incidents.

k. Claimant's Oregon trip, his new emotional relationship, Dr. Hastings' observations, Claimant's long, detailed, "highly articulate" letters, and his video deposition show he has no objective signs of mental injury, or impairment in his current abilities, to support his subjective complaints.

l. Reviewing Dr. Hastings' reports, he notes her mental status examinations were "unremarkable" – his mood was euthymic (non-depressed, reasonably positive), intact attention and concentration, normal speech and eye contact, the ability to sustainably concentrate and focus, problem solve, make decisions, and engage in executive functioning.

m. Claimant's presentation shows evidence of secondary gain – a preoccupation with medico-legal issues. His failure to apply for any work since June 2015 is consistent with that opinion.

n. Claimant could have a borderline personality disorder, manifested in intense, difficult to control anger, paranoia, dissociation, and unstable and intense interpersonal relationships.

35. Dr. Hata was deposed on December 29, 2016. In the deposition, he said:

a. He could not state whether Claimant suffered a physical injury as a result of the 2013 incident;

b. Claimant did not develop PCS in that incident – PCS emerged from the second incident in 2014;

c. Claimant had been released to work for Employer as a hand wash monitor. That position would be appropriate for him;

d. Claimant needed intense medical care because he suffers from obsessive-compulsive disorder and paranoia;

e. Given his paranoia, Claimant could try jobs that are physically undemanding and involve little interaction with people;

f. PTSD is a psychiatric, not neurologic condition;

g. Claimant's main problem at this point is psychiatric, not physical; his obsessive-compulsive disorder and paranoia are "consuming his life," manifesting themselves in the dozens of lawsuits Claimant has filed and the degree to which he dwells on them;

h. He could not say yes or no whether Claimant's injuries of 2013 or 2014 were a major contributing cause for Claimant's psychological/psychiatric condition (he would defer to a psychiatrist or neuropsychologist on that.)

i. He was reluctant to say so, but believed Dr. Hastings was motivated in part by subjective sympathy toward Claimant – this prompted him to refer Claimant for neuropsychiatric evaluation by Dr. Cherry.

36. Claimant was not evaluated by Dr. Cherry, as Claimant refused to cooperate with the examination.

37. Dr. Stephen Manlove, a psychiatrist, performed a "forensic psychiatric evaluation" of Claimant requested by Claimant's attorney. Dr. Manlove met with him on four occasions from October 2015 to January 2016. The report was completed July 13, 2016. He reached the following conclusions:

a. Claimant had PTSD with delayed expression and alcohol use disorder, moderate, in sustained remission.

b. Claimant was not malingering.

c. Claimant's two incidents caused him to be 22 % permanently disabled, a product of work-related PCS and PTSD.

d. There was "clear and convincing evidence" that the November 2013 and December 2014 incidents were, and remain, a major contributing cause of Claimant's mental injuries.

38. Dr. Manlove offered the following as "objective proof" of his opinions:

a. Psychological testing done by Dr. Ertz,

b. Observations of his treating physicians: Dr. Hamlyn and Dr. Hata, and his treating psychologist: Dr. Hastings,

c. Letters and emails written by Mr. Baker since his injuries,

d. Claimant's videotaped deposition,

e. The mental status exam Dr. Manlove performed, and

f. Claimant's work record.

39. Dr. Manlove did an updated mental status examination on July 6, 2017 and did not change any of these opinions. He commented on Dr. Gratzer's report, disagreeing that Claimant's not seeking mental health care in 2013 confirmed Claimant did not suffer mental health problems stemming from that incident; agreeing with Dr. Gratzer that paranoia is not a PTSD symptom, but asserting that hypervigilance can be, and Claimant's hypervigilance has evolved into paranoia. He agreed that Claimant is unemployable.

40. Dr. Manlove did not agree with the diagnosis of borderline personality disorder, saying, "The DSM V (Diagnostic and Statistical Manual of Mental Disorders, Fifth

Edition) criteria for Borderline Personality Disorder are as follows: A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of contexts ... ". He proceeded to say Claimant only exhibited one of the nine indications of such a pattern.

41. Dr. Gratzer reviewed Dr. Manlove's report. He placed a greater weight on the psychiatric factors preexisting 2013 and 2014 than Dr. Manlove; for example, Dr. Gratzer found evidence of irritability and anger outbursts in Claimant's medical history before 2013 (leading Tolson to suggest Claimant might have borderline personality disorder.)

42. Additional facts will be discussed as necessary.

Discussion:

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 N.W.2d 363, 367. His burden is higher when claiming a compensable mental injury. An injury does not include a mental injury arising solely from emotional, mental, or nonphysical stress or stimuli, and is only compensable 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). It is enough, however, if a physical incident constitutes "physical accident or trauma" that is clearly connected to a mental injury. *Everingim v Good Samaritan Center,* 1996 SD 104, ¶ 34, 552 N.W.2d 837, 843.

Even if a work-related injury is undisputed, the claimant must establish that the injury caused the current condition. "The evidence necessary to support an award must not be speculative, but rather must be precise and well supported. Causation must be established to a reasonable degree of medical probability, not just possibility. The testimony of medical professionals is crucial in establishing that a claimant's injury is causally related to the injury complained of because the field is one in which laypersons ordinarily are unqualified to express an opinion." *Martz v Hills Materials,* 2014 SD 83, ¶ 23 857 N.W.2d 413, 419 (additional citations omitted.) Further, "the trier of fact is free to accept all of, part of, or none of, an expert's opinion," *Johnson v Albertson's,* 2000 SD 47, ¶ 26, 610 N.W.2d 449, 455, and "the value of the opinion of an expert witness is no better than the facts upon which they are based." *Martz,* 2014 SD 83, ¶ 31, 857 N.W.2d 413, 421 (citations omitted.)

Claimant was struck by patients at work in 2013 and 2014. The first issue to address is whether these incidents caused "physical trauma." In *Everingim,* Claimant was a victim of sexual touching when a male patient grabbed her between the legs. *Everingim v Good Samaritan Center,* 1996 SD 104, ¶ 15, 552 N.W.2d 837, 840. This touching caused her to experience panic attacks and nightmares which caused her to become fearful of going to work. *Everingim v Good Samaritan Center,* 1996 SD 104, ¶ 21, 552 N.W.2d 837, 840. Dr. Gratzer, examiner for Employer and Insurer, thought Claimant developed anxiety related to PCS, and a recurrence of PTSD from the 2014 injury, though he believed those conditions were in remission as of July 27, 2015. It is therefore concluded the Claimant suffered work-related physical trauma.

It is clear that Claimant suffers from mental conditions. All the physicians in this case have agreed Claimant suffered from PCS, PTSD, depression, and anxiety after the 2014 trauma. It is acknowledged that Dr. Gratzer believes these conditions are in remission as of July 2015.

The next step is to consider whether the 2013 or 2014 traumas caused this mental injury and continue to do so. The standards for causation on this point have changed since *Everingim*, as it must now be shown that a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. SDCL § 62-1-1(7).

"A cause which cannot be exceeded is a major contributing cause." *Orth v Stoebner & Permann Construction, Inc.*, 2006 SD 99, ¶ 42, 724 N.W. 2d 586, 596. The additional requirement in the case of the physical causation of mental injuries is "clear and convincing evidence," which means "more than a mere preponderance but not beyond a reasonable doubt ... evidence that is so clear, direct, weighty, and convincing so as to allow either a judge or jury to come to a clear conviction, without hesitancy, of the precise facts in issue." *Cromwell v Hosbrook*, 81 SD 324, 134 N.W.2d 777, 780 (1965). Here, the evidence is mixed. Dr. Hata, who was one of Claimant's treating physicians, said he could not say whether Claimant's injuries of 2013 or 2014 were, or remain, a major contributing cause for Claimant's psychological/psychiatric condition. He deferred to the neuropsychologists and psychiatrists for expertise on the point. Dr. Hastings, a neuropsychologist, has offered her opinions on causation, but they are rejected as calling for a medical opinion which she is unqualified to provide. *E.g., John v Im,* 559 S.E.2d 694, 697 (Va. 2002). Dr. Hamlyn and Dr. Manlove linked Claimant's PTSD and

anxiety to the patient attacks, and Dr. Manlove said there was clear and convincing evidence of the connection. Dr. Manlove said the connection to the original injury remains, and these conditions are ongoing, not in remission as Dr. Gratzer believes. While Dr. Gratzer acknowledges Claimant has experienced such problems, he believes they preexisted the attacks.

Dr. Hata believes Claimant is obsessive-compulsive and paranoid, and these feelings are directed at Rapid City Regional Hospital and those Claimant believes are helping them. Dr. Hata does not link these conditions, or any mental conditions Claimant experiences, to Claimant's 2013 or 2014 physical traumas, as he considers such opinions outside his expertise. That said, he sees these behaviors as "consuming" Claimant's life – so much so that he thinks there would be therapeutic value in Claimant simply abandoning the various legal cases he has started. Put another way, even if Claimant experienced the mental conditions he claims arose from his trauma, those conditions – PTSD, PCS, anxiety, depression – are significantly less important sources for his dysfunctional behavior than his impulses for vengeance, or his hypervigilant/paranoid fear of working around other people, and these latter conditions were not caused by physical trauma.

Physical trauma resulting from Claimant's 2013 and 2014 incidents was not proven by clear and convincing evidence to have been a major contributing cause for the mental conditions his experts believe constitute mental injury.

The standards for permanent total disability benefits are well-established:

> "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." SDCL 62-4-53. The burden is on the employee "to make a prima facie showing of permanent total disability.

> 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. 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.
>
> 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.
>
> *Baier v Dean Kurtz Construction, Inc.*, 2009 SD 7, ¶ 25, 761 N.W.2d 601, 608.

Claimant has not asserted he is in continuous, severe and debilitating pain rendering him obviously unemployable. He has not attempted to find work with employers besides Employer, and has not actually worked for Employer since June, 2015. If he is to establish permanent total disability, he must therefore prove he is "obviously unemployable" due to his age, education, training, and any mental conditions for which his 2013 and 2014 physical traumas were a major contributing cause.

Claimant is 55. He worked for Employer in various capacities, the last of which were psychiatric technician, then handwash monitor, from 1981 to 2015. He attended post-secondary school in the 1980's but did not get a degree. As to his condition, he starts by pointing to the disability determination by the Social Security Administration, then his physicians' opinions, and his vocational expert's report as proof of his obvious unemployability.

Social Security Administration determinations are persuasive, but not controlling authority on the question of disability. *See Vilhauer v Dixie Bake Shop*, 453 N.W.2d 842, 846 (S.D. 1990) ("The new evidence also included a new determination by the Social

Security Administration concluding that Vilhauer was totally disabled, although we recognize that such a determination is not binding on this Court.")

Dr. Hata's opinions shed the most light on the effect Claimant's physical traumas and resulting mental conditions have on his employability. He concluded Claimant's biggest problems are his anger, desire for vengeance, and obsessiveness, none of which were caused by his traumas. His PTSD is a psychological condition, not attributable to a physical cause. He thinks Claimant could have continued his work as a handwash monitor, a regularly available position that addresses Claimant's biggest employment issue, his needs to keep his contact with co-workers structured and limited, and to avoid direct patient care. He has driven alone halfway across the country, taken the time, expense and mental energy to write volumes of things attacking those he sees as the source of his troubles, and managed to work for months after his 2014 incident despite feeling intense paranoia, anxiety, depression, and stress.

Claimant's vocational expert, Jim Carroll, has concluded Claimant is unemployable and incapable of being retrained. Those opinions, however, were based on the observation that Claimant's doctors opined he cannot work, and this inability to work was driven by PTSD, PCS, anxiety and depression produced by his physical traumas. Dr. Hata, who saw him the longest, said he could work, and Dr. Gratzer thought he could work. Drs. Hamlyn and Manlove said he could not work, but they based their opinions on the foundation that Claimant suffered from PTSD caused by Claimant's physical traumas. He has mental issues and conditions, but it is not clear they are truly disabling, and even if it is assumed they were, the greatest causes for his 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. Carroll's opinion depended in large part on the assumptions that Claimant's PTSD was work-related and a major contributing cause for his permanent disability; as the Department has concluded the PTSD was not caused by physical trauma, and even if it was not a major contributing cause for him not currently working, Mr. Carroll's opinions are rejected. It is concluded that Clamant is not permanently and totally disabled as a result of those traumas. His petition will therefore be dismissed.

Counsel for Employer and Insurer is directed to prepare Findings of Fact, Conclusions of Law and an Order consistent with this ruling, along with any objections to the same, for my signature within twenty (20) days of receipt of my Decision. Counsel for Claimant shall have twenty (20) days from the receipt of Employer and Insurer's submissions to submit proposed Findings, Conclusions, Order, and Objections.

Dated this 2nd day of May, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

James E. Marsh

James E. Marsh
Staff Attorney

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

WILLIAM R. BAKER,

Claimant,

v.

RAPID CITY REGIONAL HOSPITAL,

Employer,

and

HARTFORD INSURANCE,

Insurer.

HF No. 55, 2015/16

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came before the South Dakota Department of Labor and Regulation, Division of Labor and Management, James E. Marsh, Staff Attorney, pursuant to SDCL § 62-7-12 and Chapter 47:03:01 of the Administrative Rules of South Dakota. A hearing was held October 2, 2017 to address both petitions. William R. Baker (Claimant) was represented by Al Scovel, Attorney at Law, and Michael J. Simpson, Julius & Simpson, LLP; Regional Hospital (Employer) and Hartford Insurance (Insurer) were represented by Comet Haraldson and Jennifer VanAnne, Woods, Fuller, Shultz & Smith, P.C. The Department has considered this matter based on the evidence submitted at the hearing and the parties' post-hearing briefs, and enters the following:

FINDINGS OF FACT

1. On November 7, 2013, Claimant was struck by a patient while performing his duties for Employer.

2. The same day, Claimant went to Employer's emergency room. He said a patient struck him in the face, and his left jaw hurt. He did not lose consciousness, and had no bruising, lacerations, or signs of trauma. A CT scan was negative. A Glasgow Coma Scale test designed to identify brain injury was done, and Claimant scored the maximum 15 points, meaning no deficits in eye movement, speech/verbal skills or motor skills could be detected.

3. Claimant returned to the emergency department two days later, saying he had lost his prescription for Naprosyn and needed another. He saw Dr. Tibbles, who diagnosed: (1) subacute left face and head contusions; (2) acute assault; (3) persistent face pain; (4) work related injury; (5) acute or chronic tenderness, possible minor concussion. Dr. Tibbles ordered two weeks off work and gave him a prescription of Percocet. Claimant only took a few pills because they made him tired.

4. Claimant returned to full duty after a few days off, and worked until December 11, 2014 with no problems.

5. Claimant did not treat with anyone for his 2013 injury after his first emergency room visit.

6. On December 11, 2014, Claimant was struck on the right side of his face by a patient.

7. Claimant testified in his deposition that the patient struck him with the backside of his left hand. At the hearing, Claimant testified the patient hit him with his casted arm in the "right parietal" area (on top of the head.)

8. Claimant's supervisor, Tristina Weekley, testified by way of affidavit that Claimant reported having been struck in the cheek.

9. This event did not stop Claimant from doing his work; he fed the patient until the patient's dinner was gone.

10. Claimant went to the emergency room early on December 12, 2014. His Glasgow Coma score was again 15. A CT scan was negative. He did not lose consciousness.

11. Claimant sought no additional treatment until he saw Dr. Carson Phillips at Rapid City Regional Hospital on December 23, 2014. He reported lightheadedness, weakness, thirst, nausea, and "feeling shaky." He was diagnosed with a concussion but reported to work the next day.

12. Claimant underwent a neuropsychological evaluation on December 26, 2014 with Teresa Hastings, Ph.D. at Regional Rehab Institute. Dr. Hastings concluded Claimant was on the "severe end of a mild concussion," based on such things as short term memory problems, inability to keep attention, reduced "processing speed," referring to an impaired ability to process new information, and dizziness. She found Claimant to be severely anxious, mildly depressed, and recommended he speak with his physicians about medications for that.

13. On December 30, 2014, Claimant saw Dr. Ott at Rapid City Regional Hospital for a follow up. He had a persistent headache with dizziness and nausea, and complained of both vertigo and short-term memory problems. Claimant did not exhibit slurred speech.

14. In January 2015, Claimant saw Dr. Daniel Berens for care. Claimant reported headaches, nausea, and blurred vision, and Dr. Berens noted slurred speech.

15. In January 2015, Dr. Berens referred Claimant to Dr. Minton, an ophthalmologist, primarily because Claimant experienced "convergence," where the eyes move toward each other. By that time, however, Claimant had undergone a physical therapy regimen which successfully addressed the problem. Claimant added that bright light was significantly irritating, which Dr. Minton classified as photophobia. Dr. Minton also diagnosed Claimant as having a concussion.

16. On February 3, 2015, Dr. Berens noted Claimant's post concussive symptoms had improved, and he was working on modified duty.

17. Claimant began seeing Dr. Steven Hata, a neurologist, on February 20, 2015. Claimant reported he was injured in 2014 by being "punched" on the right side of his head and "immediately developed a severe headache" which went away after a couple of days. He diagnosed postconcussion syndrome (PCS), vertigo, mild cognitive disorder, and hypersomnia with sleep apnea. He recommended a second neuropsychological examination be done a minimum of three to four months later.

18. On March 30, 2015 and April 17, 2015, Claimant saw Dr. Patrick Blair, DO, a general practitioner, on referral from Dr. Berens. Dr. Blair noted anxiety "secondary to recent head injury or psychological effect surrounding recent trauma and environment. This is difficult to separate." He took Claimant off work for two weeks at the March visit. In April, he observed Claimant's continued

struggle with anxiety, noting "all of these symptoms are related to his work and ... seem to have more of a psychological component than a physical one." He added his opinion that "the symptoms he is having in large part meet the spectrum for PTSD." He discussed removing Claimant from his hospital work more permanently as it was contributing to "fears, anxiety, problems with concentration, and the physical symptoms associated with those."

19. Dr. Hastings conducted a second neuropsychological examination on April 14, 2015. She concluded Claimant suffered from developing anxiety disorder due to PCS, posttraumatic stress disorder (PTSD), and adjustment disorder with mixed anxiety and developing depression. She felt he had made minor neurocognitive and physical symptom improvements.

20. On April 23, 2015, Claimant saw Dr. Hata again. Claimant reported "a great deal of anxiety" over his work in the psychiatric ward. He claimed to have occasional headaches and some dizziness and was very anxious about his work at the psychiatric ward, as he was afraid of being attacked again. Dr. Hata recommended he no longer work in the ward "because of anxiety and posttraumatic stress disorder after being punched twice by unruly clients." He started Claimant on various medications, including Paxil (paroxetine) for anxiety and trazadone for his depression.

21. Dr. Hastings referred Claimant to Dr. Harry Hamlyn, psychiatrist, for counseling. Dr. Hamlyn met with Claimant on May 20, 2015, and agreed that Claimant likely had PTSD, PCS, and depression. He continued the paroxetine, and substituted

Ativan (lorazepam) for the trazadone in connection with the depression, as the trazadone was "not helpful."

22. Claimant reported significant anxiety at the May 20 visit, saying he had been borderline suicidal, though that had passed, had low energy, slept a lot, had dizziness and vertigo, and "some difficulty trusting staff through Workman's Compensation."

23. Claimant saw Dr. Hamlyn several times over the following months. Dr. Hamlyn changed his medications a little, adding clonazepam (benzodiazepine) briefly to address Claimant's panic attacks but concluding that was not helpful, then putting him back on at the next visit with a higher dosage. On July 14, 2015, Dr. Hamlyn concluded Claimant should be taken off work completely for six months "due to" PTSD, PCS, and depression.

24. Dr. Hamlyn observed that Claimant's mental condition worsened over the ensuing months. By August 10, 2015, his recent and/or remote memory was "abnormal," his behavior agitated, though his thought processes were logical, he was not delusional, and his appearance (grooming, dress, weight, etc.) did not prompt concerns.

25. On October 22, 2015, Dr. Hamlyn released Claimant from work restrictions, though he felt that "it would be beneficial for him to get involved with a different type of work," and he was incapable of work at Rapid City Regional Hospital or any healthcare facility. Dr. Hamlyn was hopeful alternative work, coordinated by Jerry Gravatt (Gravatt), a vocational consultant working on behalf of Insurer, would help Claimant's condition. By November 5, 2015, however, Dr. Hamlyn

sent a follow up letter taking Claimant off all work due to "severe symptoms of anxiety and panic," and "significant symptoms of depression."

26. Dr. Hamlyn saw Claimant for the last time on July 8, 2016. He continued to believe Claimant had PTSD and depression, but never proffered an opinion one way or the other on the cause. He did not release Claimant to any work, his last statement on that (in April 2016) being Claimant was unable to work any kind of job.

27. Claimant's date of birth is June 3, 1962; he is 56 as of the date these Findings of Fact and Conclusions of Law were entered.

28. Claimant completed a high school diploma at Rapid City Central; following high school, he attended Black Hills State University, National American University, South Dakota School of Mines and Technology, and Oglala College, never completing any post-secondary degree.

29. Except for several months in 1996, Claimant worked for Employer from 1981 to 2015, or for almost 34 years. For his first nine years, Claimant worked in the housekeeping department. From 1990 until 2015, he worked as a psychiatric aide/technician at Regional West Psychiatric Hospital.

30. Claimant returned to work a few days after the 2014 incident and continued working until June 2015. He has not worked anywhere since, nor has he sought work.

31. Claimant drove by himself to Oregon and back over a fifteen-day period in the fall of 2015, and made trips alone to North Dakota, Montana, and Sioux Falls after that.

32. Claimant owned an incorporated business for several years called Spirit of Success, Inc., which produced various items such as lanyards and blankets carrying the company logo and incorporated historical photographs in custom projects. There is no indication the company made money.

33. Beginning in 2015, Claimant filed dozens of pro se lawsuits and formal complaints against many people and entities. Some of the documents involved were more than 70 pages long, and many of them required him to type steadily for hours. These pleadings showed a knowledge of pleading requirements and procedures, but often descended into irrational, incoherent rambling, apparently reflecting Claimant's fear, hate, and vengefulness.

34. Claimant's workers' compensation benefit rate has been determined to be $500.89 a week.

35. The Social Security Administration found Claimant became disabled on June 16, 2015, and awarded benefits.

36. James Carroll completed a vocational assessment for Claimant, noting that Claimant had been diagnosed with PTD, PCS, Anxiety, and Depression. He concluded Claimant was unemployable and a job search would be futile. He noted his opinion was supported by various doctors including Dr. Hata, despite Dr. Hata's opinion that there was work Claimant could do, and Dr. Hata saw Claimant more than anyone, and Dr. Hamlyn's hope that alternative work would help Claimant's condition. (Dr. Hamlyn changed his position shortly afterward, concluding Claimant was suffering "severe symptoms of anxiety and panic," and "significant symptoms of depression.")

37. Jerry Gravatt, a vocational consultant working on behalf of Insurer, attempted to coordinate a return to work when Dr. Hamlyn cleared Claimant to work, but such efforts ended when Dr. Hamlyn withdrew his work release.

38. The various physicians and experts involved in Claimant's case referred to various things which could have a bearing on the work-connectedness of his mental conditions. Claimant suffered a concussion with brief loss of consciousness at age eight. While he described his childhood as "idyllic," he later conceded he had experienced sexual abuse on at least one occasion, his father was abusive, and his parents divorced when he was still at home. He had problems with alcoholism and illegal drug use well into adulthood. He saw Bonnie Ringgenberg, a social worker, for sexual identity issues from 1985-1990. He was treated psychiatrically by Dr. Charles Lord and Dr. Donald Burnap for medication management in the mid 1990's. He saw Joseph Tolson, a social worker, from 2002-2004 for adjustment disorder issues; Tolson also referred in one report to Claimant suffering from borderline personality disorder. None of the records from these various providers are available.

39. Dr. Thomas Gratzer, a psychiatrist, performed an independent psychiatric evaluation of Claimant at Employer and Insurer's request on June 27, 2015, issuing a report on July 16, 2015. As additional information became available, he issued follow up reports on October 7, 2015, January 21, 2016, June 27, 2016, September 28, 2016, May 11, 2017, and June 13, 2017.

40. Claimant participated in two Minnesota Multiphasic Personality Inventories (MMPI) since his injury: with Dr. Marvin Logel, Ph.D. on June 27, 2015, referred

by Dr. Gratzer, declared invalid "due to an excessive number of infrequent responses," and with Dr. Dewey Ertz, Ed.D., referred by Dr. Manlove, in January 2016, also declared invalid. Dr. Ertz specifically noted "No concerns regarding under-reporting his symptoms were present. William displayed significant over-reporting of psychological symptoms, or inconsistently responded, by endorsing an excessive number of responses infrequently endorsed by individuals who present genuine severe psychological difficulties. He further over-reported, or inconsistently responded, by endorsing an excessive number of somatic symptoms rarely described by individuals with genuine medical concerns." Dr. Ertz had the opportunity to review Dr. Logel's data and found Claimant's responses "elevated the same validity areas."

41. Dr. Ertz also performed a Trauma Symptom Inventory (TSI) on January 27, 2016, which he declared valid. This testing suggested Claimant was "likely to present symptoms and associated features of posttraumatic stress disorder," experiences anxiety, excessive dissociation, chronic somatic reactions, both physical and psychological. Dr. Ertz believed that the inconsistencies in the MMPI testing might therefore be explained because of rapid changes in his mental status.

42. Dr. Gratzer made the following opinions and conclusions in his reports:

    a. He diagnosed PTSD in remission, anxiety disorder, depressive disorder, and history of alcohol abuse.

    b. These diagnoses all predated Claimant's 2013 or 2014 incidents, but he developed worsening anxiety and depressive symptoms from the physical stresses of the 2014 incident.

c. Claimant's medications were improving those conditions.

d. Claimant's 2014 injury did not remain a major contributing cause for his current psychiatric status. Dr. Gratzer conceded Claimant developed anxiety related to PCS, and a recurrence of PTSD from the 2014 injury, but believed those conditions were in remission as of July 27, 2015.

e. Claimant's psychiatric symptomatology was complex, as Claimant had had anxiety and depression requiring prolonged treatment in the past (prior to Claimant's dates of injury.)

f. As of July 27, 2015, Claimant was not disabled from working due to his psychiatric condition, whether a product of his 2014 incident or not, nor did Claimant need psychiatric restrictions at work.

g. As of July 27, 2015, treatment should continue under Dr. Hamlyn for a year.

h. No permanent disability or impairment was attributable to the 2014 injury.

i. In his June 27, 2016 report, he added that Claimant did not develop psychiatric symptoms in 2013, as there was no evidence or documentation of such symptoms at the time.

j. He did not believe Claimant experienced true memory loss from the 2013 or 2014 incidents.

k. Claimant's Oregon trip, his new emotional relationship, Dr. Hastings' observations, Claimant's long, detailed, "highly articulate" letters, and his video deposition show he has no objective signs of mental injury, or impairment in his current abilities, to support his subjective complaints.

l. Reviewing Dr. Hastings' reports, he notes her mental status examinations were "unremarkable" – his mood was euthymic (non-depressed, reasonably positive), intact attention and concentration, normal speech and eye contact, the ability to sustainably concentrate and focus, problem solve, make decisions, and engage in executive functioning.

m. Claimant's presentation shows evidence of secondary gain – a preoccupation with medico-legal issues. His failure to apply for any work since June 2015 is consistent with that opinion.

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43. Dr. Hata was deposed on December 29, 2016. In the deposition, he said:

a. He could not state whether Claimant suffered a physical injury as a result of the 2013 incident;

b. Claimant did not develop PCS in that incident – PCS emerged from the second incident in 2014;

c. Claimant had been released to work for Employer as a hand wash monitor. That position would be appropriate for him;

d. Claimant needed intense medical care because he suffers from obsessive-compulsive disorder and paranoia;

e. Given his paranoia, Claimant could try jobs that are physically undemanding and involve little interaction with people;

f. PTSD is a psychiatric, not neurologic condition;

g. Claimant's main problem at this point is psychiatric, not physical; his obsessive-compulsive disorder and paranoia are "consuming his life," manifesting themselves in the dozens of lawsuits Claimant has filed and the degree to which he dwells on them;

h. He could not say yes or no whether Claimant's injuries of 2013 or 2014 were a major contributing cause for Claimant's psychological/psychiatric condition (he would defer to a psychiatrist or neuropsychologist on that.)

i. He was reluctant to say so, but believed Dr. Hastings was motivated in part by subjective sympathy toward Claimant – this prompted him to refer Claimant for neuropsychiatric evaluation by Dr. Cherry.

44. Claimant was not evaluated by Dr. Cherry, as Claimant refused to cooperate with the examination.

45. Dr. Stephen Manlove, a psychiatrist, performed a "forensic psychiatric evaluation" of Claimant requested by Claimant's attorney. Dr. Manlove met with him on four occasions from October 2015 to January 2016. The report was completed July 13, 2016. He reached the following conclusions:

a. Claimant had PTSD with delayed expression and alcohol use disorder, moderate, in sustained remission.

b. Claimant was not malingering.

c. Claimant's two incidents caused him to be 22 % permanently disabled, a product of work-related PCS and PTSD.

d. There was "clear and convincing evidence" that the November 2013 and December 2014 incidents were, and remain, a major contributing cause of Claimant's mental injuries.

46. Dr. Manlove offered the following as "objective proof" of his opinions:

a. Psychological testing done by Dr. Ertz,

b. Observations of his treating physicians, Dr. Hamlyn and Dr. Hata, and his treating psychologist Dr. Hastings,

c. Letters and emails written by Mr. Baker since his injuries,

d. Claimant's videotaped deposition,

e. The mental status exam Dr. Manlove performed, and

f. Claimant's work record.

47. Dr. Manlove did an updated mental status examination on July 6, 2017 and did not change any of these opinions. He commented on Dr. Gratzer's report, disagreeing that Claimant's not seeking mental health care in 2013 confirmed Claimant did not suffer mental health problems stemming from that incident; agreeing with Dr. Gratzer that paranoia is not a PTSD symptom, but asserting that hypervigilance can be, and Claimant's hypervigilance has evolved into paranoia. He agreed that Claimant is unemployable.

48. Dr. Manlove did not agree with the diagnosis of borderline personality disorder, saying, "The DSM V (Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition) criteria for Borderline Personality Disorder are as follows: A pervasive pattern of instability of interpersonal relationships, self-image, and affects, and marked impulsivity beginning by early adulthood and present in a variety of

contexts ... ". He proceeded to say Claimant only exhibited one of the nine indications of such a pattern.

49. Dr. Gratzer reviewed Dr. Manlove's report. He placed a greater weight on the psychiatric factors preexisting 2013 and 2014 than Dr. Manlove; for example, Dr. Gratzer found evidence of irritability and anger outbursts in Claimant's medical history before 2013 (leading Tolson to suggest Claimant might have borderline personality disorder.)

50. To the extent that any Findings of Fact are improperly designated as such, they should be considered Conclusions of Law, and vice versa.

Based on these Findings of Fact, the Department reaches the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the parties and the subject matter of this litigation.

2. Claimant has the burden of proving all facts essential to sustain an award of compensation.

3. Claimant's burden is higher when claiming a compensable mental injury. An injury does not include a mental injury arising solely from emotional, mental, or nonphysical stress or stimuli, and is only compensable 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.

4. It is enough, however, if a physical incident constitutes physical accident or trauma that is clearly connected to a mental injury.

5. Claimant suffered work-related physical trauma.

6. Claimant must further establish the injury caused his current condition. The evidence necessary to support an award must not be speculative, but rather must be precise and well supported. Causation must be established to a reasonable degree of medical probability, not just possibility. The testimony of medical professionals is crucial in establishing that a claimant's injury is causally related to the injury complained of because the field is one in which laypersons ordinarily are unqualified to express an opinion. Further, the trier of fact is free to accept all of, part of, or none of, an expert's opinion, and the value of the opinion of an expert witness is no better than the facts upon which they are based.

7. A cause which cannot be exceeded is a major contributing cause.

8. The additional requirement in the case of the physical causation of mental injuries is clear and convincing evidence, which means more than a mere preponderance but not beyond a reasonable doubt ... evidence that is so clear, direct, weighty, and convincing so as to allow either a judge or jury to come to a clear conviction, without hesitancy, of the precise facts in issue.

9. Dr. Hastings, a neuropsychologist, has offered her opinions on causation, but they are rejected as calling for a medical opinion which she is unqualified to provide.

10. Reviewing Dr. Hamlyn's, Dr. Manlove's, Dr. Hata's, and Dr. Gratzer's opinions on causation, they do not establish by clear and convincing evidence that Claimant's physical trauma caused his impulses for vengeance, his obsessive-compulsive

disorder; these conditions are the greatest contributors to his current mental condition.

11. Claimant has failed to prove by clear and convincing evidence that his work injuries of November 7, 2013 or December 11, 2014 are or remain a major contributing cause of a mental injury.

12. Claimant has failed to prove his 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.

13. 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. The burden is on Claimant to make a prima facie showing of permanent total disability. First, if Claimant is obviously unemployable, then the burden of production shifts to Employer and Insurer to show that some suitable employment is actually available in claimant's community for persons with claimant's limitations. 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. Second, if 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

Claimant to demonstrate the unavailability of suitable employment by showing that he has unsuccessfully made reasonable efforts to find work.

14. Claimant has not asserted he is in continuous, severe and debilitating pain rendering him obviously unemployable; he cannot, therefore, establish permanent total disability on that basis.

15. Claimant has not attempted to find work with employers besides Employer, and has not actually worked for Employer since June 2015; he has not therefore established he is permanently and totally disabled based on completion of a good faith but unsuccessful work search.

16. Claimant must prove he is "obviously unemployable" due to his age, education, training, and any mental conditions for which his 2013 and 2014 physical traumas were a major contributing cause.

17. Social Security Administration determinations are persuasive, but not controlling authority on the question of disability.

18. Claimant is not permanently and totally disabled as a result of his 2013 and 2014 physical traumas.

19. Claimant has challenged the constitutionality of SDCL § 62-1-1(7). Employer and Insurer has objected to the challenge; that objection is overruled, but the Department as an administrative agency nonetheless lacks the jurisdiction to consider a constitutional challenge to a law it administers. The proper course for such a challenge is for Claimant to exhaust his administrative remedies and raise the issue if necessary in Circuit Court.

20. Claimant's petition for hearing should be dismissed with prejudice.

21. Let an Order issue accordingly.

22. The Department's Decision of May 2, 2018 is incorporated by this reference.

Dated this 30th day of August, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

James E. Marsh

James E. Marsh
Staff Attorney

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

WILLIAM R. BAKER,

Claimant,

v.

RAPID CITY REGIONAL HOSPITAL,

Employer,

and

HARTFORD INSURANCE,

Insurer.

HF No. 55, 2015/16

ORDER

James E. Marsh, Staff Attorney acting as Administrative Law Judge, heard this matter, reviewed Claimant's and Employer and Insurer's submissions and arguments, and issued a Decision May 2, 2018, as well as Findings of Fact and Conclusions of Law on August 27, 2018. It is hereby ORDERED that:

1. Claimant has failed to prove by clear and convincing evidence that his work-related claims of November 7, 2013 and December 11, 2014 are and remain a major contributing cause of his current mental condition, including his claim for permanent total disability benefits and need for treatment related to his mental condition;
2. Claimant has failed to prove he is entitled to medical, psychiatric, or psychological treatment related to his mental problems, and therefore any and all medical, psychiatric or psychological expenses for the treatment of Claimant's mental conditions or mental problems are hereby denied;

3. Claimant's challenge to the constitutionality of SDCL 62-1-1(7) is denied for lack of departmental jurisdiction.
4. All Claimant's claims in this matter are dismissed with prejudice.
5. The parties will bear their own costs.

Dated this 30th day of August, 2018.

SOUTH DAKOTA DEPARTMENT OF LABOR & REGULATION

James E. Marsh

James E. Marsh
Staff Attorney

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:
>
> > (1) In violation of constitutional or statutory provisions;
> >
> > (2) In excess of the statutory authority of the agency;
> >
> > (3) Made upon unlawful procedure;
> >
> > (4) Affected by other error of law;
> >
> > (5) Clearly erroneous in light of the entire evidence in the record; or
> >
> > (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> 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

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[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.

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[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).

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[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

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.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

WILLIAM BAKER, Claimant/Appellee, v. RAPID CITY REGIONAL HOSPITAL and HARTFORD INSURANCE, Employer and Insurer/Appellants.	)	32CIV18-187 ORDER

WHEREAS, the Court having entered its Memorandum Decision on June 28, 2019, and having expressly incorporated the same herein, now, therefore, it shall be and hereby is

ORDERED, ADJUDGED, AND DECREED:

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 denying 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.

Pursuant to SDCL 1-26-32.1 and SDCL 15-6-52(a), the Court's Memorandum Decision shall act as the Court's findings of fact and conclusions of law as permitted by SDCL 1-26-36.

Dated this 28th day of June, 2019.

BY THE COURT:

Patricia DeVaney

Patricia J. DeVaney
Circuit Court Judge

ATTEST:

Clerk of Courts

(SEAL)

IN THE SUPREME COURT

IN THE

STATE OF SOUTH DAKOTA

WILLIAM BAKER, Appellant, vs. RAPID CITY REGIONAL HOSPITAL and HARTFORD INSURANCE, Appellees.	)	Appeal No. 29753

APPELLANT'S REPLY BRIEF

Appeal from the Sixth Circuit
Hughes County, South Dakota
The Honorable Christina L. Klinger and The Honorable Patricia DeVaney

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NOTICE OF APPEAL FILED AUGUST 25, 2021

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Cases

Appellant William Baker responds to Appellee Rapid City Regional Hospital's arguments as follows:

I. Baker's Argument

In his Opening Brief, Baker argued that the opinion of consulting psychiatrist Dr. Manlove that Baker was totally impaired in his ability to work due to "his anxiety, paranoia and thought disorder" should have been accepted by the Department of Labor and Circuit Court. (*See* Opening Brief at 23-29). Baker argues that the reasons given for rejecting Dr. Manlove's opinion were not sufficient, citing *Davidson v. Horton Industries*, 641 N.W.2d 138 (SD 2002) and *Foltz v. Warner Transportation*, 516 N.W.2d 338, 340 (SD 1994). In those cases, this Court reversed Department and Circuit Court decisions denying disability benefits when the expert testimony was compelling and the denial based on "matters of little consequence."

Dr. Manlove explained that the severity of Baker's paranoia and anxiety rendered him unemployable. ((Manlove July 26, 2017 report at 7). Dr. Manlove explained that paranoia, while not a symptom of PTSD, is an extreme form of hypervigilance, which *is* a classic symptom of PTSD. (*Id*.). Manlove further explained (quoting from the DSM-V) that "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 the evolution from hypervigilance to paranoia is not uncommon in PTSD. (*Id*.). Manlove believed that Baker's anxiety was so high that it resulted in a thought disorder (loose association) which makes it hard to problem solve in a rational manner. (*Id*.).

Dr. Manlove's opinion is consistent with the opinions of Baker's team of medical providers and their medical records, along with Baker's writings.

A. Dr. Hastings

Neuropsychologist Dr. Theresa Hastings saw Baker 41 times from December 26, 2014 to June 1, 2017. (Ex. 3). Her treatment notes show a worsening of Baker's PTSD and increasing paranoia during this time. For example, on February 16, 2016, Hastings noted Baker was "still fearful in social situations where there are young men around (reminds him of his two assaults). (Ex. 3 at 001047). On February 23, 2016, Hastings noted Baker had a "PTSD related fear" that he is afraid that if he gets sick enough to need the emergency room he has nowhere to go. He is afraid he might die at RCRH or related facilities." (*Id.* at 001049). On June 10, 2016, Hastings noted Baker's anxiety had increased over the course of the last several months. (Ex. 3 at 001061). On June 10, 2016, Hastings noted that Baker had had panic attacks at Walmart due to crowds, noise, and the unpredictability and uncontrollability of the situation. (*Id*. at 001063). She also reported that when Baker came into the clinic, he responded to seeing a boy standing off to the side with an "exaggerated startle response" which she believed was a "continued symptom of his PTSD about being jumped and assaulted." (*Id*.) Similarly, on September 2, 2016, Hastings noted that Baker still had panic attacks if walking through a group of men alone, due to his assaults at work. (*Id*. at 001072).

As the months went on, Baker's paranoia escalated. On March 23, 2017, Hastings called the police to conduct a welfare check because he was "not making sense when talking to me" and had visited his lawyer's office that day and "mentioned that he had a

gun." (*Id*. at 001086). Hastings noted that "his extremely agitated and paranoid behavior greatly concerned me." (*Id*.). On April 3, 2017, Hastings wrote that Baker was "presenting as more paranoid as time goes by." (*Id*. at 001089). She wrote "he does not deny that he might be paranoid but feels he has some reason to be. This is part of his PTSD process." (*Id*.). Hastings wrote "he spent most of the hour explaining the various connections between agencies, the coordinated effort by agencies to harass him or make him go away, and the lawsuits he has going or has planned." (*Id*.). Similarly, on April 21, 2017, Hastings discussed numerous letters Baker had been sending to her and Kari Scovel and to his lawyer and noted "each letter was difficult to follow his train of thought and there was always some kind of mention of civil action . . .." (*Id*. at 001093). In her mental status examination on that date, Hastings noted Baker's speech was somewhat pressured, his mood was anxious and sad, his affect was congruent with mood, he was more anxious and paranoid than normal, and he had "paranoid thoughts." (*Id*.).

B. Dr. Hamlyn

Dr. Manlove's opinions are also consistent with treating psychiatrist Dr. Hamlyn's opinions and treatment records. (Ex. 2). Hamlyn saw Baker seven times from May 20, 2015 to July 8, 2016. Dr. Hamlyn took Baker off work due to his PTSD, depressive disorder, and post-concussive syndrome on July 14, 2015, November 5, 2015, January of 2016, and July 9, 2016, due to his symptoms of depression, anxiety, and irritability. (Ex. 2, 001015, 001020, 001022). Hamlyn did not believe Baker was capable of doing "any kind of work." (*Id*.). Hamlyn prescribed increasing doses of Lorazepam and

Paroxetine during this period of time. (Ex. 2). His mental status examinations were often positive for anxious and depressed mood. (*Id*.).

C. Dr. Hata

Neurologist Dr. Hata's medical records and his deposition testimony are consistent with Dr. Manlove's opinions. Hata saw Baker six times from February 20, 2015 to December 23, 2016. (Ex. 1).

In July of 2016, Hata noted Baker was suffering from agoraphobia and believed he had "significant PTSD, since he wants to withdraw from activities and social interactions." (Ex. 1 at 001016). On December 23, 2016, Hata noted Baker "admitted to paranoia, fear for his life, fear for the lives of his family, and was obsessed with litigating his workers' compensation claim and expanding litigation to the federal level." (*Id*. at 001036). Hata noted Baker had had "a significant exacerbation of his PTSD following the work incidents of 2013 and 2014 manifested by paranoia and fear of being attacked physically." (*Id*.). Hata noted "the degree of paranoia and obsession that Baker displayed was worse than he had ever seen before." (*Id*.).

In Hata's December 29, 2016 deposition, he testified Baker was in need of "intensive psychiatric treatment" and was "psychiatrically impaired, markedly so, compared to previous visits." (Hata deposition at 35 and 52). Hata did state that he would "not prohibit" Baker from trying numerous jobs, although Hata stated "whether he succeeds or not is a different matter." (Hata at 26-27). Hata stressed that as a neurologist he was not qualified to make psychiatric diagnoses or opine on psychiatric matters and he would defer to a psychiatrist on those issues. (Hata at 39 and 40).

D. Baker's Writings

Baker's writings, marked as exhibits at the workers' compensation hearing (*see* Exs. 17-46, 50-56, 60-64, 117, 120 and 121) also provide support for Dr. Manlove's opinions regarding his inability to work due to his severe paranoia. Manlove described Baker's writings as "evidence that he was thought disordered and paranoid." (Ex. 4 at 001011). Manlove wrote that "in his writings, he over-interpreted a host of issues, not just related to his workers' compensation claim, in paranoid ways." (*Id.*). Manlove continued "he discussed issues such as being stalked, being harassed and being subjected to prejudice." (*Id.*). Manlove concluded "it was clear from his writings that he felt much of the world he had been engaged with throughout his adult life, particularly RCRH, was both actively and passively against him." (*Id.*). Baker quoted from several of his writings in his Opening Brief (*see* Opening Brief at 16-17); a review of these writings shows Baker's descent into paranoia from 2015 to 2017.

E. RCRH Didn't Meet Their Burden to Show the Existence of Non-Sporadic Employment for Baker

If Baker is totally impaired in his ability to adapt himself in the work place and totally impaired in his "ability to work" as Dr. Manlove believed, then he is entitled to workers' compensation disability benefits, as these restrictions are obviously inconsistent with any form of gainful employment. In addition, these restrictions would prove he is "obviously unemployable" and make his prima facie case for disability benefits, which then would need to be rebutted by RCRH.

This Court has consistently held that in order for an Employer/Insurer to meet their burden to show the existence of non-sporadic employment, they must inform

potential employeers of *all* of the Claimant's limitations. *Shepherd v. Moorman Mfg.*, 467 N.W.2d 916, 920 (SD 1991); *Eite v. Rapid City Area School Dist. 51-4*, 739 N.W.2d 264, 273 (SD 2007); *Kurtz v. SCI*, 576 N.W.2d 878, 885 (SD 1998); *Enger v. FMC*, 565 N.W.2d 79, 86 (SD 1997) and *Billman v. Clarke Machine, Inc.*, 956 N.W.2d 812, 825 (SD 2021). "An expert's listing of jobs that focuses on Claimant's capabilities to the exclusion of his limitations is insufficient as a matter of law. When prospective employers were not informed of the nature of the limitations they needed to accommodate, there was no basis for the expert's opinion in concluding that the employers were willing to make modifications to meet those limitations." *Eite*, 739 N.W.2d at 273. In this case, RCRH's vocational expert did not contact potential employers to inform them of *any* of Baker's limitations, including his severe difficulties in adaptation due to his anxiety, paranoia, and thought disorder.

II. RCRH's Argument

RCRH argues that while Baker is limited due to his PTSD symptoms, his disability is "very limited and specialized" because his PTSD pertains "mostly to scenarios regarding either this workers' compensation litigation, or to Claimant's former employer, RCRH, and any individuals associated with either." (RCRH's Brief at 14, citing Circuit Court Decision at 41). RCRH argues that Dr. Manlove recognized this, because he wrote in his report that "any impairment with his social functioning was specifically related to his previous relationships with co-workers at employer." (RCRH Brief at 16, citing Circuit Court Decision at 38). RCRH also cites to Dr. Hata's testimony that he would not prohibit him from trying jobs identified by RCRH's

vocational expert and was not "completely incapable of working," arguing that Hata's testimony is inconsistent with Manlove's opinions. (RCRH Brief at 15).

RCRH also argues that IME Dr. Gratzer's opinions about Baker's capabilities provide a valid reason for Dr. Manlove's opinions to be rejected. (RCRH Brief at 16). RCRH cites to Dr. Gratzer's stated reasons why he believed Baker was employable: "Claimant's lengthy road trip to Oregon, Claimant's new relationship, Dr. Hastings' observations of Claimant (unremarkable mental status exams including conduct and memory) along with Claimant's long detailed letters, show that Claimant's subjective complaints were not supported by objective evidence." (*Id*.). RCRH further argues that Gratzer's opinion that Baker's writings and actions "demonstrated the ability to engage in sustained concentration and focus, problem solving, decision making and other aspects of executive functioning" and provide a valid reason to reject Manlove's opinions. (*Id*.). Finally, Gratzer opined that there was evidence of "secondary gain" affecting Baker's presentation, given his preoccupation with medical-legal issues. (*Id*.).

Baker will address each of Insurer's arguments in the paragraphs below.

A. "Limited and Specialized Disability"

Regarding Baker's disability being "very limited and specialized", the treatment records and Dr. Manlove's opinions (described above and in Baker's Opening Brief) make clear that while much of Baker's paranoia and anxiety *is* related to the workers' compensation litigation and RCRH, it is not exclusively due to those stressors. Specifically, in Dr. Hastings' notes, she describes panic attacks and increased anxiety and paranoia when Baker is in crowds or is alone around males. This is not limited to

crowds or males somehow associated with RCRH or this litigation. In October of 2015 Dr. Hamlyn released Baker to work in non-healthcare jobs. However in November of 2015, Hamlyn changed his opinion and took Baker off all work due to his "severe symptoms of anxiety and panic." While RCRH argues that Dr. Manlove's restrictions in social functioning are "specifically related to previous relationships with co-workers at employer", this isn't accurate. In fact, Manlove wrote "Baker's previous relationships, (particularly with co-workers at RCRH) are severely strained." (Ex. 4 at 001012).

B. Dr. Hata's Testimony

Regarding Dr. Hata's testimony that certain jobs might be appropriate, Hata made clear in his deposition that he was not qualified to render opinions regarding Baker's mental health condition. (Hata at 39-40). While Hata testified in his deposition that Baker was "obsessive compulsive about litigation" and "paranoid" and that those two factors were "consuming his life", Hata labeled these conditions as psychiatric diagnoses and emphasized that he was not qualified as a psychiatrist and would thus defer to psychiatrist Dr. Manlove for psychiatric matters or to Dr. Hastings for neuropsychological matters. (Hata deposition at 35, 39, 61). Thus, because Hata deferred to qualified mental health professionals regarding Baker's psychiatric diagnoses (and restrictions), the fact that Hata would release Baker to try some limited jobs is not a valid reason to reject Dr. Manlove's opinions.

C. Trip to Oregon

Regarding Baker's "lengthy trip to Oregon", this trip was taken in November, 2015, before his paranoia and anxiety snowballed in 2016 and 2017. Thus, it is not very

relevant to Baker's work abilities in 2016 and 2017. In any event, it is not clear that the ability to take a trip at one's own pace is in any way comparable to dealing with the stresses of full time competitive employment, which is the issue here. Of course, Dr. Manlove was aware of Baker's trip and took it into account when giving his opinions on Baker's condition.

D. New Relationship

Regarding the "new relationship", it is true that in Dr. Hastings' notes she makes mention of Baker meeting a new friend in January of 2016, that the relationship was "serious" as of April, 2016 and "things were going well" at that time. (Ex. 3 at 001045 and 001055). However, there are no references after this to the relationship and there was no testimony at the hearing about this matter. As with taking a trip at one's own pace, the ability to have a relationship does not say much about the ability to maintain gainful employment. Again, as with the trip, Dr. Manlove was certainly aware of Baker's relationship as he had access to Hastings' records.

E. Dr. Hastings' Mental Status Examinations

Regarding the claim that Dr. Hastings' treatment notes have "unremarkable mental status examinations" and are therefore inconsistent with the significant PTSD symptoms and restrictions given by Dr. Manlove and the other treating providers, it is true that in many of her treatment notes the mental status exams *are* unremarkable. From the notes, it appears that Baker was comfortable with Hastings such that his behavior in the exam room was appropriate.

However, in 2017, when his paranoia was getting worse, the mental status

examinations have notations of paranoid thoughts, and anxious mood. (*See* Ex. 3 at 001093). Similarly, a review of Dr. Manlove and Dr. Hamlyn's treatment notes shows many abnormal findings in their mental status examinations during the three year period at issue. A review of the records shows that as time went on, all of the treatment providers agreed that Baker was suffering from severe psychological distress due to paranoia, hypervigilance, and anxiety caused by his PTSD. At his December 29, 2016 deposition, Dr. Hata also testified Baker needed "intensive psychiatric care." (Hata deposition at 35, 54). On April 4, 2017, Dr. Hastings also made this recommendation. (Ex. 3, 001089). In this context, Hastings' "normal" mental status examinations do not provide a valid reason to disregard Dr. Manlove's opinions.

F. Baker's Writings

RCRH's belief that Baker's writings show the ability to "engage in sustained concentration and focus, problem solving, decision making, and other aspects of executive functioning" does not correspond with the writings themselves. A sampling of these writings were quoted in Baker's Opening Brief, to give this Court a flavor of their disjointed, unorganized, paranoid, and scattered nature. As the years went on, Baker's writings become increasingly scattered, difficult to understand, and riddled with paranoid fantasies. Dr. Manlove's description of these writings as "evidence that he is thought disordered and paranoid" rings true.

G. Dr. Gratzer's Opinion on Secondary Gain/Refusal to see Dr. Cherry

RCRH argues that Dr. Gratzer's belief that Baker's presentation and lack of a job search showed "evidence of secondary gain" is a reason to reject Dr. Manlove's opinion. (RCRH Brief at 7). RCRH similarly argues that Baker's refusal to see RCRH neuropsychologist Dr. Cherry is consistent with "malingering." (*Id*. at 19).

The malingering issue was addressed by Dr. Manlove directly in his reports. Manlove opined Baker was not malingering because his hypervigilance and paranoia go far beyond his workers' compensation claim. (Ex. 4 at 001012). Manlove also noted Baker felt his paranoia was rational and if Baker were malingering, his symptoms would not be dominating his whole life. (*Id*.). Manlove also noted that the MMPI-II testing done was consistent with post traumatic stress disorder and do not suggest malingering. (*Id*.).

Neither the Department of Labor or the Circuit Court found that Baker was

malingering. The Circuit Court correctly noted that even Dr. Gratzer did not opine that Baker was malingering, while Dr. Manlove provided an opinion that he was not, with reasons supporting that opinion. (Circuit Court Decision at 22).

Baker's severe paranoia and anxiety provides a good explanation for why he didn't search for work and why he refused to see Dr. Cherry. Hata's referral to Cherry was done on December 23, 2016, when Hata believed that the paranoia and anxiety caused by PTSD had worsened significantly, such that Baker feared for his life and the lives of his family members and was obsessed with litigating his workers' compensation and federal lawsuits. (Ex. 1 at 001036). Regarding Baker's decision not to search for work, his psychiatrist, Dr. Hamlyn, did not release him to work and Dr. Manlove – who saw him four times – opined in July of 2016 that he was incapable of employment due to his PTSD. Given these opinions – which Baker was certainly aware of – his decision is understandable.

H. Restriction from Working Full Time

RCRH argues that "no medical provider restricted Claimant from working full time" and therefore several Supreme Court decisions in which this Court affirmed the denial of disability benefits are on point. (RCRH Brief at 20-21). Specifically, RCRH cites to *Bonnett v. Custer Lumber Corp.*, 528 N.W.2d 393 (SD 1995); *Wagaman v. Sioux Falls Const.*, 576 N.W.2d 242 (SD 1998); *Hendricks v. Graham Tire Co.*, 520 N.W.2d 876 (SD 1994); *Tiensvold v. Universal Transp., Inc.*, 464 N.W.2d 820, 823 (SD 1991); and *Kester v. Colonial Manor of Custer*, 571 N.W.2d 376, 382 (SD 1997) for the proposition that when none of the claimants' medical providers prevent the employee

from working, this can support a finding that the claimant is not obviously unemployable. (*Id*.). In addition, RCRH argues that because "no medical provider restricted Claimant from working full time," he must do an unsuccessful job search to prove his disability case.

However, in this case, Dr. Hamlyn *did* restrict Claimant from working beginning in the summer of 2015 and continuing on to the summer of 2016. As noted by the Circuit Court in its decision, Dr. Hamlyn took Baker off all work due to his PTSD, depression, and anxiety symptoms beginning in July of 2015 and continuing until July of 2016, when he wrote a letter taking Baker off work for another six months due to his conditions. (Circuit Court Decision at 6-7). In addition, Dr. Manlove provided his opinion that Baker was "totally impaired in his ability to work due to his anxiety, paranoia, and thought disorder" in his report dated July 13, 2016. (Ex. 4 at 001012). For these reasons, the cases cited by RCRH are distinguishable.

CONCLUSION

In Baker's Opening Brief, he attempted to list out in some detail the psychological and medical treatment he received, the opinions of his treating providers, the opinions of consulting psychiatrist Dr. Manlove, and the opinions of IME psychiatrist Dr. Gratzer. In addition, Baker attempted to summarize his writings and legal complaints and emails. Baker believes that a fair reading of all of this information leads to the conclusion that Dr. Manlove's opinion regarding his ability to work should have been accepted by the Department of Labor and not rejected. Dr. Manlove's opinion is consistent with all of this evidence.

RCRH's arguments why Dr. Manlove's opinions should be rejected concern "matters of little consequence" as defined in the *Davidson* and *Foltz* cases discussed in Baker's Opening Brief.

Baker can have a relationship, do some limited traveling, and can write emails, letters and even file *pro se* lawsuits. But can anyone read the hundreds of pages of treatment notes and these writings and seriously conclude he is employable in any way whatsoever? It is worth remembering that during the time frame at issue, Baker was not working (and not subject to the stresses of social interactions in the work place), was getting regular treatment provided by a team of providers, was taking increasing doses of psychological medications, but *still* suffered from worsening symptoms of PTSD, which led his providers to recommend "intensive psychiatric treatment." In this context, RCRH's arguments are "matters of little consequence." Dr. Manlove's analysis of the voluminous record here is sensible and reasonable and should have been accepted by the Department of Labor and the Circuit Court.

If Dr. Manlove's opinions regarding Baker's functioning are accepted, Baker made his prima facie case for permanent total disability. RCRH did not rebut that case, as their vocational expert did not contact any employers, let alone inform them of Baker's limitations. Baker has proven his case for permanent disability under South Dakota law. He respectfully requests that this Court reverse the decision of the Department of Labor and the Circuit Court and found that he is entitled to permanent total disability benefits.

Dated this 22nd day of December, 2021.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that he served a true and correct copy of Appellant's Reply Brief that was filed with the Court and that any associated attorneys were served via email to:

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Dated this 22nd day of December, 2021.

JULIUS & SIMPSON, L.L.P.

By: */S/ Michael J. Simpson*
Michael J. Simpson
Attorney for Appellant

APPELLANT RESPECTFULLY REQUESTS ORAL ARGUMENT

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66, Michael J. Simpson, counsel for Appellant, does submit the following:

The foregoing brief is 12 pages in length. It is type in proportionally spaced typeface Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 3,654 words in the body of this brief.

Dated this 22nd day of December, 2021, at Rapid City, South Dakota.

JULIUS & SIMPSON, L.L.P.

By: */s/ Michael J. Simpson*

Michael J. Simpson
Attorneys for Plaintiff/Appellant