MENTAL STRESS CAUSING MENTAL DISABILITY UNDER WORKERS' COMPENSATION LAWS

A SHORT HISTORY, THE COMPETING ARGUMENTS, AND A 2020 INVENTORY

David B. Torrey*

I. Introduction

The law of mental stress causing mental disability, and its compensability under workers' compensation (the law of the "mental-mentals"), has been the subject of considerable study.[1] The topic is treated in encyclopedias published for lawyers, most famously in the multi-volume treatise originally authored by Arthur Larson, and now carefully updated on the subject.[2] And, when mental-mentals constituted a crisis area of workers' compensation, the academic law journals were full of pro and con analyses of whether coverage of such claims was proper and, if so, under what conditions.[3] Such analyses can still be found in the present day.[4]

This article examines anew this still-controversial aspect of workers' compensation. It does so in a period when, after several decades during which many states withdrew or limited coverage, legislatures are enacting or considering presumption and other laws to ease the ability of first responders (police, fire, and emergency medical professionals) to secure coverage for mental injury and disability, particularly Post-Traumatic Stress Disorder (PTSD). The present day is also marked by a seeming parallel trend: at least some state courts are reading their traditional laws in the mental-mental area liberally so as to award compensation to such

* A.B., 1982, West Virginia University; J.D., 1985, Duquesne University School of Law. Adjunct Professor of Law, University of Pittsburgh School of Law. Thanks to Justin D. Beck, Esq. and to Mr. Jarek Sulak for their editing and proofing assistance. Thanks also to Robin E. Kobayashi, Adriana M. Sciortino, and LexisNexis for allowing me access to the Larson treatise during the pandemic period, when the Allegheny County Law Library was closed. Thanks finally to Donald T. DeCarlo, Esq., New York, NY, who suggested that I prepare this article and inventory. All opinions expressed herein are strictly those of the author.

[1] *See* DONALD T. DECARLO & ROGER THOMPSON, WORKERS COMPENSATION: THE FIRST HUNDRED YEARS, pp.54-59 (2012); DONALD T. DECARLO & MARTIN MINKOWITZ, WORKERS COMPENSATION INSURANCE LAW & PRACTICE: THE NEXT GENERATION Chapter 11 (1989); DONALD T. DECARLO & DEBORAH H. GRUENFELD, STRESS IN THE AMERICAN WORKPLACE: ALTERNATIVES FOR THE WORKING WOUNDED, pp.1-37 (1989).

[2] ARTHUR LARSON, WORKERS' COMPENSATION, Chapter 56 & Digest to Chapter 56 (updated through June 2019). *See also* 2 MODERN WORKERS' COMPENSATION, § 109:29 (Thomson Reuters 2019); Eric M. Larson & Jean A. Talbot, *Recovery Under Workers' Compensation Statute for Emotional Injury or Disease Caused by Work-Connected Stress Without Physical Cause or Result*, 45 CAUSES OF ACTION2D 341 (2010, with October 2019 update).

[3] *See, e.g.*, Thomas S. Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62 NOTRE DAME LAW REVIEW 879 (1987) (decrying restrictions on coverage); Edward J. Mills, *Mental Stimulus Causing Mental Disability: Compensability Under the Pennsylvania Workers' Compensation Act*, 23 DUQUESNE LAW REVIEW 375 (1985) (arguing for a restrictive law).

[4] *See, e.g.*, Logan Burke, *Finding a Way out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century*, 118 WEST VIRGINIA LAW REVIEW 889 (2015).

traumatized workers.[5] Finally, this examination of laws is undertaken in the aftermath of successive Middle East wars, which generated an epidemic of mental illness and suicide among soldiers, a phenomenon which raised awareness about PTSD and which only now is being fully analyzed.[6]

This article features tables in which the laws of the state and federal programs are identified and specifically referenced by statute and/or important caselaw. The first table is an unabridged recounting of the mental-mental laws[7]; the second identifies the special first responder laws which have been enacted, or which are being considered[8]; and the third details the statutory features of the first responder laws that have been enacted as of April 27, 2020.[9]

An introduction to the law in this area requires a definition of the term "mental-mental." These are claims in which the injured worker has experienced purely mental stress and thereafter sustains a purely mental disability. An example is the bank teller faced with deadlines and mandatory overtime, without additional pay, who develops depression, agoraphobia, and panic attacks and, as a result, is unable to work.[10] Notably, while this mental-mental terminology may sound like an insensitive reductionism of a serious malady (this writer would not use the phrase in the presence of a distressed worker), the term is used by courts in published decisions[11] and by legislatures in statutes,[12] and has taken hold universally.

More importantly, the mental-mental phrase, likely coined by Larson, is intended to set off such claims from two less controversial categories of mental injury. These are the "physical-mentals" and the "mental-physicals." A physical-mental is typified by the worker who sustains a

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[5] *See, e.g.*, *France v. Indus. Comm'n*, ___ P.3d ___, 2020 WL 772524 (Ariz. Ct. App. Feb. 18, 2020) (court, reversing ALJ, awards benefits to deputy who was traumatized by shotgun-wielding madman and who thereafter developed PTSD); *Moran v. Illinois Workers' Compensation Commission*, 59 N.E.3d 934 (Ill. App. Ct. 2016) (court, reversing Industrial Commission, awards benefits to fire company supervisor who directed firefighters at site of deadly house fire); *Payes v. WCAB (Pennsylvania State Police)*, 79 A.3d 543 (Pa. 2013) (court, reversing lower tribunal, awards benefits to state trooper who, on darkened interstate, struck and killed woman who was apparently trying to commit suicide-by-cop).

[6] *See* DAVID KIERAN, SIGNATURE WOUNDS: THE UNTOLD STORY OF THE MILITARY'S MENTAL HEALTH CRISIS (2019) (arguing that, even in wake of Vietnam War experiences, U.S. Army and military medicine were unreceptive to, and unprepared for, phenomenon of mental stress suffered by soldiers subjected to repeated, unexpected, and seemingly endless deployments overseas).

[7] *See* Appendix 1.

[8] *See* Appendix 2.

[9] *See* Appendix 3.

[10] These are the facts of the Pennsylvania case, *Williams v. WCAB (Phila. Nat'l Bank)*, 548 A.2d 1344 (Pa. Commw. 1988).

[11] *See, e.g.*, *City of Lower Burrell v. WCAB (Babinsack)*, 2020 WL 1190603 (Pa. Commw. 2020); *Moran v. Illinois Workers' Compensation Commission*, 59 N.E.3d 934 (Ill. App. Ct. 2016).

[12] *See, e.g.*, W. VA. CODE § 23-4-1f (precluding such claims from compensation, and providing, "It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter.").

violent trauma to the body and is physically injured, but who is left, in the aftermath, with anxiety and depression.[13] A mental-physical, meanwhile, is typified by a worker who develops stress at work (for example, an encounter with a menacing supervisor) and who, in the aftermath, is left with a physical injury (for example, a heart attack).[14] These types of injuries are universally held compensable as long as medical causation is established.[15]

These three categories are crucial to the understanding of how mental injuries are treated by workers' compensation laws. With few exceptions, state laws place a *heightened burden* of causation ("abnormal working conditions" or the like) on the mental-mental cases, or even *preclude* them. On the other hand, state laws freely accommodate the compensability of the physical-mentals and mental-physicals.

The subject of this article is the mental-mental cases but, as will be seen, on occasion lawyers and/or courts blur the distinction.[16] Fortunately for the legal analyst, most courts have created impressive bright lines between the categories.

An introduction also requires appreciation of two phenomena that have attended the recognition of mental-mental injuries, a recognition that in itself has only widely existed since the 1970s.

First is the majority rule that, if a workers' compensation statute will not allow, as a matter of law, a claim for mental stress causing mental disability, then presumably a negligence suit against the employer by the worker (typically based on a theory of failure to provide a safe workplace) will be cognizable.[17] Second is the majority, if not "universal," rule that a worker who has completely imagined his or her workplace stress will possess no cognizable claim[18]; as the Larson treatise correctly declares, claims based on misperceived stress, though originally recognized by a few courts, "have not fared well."[19]

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[13] *Donovan v. WCAB (Academy Medical Realty)*, 739 A.2d 1156 (Pa. Commw. 1995) (worker, a janitor who cleaned dentist's office, and who twice sustained needle sticks from moving rubbish, requiring medical treatment, and who thereafter developed "dysthymic disorder or depression," had sustained a physical-mental injury).

[14] *Panyko v. WCAB (U.S. Airways)*, 888 A.2d 724 (Pa. 2005).

[15] LARSON, *supra*, § 56.02[1]; § 56.03[1]. An exception is found in Montana, where the workers' compensation statute provides that mental-physicals are not compensable. MONT. CODE ANN. § 39-71-119(3).

[16] *See infra* Part IV(E).

[17] *See, e.g., LaRose v. King County*, 437 P.3d 701 (Wash. Ct. App. 2019) (tort case) (genuine issue of material fact existed with regard to whether plaintiff's injuries were reflective of gradual stress or, instead, a singular incident; if the former, no claim existed as a matter of law under the Washington Act for benefits, and hence plaintiff would be allowed her negligence suit).

[18] *See, e.g., Camp v. Dade-Behring*, 2005 WL 2249761 (Del. Super. 2005) (no recovery for mental-mental claimant when she "merely imagine[d] or subjectively conclude[d]" that work events were the source of her problems).

[19] LARSON, *supra*, at § 56.04[4].

With these introductory items in mind, this article first provides an historical account of how mental injuries have been addressed in workers' compensation laws. This article then sets forth the arguments, pro and con, with regard to compensability. Thereafter, this article, addressing the first of the tables, discusses the laws among the states on the subject of mental-mental injuries. In that discussion, a discrete examination of each jurisdiction's laws is necessarily not undertaken (the current Larson treatise "digest," which admirably undertakes this feat, runs to 275 pages), but the discussion sets forth key statutory features and details how lawyers and judges have approached and interpreted them. That discussion is followed by an analysis of the first responder PTSD laws, which constitute the emerging development in this area. That analysis addresses the tables of the second and third appendices. This article concludes with recommendations for how mental-mental cases are best treated under workers' compensation laws.

II. A Short History of the Mental-Mental Claim

A. The Emergence of Mental-Mental Claims

The mental-mental injury, and the popularization of the three-part categorization to which it gave rise, are phenomena that had their genesis in the 1980s. The workers' compensation literature is unanimous on this point. DeCarlo and Minkowitz, writing in 1989, stated that between 1980 and 1988, such claims more than doubled. Claims for mental disability "were nearly unheard of ten years ago and nonexistent in most states five years ago."[20] The Larson treatise, meanwhile, features an entire subsection addressing the "upsurge of stress claims" during this period.[21] In California, a state which experienced a litigation explosion in this realm, the number of stress injury claims rose from 1,282 in 1980 to 6,812 in 1986.[22]

The idea that the rise of mental-mentals is a 1980s phenomenon is well apparent. One only need examine the 1972 National Commission Report to see that the issue of mental-mental claims was not only a non-issue a decade before but an item which is completely unremarked upon. The Report – relevantly – calls for "broad coverage of work-related injuries and diseases," but the mental-mental claims were not on the Commission's radar.[23]

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[20] DECARLO & MINKOWITZ, *supra*, p.283. *See also* Donald T. DeCarlo, C*ompensating Stress in the '80's*, INSURANCE COUNSEL JOURNAL, p.681 (1985).

[21] LARSON, *supra*, § 56.06[1].

[22] *California Work Injuries and Illnesses – 1986 (Cal. Div. of Labor Statistics & Research 1986)*, cited in JOSEPH W. LITTLE, THOMAS A. EATON & GARY R. SMITH, CASES AND MATERIALS ON WORKERS' COMPENSATION, p.297 (3d ed. 1993)).

[23] *See* REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972), https://workerscompresources.com/. Commission Recommendation 2.12 was to abolish the accident requirement and cover all injuries, but mental injuries are not otherwise referenced.

In any event, the phenomenon, at the time, was treated as a crisis, because of vast potential workers' compensation liability on the part of employers and carriers.[24] DeCarlo and Gruenfeld, writing in 1989, remarked that stress claims were typically twice as expensive as traditional claims, and "once the word gets out [about the compensability of mental-mentals] …, the workers compensation and insurance industries could face claims of unprecedented magnitude …."[25]

As will be seen, a pattern of many courts liberally allowing such claims, even those based upon purely subjectively-perceived stress, eventually gave rise, a decade or so later, to a striking "swinging of the pendulum." Legislatures (West Virginia, for example) and courts (Pennsylvania, for example) began to prohibit, or limit the compensability of, mental-mental claims. This rise and reaction are discussed below.

B. A Retrospective: The Prior Thinking and Cases Before the 1970s

It is first important to consider, however, that the issue of the purely mental stress-induced impairment and disability had long been recognized. What is now called a "conversion reaction," unfolding in the wake of injury, and causing psychosomatic symptoms,[26] is addressed in both workers' compensation treatises and occupational injury texts from well before World War II. These were called "traumatic neuroses" (a now-discarded term) and typically followed a physical injury.

C. An Early View of the Law

The treatise writer Honnold, writing in 1917, cites multiple cases from England and the U.S. states where a sudden *physical* injury was attended by a shock or fright, which in turn led to a conversion reaction (impairment or disability with no objective findings). The book endorses compensability of such cases – at least when authentic.

Under the Honnold rule, however, even a purely *mental* shock arising of out the employment can be compensable. The lead example from the text is of a worker who develops "nervous shock, producing neurasthenia and incapacity, received by a workman while assisting [the rescue of] an injured fellow workman." He adds, "The possibility of witnessing some shocking injury to a fellow workman and receiving a nervous shock therefrom is a risk of any

[24] DECARLO & GRUENFELD, *supra*, pp.10-11. *See also* Janet C. deCarteret, *Occupational Stress Claims*, 42 AAOHN JOURNAL, p.494 (Oct. 1994), https://journals.sagepub.com/doi/pdf/10.1177/216507999404201007.

[25] DECARLO & GRUENFELD, *supra*, p.10.

[26] *See, e.g., Commonwealth, Dep't of Highways v. Lindon*, 380 S.W.2d 247 (Ky. Ct. App. 1964) (claimant sustained minor foot injury but then developed a "psychoneurosis conversion hysteria" which was superimposed on a minor foot injury; worker became convinced that he had constant pain in his foot and leg and, as a result, was unable to work – ultimately, he was obliged to undergo a "sodium amytal" (truth serum) interview).

employment. Such nervous shock arises out of and is incidental to the employment, and is compensable if it definitely causes the injury ….”[27]

D. An Early View of the Diagnosis

Meanwhile, the occupational medicine expert Henry H. Kessler, M.D., writing in 1932, devoted an entire subchapter to such “traumatic neuroses.”[28] Like Honnold, he was aware of mental stress developing exclusively from shock, and he, too, included them with other traumatic neuroses. Notably, he had sympathy for authentic cases (though he termed the subjects’ mental and/or physical make-up “below par”[29]), and was not averse to compensation for the unfortunate victims of such a disabling phenomenon. He notes, in this regard, a credible account of a worker moving a co-worker’s dead body; though the worker himself was unharmed, the next day his hand was paralyzed.[30]

Kessler also identified what Larson, in an entire subchapter, terms “compensation neurosis”[31] – that is, a worker who has a *bona fide* injury but who, because of the promise, or receipt of, weekly workers’ compensation, authentically believes himself to be continually physically or mentally afflicted. “The constitutional make-up” of such patients, Kessler further explained, “may be such as to predispose the injured to such a psychopathic condition, and in the very nature of the case the desire for compensation is awakened following trauma.”[32] Kessler added, sarcastically, that many such patients recover after a settlement is reached, referring to such resolutions as the “gold treatment.”[33] While such callous assertions may seem unsurprising for the day, a further editorial remark is jarring: “During the World War, hospitals were filled with patients suffering from apparent traumatic neuroses in a different setting, but no hospitals were needed for the prisoners of war who knew they were out of danger.”[34]

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[27] 1 ARTHUR B. HONNOLD, HONNOLD ON WORKMEN’S COMPENSATION, § 95, p.294 (1917).

[28] HENRY H. KESSLER, ACCIDENTAL INJURIES: THE MEDICO-LEGAL ASPECTS OF WORKMEN’S COMPENSATION AND PUBLIC LIABILITY, Chapter 18 (1932).

[29] *Id.*, p.530.

[30] Still, foreshadowing the current, ubiquitous concern about purely mental phenomena, Kessler urged fellow occupational medicine practitioners to watch for the common malingerer among those suffering from *bona fide* conversion reactions. *Id.* at 542 ((“It is with those persons who have more or less combined real and unreal physical injury that the greatest difficulty arises. Here is the largest field for malingering, and the abilities of the examiner are taxed in making the differentiation.”).

[31] LARSON, *supra*, § 56.05.

[32] KESSLER, *supra*, p.531.

[33] Id. (“What is true today in this regard was true as long ago as 1894, when Ricolins spoke of the gold treatment which can be made of bank notes, referring to the causal relation between liability legislation and traumatic hysteria.”). In the present day, some cynics refer to this phenomenon as the “Greenback Poultice.”

[34] *Id.*

While a few mental-mental cases can thus be found in the older literature, most mental disability and conversion cases involved a *physical* stimulus. These older cases are of interest, however, because one can perceive in the attitudes of pivotal writers such as Kessler that mental illness and claims based on the same were looked upon with suspicion. That suspicion, and a more general frustration that the true causation of mental problems is impossible to determine, endures to the present day and has shaped the law.

A key admonition of Kessler, an icon of the prior thinking, also defines much *current* thinking: "To define the exact causation of the neuroses in general would be equivalent to solving the riddle of human behavior."[35]

E. Traumatic Neuroses Cases before the 1970s

We know from the Honnold and Kessler treatises that at least some form of mental-mentals has long been appreciated in law and medicine. They were, however, invariably limited to a sudden fright or shock as the mental cause. Courts could award benefits in such situations because the sudden and unexpected nature of the event could be conceived of as the type of "accident" workers' compensation was intended to compensate. (That term and concept endures in most states, though typically interpreted liberally.) Of course, the idea of awarding benefits for *gradual* stress would have been thought absurd.

Throughout the decades before the 1970's, courts in many cases continued to award benefits in fright or shock cases. These cases are significant as they typically justified their holdings by explaining, over employer resistance, that an injury or accidental injury cannot reasonably be limited to one's flesh and bones. Later courts were influenced by this logic. Four such cases, long characterized as landmarks, belong in this category.

In a 1944 Virginia case, a factory worker who suffered a mental shock from being surprised by an electric flash at a nearby machine developed an immediate traumatic neurosis. Her affliction, counterintuitively, was characterized by fainting at the sight of the worker who had originally *come to her aid*. True, claimant was not physically injured, but her disabling malady was held to be an injury under the Virginia Act. In this regard (as in many of these landmarks), all physicians confirmed causal connection. And, pivotally, "her incapacity was effected as if it had been caused by a visible lesion."[36]

In a 1953 New Jersey case, meanwhile, a maintenance worker who suffered an emotional shock from a violently exploding boiler pipe, which incident caused the death of his supervisor, caused him to develop a "severe state of psychoneurosis." This disabling condition was held to be an injury under the New Jersey Act. The court declared, "There is nothing in the law to exclude from the import of this term such injuries as result from non-physical, that is, psychic,

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[35] KESSLER, *supra*, p.530.

[36] *Burlington Mills Corp. v. Hagood*, 13 S.E.2d 291 (Va. 1944).

trauma."[37]

In 1954, the Florida Supreme Court considered such a case. There, a hospital typist, apparently shocked when lightning struck the hospital, developing chest pain and other maladies, not objectively verifiable, was held to have sustained an injury. While the compensation judge had required a "visible injury," thus dismissing her case, that requirement was error. In this regard, the pivotal Florida term "trauma" was to be defined by consulting Webster's: "injury, wound, shock, or the resulting condition of neuroses." Reversing the trial judge, and awarding benefits, the court declared, "We find no definition which limits the word to a "visible wound."[38]

In a 1955 Texas case, finally, the claimant was a skilled ironworker who, in a calamitous accident, observed his co-worker fall to his death in a scaffold collapse, nearly perishing himself during the event. He thereafter developed anxiety and depression which disabled him from his job. The Texas Supreme Court determined that claimant had sustained a compensable injury, and this was so even though the statute read, as to the definition of injury, "damage or harm to the physical structure of the body."[39] As to this tension, the court remarked:

> The substance of all of the testimony shows agreement that plaintiff's body no longer functions properly. Now, can we say that, as a matter of law, even though a "physical structure" no longer functions properly, it has suffered no 'harm'? What meaning can the word 'harm' to the body have if not that, as a result of the event or condition in question, the body has ceased to function properly?[40]

With this thought in mind, the court stated, "Even though an accident may not produce an anatomical pathology, nevertheless if the workman does in fact become disabled as a result of that accident, the injury is compensable, although such disability may be the result of hysteria – and may be traceable to a mental condition and not a physical disorder."[41]

F. Mental-Mentals: Rise and Reaction

Mental-mental cases were known to the law for decades, but it was only in the 1980s that the great surge in filings occurred. At least three forces were seemingly at work. The first was liberalized court decisions in the 1970s and early 1980s which accommodated potential recovery. The second was the socio-cultural changes of the period which caused more and more individuals to perceive disabling stress at work. Third was the sociological phenomenon that once a diagnosis is named, and identified as compensable, individuals, with the assistance of their physicians, are more likely to pursue claims based on the same.

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[37] *Simon v. RHH Steel Laundry*, 95 A.2d 446 (N.J. Super. 1953), *aff'd without opinion* (N.J. 1954).

[38] *Lyng v. Rao*, 72 So.2d 53 (Fl. 1954).

[39] *Bailey v. American General Ins. Co.*, 279 S.W.2d 315 (Tex. 1955).

[40] *Id.* at 318-319.

[41] *Id.* at 319 (quoting *Peavy v. Mansfield Hardwood Lumber Co*., 40 So.2d 505, 508 (La. Ct. App. 1949)).

1. Liberalized Legal Doctrine

At least three cases, all from influential courts, are well known for having hastened the rise of the mental-mental claim. It is with these three cases that the modern legal history of the mental-mental begins.

In the 1975 decision *Wolfe v. Sibley, Lindsay & Curr Co*.,[42] the New York Court of Appeals awarded benefits in a case with jarring facts. There, the claimant was a key assistant to the security chief of a large department store. The chief became highly stressed with work and developed a fear of failure. When he finally committed suicide by gunshot, in his office, claimant was the first to discover the body. She developed not some conversion reaction but, instead, an "acute depressive reaction." The appellate division turned down the claim, ruling that mental-mentals were not compensable as a matter of law. In its view, a physical stimulus was required.

The Court of Appeals, rejecting an explicit opening-of-the floodgates arguments, and a dissent which warned of significant costs in allowing such claims, reversed. Recognizing the mental-mental cause of action, the court remarked, poetically, that there is "nothing talismanic about physical impact,"[43] and held:

> We hold today that psychological or nervous injury precipitated by psychic trauma is compensable to the same extent as physical injury. This determination is based on two considerations. First, as noted in the psychiatric testimony there is nothing in the nature of a stress or shock situation which ordains physical as opposed to psychological injury. The determinative factor is the particular vulnerability of an individual by virtue of his physical makeup. In a given situation one person may be susceptible to a heart attack while another may suffer a depressive reaction. In either case the result is the same – the individual is incapable of functioning properly because of an accident and should be compensated under the Workmen's Compensation Law.[44]

In the 1978 Massachusetts case, *In re Fitzgibbons*,[45] meanwhile, the Supreme Judicial Court recognized mental-mentals. It did so in a case where a corrections supervisor, who had dispatched a subordinate to an emergency, sustained a "psychotic depression," culminating in suicide, after the subordinate perished in the course of his task. As far as the Massachusetts court was concerned, "There is no valid distinction which would preclude mental or emotional stimulus caused by mental or emotional trauma from compensation."[46]

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[42] *Wolfe v. Sibley, Lindsay & Curr Co*., 36 N.Y.2d 505 (N.Y. 1975).

[43] *Id.* at 606.

[44] *Id.*

[45] *In re Fitzgibbons*, 373 N.E.2d 1174 (Mass. 1978).

[46] *Id.* at 1177.

In the 1982 California case, *Albertson's Inc. v. WCAB (Bradley)*,[47] finally, a California court awarded benefits in a case where a supermarket cake decorator, who suffered from significant pre-employment emotional problems, suffered a nervous breakdown. The worker in that case accused her supervisor of a series of various harassments, and she eventually went off of work. During the proceedings, the credible lay and medical evidence was that claimant had in essence imagined the harassments. Yet, the same expert testimony certified that claimant was authentic in her *imaginings*. This fact was enough for the court to award benefits:

> The proper focus of inquiry, then, is not on how much stress should be felt by an employee in his work environment, based on a "normal" reaction to it, but how much stress is felt by an individual worker reacting uniquely to the work environment. His perception of the circumstances (e.g., crowded deadlines, mountains of paper, a too-fast assembly line) is what ultimately determines the amount of stress he feels.[48]

The court compared this approach to the Michigan "honest perception" rule, and it identified that state as one where the courts had created a similarly permissive standard.[49]

This case led Larson to remark, "It is difficult to overstate the breadth of coverage implied by the court's holding. Compensability was judged purely on claimant's subjective perception of work stress, not objective reality."[50] As discussed below, the legislature overthrew this rule (as did the Michigan legislature), but in the intervening decade California experienced an unequalled upsurge in claims, lawyer involvement, and fractious litigation.

2. Social Developments

A major theme of current literature is that life in the present day is afflicted with much more stress than prevailed in an earlier day, before the rise of the service-based economy, automation, globalization, and the astonishing advances in communications which largely fueled all three. Such stress can afflict an individual both at work and in one's personal life, a fact that complicates the mental-mental claims and which guarantees that, in essence, each and every such claim is subject to denial and, typically, litigation.

One writer, asserting, in 2000, that the Missouri workers' compensation law should more freely cover mental-mental claims, summarized common thinking about how social developments have caused more stress at work:

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[47] *Albertson's Inc. v. WCAB (Bradley)*, 182 Cal. Rptr. 304 (Cal. Ct. App. 1982).

[48] *Id.* at 308.

[49] *Id.* at 314-315 (citing *Deziel v. Difco Laboratories, Inc.*, 268 N.W.2d 1 (Mich. 1978)).

[50] LARSON, *supra*, at § 56.06[1][a].

> America's shift from a manufacturing industry towards a more service-oriented industry has introduced workers to divergent task requirements, atypical work environments, new technology, and an unfamiliar social setting…. Furthermore, the likelihood that an employee remains with the same company until retirement has decreased. Instead, employee stress levels have increased with the realization that one's job is in constant jeopardy because of "plant closings, technological obsolescence, mergers and acquisitions, the replacement of people with technology, and downsizing…. Moreover, the market's demand for increased productivity has resulted in additional work-related stress because of the need for new products and services to stay viable with competitors ….[51]

Commentators who were experiencing the rise of mental-mental claims in real time also endeavored to identify the cause of the phenomenon. DeCarlo and Minkowitz (1989) identified economic conditions (which were poor in the U.S. during the 1980s), increased automation, employee surveillance via monitoring, and sexual harassment perceived by female workers.[52] Larson, meanwhile, observed, "In a world of computer cubicles and global competition, stress-related disability is … no longer a rare occurrence."[53]

DeCarlo and Gruenfeld, in *Stress in the American Workplace: Alternatives for the Working Wounded* (1989) dug deeper with their inquiry into why more and more Americans felt such stress in that era (which they referred to as a period of "plague") that workers' compensation claims were often the result. They identified the introduction of computers, increased workloads, time pressures, poor relationships with supervisors and co-workers, troublesome relationships with the public and other customers, noise pollution, and "densely-populated offices."

Meanwhile, citing a NCCI study, DeCarlo and Gruenfeld also identified many white-collar workers developing anxiety over the "merger mania" of the day – and the plant closings and lay-offs which often attended that phenomenon. And, like Larson, DeCarlo and Gruenfeld identified the very nature of a service-based economy:

> In times when work involved physical output, overworked employees felt the wear and tear on their bodies. In today's world, the mental capacity of humans to absorb and digest information is being put to the test. As workloads and stressful conditions exceed our power to think, the damage is bound to be mental.[54]

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[51] Natalie Riley, *Mental-Mental Claims – Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 65 MISSOURI LAW REVIEW 1023, 1024 n.6 (2000) (citing Amy S. Berry, *The Reality of Work-Related Stress: An Analysis of How Mental Disability Claims Should be Handled Under the North Carolina Workers' Compensation Act*, 20 CAMPBELL LAW REVIEW 321 (1998)).

[52] DECARLO & MINKOWITZ, *supra*, pp.280-282.

[53] LARSON, *supra*, § 56.06[1].

[54] DECARLO & GRUENFELD, *supra*, p.47.

The two authors, in their exhaustive inquiry, also identify a stressor that was certainly one of the times – many workers' often-unfounded fear of contracting AIDS in the workplace.[55]

3. Social Factors and the Filing of Claims

If one accepts that the 1980s were a period when Americans felt an onslaught of stress in general, and at work; and were dealing with poor economic times, the question remains as to why the workers' compensation *claims* upsurge – and a resulting crisis in many jurisdictions – unfolded. Presumably, sufferers of such stress could have simply lived with the malady, had their providers submit treatment billings to group health insurance, filed for unemployment compensation, or simply absorbed the costs.

As submitted above, the advent of case law in many jurisdictions *allowing* mental-mental cases was critical. Lawyers will not file claims unless some reasonable prospect of recovery exists. This was the striking lesson of the Pennsylvania experience. When mental-mentals were first judicially recognized, a liberal rule encouraged a torrent of claims. After the pendulum swung back, with courts enforcing the restrictive "abnormal working conditions" rule with an iron fist, the upsurge ended: now, a very organized and skilled injured workers' bar will rarely file a mental-mental claim.

DeCarlo and Minkowitz added that during the crisis period, tort law had also been liberalized to allow recovery for personal injury in negligence cases, even in lieu of physical injury. "It would not be surprising," they remarked, "if this increased recognition of mental injury in tort would also spill over into workers compensation, which, after all, replaces the employee's tort remedy against an employer for injuries arising out of employment."[56] DeCarlo and Minkowitz also identified the familiar phenomenon that, in general, lay-offs, common at the time, result in an upsurge in claim filing. Finally, they identified as a cause for the upsurge publicity surrounding the awarding of mental-mental claims:

> It has often been suggested that highly publicized workers compensation recoveries spur similar claims. This may be especially important in mental stress claims because of the universality of mental stress…. [M]ost workers can identify with an employee experiencing mental stress from such job pressures as a change in duties or a conflict with supervisors.[57]

DeCarlo and Gruenfeld, interestingly, suspected that many mental-mental claims of the period had their genesis in stressed-out workers simply wanting a good old-fashioned "pound of flesh." In a stressful, unfair society, "an overwhelming sense of powerlessness" exists. As a result:

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[55] *Id.* at pp.69-75. Seven single-spaced pages of the book are devoted to workplace fear of AIDS.

[56] DECARLO & MINKOWITZ, *supra*, p.281.

[57] *Id.*, p.280.

> Society feels duped by the rule makers and is out for revenge. People are turning to lawsuits in an attempt to claim what they feel is rightfully theirs….
>
> The victims of stress are finding their niche in this litigious society. Protesting excessive job pressures, harassment, and unpalatable supervisory conduct, the working wounded are queueing up to receive compensation for their troubles.[58]

In some jurisdictions, the lawyer community contributed significantly to the increase in mental-mental filings and consequent litigation. In California, the temptations of the *Albertson's* case (which held that even imagined stress was compensable) was apparently too much for certain attorneys to resist. Many lawyers advertised the recoverability of stress claims and/or unethically solicited workers to file for workers' compensation based on contrived allegations of stress.[59] When the final pro-business reform came, the governor remarked, alluding to lawyers and their associated doctors, "these reforms crack down on those who are defrauding the system. This legislation marks the beginning of the end for the stress-mill millionaires."[60]

4. Experts, Social Factors, and Moral Hazard

The rise in filings of mental-mental claims could never have unfolded without psychiatrists and psychologists validating work-stress induced diagnoses, and by thereafter providing expert reports and testimony. Workers' compensation systems, it has been correctly observed, ultimately look to physicians as the "gatekeeper[s], whose pronouncements about occupational causality affect subsequent actions by workers, employers, insurers, and public health officials." Disputes over causation "are generally resolved in the court of medical opinion, with physicians acting as experts on both sides of the issue." And social factors are involved in leading doctors to acknowledge particular ailments as work-related. Determination of work causation "is not merely a matter of gathering and interpreting empirical evidence but rather a complex social phenomenon…."[61]

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[58] DECARLO & GRUENFELD, *supra*, p.6.

[59] Aya V. Matsumoto, *Reforming the Reform: Mental Stress Claims under California's Workers' Compensation System*, 27 LOYOLA LOS ANGELES LAW REVIEW 1327, 1337 (1994), https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1862&context=llr.

[60] *See Sakotas v. WCAB (Motel 6)*, 95 Cal. Rptr.2d 153, 160 (Cal. Ct. App. 2000).

[61] ALLARD DEMBE, M.D., OCCUPATION AND DISEASE: HOW SOCIAL FACTORS AFFECT THE CONCEPTION OF WORK-RELATED DISORDERS (1996).

Other experts beyond psychiatrists and psychologists during the crisis period also identified for the working public the import of stress at work. DeCarlo and Gruenfeld verify in the 1980s that an entire industry developed: "In recent years," they noted, "the stress problem has been addressed by social scientists, organizational psychologists, family therapists, and management consultants …. The deluge of media coverage it has received has progressively broadened the term "stress" into a generic, catch-all concept that generally refers to the feelings of frustration and anxiety that are exceedingly common in a complex society such as ours." DECARLO & GRUENFELD, *supra*, pp.1-2.

Mental health professionals, during the rise of claim filings, supported workers' claims, certifying, no doubt in most cases correctly, that injured workers' mental-mental claims were valid. But plainly social factors were at play in validating such diagnoses and their assignment as work-related.

Allard Dembe, M.D., in *Occupation and Disease: How Social Factors Affect the Conception of Work-Related Disorders* (1996), asserts persuasively that social factors are relevant for understanding how occupational disorders are initially recognized and conceived. Virtually all of his principal points are pertinent in the expert-supported 1980s rise of the mental-mentals.

He notes, for example, that new technologies, and the reaction to the same by various societal groups, can lead to the increased reporting and diagnosis of occupational disorders. Meanwhile, legal decisions establishing financial compensation can bring increased attention to the question of whether or not a disorder is work-related. Further, occupational disorders are apt to be initially recognized during periods of economic instability and job loss, and attention by the national mass media to a particular workplace disorder can heighten medical awareness of the problem. Finally, medical attitudes arising in the course of military conflicts can influence the way that occupational disorders are subsequently studied and understood.[62]

Another social factor that was at work in the upsurge of claims filing was simple moral hazard, that is, the potential availability of workers' compensation. Once the courts accommodated such recoveries in terms of *legal* causation, and psychiatrists and psychologists were available to verify *medical* causation, the door was open to such claims filing. It is likely that many mental disabilities depicted as having their genesis in work stress would never have manifested themselves in the first place if not for the presence of insurance. Mandatory insurance schemes like those of motor vehicle law and workers' compensation are known to create illnesses, drive treatment, and breed litigation.[63]

5. Rise and Reaction in Four Select States

As demonstrated by the table in Appendix 1, 17 states now feature exclusions of mental-mental cases, most by statute. Several other states have provisos which specially *burden* recovery in such claims. These exclusionary and restrictive provisos were reactions to the pattern of liberalized case law, perceptions of increased worker stress, and the consequent increase in claims filings which have been discussed above. The "California story" was – and remains – the most prominent of these episodes, but the rise and response has been well-documented in a number of jurisdictions.

Arkansas. The Arkansas legislature abolished mental-mental compensability as part the major 1993 amendments to the Act. Mental injuries had been "generous[ly]" compensated by

[62] DEMBE, *supra*, pp.19-20.

[63] *See* ANDREW MALLESON, M.D., WHIPLASH AND OTHER USEFUL ILLNESSES (2002).

the Arkansas Commission and courts.[64] The court in the case which recognized mental-mentals, notably, remarked, "[w]e can conceive of no reason why harm to the body of a worker should be limited to visible physical injury to the bones and muscles and should exclude work-related trauma which results in an injury to the mind. We hold that that such psychological injuries may be compensable under our Act."[65]

The law did require, as part of the claim, a showing that "more than ordinary day-to-day stress to which all workers [were] subjected." Thus, in the decision quoted above, a delivery driver who had fallen behind in her deliveries and sustained a nervous breakdown was *denied* benefits.

Despite this elevated burden, compensability of such claims did not survive a reform effort that had its genesis in perceptions of system-wide fraud, premium rates which had increased 72.3% between 1987 and 1992, and the "expansion" of the law by ALJs, the Commission, and the courts.[66] A critic at the time decried this complete abolition of the mental-mental claim, lamenting that Arkansas had "deserted" what Larson had described as the "impressive majority" approach.[67]

West Virginia. The West Virginia legislature, in a scenario similar to that of Arkansas, disallowed mental-mentals in a 1993 reform.[68] The Supreme Court had, in 1981, recognized mental-mental cases in a case where a grocery store worker had alleged a series of harassing comments and acts by a supervisor.[69] Later, after complaints of claim and litigation abuse, the legislature eliminated such claims, overturning the leading case and declaring, explicitly, "It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter."[70]

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[64] John D. Copeland, *The New Arkansas Workers' Compensation Act: Did the Pendulum Swing too Far?*, 47 ARKANSAS LAW REVIEW 1, 17 (1994).

[65] *Owens v. National Health Laboratories, Inc.*, 648 S.W.2d 829 (Ark. 1983).

[66] Copeland, *supra*, p.3.

[67] *Id.*, p.18.

[68] *See* Logan Burke, *Finding a Way out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century*, 118 WEST VIRGINIA LAW REVIEW 889 (2015).

[69] *Breeden v. Workmen's Comp. Comm'r*, 285 S.E.2d 398 (W. Va. 1981) (relying on *Montgomery v. State Comp. Comm'r*, 178 S.E. 425 (W. Va. 1935) (addressing claim of miner suffering from exhaustion and disability after having been lost in his mine for a period of seven days, and stating "it is clear that the term 'personal injury' as used in the … Act … contemplates and includes the result of unusual exposure, shock, exhaustion, and other conditions not of traumatic origin, provided that they are attributable to a specific and definite event arising in the course of, and resulting from, the employment.")).

[70] W. VA. CODE § 23-4-1f. In referencing the 1993 reform, Burke notes that "West Virginia's workers' compensation system has been through several rounds of reform. One of the recurring concerns of [such] reform is preventing abuse of the system and fraudulent receipt of benefits, which, in turn, creates a drag on the entire system. In the 1990s, reform measure specifically targeted preventing abuse by claimants and health care providers. One of

Pennsylvania. The Pennsylvania legislature, in 1972, eliminated the restrictive "accident" requirement and replaced that concept with the term "injury." In so doing, Pennsylvania was responding to the National Commission recommendation that the accident terminology be jettisoned and that, instead, "broad coverage of work-related injuries and diseases" be afforded. The courts have, since then, afforded a liberal interpretation to the term "injury."[71]

One occasion for liberal interpretation was the Commonwealth Court's 1979 recognition of purely mental-mental cases. There, a University of Pittsburgh physician and the head of a major clinic developed a stress-induced psychosis and ultimately committed suicide.[72] The employer opposed the claim, asserting that despite the elimination of the accident requirement, "the term 'injury' [should be] confined to the occurrence of physical harm to the body."[73] The court, rejecting this assertion and affirming an award to the widow, quoted at length the influential comment of the Larson treatise: "[T]here is no really valid distinction between physical and 'nervous' injury. Certainly[,] modern medical opinion would support this view, and insist that it is no longer realistic to draw a line between what is 'nervous' and what is 'physical.'"[74]

This ruling was perceived by some as heralding an era of wide-open compensability of mental-mental cases. And, indeed, many were filed. In a remarkable development, however, several judges of the Commonwealth Court (a middle-level appeals court) came to question whether such claims should be freely cognizable. This cynicism was exacerbated after one panel of the court, in 1984, granted benefits in what came to be known derisively as the "Peter Principle" case.[75] There, an employee suffered a disabling mental illness as a result of the stress involved in his promotion from manual tasks to a management job. The court held, in that case, that he had sustained a compensable mental-mental injury. The mental stress cynics at the court, in the face of that case, thereafter started to resist the idea that routine promotions, demotions, and lay-offs should form the basis of workers' compensation claims.

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these reforms addressed mental-mental claims…." Burke, *supra*, p.905.

[71] For a thorough retrospective of how the "injury" criterion was interpreted by Pennsylvania courts, see Justin D. Beck, *From the Glass Lined Tanks of Old Latrobe: 30 Years of Pawlosky*, in PENNSYLVANIA BAR ASSOCIATION WORKERS' COMPENSATION LAW SECTION NEWSLETTER, Vol. VII, No. 129 (Appendix) (March 2017) (noting that the term "injury" in Pennsylvania is defined as any adverse or hurtful effect).

[72] *University of Pittsburgh v. WCAB (Perlman)*, 405 A.2d 1048 (Pa. Commw. 1984).

[73] *Id.*, p.1050

[74] *Id.*, p.1051 (quoting 1B A. LARSON, WORKMEN'S COMPENSATION LAW § 42.23(a), at 7-632 (1978)).

[75] *Bevilacqua v. WCAB (J. Bevilacqua Sons, Inc.)*, 475 A.2d 959 (Pa. Commw. 1984). The Peter Principle provides that "anything that works will be used in progressively more challenging applications until it causes a disaster."

This concern, and the worry that Pennsylvania would experience a California-style mental-mental litigation crisis, soon won the day.[76] In a series of rulings, the pendulum swung dramatically, and the court soon generated a series of rules that significantly burdened mental-mental claims.[77] Now, stress cannot be a subjective reaction to normal working conditions and, to the contrary, must be an objective reaction to abnormal working conditions – with the point of reference the stresses of similarly situated workers.

The Supreme Court was soon to ratify this doctrine,[78] and the Commonwealth Court in turn enforced the "abnormal working conditions" with the proverbial iron fist. If the stressor was foreseeable, given the type of occupation involved, it could not be deemed abnormal.[79] This rule was (and remains) particularly burdensome on police and corrections officers, who generally must be ready for virtually any stressful circumstance.[80]

Pennsylvania does not exclude mental-mental claims, but the effort of the Commonwealth Court to avoid a California-style crisis worked. One modern critic has correctly remarked, "Pennsylvania's approach … effectively close[d] the floodgates before they [could] open …."[81] While the Supreme Court, in a surprising 2013 case, lightened the worker's burden somewhat,[82] it is still correct that "the abnormal working conditions rule and the specificity of medical evidence linking the injury to work-related causes continue to be prohibitive of most claims of mental injury caused by mental stimuli."[83]

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[76] DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 4:9 & n.8 (Thomson Reuters 2008 & Supp. 2019-2020).

[77] An account of the swinging of the pendulum is found in Bradley R. Smith, *Pennsylvania's Mental Lapse: A History of Pennsylvania's Treatment of Mental Disabilities Caused by Mental Stress in Workers' Compensation*, Chapter 17, in DAVID B. TORREY, EDITOR, THE CENTENNIAL OF THE PENNSYLVANIA WORKERS' COMPENSATION ACT: A NARRATIVE AND PICTORIAL CELEBRATION (2015).

[78] *Martin v. Ketchum*, 568 A.2d 159 (Pa. 1990).

[79] TORREY & GREENBERG, *supra*, § 4:24. *See City of Pittsburgh v. W.C.A.B. (Plowden)*, 804 A.2d 82 (Pa. Commw. Ct. 2002) (municipal worker who was employed in job seeking rehabilitation of urban gang members did not experience abnormal working conditions: "[C]ertainly, when Plowden accepted these job duties, working with the 'Mayor's Task Force on Youth Violence', he should have realized that conflict, and perhaps even some slight element of danger or unrest, might be involved.").

[80] TORREY & GREENBERG, *supra*, § 20:83 ("law enforcement professionals such as police officers and prison guards typically face a difficult burden when seeking to establish a compensable 'mental-mental' claim because of the unusual environment in which they work and the inherent dangers associated with criminal activity.").

[81] Burke, *supra*, p.910.

[82] *Payes v. WCAB (State Police)*, 79 A.3d 543 (Pa. 2013) (one cannot simply conclude that because an occupation is inherently stressful that any eventuality, no matter how shocking, is normal; court, on appeal, must take into account and be bound by the "unique factual findings of the case")). *See* Smith, *supra*, pp.472-74.

[83] Smith, *supra*, p.475.

California. The experience of California with the rise of mental-mentals had such notoriety that Larson devotes an entire subsection to it, called the "California Story."[84] In the wake of the *Albertson's* case, noted above, mental-mentals became very popular. Claim filings increased dramatically. Stress claims in the state went from 1,282 in 1980 to 4,236 in 1984 to 6,812 in 1986.[85] By 1992 the volume was still increasing to the low double-digits.[86] A contemporary account, which characterizes *Albertson's* having "good intentions but unintended results," states that the "floodgates" really did open.[87] These claims were said to be especially onerous for business, as the cost of defending and resolving them was "typically much higher than for 'old-fashioned' physical claims."[88]

By several accounts, the upsurge in claims was caused, or at least attended by, overreaching and outright fraud:

> Advertising by physicians and attorneys [was undertaken] which invited dissatisfied workers to file stress claims. [Such activities were often] criticized as fostering fraud. [S]ome attorneys and physicians involved in high-volume workers' compensation practice assert a stress disability for virtually every applicant. Additionally, some practitioners employ recruiters to encourage workers to file claims in order to generate medical charges for insurance billings.[89]

In one case, by report, a large restaurant closed permanently, and 115 of its 119 employees purportedly filed stress claims. According to the report, "Attorneys had stationed themselves outside the door the day of the layoffs to intercept the newly unemployed, influencing them to file these claims …."[90]

The 1993 amendments to the law (the third of a series) tightened coverage standards by requiring (1) that the complained of stress must be based on "actual" employment conditions; (2) that the claim be proven by the preponderance of the evidence; (3) that the diagnosis must be

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[84] LARSON, *supra*, § 56.01[1][a].

[85] *Id.*

[86] Janet C. deCarteret, *Occupational Stress Claims*, 42 AAOHN JOURNAL, 494, 497 (Oct. 1994), https://journals.sagepub.com/doi/pdf/10.1177/216507999404201007.

[87] Aya V. Matsumoto, *Reforming the Reform: Mental Stress Claims under California's Workers' Compensation System*, 27 LOYOLA LOS ANGELES LAW REVIEW 1327, 1336-1337 (1994) (stating, "As if the floodgates had opened, claims for mental stress injuries have inundated workers' compensation systems."), https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1862&context=llr.

[88] LARSON, *supra*.

[89] Matsumoto, *supra*, p.1337.

[90] de Carteret, *supra*, p.497.

made under the DSM; (4) that the employee be employed for at least six months; and (5) that the claim cannot be based on a "good faith personnel action." The revised law also sharply limited the post-employment filing of claims.[91]

III. Arguments for and Against Compensability

Legislative and judicial disputes addressing under what conditions mental-mentals should be covered, if at all, by workers' compensation are largely quiescent. The period of state legislatures taking drastic action and *completely eliminating* coverage seems to have ended. Further, though claims in California and Illinois are said to be increasing,[92] no jurisdiction seems to be experiencing any remarkable crisis of claims filing that is kindling the fires of retractive reform.

On the other hand, in the present day a trend exists for legislatures to enact special laws that will provide coverage for mental-mentals, particularly PTSD, for first responders like police officers, firefighters, and EMTs.[93] To a limited extent, accordingly, the pendulum seems to be swinging back in favor of compensability.

Also, some advocates, not surprisingly, assert that complete elimination, found in 17 states, is unfair, and that the issue of coverage should be revisited. In South Carolina, for example, the Supreme Court has derided as anachronistic the restrictive abnormal working conditions rule of that state and has called for the legislature to abandon it.[94]

It is worthy, accordingly, to revisit the arguments for and against compensability.

A. Arguments for Compensability and Against Exclusion

The most compelling argument favoring compensability is that mental injuries and their causes are no longer great mysteries as they were in the past.[95] Larson, in his treatise, has long admonished that drawing a distinction between mental injuries and physical injuries is simply

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[91] LARSON, *supra*. The law is currently codified in substantially the 1993 form at Cal. Labor Code § 3208.3. The California provisions is plainly the most detailed of the state mental-mental laws. *See also infra* Part IV(A)(5).

[92] Louise Esola, *Reviews of Psych Claims in Comp Increase*, BUSINESS INSURANCE (Oct. 2, 2019), https://www.businessinsurance.com/article/20191002/NEWS08/912330957/Reviews-of-psych-claims-in-comp-increase#.

[93] *See infra* Part V(D).

[94] *Bentley v. Spartanburg County*, 730 S.E.2d 296 (So. Carolina 2012) (deputy who shot umbrella-wielding suspect at short-range, and observed him die, did not experience unusual stress; though denial of benefits was affirmed, court recommends that legislature abandon the restrictive statutory test). *See also* Logan Burke, *Finding a Way out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century*, 118 WEST VIRGINIA LAW REVIEW 889 (2015).

[95] *See, e.g.*, *Bentley*, p.299 ("those in favor of allowing broader recovery point out that advances in medical science have made it easier for medical professionals to diagnose and verify the validity of mental injuries, enabling courts to weed out fraudulent claims."); LARSON, *supra*, §§56.04[1].

"unsound." A well-known dissent in a West Virginia case exemplifies this advocacy. In disagreeing that a PTSD-like reaction by a coal miner who had been traumatized, and feared for his life, was different from that of a lung injury, the dissent asserted:

> [M]odern medical science shows that traumatic stress disorders are, in fact, a physical injury. The shock of a terrifying event – like a rape, a robbery at gunpoint, or fearing death by suffocation when lost in the smoky darkness of a mine for ninety minutes – triggers chemical reactions in the brain that measurably scar and injure nerve tissue. The brain is actually, physically "re-wired" and injured. To somehow suggest that the injury to the plaintiff's brain is different from the lung injury that suffocated the decedent in *Jones* [the other case] reflects a primitive, outdated view of science.[96]

This argument is likely the best as against those who would argue that workers' compensation is simply not an appropriate remedy for mental injury. If such injuries arise out of and in the course of employment, and medical cause is persuasively established, no basis exists to assert that this time-honored test of compensability has not been met.

Related to this argument is the assertion that it is simply unfair, indeed intolerable, to deny insurance benefits to a worker when all experts agree that work stress has caused impairment and disability. Such are the circumstances of many reported cases in the modern day. To the reply that the afflicted worker simply did not have the necessary mettle and true grit to withstand the emotional challenges of work, another time-honored proposition applies: that the employer should take the employee as it finds him or her.[97]

One skilled commentator, like Larson, condemns hostility to mental-mental cases as retrograde and inconsistent with the whole purpose of workers' compensation. Viewing the issue in a historical light, he remarks:

> The reluctance of most courts to extend workers' compensation coverage to injuries not traceable to a single isolated event reflected a conservatism which contrasts markedly with their stated desire to liberally construe workers' compensation statutes…. This conservatism appears to stem from a fear that to adopt a broad definition of injury would lead to a large number of cases being found compensable, thus resulting in great economic liability for employers. This is a theme repeatedly found throughout the history of workers' compensation laws in this country, and explains much of the judicial and statutory approach to stress-related disability today.[98]

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[96] *See also* Burke, *supra*, pp.898-900 (setting forth the ways in which stress affects the body).

[97] *See* Glenn M. Troost, *Workers' Compensation and Gradual Stress in the Workplace*, 133 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 847, 860-861 (1985).

[98] Thomas S. Cook, *Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application*, 62

Proponents of wide availability of benefits for mental-mental injuries do not deny that causation may be at issue in many cases, despite the advances of medicine and psychiatry. Many argue, however, that if causation is in question, simply let the judge or hearing officer decide the issue. "Undoubtedly," one 1980s advocate asserted, "some claimants will attempt to recover for feigned mental injuries or mental injuries unrelated to work, but it is preferable to adopt a broad rule and administer it closely than to allow the fear of overcoverage to compromise the workers' compensation system as a whole."[99] Advocates, with the same reasoning, often dismiss claims that freely allowing mental-mentals will open the floodgates. In objecting to *institution* of a restrictive abnormal working conditions rule, the dissent in a Rhode Island case declared:

> [P]rotection against abuse in the award of workers' compensation lies in the competence and good judgment of the members of the commission, an organization that through the years has performed its duties in an exemplary fashion. "In the last analysis, the problem of malingering is one of fact, which must be left to the skill and experience of medical and psychiatric experts, and of compensation administrators, who usually manage in time to develop considerable facility in detecting malingerers at the factfinding level."[100]

Many proponents of compensating mental-mentals *do perceive*, as appropriate, unusual stress as part of the worker's burden.[101] The same advocate of open compensability (quoted above), however, complains:

> A serious shortcoming of the unusual-stress test is that it is predicated on the fallacious belief that the existence of extraordinary or unusual events assures that subsequent mental injuries are genuine and work-related and on the converse belief that the absence of such events indicates that the alleged injuries are not genuine or work-related…. [But] judicial reliance on tangibility as one of the indicia of an injury's genuineness is misguided.[102]

He would again leave the question of genuineness to doctors and judges: "[A]lthough the concern over fraudulent claims is valid, professionals may be able to detect certain feigned psychoneurotic reactions more easily than some more commonly feigned physical injuries."

An intuitive argument favoring coverage of mental-mentals is that, if employers are free of liability for even *bona fide* mental-mental claims, they will not be leveraged to safety in the area of employee mental health. "The present state of affairs," one observer comments, referring

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NOTRE DAME LAW REVIEW 879, 886 (1987).

[99] Troost, *supra*, p.864.

[100] *Seitz v. L&R Indus*., 437 A.2d 1345, 1354 (R.I. 1981) (Kelleher, J., dissenting) (quoting Arthur Larson, *Mental and Nervous Injury in Workmen's Compensation*, 23 VANDERBILT LAW REVIEW 1243, 1259 (1970)).

[101] *See, e.g.*, Natalie D. Riley, *Mental-Mental Claims – Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 65 MISSOURI LAW REVIEW 1023 (2000).

[102] Troost, *supra*, p.863.

to abnormal working condition requirements, "provides the employer with no incentive to work on reducing stresses that are hard to detect, or to create a more bearable or pleasant working environment."[103]

B. Arguments Against Unrestricted Compensability of Mental-Mentals

Arguments resisting compensation of mental-mentals, and even for completely outlawing them, have often succeeded. In excluding such claims from compensation, for example, the Montana legislature included a public policy statement which remarks, "The legislature recognizes that these claims are difficult to objectively verify and that the claims have the potential to place an economic burden on the workers' compensation and occupational disease systems."[104] These two concerns, voiced unapologetically, underlie most resistance to unrestricted compensability of mental-mental claims. In a 2007 case, meanwhile, a Nevada court stated, "stress-related injury claims are the most nebulous type of workers' compensation claim, and the most susceptible to fraud."[105]

The precise anxieties are (1) fear of compensating mental ailments that are not, in any material contributing aspect, related to work exposures; (2) fear of compensating claims which are authentic when they first manifest, but then morph into assertions of indefinite disability; and (3) fear of outright fraud.

Most agree that medical science has progressed and that psychic injuries and disabilities are better understood in the present day. Certainly no one would characterize (as in the old days) those susceptible to stress as mentally "below par." Yet, many have argued that while physicians say that mental injury is real, the science is still weak on diagnosis and causation of the same. To declare that mental-mental injuries are equal to physical injuries may sound compelling "idealistically," but in the end experience shows that psychiatrists and psychologists are indeed weak on causation.[106] Notably, many have assailed the integrity of the PTSD diagnosis itself.[107] DeCarlo and Minkowitz (1989) concluded that it is "not surprising that courts are cautious" in

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[103] Letitia J. Mallin, *Disease, not Accident: Recognition of Occupational Stress Under the Workmen's Compensation Laws*, 13 COLUMBIA JOURNAL OF ENVIRONMENTAL LAW 357, 386 (1988).

[104] MONTANA CODE § 39-71-105(5).

[105] *McGrath v. Dept. of Public Safety*, 159 P.3d 239 (Nev. 2007) (quoting *Gatlin v. City of Knoxville*, 822 S.W.2d 587 (Tenn. 1991)).

[106] Edward J. Mills, *Mental Stimulus Causing Mental Disability: Compensability Under the Pennsylvania Workmen's Compensation Act*, 23 DUQUESNE LAW REVIEW 375, 382 (1984) ("serious questions still exist with respect to whether the fields of psychology and psychiatry have advanced to the point where it is possible to consistently give a credible and unequivocal opinion regarding causation.").

[107] *See infra* this section (discussing Deirdre Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMPLE LAW REVIEW 1 (2011)).

the realm of mental-mental claims.[108]

A lawyer from the insurance industry, writing in 1984, voiced the concern as follows:

> "No method exists either to quantify or qualify the extent to which one reality and not the other is a cause of the mental disorder." … Thus, the door is left wide open for the claimant who has filed or plans to file a workmen's compensation claim to emphasize the stresses of his workplace over the numerous other personal, social and environmental stresses which have contributed to his mental disorder. Unless the psychiatrist or psychologist has reason to believe that the claimant is not giving a full and accurate history, it is highly possible, if not probable, that he will accept the claimant's emphasis on the work stress and conclude that the disorder was primarily the result of those stresses.[109]

To blithely say that questions as to cause can simply be fought out in dispute resolution before compensation judges is not a satisfying answer to these concerns. Litigation over mental-mentals encourages individuals to stay out of work, generates discovery of the most invasive kind, and engenders hostility between employers and employees.

And, at the end of the dispute, a layperson (in most jurisdictions) will be choosing one expert another in another iteration of the "dueling doctors" situation. Notably, scholars Little, Eaton, and Smith characterize as especially acute the cynicism of such dueling-expert regimes in the context of mental injuries.[110] In this spirit, they identify the 1954 Louisiana case *Ladner v. Higgins.*[111] There, in response to the question, "Is [it] your opinion that this man is a malingerer?," the expert responded, "I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a post traumatic condition."

Wariness of compensating mental-mentals includes a concern that, once the claim is accepted, and the worker receives treatment and disability, he or she will develop, rightly or wrongly, a sense of enduring entitlement. The precise worry is that the claim, particularly in a wage loss state, will continue indefinitely. Workers who seem to develop this picture are not, typically, malingering. A psychiatrist who testified for many decades in Pittsburgh characterized as simply stubborn workers who insisted that, because of continuing anxiety, they could not return to work. Utilizing old cigarette commercial lingo, he would posit, as to such an obdurate worker, "He'd rather fight than switch."

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[108] DECARLO & MINKOWITZ, *supra*, p.288 (discussing the "uncertainty of psychiatry").

[109] Mills, *supra*, at 382 (quoting Lawrence Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 VANDERBILT LAW REVIEW 263, 272 (1983)).

[110] *See* JOSEPH W. LITTLE, THOMAS A. EATON & GARY R. SMITH, CASES AND MATERIALS ON WORKERS' COMPENSATION, p.300 (3d ed. 1993)).

[111] *Ladner v. Higgins*, 71 So.2d 242 (La. Ct. App. 1954).

However, some portray this aspect of mental claims as in essence reflecting fraud. An insurance analyst, commenting on the 2019 rise in requests for psychiatric IMEs, remarked that PTSD is increasingly a common condition in claims, "but often it's added later, which employers say can be attempts to prolong the claim, an industry term known as 'malingering,' …. "People [a defense lawyer stated] are getting a whole lot more treatment than they used to and in my practice in Illinois a lot of the cases I see start off as legitimate and then turn into malingering, which is why IMEs are being requested as frequently as they are …."[112]

Opponents of unrestricted mental-mental compensability warn, of course, of opening the floodgates to uncontrolled litigation. This has been a caution raised both in the past and in the present.[113] When, for example, in 2013, injured worker advocates in South Carolina advanced a bill which would eliminate the abnormal working conditions requirement, industry made precisely this argument.[114]

While some critics dismiss such cautions as phony catastrophism masking a judicial concern over narrow economic considerations,[115] the California experience, which everyone agrees was a misfortune, was attended by the opening of floodgates. In the realm of the mental-mental debates, the concern over a cascade of filings is the one concern that seems evidence-based.

Another concern over mental-mentals (connected with the causation problem) is the sense that many claimants with a purported work-induced mental disorder (like PTSD), are simply riding the wave of the current (or, in this case, ongoing) diagnosis *de jeur*, with their providers as facilitators. As discussed above, researchers have long pointed to social factors like the popularity of certain diagnoses as influencing doctors to diagnose them – and workers to suffer from them.

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[112] Louise Esola, *Reviews of Psych Claims in Comp Increase*, *Business Insurance* (Oct. 2, 2019), https://www.businessinsurance.com/article/20191002/NEWS08/912330957/Reviews-of-psych-claims-in-comp-increase#.

[113] The dissent in the leading New York case *Wolfe*, summarized above, was full of foreboding: "In an era marked by examples of overburdening of socially desirable programs with resultant curtailment or destruction of such programs, a realistic assessment of impact of doctrine is imperative. An overburdening of the compensation system by injudicious and open-ended expansion of compensation benefits, especially for costly, prolonged, and often only ameliorative psychiatric care, cannot but threaten its soundness or that of the enterprises upon which it depends." *Wolfe v. Sibley, Lindsay & Curr Co*., 36 N.Y.2d 505, 514 (N.Y. 1975).

[114] Frank Knapp, *Lawmakers Grapple with Mental-Mental, Longshore Bills*, Blog Post, SO. CAROLINA SMALL BUSINESS CHAMBER OF COMMERCE (Feb. 15, 2013) https://scsbc.org/lawmakers-grappling-with-mental-mental-longshore-bills/ ("Mike Chase, legal advisor to SCSIA, said Thursday that Pope's bill will allow claimants' attorneys to argue that workers suffered compensable mental trauma from normal working conditions and may open the flood gates to mental-mental claims.").

[115] *See* Cook, *supra*, pp.897-98 (charging that courts resist recognizing mental-mental cases on doctrinal grounds "as convenient ways in which to deny compensation for legal disability which courts and legislatures deem unwise due to economic considerations.").

Defenders of heightened-burden requirements, like abnormal working conditions, emphasize that such controls work to ferret out false or weak claims, those based primarily on pre-employment maladies,[116] and ensure (by definition) that claims based merely on subjective reactions to normal work conditions will not end in a disability claim. This position seems correct to this writer. A supporter of unrestricted mental-mentals, quoted above, asserts that "judicial reliance on tangibility as one of the indicia of an injury's genuineness is misguided," but this assertion is itself misguided – and even strange. Corroboration and plausibility are factors any judge utilizes to estimate whether a purported harm has occurred.[117] Identification of abnormal working condition, or some "untoward" event, helps to satisfy these inquiries.

Many are wary of unrestricted compensability of mental-mentals, particularly where PTSD is implicated. System participants have argued that PTSD is over-diagnosed, and that the diagnosis itself is a construct not based on scientific evidence.[118]

The impression of this writer has been that PTSD may, indeed, be overdiagnosed in compensation cases. Indeed, this assertion has been a common charge heard throughout the community for more than 20 years. This writer has seen many cases where a treating psychiatrist or psychologist perhaps sloppily makes the diagnosis, only to have it effectively picked apart by the IME psychiatrist. This phenomenon hardly means that the claimant was not credible or worthy of compensation, but it certainly raises an eyebrow as to the validity and basic integrity of the diagnosis.

IV. Laws Among the States

A. General Findings; Categorization of State Laws

Currently, among the 50 states, 33 permit recovery, under various tests, for mental-mental injuries. Seventeen, meanwhile, exclude such claims. The District of Columbia, the Longshore Act, and FECA also allow recovery for mental-mentals.[119] Generally, bright lines are in place.

Still, it is difficult, in this realm, to speak in absolutes. Nuance attends some state laws. Thus, in Arkansas, mental-mentals are prohibited, except when the mental stress is attended by

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[116] *See* Riley, *supra*, p.20 ("Requiring unusual stress for recovery also reduces the possibility of an employer becoming a general health insurer when an employee with pre-existing metal health problems is hired.").

[117] *See* David B. Torrey, *How Judges Judge and Why*, Seminar Paper, ABA Workers' Compensation Sections CLE, Coral Gables, FL (March. 16, 2013), https://paworkinjury.files.wordpress.com/2013/03/torreycredibility.pdf. *See also* John L. Kane, *Judging Credibility*, in LITIGATION, Vol. 33, No. 3 (ABA Spring 2007).

[118] Deirdre Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMPLE LAW REVIEW 1 (2011). Smith asserts, among other things, that lawyers should gain sophistication about the legal history – and legalistic aspects – of PTSD: "Courts," she accurately posits, "are likely unaware of PTSD's legal origins, the persistent controversies within psychiatry and psychology about the theoretical underpinnings of the diagnosis, and the complicated notion of 'causation' within contemporary psychiatry."

[119] *See* Appendix 1.

an act of violence.[120] Thus, presumably, an employee who is robbed, kidnapped, tied up, and otherwise terrorized, with no physical injury, can establish a claim.[121] Meanwhile, in California, mental-mentals are prohibited for gradual stress experienced in the first six months of employment, but such claims may be cognizable even during this initial period of employment if having their genesis in a "sudden and extraordinary employment condition."[122] And, of course, some of the most restrictive states, like Florida, have established carve-outs accommodating mental-mentals, particularly for PTSD, in the case of first responders.[123]

The laws of the fifty states are depicted, with statutory and caselaw references, in the table of Appendix 1. The laws of states introducing and enacting special laws for first responders, some featuring causation presumptions, are depicted in the tables of Appendices 2 and 3. What follows is a brief account of statutory and caselaw features based on these three tables.

1. States Disallowing Mental-Mentals

DeCarlo and Minkowitz, surveying the laws in 1989, noted that the law of mental-mentals was almost entirely in the cases; in contrast, statutes on the subject were rare.[124] The landscape is different in the present day, with 14 states featuring statutes that exclude mental-mental claims. These jurisdictions have, in effect, cut off at the pass the compensability of such claims. As discussed, Arkansas and West Virginia are states in this category.[125] Connecticut is the unusual northeastern state that is likewise in this category. (The law has since been amended to allow for PTSD in police officers.)[126]

Notably, not all states that exclude mental-mentals do so by statute. Some undertake the prohibition by common law. These states are Georgia, Kansas, and Nebraska.[127]

A complete denial in a common law state in exemplified by a 2007 Nebraska case. There, the court denied benefits to the dependents of a state police trooper who committed

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[120] ARK. CODE ANN. § 11-9-113.

[121] *See, e.g., Pennsylvania Liquor Control Bd. v. WCAB (Kochanowicz)*, 108 A.3d 922 (Pa. Commw. 2014) (benefits granted under such a scenario under Pennsylvania's abnormal working conditions rule).

[122] *See* CAL. LABOR CODE § 3208.3.

[123] *See infra* Section V(C).

[124] DECARLO & MINKOWITZ, *supra*, p.284.

[125] *See supra* Section II(F)(5).

[126] CONN. GEN. STAT. § 31-275(16)(B)(ii) ("'Personal injury' or 'injury' shall not be construed to include: … (ii) A mental or emotional impairment, unless such impairment ([1]) arises from a physical injury or occupational disease, [except] ([2]) in the case of a police officer [detailing certain circumstances] ….").

[127] *See* Appendix 1.

suicide in response to alleged stress. He had, in this regard, detained and then released a motorist who shortly thereafter committed a murder during a robbery. The trooper's distress at contemplating that scenario led him to take his own life. Yet, as far as the court was concerned, mental-mentals are not covered either as injuries or occupational diseases under the Nebraska Act.[128]

2. States not Requiring Exceptional Stress

Four states do not seem to maintain a rule that extraordinary stress is required before a mental-mental is cognizable as a matter of law. In these states, presumably, certain episodes of gradual stress may be compensable. These jurisdictions are California (with the major caveat noted above), Delaware, Hawaii, and New Jersey. The laws of the District of Columbia, the Longshore Act, and FECA also do not seem to require abnormal working conditions.

A Hawaii case illustrates the compensation of a gradual stress injury. There, a municipal employee who developed an anxiety disorder from the back-and-forth of what sounds like a poorly-administered system of promotions and demotions was held entitled to benefits.[129] This type of claim would likely not be cognizable in jurisdictions which require unusual stress.

3. States Requiring Abnormal Working Conditions

A plurality of states features a regime that preclude gradual stress and will only recognize a mental-mental when abnormal working conditions (the phrase in Pennsylvania), unusual or untoward work conditions, or the like,[130] have been proven by the injured worker.

A 2018 New York case serves as an example of a worker who did *not* meet the test. There, the court held that substantial evidence supported the Board's determination that a registered nurse, who alleged harassment and bullying in connection with her work, did not "establish that the stress that caused the injury was greater than that which other similarly situated workers experienced in the normal work environment." Further, "Claimant's supervisors described normal oversight and monitoring practices undertaken to assist her in correcting deficiencies in and improving her performance, and claimant failed to identify any unusual stressors or conduct that would constitute harassment or bullying as alleged in her claim for benefits."[131]

A 2008 Pennsylvania case, on the other hand, exemplifies a case where the claimant prevailed. There, the WCJ, Board, and court all held that claimant had been exposed to abnormal work conditions after her employer had both sexually harassed her and pressured her to

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[128] *Zach v. Nebraska State Patrol*, 727 N.W.2d 206 (Neb. 2007).

[129] *Davenport v. City & County of Honolulu*, 59 P.3d 932 (Haw. Ct. App. 2002).

[130] This writer has, in this article, used the phrase "abnormal working conditions" as a shorthand to capture all the characterizations of the unusual stress necessary to make out a cognizable claim in this category.

[131] *Matter of Lanese v. Anthem Health Services*, 85 N.Y.S.3d 262 (N.Y. App. Div. 2018).

participate in Islamic religious rituals, including wearing special garb.[132]

States in this category establish points of reference for what is *considered* abnormal stress. These reference points are (1) others in the general workforce; (2) others in the same type of work with the same employer; and (3) others in the same type of work regardless of employer.[133] On occasions these reference points are established by case law, but certain jurisdictions establish the criterion of comparison by statute. Of course, it is presumably easier to show abnormal working conditions when the point of reference is the general workforce.[134]

A 2017 New York case shows a state in the third category, with the coverage reference point established via case law.[135] There, an internal claims adjuster who, after a change in company policy, was harassed by fellow employees whose claims he was adjusting, developed PTSD. He was held to have established a cognizable mental-mental claim. The court characterized the law as follows: "For a mental injury premised on work-related stress to be compensable, 'a claimant must demonstrate that the stress that caused the claimed mental injury was greater than that which other similarly situated workers experienced in the normal work environment.'"

Under Vermont law, meanwhile, the statute, via a 2017 amendment, provides that the criterion of comparison as to unusual stress is "pressures and tensions experienced by the average employee across all occupations …."[136] That amendment, notably, overthrew a precedent which had identified the reference point as "all other employees performing similar work."[137]

4. States Requiring Shock or Fright

Jurisdictions in the most restrictive category, requiring shock or fright, maintain regimes with a heritage (if not via precedent, in spirit) in the "traumatic neuroses" claims discussed

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[132] *Empowerment Association v. WCAB (Porch)*, 962 A.2d 1 (Pa. Commw. 2008).

[133] These categories are discussed at length in Natalie D. Riley, *Mental-Mental Claims – Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 65 MISSOURI LAW REVIEW 1023, 1024 n.6 (2000).

[134] Riley, *supra*, p.1042. In critiquing the three standards, Riley remarks, correctly, "Comparing the claimant's work-related stress to the 'working world at large' is impractical. This standard would allow the parties to always produce a witness whose work-related stress is either significantly less or significantly greater than the stress experienced by the claimant. Furthermore, courts find this approach to be 'difficult to analyze in practice and biased towards employees who work in perceived stressful occupations.'"

[135] *Kraus v. Wegmans Food Markets, Inc.*, 67 N.Y.S.3d 702 (N.Y. App. Div. 2017).

[136] VT. STAT. ANN. tit. 21 § 601(11)(J).

[137] *Crosby v. City of Burlington*, 844 A.2d 722 (Vt. 2003) (mental-mental claims are legitimate under Vermont constitution, but directing that purported unusual level of stress is determined vis-à-vis "all other employees performing similar work," and not "as compared with the general population of employees ….").

above. Many (though not all) courts, as we have seen, long accommodated recovery.[138]

Some shock or fright requirements are, as before, found in caselaw, while others are found in modern statutes. The preeminent caselaw example is the 1976 Illinois landmark, *Pathfinder Co. v. Industrial Commission.*[139] There, the court, against an argument that physical injury must always attend a cognizable mental disability, changed the law and held that a mental-mental, when supported by sudden and severe emotional shock, "traceable to a readily perceivable cause," is compensable. In *Pathfinder*, the claimant, a factory worker, had come to the aid of an injured co-worker laboring at a press, and had retrieved her severed hand from the machine. The worker's promptly-ensuing anxiety reaction was held compensable.

A clear statutory example is found in the Louisiana Act. There, a mental-mental is only compensable if the "mental injury was the result of a sudden, unexpected, and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence."[140] Such criteria doomed the claimant in a recent case. There, a convalescent home nurse's aide who became stressed over extra work to be done on her night shift, because of the day shift's utter indolence, was held not to have experienced stress of an unexpected nature.[141]

5. Jurisdictions with Complex Laws: California and Washington

Some jurisdictions have, in their statutes, established complex schemes that stand out from most. They likely do so to try to avoid controversies as to coverage. (Pennsylvania, in contrast, is a *minimalist* state, where the entire law of mental-mentals is in the case law. Lawyers and judges are hence left to the vagaries and vicissitudes of the courts for guidance.)

California, in the wake if its claim and litigation crisis, has obviously tried to eliminate as much ambiguity in the law as possible with its Labor Code, section 3208.3. That proviso (a) allows a gradual stress mental-mental in employees with six months or more of employment; but (b) for newer workers, obliges the same to prove "a sudden and extraordinary employment condition"; and (c) in all cases, except those subject to violence, obliges claimant to prove that work stress is the predominant cause of the injury. As to (c), the statute is extraordinary in providing that, for victim of violence, only "substantial cause" must be shown, with that phrase meaning "at least 35 to 40 percent of the causation …."[142] The statute also restricts mental-mentals associated with a separation or termination of work; such claims are viable, but only

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[138] *See supra* Part II(D).

[139] *Pathfinder Co. v. Industrial Commission*, 343 N.E.2d 913 (Ill. 1976). For a recent case that seems to apply the rule liberally, see *Moran v. Illinois Workers' Compensation Comm'n*, 59 N.E.3d 934 (Ill. App. Ct. 2016) (court, reversing Industrial Commission, awards benefits to fire company supervisor who directed firefighters at site of deadly house fire and who became distraught at death of fellow firefighter).

[140] LA. REV. STAT. § 23:1021(b).

[141] *Emerson v. Willis Knighton Medical Center*, 257 So.3d 243 (La. Ct. App. 2018).

[142] CAL. LABOR CODE § 3208.3(b)(3).

under special showings – for example that the termination or layoff was attended by "sexual or racial harassment."[143]

Washington state, which may be categorized as a shock or fright state, likewise seeks to foreclose ambiguity in the law. It does so by providing administrative guidance with regard to what is and is not potentially covered. The key regulation (with statutory authority omitted here) provides, in part:

> (2)(a) Stress resulting from exposure to a single traumatic event will be adjudicated as an industrial injury…..
>
> (b) Examples of single traumatic events include: Actual or threatened death, actual or threatened physical assault, actual or threatened sexual assault, and life-threatening traumatic injury.
>
> (c) These exposures must occur in one of the following ways:
>
> (i) Directly experiencing the traumatic event;
>
> (ii) Witnessing, in person, the event as it occurred to others; or
>
> (iii) Extreme exposure to aversive details of the traumatic event.
>
> (d) Repeated exposure to traumatic events, none of which are a single traumatic event as defined in subsection (2)(b) and (c) of this section, is not an industrial injury … or an occupational disease …. A single traumatic event as defined in subsection (2)(b) and (c) of this section that occurs within a series of exposures will be adjudicated as an industrial injury ….[144]

No other jurisdiction, notably, maintains such a regulatory feature.

B. Select Statutory Features

1. Purely Subjective Mental-Mentals Excluded

As noted at the outset, all jurisdictions exclude mental-mental claims based upon a worker's purely subjective feelings of stress. Even proponents of unrestricted compensability are likely to acknowledge that allowing such claims would be unworkable and an employer's "worst nightmare."[145]

In any event, this exclusionary rule is found in both statutes and case law. The Michigan statute was enacted after a memorable, early court decision *allowed* a claim based on subjectively-perceived stress.[146] The Michigan statute now provides, in part, "Mental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions

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[143] *Id.*, § 3208.3(e)(4).

[144] WASH. ADMIN. CODE § 296-14-300(2).

[145] Glenn M. Troost, *Workers' Compensation and Gradual Stress in the Workplace*, 133 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 847, 849 n.5 (1985).

[146] *Deziel v. Difco Laboratories, Inc.*, 268 N.W.2d 1 (Mich. 1978).

thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality."[147] A Delaware court, meanwhile, denied benefits in one claim, stating that claimant had "merely imagine[d] or subjectively conclude[d]" that work events were the source of her problems.[148]

2. Good Faith Personnel Action Exception

A common statutory exclusion bars a mental-mental claim when the animus for the distress is a good-faith personnel action such as demotion, discipline, layoff, or termination. The California statute noted above features such an exception, as do the laws of at least nine other states. The otherwise permissive Hawaii statute, for example, provides that mental-mental claims "resulting from disciplinary action taken in good faith by the employer" are not compensable.[149]

Pennsylvania, meanwhile (via case law), generally considers such claims to be based on normal working conditions. During the heavy litigation period of mental-mentals in Pennsylvania, an entire body of law developed that this writer categorized as "promotions, demotions, and other common workplace stresses."[150] In a renowned case of this type, the Supreme Court denied benefits to an ALCOA executive's "Girl Friday" who, from a demotion and purported humiliation, sustained disabling emotional symptoms.[151] According to the court, abnormal working conditions had not been shown:

> An abnormal working condition is not established by evidence that a displaced employee was unable to obtain an identical job with his same employer. We reject the [idea that our abnormal working conditions precedent] suggested by [the claimant] that would allow any change in the status quo of an employment situation to be compensable simply because a claimant established that the change was actual, rather than imagined or perceived, and resulted in psychic injury.[152]

Under this Pennsylvania rule, notably, bad economic times which give rise to stress and psychic ailments, like anxiety over business failure or laying off workers, are also not reflective of abnormal work conditions.[153]

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[147] MICH. COMP. LAWS § 418.301(2).

[148] *Camp v. Dade-Behring*, 2005 WL 2249761 (Del. Super. 2005).

[149] HAWAII REV. STAT. § 386-3.

[150] DAVID B. TORREY & ANDREW E. GREENBERG, PENNSYLVANIA WORKERS' COMPENSATION: LAW & PRACTICE, § 4:25 (Thomson Reuters 2008 & Supp. 2019-2020).

[151] *Wilson v. WCAB (Aluminum Corp. Of America)*, 669 A.2d 338 (Pa. 1996).

[152] *Id.*, p.344.

3. Statutes Requiring Precise Diagnoses

One feature observed in at least two statutes, meant to narrow coverage and screen out marginal claims, is a proviso which requires that any mental-mental must be supported with a diagnosis, typically under the DSM-5, the manual published by the American Psychiatric Association. This requirement is especially notable in the first responder laws popular in the current era,[154] but can be found in general statutes as well.[155]

The Minnesota law is most prominent in this regard. There, mental-mentals are precluded unless, as to *any* occupation, the diagnosis of PTSD under the DSM is proven. In 2019, that requirement was at center stage in a case decided by the Supreme Court.[156] There, the claimant's expert diagnosed PTSD, but the insurance evaluator rejected the proposition that claimant suffered from the ailment. The WCJ credited the defense expert, but the Appeals Court reversed, "determin[ing] that the 2013 amendment requires that the compensation judge conduct an independent assessment to verify that the diagnosis of a psychologist or psychiatrist conforms to the PTSD criteria in the DSM-5 before accepting the expert's diagnosis." The Supreme Court reversed, holding that the law said no such thing, and restoring the denial of benefits.

C. Heightened Burdens and the Issue of Unequal Treatment

Workers who have sustained mental injuries and have been denied workers' compensation under restrictive laws have argued that such disparate treatment is a violation of constitutional guarantees of equal protection of the laws. These arguments, however, have been unsuccessful. Courts usually respond that rational basis review applies, and that legislatures may legitimately place extra burdens on such claims.

The leading case to this effect is *Sakotas v. WCAB (Motel 6),*[157] in which a California court identified, as legitimating the law, the legislative concern over fraudulent claims that had arisen during the period of claims-filing upsurge. The court found a legitimate state interest and a rational basis for the heightened burdens featured in the 1992 California amendment.[158]

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[153] *See, e.g., McCoy v. WCAB (McCoy Catering Services, Inc.),* 518 A.2d 883 (Pa. Commw. 1986) (*appeal denied*) (denial of fatal claim benefits to a widowed claimant whose husband's psychological stress and resulting suicide was derived from an inability to support his family as a result of his failing catering business).

[154] *See infra* Section V(H). *See* Appendix 3.

[155] For example, the Oregon statute, which also sets forth an abnormal working conditions rule, provides that a mental-mental is only compensable when "[t]here is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community." OR. REV. STAT. § 656.802(3).

[156] *Smith v. Carver County*, 931 N.W.2d 390 (Minn. 2019) (WCCA committed error in reversing denial of PTSD claim by former police officer; ALJ had no obligation to ascertain whether defense psychologist closely held to the DSM-5 diagnosis of PTSD in his opinion).

[157] *Sakotas v. WCAB (Motel 6)*, 95 Cal. Rptr.2d 153 (Cal. Ct. App. 2000).

D. Exclusion of Mental-Mentals and the Exclusive Remedy

Courts have held that when a workers' compensation statute is amended to exclude mental-mentals as a matter of law, the employer thereupon loses its immunity to the worker's tort suit. This was the holding in 1996 Montana case.[159] That decision was based on the constitutional principle that a state cannot abolish the common-law cause of action to sue in personal injury (that is, by creating workers' compensation), and then abolish the same cause of action within the workers' compensation law. The principle itself derives from state constitution "Open Courts" provisions.

A Washington case from 2019 reveals a potentially cognizable action. There, the worker, a public defender, was stalked and otherwise harassed by a former criminal court client to whom she had been assigned. When she complained to her supervisor of repeated harassing episodes, he reportedly failed to take action. She ultimately filed for workers' compensation and instituted a negligence action against her employer. Of course, in Washington, only singular traumatic events will constitute a cognizable work injury. In civil court, the employer argued that claimant's mental injury was from a singular event, and hence that her negligence claims was barred by the exclusive remedy. The trial court agreed, dismissing the claim. On appeal, however, the court held that a genuine issue of material fact existed with regard to whether the injuries were gradual or singular. The court thus reversed and remanded. If the jury found that her injury from gradual traumatic events, she would be allowed her negligence suit.[160]

West Virginia is a jurisdiction where the argument for employer tort liability in the face of mental-mental abolition has been unsuccessful. Under the 1993 reform, mental-mentals were excepted from compensability as a matter of law. Thereafter, a coal miner emotionally traumatized by a mine explosion sued his employer in tort. The issue of availability of remedies was before the court, but such considerations were overwhelmed by the majority's conviction

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[158] *Id.* p.160 ("the Legislature enacted section 3208.3, subdivision (b)(1) to combat the proliferation of fraudulent psychiatric claims and reduce the costs of workers' compensation coverage."). *See also McCrone v. Bank One Corp.*, 839 N.E.2d 1 (Ohio 2006) (R.C. 4123.01(c)(1) did not violate equal protection by complete exclusion of psychological and psychiatric injuries from workers' compensation coverage); *Frantz v. Campbell County Mem. Hosp.*, 932 P.2d 750 (Wyo.1997) (state workers' compensation law did not violate equal protection by excluding mental injuries from workers' compensation coverage: "rationale behind the exclusion includes the steadily growing number of claims for psychological disorders, the difficulty with verifying such claims because the claimant's description of his condition is often the sole basis for diagnosis and the difficulty with determining whether a causal relationship exists between the claimant's employment and the mental injury."). Scholar Michael C. Duff, meanwhile, has suggested that the proposed PTSD presumption law of his state, Wyoming, may be constitutionally questionable as an impermissible "special law." Michael C. Duff, *Is Wyoming's Proposed Workers' Compensation PTSD Bill a "Special Law"?*, Workers' Compensation Law Prof Bog (March 7, 2020), https://lawprofessors.typepad.com/workerscomplaw/2020/03/is-wyomings-proposed-workers-compensation-ptsd-bill-a-special-law.html.

[159] *Stratemeyer v. Lincoln County*, 915 P.2d 175 (Montana 1996).

[160] *LaRose v. King County*, 437 P.3d 701 (Wash. Ct. App. 2019). The LaRose workers' compensation claim, meanwhile, was dismissed, as the judge found that the mental injury was from gradual stress. The appellate court affirmed in a 2020 ruling. *LaRose v. Department of Labor & Industries*, 456 P.3d 879 (Wash. Ct. App. 2020).

that the legislature desired that employers remain immune from such suits.[161]

E. Attempts to Avoid Special Mental-Mental Rules

A phenomenon, perhaps inevitable, of regimes which exclude or limit mental-mentals, are legal "end-runs" around such roadblocks to recovery. Three such strategies exist.

1. Casting the Mental-Mental as a Physical-Mental

Under this approach, the injured worker encounters a situation, usually an accident, which features a superficial physical affect, but then develops a mental disability. The lawyer – or court – thereupon casts the case as a physical-mental to avoid a complete prohibition or abnormal working conditions requirement. This approach has not been successful in Pennsylvania. For example, in one case, the worker, an aide in a group home for the disabled, developed a mental disability after combative residents pulled at her hair and blouse. As Pennsylvania is an abnormal working conditions jurisdiction, claimant sought to portray the injury as a physical-mental. This attempt was unsuccessful, with the court holding that such level of stimulus was insufficiently physical.[162] A similar portrayal, however, was successful in Colorado.[163] There, in order to prevail in a mental-mental, the statute requires the testimony of a psychiatrist or psychologist. In the case at hand, claimant had no such expert evidence, but the court allowed the "grabbing, pinching, and kissing," to which she was subjected, to serve as a physical injury. In this manner, the requirement of the special expert was avoided.

2. Casting the Mental-Mental as a Mental-Physical

Under this approach, the injured worker encounters a situation, usually one of mental stress, which leads to a mental disability, but one accompanied by physical problems, such as high blood pressure or gastrointestinal upset. The lawyer – or court – thereupon casts the case as a mental-physical to avoid the complete prohibition or abnormal working conditions requirement. Larson has long identified this strategy, remarking, "There is the natural tendency for employees living in states that bar altogether claims for mental injury based on mental stimuli, but which allow claims for physical injury caused by mental stimuli, to attempt to expand the 'physical' component of their injuries in order to qualify for benefits under the statute's definitions."[164]

The exemplary case provided by Larson involved a police dispatcher *Luttrell v. Clearwater County Sheriff's Office*.[165] There, the claimant worked as a police dispatcher who

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[161] *Bias v. Eastern Associated Coal Corp.*, 640 S.E.2d 540 (W. Va. 2006). In classic West Virginia style, this holding provoked a blistering dissent.

[162] *Anderson v. WCAB (Washington Greene Alternative),* 862 A.2d 678 (Pa. Commw. 2004).

[163] *Oberle v. Industrial Claim Appeals Office*, 919 P.2d 918 (Colo. Ct. App. 1996).

[164] LARSON, supra, § 56.02[3].

sustained an emotional breakdown caused by a stressful emergency call. She sought to portray her disability as mental-physical, with the physical consequence reflected by an increased heart rate. The court denied the claim, holding that she had failed to present "clear and convincing evidence that the increased heart rate was anything other than part of the psychological response to her own reaction…. This was a 'mental-mental' case and therefore not compensable in Idaho."[166] Meanwhile, a Pennsylvania police officer who was subject to stress sought to avoid the abnormal working conditions rule by depicting his symptoms of sweating, crying, and uncontrollable bowel movements as physical injuries. The court rejected this strategy, dismissing such maladies as nothing more "than manifestations of the stress that he experienced …."[167]

3. Conceptualizing the Mental Disability as Biological Disorder

The two approaches identified above accept the proposition that mental-mental injuries are, rightly or wrongly, treated by the law in a restrictive manner. The third strategy, however, rejects the entire premise that any such disparate treatment should exist and relies, instead, on scientific arguments that mental illnesses constitute biological disorders and, hence, are really physical injuries.[168]

This strategy rejects prejudiced thinking with regard to mental illness and argues that a "duality between body and mind" exists. That is, that the "structure of the body includes the basic organ systems, as well as the brain and mind – itself anatomically sited in the frontal cortex – functioning 'as an integrated whole, chemically, electrically, biochemically,' and that there can be an injury to the mind without a physical touching of some part of the body.[169]

Though compelling, the approach has been unsuccessful.

The leading case on this strategy is the 2010 case *Wheeler v. State ex rel. Wyoming Workers' Safety and Compensation Division*.[170] There, a volunteer firefighter, fighting a fire and witnessing the deaths of two co-workers, developed PTSD. His later claim of permanent partial disability was denied on the grounds that his PTSD was reflective of an excluded mental disability. Claimant sought to avoid the exclusion via expert testimony that PTSD is reflective of an organic brain disorder, to wit, a physical injury:

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[165] *Luttrell v. Clearwater County Sheriff's Office*, 97 P.3d 448 (Idaho 2004).

[166] LARSON, *supra*, § 56.02[3].

[167] *Young v. WCAB (New Sewickley Police Dept.)*, 737 A.2d 317 (Pa. Commw. 1999).

[168] This writer discussed the strategy at length in David B. Torrey, *Pennsylvania Experiences with the Mental Injury/Physical Injury Dichotomy: Cases Involving Schizophrenia and Shiftwork Maladaptation Syndrome*, 47 IAIABC JOURNAL 57 (2010), https://iecdp.files.wordpress.com/2011/08/iaiabc_journal_spring_2010_webversion1.pdf.

[169] *Todd v. Goostree*, 493 S.W.2d 411 (Mo. Ct. App. 1973).

[170] *Wheeler v. State ex rel. Wyoming Workers' Safety and Compensation Division*, 245 P.3d 811 (Wyo. 2010).

> Q: And, Doctor, could you explain in layman's terms what your opinion is with respect to the physical organic basis of a posttraumatic stress disorder condition?
>
> A. Very succinctly. The brain is traumatized physically by the experience of a traumatic event where one's life is threatened or one is witnessing another life-threatening or potentially life-threatening type of event. And in the experience of that the brain goes into a very heightened state of arousal biologically ...., the chemistry that subserves that arousal sets into motion a cascade of biological events as if dominoes are falling, and they affect a number of physical aspects of brain functioning.... Structurally over time these events can even cause radiographically demonstrable changes.... And you can actually visualize radiographically changes that have occurred structurally in the brain as a result of posttraumatic stress disorder.[171]

The hearing officer and Supreme Court nevertheless denied the claim. Though not discounting the expert testimony, the court held that the legislature's explicit decision to exclude mental injuries would be meaningless, and undermined, if diagnoses like PTSD were considered physical injuries and hence not excluded.[172]

The proposition that mental illness is really *biological* illness has also been floated in a Pennsylvania case. The fact-finding (though not the holding) of that decision was that mental stress causing *schizophrenia* was a biological disorder and hence could be considered a mental-physical.[173] Yet, while the court approved an award of benefits, the conceptualization of schizophrenia, or other serious mental disorders, as a physical injury, has not, since that time, captured the imagination of Pennsylvania courts.[174]

This writer, meanwhile, has argued that one DSM-recognized mental disorder, shiftwork maladaptation syndrome (SMS), caused by working unusual shifts, and never getting a good night's rest, should be conceptualized as a physical disorder. Appellate courts which have considered this diagnosis have uniformly rejected compensability. Perhaps at some point the

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[171] *Id.*, p.815.

[172] *Id.*, p.817 ("Based upon the statutory language which clearly differentiates between mental and physical injuries, the fact that the legislature made a specific change in 1994 to exclude mental injuries that were not caused by compensable physical injuries and our case law interpreting the statute, we conclude that the requisite 'physical injury' must be something outside of the biological changes in the brain associated with mental disorders. While we respect that [the expert] disagrees with the legislature's policy choice to disallow mental injuries, we cannot overlook the clear language of the statute.").

[173] *Leo v. WCAB (Borough of Charleroi)*, 537 A.2d 399 (Pa. Commw. 1988). In that case, the claimant was a municipal worker for a small city. According to the opinion, "Upon transfer from the Street Department to the Police Department, Claimant experienced a mental breakdown, a biological illness diagnosed as paranoia schizophrenia. His physical illness was triggered by the stress he experienced in his efforts to fulfill the post of a police officer."

[174] TORREY & GREENBERG, *supra*, § 4:33.

mental injury as biological disorder will, however, be accepted in the realm of SMS. This is so as scientific evidence of verifiable pathology is strong in this realm.[175]

F. Mental-Mental Claims Based on Sexual Harassment

Sexual harassment via psychological pressures is typically held compensable as a claim of the mental stress causing mental disability type. For example, in a Pennsylvania case, the Supreme Court held that a coal miner, victimized by a supervisor's coarse and joking harassments proposing brutalizing same-sex rape, showed abnormal working conditions and was entitled to benefits.[176] The Ohio statute, meanwhile, excludes mental-mentals but makes an exception if the mental injury has arisen from "sexual conduct in which the [employee] was forced by threat of physical harm to engage or participate."[177]

Of course, claims based on Title VII alleging sexual harassment are not barred by the exclusive remedy.[178] Such claims are not usually based on personal injury. However, when such lawsuits including a count alleging mental and/or physical harm, and/or the need for medical and psychiatric treatment, a court may well strike the same.[179] This is so, anyway, in jurisdictions where sexual harassment is cognizable as a work injury; in short, the worker's tort claim sounding in negligence will likely be dismissed.

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[175] Torrey, *Pennsylvania Experiences with the Mental Injury/Physical Injury Dichotomy: Cases Involving Schizophrenia and Shiftwork Maladaptation Syndrome*, *supra*.

[176] *RAG (Cyprus) Emerald Resources, LP v. WCAB (Hopton)*, 850 A.2d 833 (Pa. Commw. Ct. 2004), *rev'd*, 912 A.2d 1278 (Pa. 2007).

[177] OHIO REV. CODE § 4123.01 (stating, among other things, "Injury" does not include: "(1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate ….").

[178] As the editor of the Larson treatise admonishes, "It is axiomatic that the exclusive remedy provisions of a state's workers' compensation act cannot trump federal anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964, which generally prohibits discrimination and/or harassment of employees on the basis of, among other things, their sex [see The Supremacy Clause (USCS Const. Art. VI)]." Thomas A. Robinson, *Sexual Harassment Claims and Workers' Compensation Exclusivity*, Blog Post (Dec. 12, 2008), https://www.lexisnexis.com/legalnewsroom/workers-compensation/b/workers-compensation-law-blog/posts/larson_2700_s-spotlight_3a00_-sexual-harassment-claims-and-workers_1920_-compensation-exclusivity. He also posits, correctly, that "in most jurisdictions, … some tort claims are successful as against the exclusivity defense, being treated as outside the ambit of the workers' compensation system. Decisions of this kind generally rely on one of three distinguishing features: [1] the intangible or emotional nature of the plaintiff's injury; [2] the intentional – rather than accidental – quality of sexual harassment; or [3] the personal – rather than work-related – origin of sexual harassment." *Id.*

[179] TORREY & GREENBERG, *supra*, § 4:28 ("Federal courts are often presented with civil complaints that include sexual harassment counts pleading physical and mental injury. Most courts dismiss such counts, convinced that the Pennsylvania Supreme Court would hold that sexual harassment in the workplace is a condition of work, and that when an injury from the same occurs, it has arisen in the course of employment.").

The potential bar of the New York law's exclusive remedy was recently implicated in the litigation that enveloped the controversial movie producer Harvey Weinstein and his various enterprises and associates. In a decision ruling on the defendants' summary dismissal motion, a federal court ruled that the plaintiff, a victim of sexual abuse by her sometime-employer Weinstein, potentially was asserting certain claims that were barred by the exclusive remedy.[180]

There, a movie producer, Canosa, filed a multiple-count lawsuit against Weinstein, his business partners, and his business (TWC). Among the several counts were allegations of rape, sexual abuse, intimidation, and harassment. The defendants, beyond Weinstein, were implicated on allegations (among others) that they had facilitated Weinstein's behavior. The defendants raised several defenses in their 12(b)(6) motion, asserting (among others), that certain claims were barred by the exclusive remedy.

As to that defense, Weinstein's business and its officers argued that the New York workers' compensation law was "the exclusive remedy for work-related injuries, including those involving sexual assault …." They hence sought dismissal of the case. The court, however, ruled that pending discovery it was too early in the proceedings to ascertain whether the claims the plaintiff was making even had their basis in the employer-employee relationship. The court, denying the motion to dismiss, stated, "The Court is persuaded that, prior to discovery, Canosa does not yet have the factual tools to make a confident showing that her work for Weinstein and TWC fell outside the WCL, so as to preserve her negligence claims…." The import of the ruling, however, was that if discovery showed that she was in an employer-employee relationship with Weinstein, her sexual harassment claims would be barred.

V. The Plight of First Responders: Cases, Laws, and Presumptions

A. Work Stress and Challenges for First Responders

Workers laboring as first responders, such as police, firefighters, and EMTs, have jobs that most agree are naturally stressful. Many such workers have encountered difficulty in succeeding with mental stress claims even when exposed to the extreme violence and appalling tragedies which are so regretfully common in the present day. As demonstrated in Appendix 1, 17 states do not provide coverage at all. In the abnormal working conditions jurisdictions, meanwhile, an afflicted police officer (for example) must typically prove that his or her stress is greater than that of other police officers. When coupled with the related rule that police officers must, in effect, be ready for virtually any violent situation, they are often left without a compensation remedy.

Though some courts strain to award benefits in extreme cases,[181] in many instances brutalized police officers and others simply cannot meet the considerable burden of proof

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[180] *Canosa v. Ziff et al.*, 2019 WL 498865 (S.D.N.Y. 2019).

[181] *See, e.g., City of Lower Burrell v. WCAB (Babinsack)*, 2020 WL 1190603 (Pa. Commw., filed March 12, 2020) (police officer already stressed from working with angina found to have experienced abnormal working conditions when he observed dead body of his colleague, who had been murdered by escaped fugitive); *Moran v. Illinois*

required in the mental-mental sphere.[182]

Three responses, within workers' compensation laws, to the first responder situation are evident. The first is a law to allow the worst of the illnesses, PTSD, to be covered in the case of all occupations. The second is an enactment which covers PTSD and/or other psychological maladies, but leaving placing the burden of proof on the worker. The third is creation of a presumption of causation for PTSD in the case of first responders. Several states have enacted such presumption laws. Both proposals and enactments among the states are noted and referenced in the tables of Appendices 2 and 3.

This impetus toward loosening mental-mental restrictions, by whatever means, is borne of a societal view that first responders, in the modern day, deserve access to medical and disability coverage in the face of exposure to an increasingly violent society. The everyday labor of such workers is stressful, but many newspaper stories recount, as well, the appalling stresses to which first responders are exposed when they arrive at the scenes of mass shootings such as that at the Sandy Hook, CT elementary school. A psychologist commenting on such events commented, "These mass shootings, especially when children are involved, that's when you see [first responders] break down."[183]

Meanwhile, an inordinate number of first responders are, in general, reportedly diagnosed with PTSD, and this fact has increasingly been understood by the public.[184] Advocates seeking easier access to mental-mental claims for first responders often assert that suicide rates among first responders are remarkably high.[185]

The impetus of loosening restrictions has also been tied to the "debt of 9/11 and its aftermath." A risk management expert ventures that, as a result of that catastrophe, "First

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Workers' Compensation Commission, 59 N.E.3d 934 (Ill. App. 2016) (court, reversing Industrial Commission, holds that claimant was exposed to sudden shock or fright, and Commission's finding to the contrary was against the manifest weight of the evidence – claimant was a supervisor at fire scene at which a subordinate was caught in a flashover and died; claimant developed guilt, mental collapse, and PTSD).

[182] *See*, *e.g.*, *Smith v. Carver County*, 931 N.W.2d 390 (Minn. 2019) (court, affirming ALJ's denial of benefits, holds that court of appeals committed error in reversing denial by former police officer; ALJ had no obligation to ascertain whether defense psychologist closely held to the DSM-5 diagnosis of PTSD in his opinion); *Bentley v. Spartanburg County*, 730 S.E.2d 296 (So. Carolina 2012) (deputy who shot umbrella-wielding suspect at short-range, and observed him die, did not experience unusual stress; though denial of benefits was affirmed, court recommends that legislature abandon the restrictive statutory test).

[183] Rene Ebersole, *First Responders Struggle with PTSD Caused by the Emergencies, Death, Tragedies They Face Every Day*, WASHINGTON POST (Oct. 15, 2019) (including an account of a volunteer firefighter/EMT traumatized by providing aid at the Sandy Hook elementary school massacre).

[184] John E. Hanson, *Addressing the Emergence of [the] PTSD Presumption: Issues and Solutions*, Power Point Slides (Willis Towers Watson 2018), https://www.nlc.org/sites/default/files/users/user118/PDF%20Hanson%20PTSD%20d.3a.pdf.

[185] *See* Hannah Wiley, *New California Law Lets First Responders Seek Workers' Comp for PTSD*, THE SACRAMENTO BEE (Oct. 2, 2019) (reporting on the signing of S.B. 542 and stating that more firefighters and police officers died from suicide in 2017 than injuries sustained in the line of duty).

responders have earned unquestionable protection of [their] health under the law … [and] a generation of veterans now fills the ranks of first responders."[186] The same expert suggests that workers' compensation, with its typical insistence on scrutiny as to work causation has, in effect, been diverted. In this regard, concerns over causation fall by the wayside as providing benefits under the program becomes a "very easy means of assuaging the community's need to help."[187]

B. The Minnesota and Colorado Enactments

Minnesota, a state which otherwise excludes mental-mentals, enacted a unique law facilitating PTSD awards. It did so in response to a notoriously harsh denial to a police officer who had been mentally traumatized but was left without a remedy. The Minnesota law, however, is democratic and covers *all* workers. The Colorado legislature also enacted a law which covers PTSD. That state is a "shock or fright" jurisdiction where compensability of mental-mentals is hence highly restricted. After reports that first responders would routinely use group health insurance for such mental injuries, a lobby developed to amend the law. In the current version, all workers can potentially secure an award for PTSD.[188]

C. The Florida Enactment

Florida, a state which has traditionally been hostile to mental-mentals, took another approach. It, too, enacted a law covering PTSD, but it applies only to first responders. This expansion of rights is likely the most publicized of the statutory enactments to address the plight of such workers.

The enactment unfolded in March 2018. The legislature in that month approved Senate Bill 376, which established PTSD as a compensable occupational disease for first responders. The law as codified, notably, is not part of the workers' compensation laws (title 440) but, instead, is codified at title 112, "Public Officers, Employees, and Records."

The genesis of the law is clear. Florida, in this regard, was a state where mental-stress injuries like PTSD were covered by workers' compensation only if the condition had its genesis in a physical injury. In the wake of the massacres at Pulse nightclub and the Marjory Stoneman Douglas High School, however, a lobby developed so that law enforcement officers, firefighters, and EMTs (career and volunteer) would be covered for the condition even in lieu of physical injury.[189]

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[186] Hanson, *supra*, p.4.

[187] *Id.*

[188] COLO. REV. STAT. § 8-41-301(3).

[189] *See, e.g.*, Louisiana Comp Blog, *New Louisiana PTSD Law for First Responders Stand out in Region* (July 25, 2019) (observing that the "new law is part of a larger national trend that seeks to address, in part, public outcry from what some considered to be negligent treatment of first responders struggling after mass shootings like that at the Pulse nightclub in Orlando.").

Under the law, PTSD must have been diagnosed consistently with the DSM-5 and have been occasioned by exposures to or experiences with at least one of eleven situations (for example, "directly witnessing the death of a minor" or "directly witnessing death, including suicide, that involved grievous bodily harm of a nature that shocks the conscience."). With regard to this latter criterion, the Florida agency is directed to adopt definitional rules.[190]

The first responder must, in any event, prove the existence of the disorder "by clear and convincing medical evidence."[191] Thus, Florida has added PTSD as a compensable condition. Importantly, however, the first responder in Florida does not enjoy a presumption of causation, a popular statutory device which has been enacted in several jurisdictions.[192]

D. Presumption Laws for First Responders

1. The Trend

A vigorous trend is for states to make exceptions, within exclusionary laws, for first providers via the legislative "presumption of causation" device.[193] In February 2020, NCCI, which carefully monitors proposed bills and enactments on this topic, characterized the PTSD bills, including those featuring a presumption, to be the "top trending issue" for 2019.[194] These laws, as proposed and enacted, as they stood as of April 27, 2020, are listed in the tables of Appendices 2 and 3.

First-responder advocates have argued, often with obvious success, that current workers' compensation laws are inadequate to address the problem of first responder stress, injury, and suicide.[195] The idea behind such laws is that when a first responder (or similar worker) develops

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[190] These rules have now been published. They are available at *First Responder FAQs for PTSD*, https://www.myfloridacfo.com/Division/WC/InfoFaqs/PTSD-FAQs.pdf.

[191] *See* FLORIDA STATUTES § 112.1815(5)(a) *et seq.*

[192] Texas is another state where eligibility standards have been eased, but where the worker still has the burden of proof. TEX. LAB. CODE § 504.019.

[193] Thomas A. Robinson, *Challenges for First Responders (and a Society that Respects Them)*, in WORKERS' COMPENSATION: EMERGING ISSUES ANALYSIS, 2019 EDITION, p.vii *et seq.* (2019). This writer and colleagues have also tracked the trend for the last few years. *See* David B. Torrey, Lawrence D. McIntyre & Justin D. Beck, *Recent Developments in Workers' Compensation and Employers' Liability Law (2019 Survey Issue)*, 55 ABA TTIPS LAW JOURNAL___ (2020); David B. Torrey, Lawrence D. McIntyre, Kyle D. Black & Justin D. Beck, *Recent Developments in Workers' Compensation and Employers' Liability Law (2018 Survey Issue)*, 54 ABA TTIPS LAW JOURNAL 761 (2019). A journalist's early account of this legislative activity is Louise Esola, *First Responder Comp Bills Introduced to Limited Success*, BUSINESS INSURANCE (Sep. 19, 2018), https://www.businessinsurance.com/article/20180919/NEWS08/912324081/First-responder-comp-bills-introduced-to-limited-success.

[194] Workcompwire, *NCCI Release INSIGHTS: 2020 Workers' Compensation Legislative Session Review* (Feb. 12, 2020), https://www.workcompwire.com/2020/02/ncci-releases-insights-2020-legislative-session-workers-comp-preview/.

PTSD or other listed condition, he or she will no longer bear the burden of showing causation. Instead, the law presumes, or takes for granted, that work causation exists, and it is for the employing municipality to prove that the condition has its genesis in some non-work-related cause.

Maine and Vermont were states which, in 2018, enacted such laws. Meanwhile, the National Council on Compensation Insurance (NCCI) identified Idaho, California, Louisiana, New Hampshire, New Mexico, Nevada, and Oregon as states which, during the first half of 2019, enacted laws establishing PTSD presumption laws for first responders.[196] Minnesota and Washington also have first responder statutes that feature presumptions.

No two presumption laws are precisely alike. All feature PTSD, as defined by the DSM, as the malady covered, though New Hampshire and Oregon also include the diagnosis, "acute stress disorder." Meanwhile, the range of occupations is different for each jurisdiction. Oregon seems the most expansive, affording the PTSD presumption to full-time firefighters, EMS personnel, police officers, correctional officers (adult and youth), parole and probation officers, emergency dispatch personnel, and 911 operators.[197]

2. Exemplary State: Vermont

An example of one of these provisos is that of Vermont. The workers' compensation law of that state now provides, "In the case of police officers, rescue or ambulance workers, or firefighters, post-traumatic stress disorder that is diagnosed by a mental health professional shall be presumed to have been incurred during service in the line of duty and shall be compensable, unless it is shown by a preponderance of the evidence [by the employer] that the post-traumatic stress disorder was caused by nonservice connected risk factors or nonservice-connected exposure."[198] Notably, other mental conditions suffered by these Vermont workers are now covered as well, but in such cases the worker will bear the initial burden of proof of causation.[199] And, notably, a statute of repose is a feature of the statute: "A police officer, rescue or ambulance worker, or firefighter who is diagnosed with post-traumatic stress disorder within three years of the last active date of employment [in such occupation] … shall be eligible for benefits under this subdivision."

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[195] *See, e.g.*, Louisiana Comp Blog, *New Louisiana PTSD Law for First Responders Stand out in Region* (July 25, 2019) (observing that the "new law is part of a larger national trend that seeks to address, in part, public outcry from what some considered to be negligent treatment of first responders struggling after mass shootings like that at the Pulse nightclub in Orlando."). *See also* Hanson, *supra*, p.2.

[196] *See* NCCI REGULATORY & LEGISLATIVE TRENDS REPORT (July 2019), https://www.ncci.com/Articles/Documents/II_Regulatory-Legislative-Trends2019.pdf.

[197] OR. REV. STAT. § 656.802.

[198] VT. STAT. § 601(11)(I)(i).

[199] *Id.* § 601(11)(J).

3. Presumptions as not Meaning Automatic Payment

A worker benefitted by a presumption of causation does not automatically receive an award of compensation, at least under presumption statutes as traditionally designed.[200] Presumptions are "rebuttable," which means, in the first responder context, that the defending municipality, as in Vermont, may develop its own proofs and defend itself in litigation. The presumption gives the claimant "a leg up" in court, but is not the equivalent of a pay order. This aspect of presumptions has on occasion been misunderstood.[201]

In some jurisdictions, the presumption of causation may be very weak. For example, under the Pennsylvania Act occupational disease provisos, as soon as the defense presents any evidence of lack of causation (identifying some other potential cause) the presumption – which is merely procedural – "drops out." The claimant thereupon, once again, has the burden of proof.[202] This type of presumption, in academic literature, is called a "Wigmore-Thayer" presumption. Such presumptions are not substantive rules of law (the so-called "Morgan" approach to presumptions) as found in certain jurisdictions, which may strengthen claimant's case.[203]

Given this level of nuance, a mandate exists in this area: each state presumption law must be carefully read to determine its precise operation. Still, in *any* jurisdiction, once litigation commences, a first responder who hopes to rely solely on the presumption to win his or her case may be disappointed. Indeed, lawyers with experience in occupational disease litigation rarely rely completely on presumptions. This was the case in southwest Pennsylvania in the extensive Black Lung litigation of the 1970s and 1980s. Counsel for coal miners never relied on the pneumoconiosis presumption enjoyed by deep miners. To the contrary: they always presented an expert pulmonologist or similar specialist.

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[200] On the other hand, the New Mexico statute seems to suggest that a claimant qualifying for the presumption is to be paid medical treatment benefits until an adjudication to the contrary. The statute provides, "Medical treatment based on the presumptions created in this section shall be provided by an employer as for a job-related illness or injury unless and until a court of competent jurisdiction determines that the presumption does not apply. If the court determines that the presumption does not apply or that the illness or injury is not job related, the employer's workers compensation insurance provider shall be reimbursed for health care costs by the medical or health insurance plan or benefit provided for the firefighter by the employer." N.M. REV. STAT. § 52-3-32.1(F).

[201] Howard Fischer, *Arizona Officials Tackle Workers' Comp Law for Firefighters with Cancer*, YOURVALLEY.NET (Jan. 16, 2020) (discussing a new bill that would eliminate "loophole" of rebuttal proviso and replacing same with presumably guaranteed recovery: "This new proposal would spell out that if a firefighter was diagnosed with one of the listed cancers in the law, that provides 'conclusive and irrebuttable' evidence that the disease is work related. And that, in turn, ensures that workers' compensation benefits are available."), https://www.yourvalley.net/stories/arizona-officials-tackle-workers-comp-law-firefighters-cancer,131201

[202] *Bristol Borough v. WCAB*, 206 A.3d 585 (Pa. Commw. 2019).

[203] David B. Torrey, *Firefighter Cancer Presumption Statutes in Workers' Compensation and Related Laws: An Introduction and a Statutory/Regulatory/Caselaw Table* (NAWCJ White Paper 2012), http://www.nawcj.org/wp-content/uploads/2019/06/NAWCJ-FIREFIGHTER-PRESUMPTIONS-Essay-Table-2013.pdf.

4. Opposition to and Critique of Presumption Laws

Opposition exists to the trend of PTSD presumption laws. Some argue that evidence simply does not exist that PTSD is more prevalent among first responders than in other occupations, and hence that it is unsatisfactory that such workers receive the advantage that a presumption affords. One risk management expert writing on the topic is hardly hostile to first responders, but he quips that support of presumptions is on the rise despite "lack of persuasive scientific evidence …." "[S]entiment over science," he complains, prevails among presumption advocates.[204] A California-based researcher, in a full-frontal attack on firefighter *cancer* presumptions, also rejects the proposition that the presumption should be expanded to PTSD. He admonishes that "the evidence for elevated risk among firefighters for any of these conditions is nonexistent, inconsistent or even contradictory."[205]

More common opposition is voiced by those who are concerned that PTSD presumption laws will strain or overwhelm municipal workers' compensation budgets.[206] A particular challenge is estimating costs: "every source weighs the cost of PTSD differently."[207] An NCCI actuary in 2018 remarked that "putting a dollar amount on the presumption bills is not feasible, given that 'many of the occupational diseases typically included in proposals providing presumptive coverage to first responders have long latency periods. Therefore, it may take several years before claim activity associated with first responder occupational diseases emerge in the [available] data …."[208]

A critique of a different kind is that it is unfair to allow the presumption to first responders, but *disallow* it to other workers who are exposed to extreme stress – *without* such exposures even being part of their jobs. Both Robinson, the editor of the Larson treatise, and Cleveland attorney Donald Lampert, question the disparate treatment that is created by PTSD presumptions. Robinson ponders:

> [O]ne might imagine that in Florida, Connecticut, Kentucky, Washington, Idaho, and any other state that limits PTSD to so-called "first responders," it is the long-haul truck driver who is actually the first on the scene at many serious auto accidents. It [was] a teacher who was first on hand [at the Sandy Hook massacre] to hold the hand of a dying child shot by a crazed assailant. It was a bartender or other wait staff employee [who] was the first to comfort a wounded customer or

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[204] Hanson, *supra*, p.4.

[205] Frank Neuhauser, *Cancer Presumption for Firefighters: Good Policy or Give Away?*, IAIABC PERSPECTIVES, p.7 (July 2019).

[206] Louise Esola, *First Responder Comp Bills Introduced to Limited Success*, *supra* (noting that PTSD presumption bills "have been opposed by municipalities concerned about the potential for their costs to run in the 'hundreds of millions of dollars ….").

[207] Hanson, *supra*, p.4.

[208] Louise Esola, *First Responder Comp Bills Introduced to Limited Success*, *supra*.

co-employee at Pulse, the Orlando nightclub.[209]

Lampert, noting that, in Ohio, a PTSD bill was submitted but never enacted, posits, "Police and fire unions were obviously disappointed. Absent from the debate[, however], were the legal and constitutional issues that workers' compensation practitioners would recognize. What about non-public safety workers? An over-the-road truck driver and/or Good Samaritan can just as easily come upon a horrible scene causing PTSD."[210]

A final critique of the presumption laws is that, in typically limiting recovery to PTSD, less extreme yet disabling forms of psychic illness are excluded. That critique, in other words, asserts that the presumption laws in their current typical manifestation do not go far *enough*.

VI. Conclusion

The last word has obviously not been spoken on the issue of mental-mentals. As demonstrated by the last section, evidence exists that the pendulum has begun to swing back towards a more available mental-mental remedy. This is so, at least, when a pin-pointed diagnosis of PTSD is made and the victim is a first responder. It may be, however, that the increased sensitivity to mental suffering that is reflected by the trend of first responder laws may transfer to the benefit of the general working public. That seems to have been the case in Minnesota and Colorado.

It is submitted that complete disallows of mental-mental cases are unsatisfactory. While such exclusionary rules by their very nature prevent fraudulent and exaggerated claims, many workers who sustain serious mental injuries arising in the course of their employment are denied the reasonable remedies of medical treatment and disability payments during their period of convalescence. On the other hand, unrestricted compensability seems unworkable and, to revisit some earlier rhetoric, employers' "worst nightmare." We know from the California and Pennsylvania experiences that open-ended regimes invite all sorts of marginal claims, contentious litigation, and public disrespect for the system. A reasonably-applied abnormal working conditions rule seems best suited as a compromise.

It is submitted, also, that allowing mental-mental indiscriminately and simply letting the judge decide all disputed claims is no answer to the overall challenge of the mental-mentals. True, it is the office of courts to decide disputes. Yet, virtually *all* mental-mentals *are* disputed, and litigation of many such claims encourages individuals to stay out of work, generates invasive discovery, and promotes hostility between workers and their employers.

Perhaps another compromise measure (for the exclusionary jurisdictions) is to allow, for the mental-mental case, psychiatric and psychological treatment only, and/or a maximum

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[209] Thomas A. Robinson, *Challenges for First Responders (and a Society that Respects Them)*, in WORKERS' COMPENSATION: EMERGING ISSUES ANALYSIS, 2019 Edition, pp.ix-x (2019).

[210] Donald E. Lampert, [*Recent Developments in Ohio],* in WORKERS' COMPENSATION: EMERGING ISSUES ANALYSIS, 2019 Edition, p.165 (2019).

number of weeks of disability.[211] True, such a proposal goes against the National Commission condemnation of arbitrary limits on duration of benefits,[212] but such a compromise may relieve the employer anxiety that mental-mental claims will be of indefinite duration and break the bank. By way of analogy, it is notable that, in the wake of the chronic pain/opioid abuse crisis, employers and carriers have been encouraged, as a substitute for narcotic use, to point workers to psychotherapy for pain management. This is so in the name of cost savings, but also for the improved health of the patient.

[211] Some states limit the maximum number of weeks of disability available in physical-mental claims to six months after maximum medical improvement. *See, e.g.*, FLA. STAT. § 440.093(3). Wyoming maintains essentially the same law. WYO. STAT. § 27-14-102(xi)(J)(I).

[212] *See* Recommendation 3.17, REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS (1972), https://workerscompresources.com/.

APPENDIX 1

STATE BY STATE ANALYSIS OF MENTAL STRESS/MENTAL DISABILITY COMPENSABILITY UNDER WORKERS' COMPENSATION LAWS (4.27.2020)*

C = Potentially Compensable?
GS = Gradual Stress Potentially Compensable
AWC = Abnormal Working Conditions/Unusual or Untoward Work Conditions Required
S/F = Sudden Stimulus: Shock, Fright, or the Like

David B. Torrey
DTorrey@pa.gov
4.27.2020

State	C	GS	AWC	S/F	Statute	Leading or Exemplary Case Law
AL	N				Ala. Code § 25-5-1(9) ("Injury does not include a mental disorder or mental injury that has neither been produced nor been proximately caused by some physical injury to the body.").	
AK	Y		x		Alaska Stat. § 23.30.010(b) ("compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury…."). [1]	*Kelly v. State of Alaska (Dep't of Corrections)*, 218 P.3d (Alaska 2009) (correctional officer who was threatened with death by inmate, and who developed PTSD, encountered "extraordinary and unusual" work circumstances).
AZ	Y		X		Ariz. Rev. Stat. § 23-1043.01(B) ("A mental injury, illness or condition shall not be considered a personal injury by accident	*France v. Indus. Comm'n*, 2020 WL 772524 (Ariz. Ct. App. Feb. 18, 2020) (court, reversing ALJ, awards benefits to deputy who was

* Thanks to Mr. Jarek Sulak, a 1L at Duquesne University School of Law, for his editing and proofreading assistance.

[1] **Alaska**: Alaska Stat. § 23.30.010(b) also provides, "The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer." This latter requirement is hereinafter referred to as the "Good-Faith Personnel Action" exception.

					arising out of and in the course of employment and is not compensable pursuant to this chapter unless some unexpected, unusual or extraordinary stress related to the employment or some physical injury related to the employment was a substantial contributing cause of the mental injury, illness or condition.").	traumatized by shotgun-wielding madman and who thereafter developed PTSD); *Marks v. Industrial Comm'n (Crossroads Carriers, LLC & Sentry Ins. Co.)*, 2016 WL 3176467 (Az. Ct. App. 2016) ("A disabling mental condition is not compensable if it is brought about by the general building of emotional stress rather than an injury-causing event….").
AR	N[2]			x	Ark. Code Ann. § 11-9-113 (disallowing all mental-mental claims, except when injury is sustained by "any victim of a crime of violence.").[3]	*Amlease, Inc. v. Kuligowski*, 957 S.W.2d 715 (Ark. 1997) (interpreting statute and denying claim to truck driver for his PTSD, incurred after motor vehicle accident involving fatality).
CA	Y	x[4]			Cal. Labor Code § 3208.3 (extensive proviso on compensability of psychiatric injuries, (a) seemingly allowing gradual stress in employees with six months or more of employment, but (b) for newer workers obliging same to prove "a sudden and extraordinary employment condition"; and (c) in all cases, except those subject to violence, obliging claimant to prove that work stress is the predominant cause of the injury).[5]	*Sakotas v. WCAB (Motel 6)*, 95 Cal.Rptr.2d 153 (Cal. Ct. App. 2000) (claimant, front desk clerk and occasional manager, who became stressed by increase of work over time, failed to show that such stress was predominant cause of injury).
CO	Y			x	Colo. Rev. Stat. § 8-41-301(2), (3) (stating, *inter*	*Kieckhafer v. Indus. Claims Appeal Office*, 284 P.3d 2020

[2] **Arkansas**: An exception exists when the claimant is a victim of a "crime of violence."

[3] **Arkansas**: The restrictive 1993 reform in Arkansas was noted and criticized in John D. Copeland, *The New Arkansas Workers' Compensation Act: Did the Pendulum Swing too Far?*, 47 ARKANSAS L. REV. 1 (1994).

[4] **California**: Gradual stress claims not cognizable for workers who have been employed fewer than six months. The California law, and how it was changed in 1993, is discussed at Aya V. Matsumoto, *Reforming the Reform: Mental Stress Claims under California's Workers' Compensation System*, 27 LOYOLA LOS ANGELES LAW REVIEW 1327 (1994), https://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1862&context=llr.

[5] **California**: Statute features a Good-Faith Personnel Action exception. Lighter burden of proof on claimant when injury alleged to have been caused by violent act or exposure to same.

					alia, that, to constitute an injury, a "psychologically traumatic event" must have been experienced, and "the claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment.").[6]	(Colo. Ct. App. 2012) (mental health nurse, in failing to submit expert report, necessarily failed to establish psychologically traumatic event, and ALJ and Appeals Office committed no error in dismissing claim).
CT	N				Conn. Gen. Stat. § 31-275(16)(B)(ii) ("'Personal injury' or 'injury' shall not be construed to include: … (ii) A mental or emotional impairment, unless such impairment ([1]) arises from a physical injury or occupational disease, [except] ([2]) in the case of a police officer [detailing certain circumstances] ….").[7]	
DE	Y	x			Del. Code Ann. tit. 19, § 2301(12) (basic definition of injury; does not refer to mental stress).	*State v. Cephas*, 637 A.2d 20 (Del. 1994) (claimant must prove that the mental illness was the result of stressful working conditions by an objective causal nexus test; claimant must prove both the existence of the stressful working conditions and relate those conditions to the mental disorder; here, correctional officer established his case under this test by showing that his duties had increased significantly over time) (court reviewing Larson treatise and, as well, the then-extant laws of multiple jurisdictions).
FL	N				Fl. Stat. § 440.093(1) ("A mental or nervous injury due	*Kneer v. Lincare (Travelers)*, 267 So.3d 1077 (Fla. Dist. Ct.

[6] **Colorado**: July 2018 amendment clarifies that PTSD is covered. Also, statute features a Good-Faith Personnel Action exception.

[7] **Connecticut**: *See generally* Lee R. Hansen, "*Mental-Mental" Workers' Compensation in Nearby States*, Office of Legislative Research Report (March 3, 2014) (examining the law of mental-mental injuries in Massachusetts, New Jersey, New York, and Rhode Island), https://www.cga.ct.gov/2014/rpt/pdf/2014-R-0080.pdf

					to stress, fright, or excitement only is not an injury by accident arising out of the employment. Nothing in this section shall be construed to allow for the payment of benefits under this chapter for mental or nervous injuries without an accompanying physical injury requiring medical treatment. A physical injury resulting from mental or nervous injuries unaccompanied by physical trauma requiring medical treatment shall not be compensable under this chapter").	App. 2019) (limit on psychiatric care (post-physical injury) was not unconstitutional) (noting also, "benefits have never been available for stand-alone mental injuries without an accompanying physical injury.").
GA	N				Ga. Code Ann. § 34-9-1(4) (basic definition of injury; does not refer to mental stress).	*Abernathy v. City of Albany*, 495 S.E.2d 13 (Ga. 1998) (mental-mentals are not compensable; hence, where municipal worker, after massive flooding, had to retrieve unearthed caskets and corpses, and suffered nervous breakdown, claim denied).
HI	Y	x			Hawaii Rev. Stat. § 386-3 (basic definition of injury; refers to mental stress only to exclude certain claims "resulting from disciplinary action taken in good faith by the employer ….").	*Davenport v. City & County of Honolulu*, 59 P.3d 932 (Haw. Ct. App. 2002) (explaining 1998 amendment which recognizes good faith disciplinary action exclusion, and holding that claimant, who sustained anxiety disorder from the back-and-forth of promotions and demotions, was not subject to such exclusion).
ID	N				Idaho Code Ann. § 72-451 (allowing mental stress claims only for mental-physicals, and expressly disallowing mental-mental claims).	*Luttrell v. Clearwater County Sheriff's Office*, 97 P.3d 448 (Idaho 2004) (clarifying that mental-mentals are not compensable).
IL	Y			x	Ill. Comp. Stat. § 305/1(d) ("To obtain compensation …, an employee bears the burden of showing, by a	*Moran v. Illinois Workers' Compensation Comm'n,* 59 N.E.3d 934 (Ill. App. Ct. 2016) (court, reversing

					preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment.").[8]	Industrial Commission, awards benefits to fire company supervisor who directed firefighters at site of deadly house fire); *GM Parts Div. v. Industrial Commission*, 522 N.E.2d 1260 (Ill. App. Ct. 1988) (claimant did not show that altercation with supervisor met the test of *Pathfinder*, which requires "a sudden severe emotional shock which produces immediate disability and is caused by an uncommon nontraumatic work-related experience out of proportion to the incidents of normal employment activity."); *Pathfinder Co. v. Industrial Commission*, 343 N.E.2d 913 (Ill. 1976) (landmark case changing the law and confirming that a mental-mental claim, when supported by sudden and severe emotional shock, "traceable to a readily perceivable cause," is compensable; in case, prevailing claimant, a factory worker, had come to aid of injured co-worker laboring on press, and had retrieved severed hand of such co-worker from machine, thereafter suffering an anxiety reaction).
IN	Y		x		Ind. Code § 22-3-6-1(e) (basic definition of injury – does not mention mental injuries).	*Hansen v. Von Duprin*, 507 N.E.2d 573 (Ind. 1987) (claimant, a victim of past violence, harassed by a teasing supervisor (who was unaware of such history, and who in the end set off a cap pistol near claimant), causing claimant's nervous breakdown, demonstrated cognizable injury).

[8] **Illinois**: "Accidental" is not defined in the Act.

IA	Y		x		Iowa Code § 85.3(1) (referring to employer's obligation to pay for "any and all personal injuries sustained by an employee arising out of and in the course of the employment ….").[9]	*Dunlavey v. Economy Fire & Casualty Co.*, 526 N.W.2d 845 (Iowa 1995) (landmark case allowing for mental-mental claims, in case involving an insurance executive who had developed psychological condition in face of increased duties; remand required for determination of whether claimant met test of compensability, which is as follows: "in order for an employee to establish legal causation for a nontraumatic mental injury caused only by mental stimuli, the employee must show that the mental injury 'was caused by workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs,' regardless of their employer.").
KS	N				Kans. Stat. Ann. § 44-508 (general definition of injury; does not mention psychological injuries, but has been interpreted to exclude them).	*Followill v. Emerson Elec. Co.*, 674 P.2d 1050 (Ks. 1984) (claimant who developed PTSD after seeing co-worker's dead body, in a "grisly" scene, did not have cognizable claim). *See also Howell v. State of Kansas*, 84 P.3d 636 (Ks. 2004) (claim denied: suicide case involving corrections psychologist who had developed depression from work stressors).
KY	N				Ky. Rev. Stat. § 342.0011 (general definition of injury, stating that stress injuries can only be cognizable if prompted by physical animus).	
LA	Y			x	La. Rev. Stat. § 23:1021(b) ("Mental injury or illness resulting from work-related	*Emerson v. Willis Knighton Medical Center*, 257 So.3d 243 (La. Ct. App. 2018)

[9] **Iowa**: Statute does not otherwise refer to mental injuries.

					stress shall not be considered a personal injury by accident … and is not compensable … unless the mental injury was the result of a sudden, unexpected, and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence.").	(convalescent home nurse's aide who became stressed at extra work to be done on her night shift, because of day shift's indolence – experiencing the "same old thing" – did not experience stress of an unexpected nature as required by the statute).
ME	Y		x		Me. Rev. Stat. Ann. tit. 39-A, § 201 (3-A) ("Mental injury resulting from work-related stress does not arise out of and in the course of employment unless: A. It is demonstrated by clear and convincing evidence that: (1) The work stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee; and (2) The work stress, and not some other source of stress, was the predominant cause of the mental injury…."). [10]	*Caron v. Maine Sch. Admin. Dist. No. 27,* 594 A.2d 560 (Me. 1991) (school teacher who experienced increased pressures after her duties were drastically changed, did establish claim under this statute).
MD	Y		x		Md. Code Ann., Labor and Employment § 9-101(b) (providing that "Accidental personal injury" means: "(1) an accidental injury …," including "frostbite or sunstroke caused by a weather condition," but not referencing mental injuries).	*Belcher v. T. Rowe Price Foundation, Inc.*, 621 A.2d 872 (Md. Ct. App. 1993) (court recognizing mental-mental claims but requiring objective proof of harm and excluding gradual stress claim: "an injury under the Act may be psychological in nature if the mental state for which recovery is sought is capable of objective determination."); *Means v. Baltimore Co.*, 689 A.2d 1238 (Md. Ct. App. 1997) (paramedic who developed PTSD could potentially prevail on her claim as an occupational disease).
MA	Y		x		Mass. Gen. Laws ch. 152, § 1(7A) ("Personal injuries	*Bisazza's Case*, 897 N.E.2d 1 (Mass. 2008) (substantial

[10] **Maine**: Statute features a Good-Faith Personnel Action exception.

					shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment.").	evidence existed that claimant, correctional officer harassed in the wake of prison murder of renowned pedophile, did incur his PTSD in wake of series of such harassments, court remarking, as to intent of statute, "amendments are consistent with the goal of denying compensation for nonspecific emotional and mental disabilities.").
MI	Y		x		Mich. Comp. Laws § 418.301(2) ("Mental disabilities … are compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities are compensable if arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality.").	*Robertson v. DaimlerChrysler Corp*., 641 N.W.2d 567 (Mich. 2002) (in case dealing with autoworker who felt he had been mal-treated by supervisor, court insists that objective standard is to apply, and that claimant's perception of events must be "grounded in reality.").
MN	Y			x	Minn. Stat. § 176.011(15), (16) (providing, in definitions of occupational disease and injury, that PTSD is included).[11]	*Smith v. Carver County,* 931 N.W.2d 390 (Minn. 2019) (WCCA committed error in reversing denial of PTSD claim by former police officer; ALJ had no obligation to ascertain whether defense psychologist closely held to the DSM-5 diagnosis of PTSD in his opinion); *Schuette v. City of Hutchinson*, 843 N.W.2d 233 (Minn. 2014) (pre-amendment case disallowing PTSD in a police officer who had responded to fatal motor vehicle accident scene in which family friends were involved).

[11] **Minnesota**: Statute features a Good-Faith Personnel Action exception.

MS	Y			x	Miss. Code. Ann. § 71-3-3 ("'Injury' means accidental injury or accidental death arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner. Untoward event includes events causing unexpected results….").	*Scarborough v. Mississippi Dep't of Transp*., 764 So.2d 488 (Miss. 2000) (worker who felt unsupported by co-workers and supervisors, especially after he alleged various conspiracies, did not persuade ALJ and Commission that he had sustained a cognizable mental-mental injury; opinion setting forth required burden of proof, to wit, injuries caused "by some untoward or unusual event or events," and remarking that ordinary stress not sufficient enough to establish cognizable claim).
MO[12]	Y		x		Mo. Rev. Stat. § 287.120.8, .9 (indicating, *inter alia*, that stress must be "extraordinary and unusual").	*Mantia v. Mo. Dep't of Transp.*, 529 S.W.3d 804 (Mo. 2017) (highway department worker who was exposed to repeated stressful highway accident scenes did not show extraordinary and unusual work conditions); *Schaffer v. Litton Interconnect Technology*, 274 S.W.3d 597 (Mo. Ct. App. 2009) (executive in charge of national workplace safety programs did not show that stress was extraordinary and unusual).
MT	N				Mont. Code Ann. § 39-71-119(3) (injury does not mean a physical or mental condition arising from emotional or mental stress; or a nonphysical stimulus or activity); § 39-71-116(23) (occupational disease does include a physical or mental condition arising from emotional or mental stress	*Yarborough v. Montana Municipal Ins. Auth*., 938 P.2d 679 (Mont. 1997) (in light of statute, firefighter's PTSD was excluded from coverage, court finding unpersuasive the theory that violence of fireball at fire scene constituted a physical animus); *Stratemeyer v. Lincoln County*, 915 P.2d 175 (Mont. 1996) (police officer with PTSD did not sustain

[12] **Missouri**: Statute discussed at Natalie Riley, *Mental-Mental Claims – Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 65 MISSOURI LAW REVIEW 1023 (2000).

					or from a nonphysical stimulus or activity).[13]	injury which was compensable under WCA; thus, he was able to sue employer in tort – exclusive remedy is not applicable if the *quid pro quo* of the compromise fails).
NE	N				Neb. Rev. Stat. § 48-141(4) (basic definition of injury; does not refer to mental stress).	*Zach v. Nebraska State Patrol*, 727 N.W.2d 206 (Neb. 2007) (police trooper who committed suicide in response to alleged stress did not sustain compensable death; this was so even if evidence showed chemical imbalances within brain; also, mental-mentals are not covered either as injuries or as occupational diseases).
NV	Y			x	Nev. Rev. Stat. § 616C.180 (statute providing for "Injury or disease caused by stress" stating, *inter alia*, that "extreme stress in time of danger" must attend any mental-mental injury, and not be caused by "any gradual mental stimulus ….").	*McGrath v. Dept. of Public Safety*, 159 P.3d 239 (Nev. 2007) (state trooper who alleged mental injury from series of harassing and retaliatory acts by co-workers showed only gradual stress injury, and did not make out a claim under this statute).
NH	N				N.H. Rev. Stat. § 281-A:2(XI) (injury does not include disease or death "resulting from stress without physical manifestation ….").[14]	*Appeal of Lettelier*, 35 A.3d 629 (N.H. 2011) (company president, seriously depressed after failure of his steel-making business, did not establish compensable mental injury).
NJ	Y	x			N.J. Stat. Ann. § 34:15-31 (basic definition of injury; does not refer to mental stress).	*Rizzo v. Kean Univ.*, 2014 WL 2590281 (N.J. Super. 1981) (social work professor did not meet burden of proof to show mental breakdown from perceived stressors at work; said burden of proof requires "objectively stressful working conditions …

[13] **Montana**: Law precludes not only "mental-mentals" but "mental-physicals" as well.

[14] **New Hampshire**: Statute features a Good-Faith Personnel Action exception.

						'peculiar' to the particular workplace").
NM	Y		x		N.M. Stat. § 52-1-24 (defines "primary mental impairment" to rule out gradual stress and requires a "psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances ….").[15]	*Romero v. City of Santa Fe*, 134 P.3d 131 (N.M. Ct. App. 2006) (worker who was obliged to daily attend to pigeon excrement as part of his job as municipal pool manager did not suffer psychologically traumatic event); *Douglass v. State of New Mexico*, 812 P.2d 1331 (N.M. Ct. App. 1991) (white collar worker with responsible job, who developed increase in duties because of personnel cutbacks, did not suffer traumatic event but, instead, gradual stress) (court referring to leading case of *Jensen*, which explained the nature of the legislative enactment) (citing *Jensen v. New Mexico State Police*, 788 P.2d 382 (N.M. Ct. App. 1990)).
NY	Y		x		N.Y. Workers' Compensation Law § 2(7) ('"Injury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom. The terms 'injury' and 'personal injury' shall not include an injury which is solely mental and is based on work-related stress if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer,	*Matter of Lanese v. Anthem Health Services*, 85 N.Y.S.3d 262 (N.Y. App. Div. 2018) (substantial evidence supported Board's determination that RN, who alleged harassment and bullying in connection with her transfer within the employer to a different job, did not "establish that the stress that caused the injury was greater than that which other similarly situated workers experienced in the normal work environment."); *Kraus v. Wegmans Food Markets, Inc*., 67 N.Y.S.3d 702 (N.Y. App. Div. 2017) (internal claims adjuster who,

[15] **New Mexico**: Gradual stress was held to be compensable in one case, but legislature thereafter changed the law to require a psychologically traumatic event. *See Candelaria v. General Electric Co*., 730 P.2d 470 (N.M. Ct. App. 1986).

					demotion, or termination taken in good faith by the employer.").	after change in policy, was harassed by fellow employees whose claims he was adjusting, developing PTSD, did establish cognizable mental-mental claim, court characterizing law as follows: "For a mental injury premised on work-related stress to be compensable, 'a claimant must demonstrate that the stress that caused the claimed mental injury was greater than that which other similarly situated workers experienced in the normal work environment.").
NC	Y		x		N.C. Gen. Stat. § 97-2(6) (basic definition of injury; does not refer to mental stress).	*Bursell v. General Elec. Co.*, 616 S.E.2d 342 (No. Carolina 2005) (worker accused of theft – as it turned out, wrongfully – potentially established claim of work injury for his subsequent psychic illness; psychic trigger must be an "unlooked for and untoward event"); *Pitillo v. No. Carolina Dep't of Environmental Health and Natural Resources*, 566 S.E.2d 807 (No. Carolina Ct. App. 2002) (worker who felt unfairly treated in employment performance review did not meet burden of showing mental stimulus).[16]
ND	N				N.D. Cent. Code § 65-01-02(11)(b)(10) (the term "injury" does not include a "mental injury arising from mental stimulus.").	
OH	N[17]				Ohio Rev. Code § 4123.01 (stating, among other things, "Injury" does not include:	*Armstrong v. John E. Jurgensen Co.*, 990 N.E.2d 568 (Ohio 2013) (truck driver

[16] **North Carolina**: For an academic treatment, see James R. Martin, Comment, *A Proposal to Reform the North Carolina Workers' Compensation Act to Address Mental-Mental Claims*, 32 WAKE FOREST LAW REVIEW 193 (1997).

					"(1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate ….").	who suffered physical injuries in accident, in the aftermath of which he also observed dead body, and who thereafter developed PTSD, did not establish a physical-mental claim, court rejecting theory that, because worker had sustained physical injury in collision, claim was cognizable; in this regard, credited medical evidence was that PTSD developed from observing the dead body, not the physical aspects of the accident).
OK	N[18]				Okla. Stat. tit. 85A, § 13 ("A mental injury or illness is not a compensable injury unless caused by a physical injury to the employee, and shall not be considered an injury arising out of and in the course and scope of employment or compensable unless demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence.").	
OR	Y		x		Or. Rev. Stat. § 656.802(3) ("[A] mental disorder is not compensable under this chapter unless the worker establishes all of the following: (a) The employment conditions producing the mental disorder exist in a real and objective sense; (b) The employment conditions producing the mental disorder are conditions other	*Whitlock v. Klamath County Sch. Dist.*, 974 P.2d 705 (Or. Ct. App. 1999) (elementary school teacher whose duties were vastly expanded after ballot measure eliminated music classes, requiring him to undertake hours of off-duty preparation, experienced obligation not "generally inherent in every working condition.").

[17] **Ohio**: Exception for injury via "sexual conduct in which the claimant was forced by threat of physical harm to engage or participate …."

[18] **Oklahoma**: An exception is made with regard to a victim of violent crime.

					than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles; (c) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community; (d) There is clear and convincing evidence that the mental disorder arose out of and in the course of employment.").[19]	
PA	Y		x		Section 301(c)(1) of the Workers' Compensation Act, Pa. Stat. Ann. tit. 77, § 411(1) (defines compensable event as "injury" without reference to mental stress injuries).[20]	*City of Lower Burrell v. WCAB (Babinsack)*, 2020 WL 1190603 (Pa. Commw., filed March 12, 2020) (police officer already stressed from working with angina found to have experienced abnormal working conditions when he observed dead body of his colleague, who had been murdered by escaped fugitive); *Payes v. WCAB (State Police)*, 79 A.3d 543 (Pa. 2013) (while "abnormal working conditions" must be proven before a mental stress case is cognizable, here state trooper who struck and killed woman, who was apparently seeking to commit "suicide by cop," had established cognizable claim).
RI	Y		x		R.I. Gen. Laws § 28-34-2(36) ("The disablement of an employee resulting from	*Tessier v. Rhode Island Hospital*, W.C.C. 02-01732 (R.I. Work. Comp. App. Ct.

[19] **Oregon**: Requirements codified in the occupational disease sections.

[20] **Pennsylvania**: Case law has interpreted "injury" to include mental-mentals, but the injured worker must show abnormal working conditions – a heavy burden. Gradual stress claims, meanwhile, are not cognizable.

					mental injury caused or accompanied by identifiable physical trauma or from a mental injury caused by emotional stress resulting from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees encounter daily without serious mental injury shall be treated as an injury as defined in § 28-29-2(7).”).	2003) (phlebotomist who felt harassed and unfairly treated at work did not establish cognizable claim; employer’s motion for summary judgment granted).[21]
SC	Y		x		S.C. Code Ann. § 42-1-160(B)(1) (providing, *inter alia*, that the “employee’s employment conditions causing the stress, mental injury, or mental illness were extraordinary and unusual in comparison to the normal conditions of the particular employment ….”).	*Bentley v. Spartanburg County*, 730 S.E.2d 296 (So. Carolina 2012) (deputy sheriff who developed PTSD after he shot and killed a suspect who attempted to assault him did not establish cognizable claim – “incident was not extraordinary and unusual, but was a standard and necessary condition of a deputy sheriff’s job.”).
SD	N				S.D. Codified Laws § 62-1-1 (“The term [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 ….”).	
TN	Y			x	Tenn. Code Ann. § 50-6-102.	*Edwards v. Fred’s Pharmacy*, 2018 WL 9365652017 (Tenn.

[21] **Rhode Island**: A leading case from 1981, *Seitz v. L&R Indus*., 437 A.2d 1345 (R.I. 1981), addressed mental-mental cases, and a rule allowing the same under certain conditions was eventually codified. The *Seitz* case is still cited as precedent even though a statute is now in place. In *Seitz*, the court held that an office manager who suffered from the ordinary stress and rigors of moving her office from one city to another was not entitled to obtain benefits under the Workers’ Compensation Act for her alleged psychological injuries.

					(17) ("'Mental injury' means a loss of mental faculties or a mental or behavioral disorder, arising primarily out of a compensable physical injury or an identifiable work-related event resulting in a sudden or unusual stimulus, and shall not include a psychological or psychiatric response due to the loss of employment or employment opportunities.").	Work Comp. App. Bd. 2018) (retail manager who was assaulted by shoplifter established "sudden and unusual stimulus").
TX	Y			x	Tex. Labor Code § 408.006 (announcing, as to the 1993 amendments to law, "(a) It is the express intent of the legislature that nothing in this subtitle shall be construed to limit or expand recovery in cases of mental trauma injuries; …."). [22]	Appeal No. 030169, 2003 WL 1733971 (Texas Work Comp. Comm'n 2003) (claimant, director of victim advocacy center, who suffered mental breakdown after learning that district attorney was calling organizations to attempt to get her fired, did not establish cognizable claim, Commission noting that claimant suffered mental stress from multiple stressors which were not work-related and that hearing officer specifically found that "the claimant did not suffer a work related single event which resulted in a work related mental trauma injury."; Commission also stating, "While a specific stressful incident of sufficient magnitude occurring on the job can result in a compensable mental trauma injury, repetitive mentally traumatic activity or stressful events do not constitute a compensable injury.").
UT	Y			x	Utah Code Ann. § 34A-2-402(2)(a) ("extraordinary mental stress from a sudden	*Marks v. CLR Transp., Inc*., 2019 WL 2100963 (Utah Labor Comm'n 2019)

[22] **Texas**: Statute features a Good-Faith Personnel Action exception.

					stimulus" required to establish a cognizable claim).	(although truck driver involved in catastrophic motor vehicle accident with multiple fatalities "resulted from a sudden stimulus," remand required so that determination could be made as to whether "such stress was greater than [his] non-industrial stress ….").
VT	Y		x		Vt. Stat. Ann. tit. 21 § 601(11)(J) (providing, *inter alia*, that, for mental condition to be compensable, "the work-related event or work-related stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee across all occupations …."). [23]	*Crosby v. City of Burlington*, 844 A.2d 722 (Vt. 2003) (mental-mental claims are legitimate under Vermont constitution, but directing that purported unusual level of stress is determined vis-à-vis "all other employees performing similar work," and not "as compared with the general population of employees ….").
VA	Y			x	Va. Code Ann. § 65.2-101 ("'Injury' means only injury by accident …") (no reference to mental injury).	*Owens v. Va. Dep't of Transp.*, 515 S.E.2d 348 (Va. Ct. App. 1999) ("To qualify as a compensable injury by accident, a purely psychological injury must be causally related to a physical injury or to a sudden shock or fright arising in the course of employment," and highway worker exposed to unexpected loud noise of dropped manhole cover did not reflect exposure to sudden shock or fright).
WA	Y			x	Wash. Rev. Code § 51.08.100 ("'Injury' means a sudden and tangible happening, of a traumatic nature, producing an immediate or prompt result, and occurring from without,	*Larose v. Department of Labor & Industries*, 456 P.3d 879 (Wash. Ct. App. 2020) (public defender who suffered repeated episodes of harassment at the hands of a former criminal court client did not suffer mental injury

[23] **Vermont**: Statute features a Good-Faith Personnel Action exception. **Note also**: The *Crosby* standard of assessing extraordinary stress via-a-vis similarly-placed workers was changed, in a 2017 amendment, to average employees across *all occupations*. *Bergeron v. City of Burlington*, 2018 WL 5823071 (Vt. Dep't of Labor & Industry, 10.25.2018).

					and such physical conditions as result therefrom."). Essential regulation pursuant to this section: Wash. Admin. Code § 296-14-300(2)(a) (stress from a "single traumatic event" – like "threatened death or assault" – can constitute a work-related injury).	cognizable under statute); *Kinzey v. Dep't of Labor & Industries*, 2015 WL 7723006 (Wash. Ct. App. 2015) (paramedic's mental stress and breakdown developed over time, so hence could not qualify as either an injury or an occupational disease); *Rothwell v. Nine Mile Falls School*, 295 P.3d 328 (Wash. Ct. App. 2013) (high school custodian's mental breakdown came on in response to stress of a single event, and hence she was limited to workers' compensation and had no cognizable claim against employer in tort – exclusive remedy applied).[24]
WV	N				W. Va. Code § 23-4-1f ("no alleged injury or disease shall be recognized as a compensable injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits….").[25]	
WI	Y		x		Wis. Stat. § 102.01(2)(C) ("'Injury' means mental or physical harm to an employee caused by accident or disease ….")	*Highman v. LIRC*, 621 N.W.2d 385 (Wis. Ct. App. 2000) ("Pursuant to the standard established in *School Dist. # 1*, Highman cannot recover duty disability benefits unless he experienced stress of a greater dimension than that ordinarily experienced by

[24] **Washington**: A program remarkable in that discrete mental injuries are recognized via administrative *regulation*. Meanwhile, statute provides that mental-mentals cannot be recovered as an occupational disease.

[25] **West Virginia**: Statute provides, remarkably, "It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter." This statute is thoroughly discussed at Logan Burke, *Finding a Way out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century*, 118 WEST VIRGINIA LAW REVIEW 889 (2015).

						police officers.") (citing landmark case, *School Dist. #1 v. DILHR*, 215 N.W.2d 373 (Wis. 1974) (guidance counselor, exposed to harsh criticism and calls for resignation by students, did not show extraordinary stress)).
WY	N				Wyo. Stat. Ann. § 27-14-102(a)(xi) (injury does not include "[a]ny mental injury unless it is caused by a compensable physical injury ….").	*Wheeler v. State*, 245 P.3d 811 (Wyo. 2010) (volunteer fire-fighter did not prove a physical injury in the form of PTSD – mental-mentals are barred under Wyoming statute, and while some experts believe that PTSD is conceptually a physical injury, because of changes caused by trauma to the brain, such was not the spirit of the exclusion as established by the legislature).
DC	Y	x			D.C. Code § 32-1501(12) ("'Injury' means accidental injury or death … and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury ….") (no reference to mental injury).	*Jones v. Dist. of Columbia Office of Unified Communications*, CRB No. 09-049, 2009 WL 1651413 (2009) (911 operator, to establish a mental-mental claim, did not have to show that work incident that gave rise to stress was peculiar to her occupational duties).
Long-shore Act	Y	x			33 U.S.C. § 902(2) ("The term 'injury' means accidental injury or death … and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury ….") (no reference to mental injury).	*Ceres Marine Terminals, Inc.*, 848 F.3d 115 (4th Cir. 2017) (court rejecting employer's argument that, for mental-mental injury, with worker in case alleging PTSD, said worker had to prove that he was in "zone of danger," as under Federal Employers Liability (FELA)).
FECA	Y	x			5 U.S.C. § 8102(a) (establishing criterion of personal injury as one sustained while [worker is] in performance of his duty ….").	*Lilian Cutler*, 28 ECAB 125 (1976) ("Where the disability results from his emotional reaction to his regular and specially assigned work duties or to a requirement

						imposed by the employment, the disability comes within the coverage of the Act."). *See Claim of G.J.* (Dep't of Defense, Defense Logistics Agency), No. 19-0801 (Sept. 16, 2019) (Board, affirming denial of benefits, sets forth law of mental injuries as established in *Cutler*; claimant had alleged mental injury from being publicly berated by a supervisor).[26]

[26] The law under FECA surrounding stress claims is discussed at American Postal Workers Union, *Stress Claims*, https://apwu.org/news/stress-claims.

APPENDIX 2

STATE BY STATE ANALYSIS

JURISDICTIONS WITH SPECIAL FIRST RESPONDER PTSD/MENTAL STRESS LAWS AS PART OF, OR PROPOSED FOR, THEIR WORKERS' COMPENSATION STATUTES

David B. Torrey
DTorrey@pa.gov
4.27.2020

State	Statute or Proposed Legislation
AL	Proposed Legislation: H.B. 44, https://legiscan.com/AL/bill/HB44/2020.
AK	No special workers' compensation law with regard to first responders.
AZ	Proposed Legislation: HB 2501 passed the House in 2018. Note: A separate law imposes counseling responsibilities on municipalities.
AR	No special workers' compensation law with regard to first responders.
CA	Cal. Labor Code § 3212.15.
CO	Colo. Rev. Stat. § 8-41-301(2)(a), (b). Proposed Legislation: SB20-026 (expanding coverages).
CT	Conn. Gen. Stat. § 31-275(16).
DE	No special workers' compensation law with regard to first responders.
FL	Special legislation for first responders. (No presumption.) Fl. Stat. § 112.1815(5)(a)-(e). 2019: HB 983 ratifies adopted rule 69L-3.009, F.A.C. that specifies the types of third-party injuries qualifying as grievous bodily harm of a nature that shocks the conscience, for the purposes of allowing wage replacement benefits for first responder post-traumatic stress disorder. Proposed legislation has been proposed to add corrections officers.
GA	No special workers' compensation law with regard to first responders.
HI	Proposed Legislation: https://www.capitol.hawaii.gov/session2020/bills/HB263_.HTM.
ID	Idaho Code § 72-451(4).
IL	Proposed Legislation: SB 2530, http://www.ilga.gov/legislation/billstatus.asp?DocNum=2530&GAID=15&GA=101&DocTypeID=SB&LegID=123351&SessionID=108.
IN	No special workers' compensation law with regard to first responders.
IA	No special workers' compensation law with regard to first responders.
KS	No special workers' compensation law with regard to first responders.
KY	No special workers' compensation law with regard to first responders. Note: BR140 of 2019 did not advance in the legislature
LA	SB 107 (2019), 23 La. Rev. Stat. § 1036.1, 33 La. Rev. Stat § 2581.2, and 40 La. Rev. Stat. § 1374.

ME	39-A Me. Rev. Stat. § 201(3-a)(B).
MD	No special workers' compensation law with regard to first responders.
MA	Proposed Legislation: SB 1509, https://malegislature.gov/Bills/191/S1509 Note: Most police are not covered by workers' compensation; a separate statute, Chapter 111F, which provides injured on duty pay, is the statute to be amended.
MI	Proposed Legislation, House Bill No. 4473, http://www.legislature.mi.gov/documents/2019-2020/billintroduced/House/pdf/2019-HIB-4473.pdf.
MN	Minn. Stat. § 176.011(15)(e).
MS	No special workers' compensation law with regard to first responders.
MO	Proposed Legislation: SB 710, http://senate.mo.gov/20info/BTS_Web/Bill.aspx?SessionType=R&BillID=26838225.
MT	Legislature, in 2019, amended section 39-71-105 to suggest that firefighters with mental injuries may be covered, but statutory language is inconclusive.
NE	Neb. Rev. Stat. § 48-101.01(B-D).
NV	AB 492: Nev. Rev. Stat. § 616C.180, § 616C.400, § 616C.420, and § 617.420.
NH	SB 59: N.H. Rev. Stat. § 281-A:2 and § 281-A:17; new sections § 281-A:17-b and c.
NJ	No special workers' compensation law with regard to first responders.
NM	N.M. Rev. Stat. § 52-3-32.1.
NY	Proposed Legislation: Senate Bill 5292A, https://legislation.nysenate.gov/pdf/bills/2019/S5292A.
NC	Proposed Legislation: H.B. 622, https://www.ncleg.gov/Sessions/2019/Bills/House/PDF/H622v2.pdf.
ND	No special workers' compensation law with regard to first responders.
OH	Proposed Legislation: House Bill 308, https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA133-HB-308.
OK	Proposed Legislation: H.B. 3360. Note: Covers correctional officers; Term "PTSD" not featured, H.B. 2271 Note: Covers first responders.
OR	Ore. Rev. Stat. § 656.802.
PA	Proposed Legislation, H.B. 432, https://www.legis.state.pa.us/CFDOCS/Legis/PN/Public/btCheck.cfm?txtType=PDF&sessYr=2019&sessInd=0&billBody=H&billTyp=B&billNbr=0432&pn=2568.
RI	No special workers' compensation law with regard to first responders.
SC	Proposed Legislation: H. 3106, https://www.scstatehouse.gov/query.php?search=DOC&searchtext=H%203106&category=LEGISLATION&session=123&conid=29470597&result_pos=0&keyval=1233106&numrows=10.

SD	Proposed Legislation: H.B. 1142, https://sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?Bill=HB1142&Session=2020.
TN	Proposed Legislation: HB2577/SB2691, http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=HB2577.
TX	Tex. Lab. Code § 504.019.
UT	Utah said to have passed legislation establishing a working group to study the compensability of mental stress claims from first responders. (NCCI 2019).
VT	Vt. Stat. § 601(11)(I)(i).
VA	Proposed Legislation: HB 438, also SB 651, https://www.virginiabusiness.com/article/senate-committee-passes-bill-to-provide-workers-compensation-to-first-responders-suffering-from-ptsd/.
WV	Proposed Legislation: HB 440 http://www.wvlegislature.gov/Bill_Text_HTML/2020_SESSIONS/RS/bills/HB4400%20INTR.pdf.
WA	Wash. Rev. Code § 51.08, § 51.08.142, § 51.32.185.
WY	Proposed Legislation: SF 0117 of 2020, https://www.wyoleg.gov/Legislation/2020/SF0117.
WI	Proposed Legislation: AB 569, also SB 511, https://docs.legis.wisconsin.gov/2019/proposals/reg/sen/bill/sb511.
DC	No special workers' compensation law with regard to first responders.

APPENDIX 3

STATE BY STATE ANALYSIS

STATUTORY FEATURES: FIFTEEN STATES WITH FIRST RESPONDER PTSD/MENTAL STRESS LAWS

David B. Torrey
DTorrey@pa.gov
4.17.2020

State	Occupations	Injury	DSM noted?	Presumption?	Effective Date	Citation; Select Remarks
CA	Firefighters (career and volunteer), peace officers, fire and rescue service coordinators.	PTSD	Yes	Yes	1/2/20	Cal. Labor Code § 3212.15. Sunset 1/1/2025.
CO	All employees.[1]	PTSD with three enumerated criteria.	No	No	7/1/2018	Colo. Rev. Stat. § 8-41-301(2)(a), (b). Expands statute to detail that "psychologically traumatic event" includes PTSD.
CT	Police officers, parole officers, firefighters.	PTSD with six enumerated criteria.	Yes	No	7/1/19	Conn. Gen. Stat. § 31-275(16). DSM "most recent edition" is to be used.
FL	Law enforcement officers, EMTs (career and volunteer).	PTSD with eleven enumerated criteria.[2]	Yes	No	10/1/18	Fl. Stat. § 112.1815(5)(a)-(e). No six-month duration of TTD as otherwise applicable to physical-mentals.
ID	Peace officers, firefighters, career	PTSD	Yes	No	7/1/19	Idaho Code § 72-451(4).

[1] **Colorado**: The law as ultimately enacted does not limit expanded PTSD coverage to first responders, but had its genesis in a concern that such employees typically did not recover workers' compensation for the condition.

[2] **Florida**: These items are further refined by regulation.

	and volunteer EMTs, EMS providers, emergency telecommunications officers.					Claim must be proven by clear and convincing evidence.
LA	Firefighters, career and volunteer, EMS personnel, police, state police.	PTSD	Yes	Yes	2019	SB 107 (2019), 23 La. Rev. Stat. § 1036.1, 33 La. Rev. Stat. § 2581.2, and 40 La. Rev. Stat. § 1374. Psychologist or psychiatrist must verify the diagnosis.
ME	Law enforcement officers, firefighters, EMS personnel.	PTSD	No	Yes	11/1/17	39-A Me. Rev. Stat. § 201(3-a)(B). Rebuttal must be by clear and convincing evidence.
MN	Police officers, firefighters, EMTs, police dispatchers, correctional officers, sheriffs, deputy sheriffs, state patrol officers.	PTSD	Yes	Yes	6/1/18	Minn. Stat. § 176.011(15)(e). Presumption must be rebutted by "substantial factors." To gain presumption, worker must establish lack of pre-existing PTSD.
NE	Sheriffs, deputy sheriffs, police officers, state patrol officers, firefighters (career and volunteer), EMS personnel (career and volunteer), corrections officers, other state employees with	"Mental injuries and mental illness."	No	No	8/24/17	Neb. Rev. Stat. § 48-101.01(B-D).

	contact with "high-risk individuals."					
NV	Firefighters (career and volunteer), police officers, emergency dispatch operators, EMTs.	Injury from "extreme stress," defined in detail, with two enumerated criteria.	No	No	6/3/19	AB 492: Nev. Rev. Stat. § 616C.180, § 616C.400, § 616C.420, and § 617.420. No waiting period.
NH	Firefighters (career and volunteer), law enforcement officers, corrections officers, emergency communications dispatchers, EMTs (career and volunteer).	PTSD and acute stress disorder.	No	Yes	1/1/21	SB 59: N.H. Rev. Stat. § 281-A:2 and § 281-A:17; new sections § 281-A:17-b and c.
NM	Firefighters (career).	PTSD	No	Yes	6/14/19	N.M. Rev. Stat. § 52-3-32.1. (1) If claimant does not qualify for the presumption, claim can be proven with claimant carrying the burden of proof. (2) A claimant qualifying for the presumption is to be paid medical treatment benefits until an adjudication to the contrary.
OR	Full-time firefighters, EMS personnel, police officers, correctional officers (adult and youth), parole and probation personnel,	PTSD, acute stress disorder.	Yes	Yes	9/29/19	Ore. Rev. Stat. § 656.802. (1) Nature of rebuttal defined: "clear and convincing medical evidence that duties as a

	emergency dispatch and 9-1-1-operators.					covered employee were not of real importance or great consequence in causing the diagnosed condition." (2) Seven-year statute of repose.
TX	Peace officers, EMTs, firefighters.	PTSD	Yes	No	9/1/19	Tex. Lab. Code § 504.019. DSM-V, "or a later edition adopted by the commissioner of Workers' Compensation" is to be used.
VT	Police officers, EMTs, firefighters.	PTSD	No	Yes	6/8/17	Vt. Stat. § 601(11)(I)(i). Three-year statute of repose.
WA	Firefighters, law enforcement officers.	PTSD	Yes	Yes	6/7/18	Wash. Rev. Code § 51.08, § 51.08.142, § 51.32.185. 60-month maximum statute of repose.