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Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application

Thomas S. Cook*

The most controversial topic in workers' compensation law during the past decade has been whether work-related mental disability caused by nonphysical occupational stress is compensable. Both physical injury resulting from unusual job stress and strain and mental disability stemming from this physical injury have largely been held to be compensable. But courts and legislatures are reluctant to compensate mental disability resulting from job stress in the absence of a physical injury or its equivalent. Although many states allow such recovery on a limited basis, they still have imposed restrictive requirements by statute or by case law designed to limit the number of such claims. This Article will show that the current controversy surrounding stress-related mental disability workers' compensation claims reflects the conservatism which has marked the development of workers' compensation systems in the United States since their beginnings earlier in this century. The central conflict of workers' compensation lies between judicial desire to liberally construe such remedial statutes and the public's perceived need to impose limits on their application. These limits arise out of fears of creating a pervasive employer-paid social insurance scheme which would compensate disability whether or not employment-related.

This Article will show that each advance in workers' compensation law which recognizes and compensates a cause or source of employee disability has been met with judicial or statutory resistance and corresponding attempts to limit the extent to which workers' compensation would be expanded. The development of an expanded definition of physical injury beyond an accidental injury to include cumulative trauma, heart conditions, and the first occupational disease claims was initially profoundly limited. Each of these areas engendered the same concerns which are presently raised in conjunction with workers' compensation claims for mental stress. For each, there has been a slow development from a very narrow interpretation of work relatedness to, eventually, a more expansive view. Study of these past developments in workers' compensation law has more than mere historical importance. The social and economic concerns underlying changing treatment of physical injury and occupational disease are central to the discussion of whether mental disability caused by mental injury should be compensable within the meaning of state workers' compensation statutes.

It can be predicted that, on the basis of past experience, states will in the future be less insistent in erecting unnecessarily restrictive threshold

requirements to workers’ compensation stress claims. Such requirements, formerly employed to restrict cumulative injuries, many occupational diseases, and heart conditions are not justified in view of the liberal intent to be accorded workers compensation claims. Stress claims will never be treated on the same basis as physical injury claims due to economic concerns and inherent suspicion as to their validity.

I. The Origins of Workers’ Compensation and Its Theory: Injuries “Arising Out Of” Employment

Prior to the advent of workers’ compensation statutes a worker’s sole remedy when injured at work was to sue his employer in tort. The employer was charged with the duty to use reasonable care in providing a safe workplace with a concomitant duty to warn employees of known dangers.1 As a practical matter, at common law the defenses of contributory negligence, assumption of the risk, and the fellow servant rule provided almost insurmountable barriers for the injured employee seeking damages.2 Experts estimate that more than eighty percent of all injured workers recovered nothing.3 America’s rapid industrialization and the resulting increase in industrial accidents focused attention on the inequities of applying the common law of torts to the workplace.4

Increased public awareness of the hazards of the workplace came at a time when court decisions weakened the traditional defenses to tortious causes of action and increased the potential liability of employers.5 This resulted in a climate favorable to the adoption of compensation schemes which balanced the competing interests of business and labor.6 Workers’ compensation statutes were not the first attempt to solve social and legal problems caused by industrial accidents. Insurance companies offered employer liability policies against employee negligence suits which for the period 1906-10 accounted for one hundred million dollars in premiums.7 The growing cost of accidents to employers due to mounting insurance rates led them to prefer the definite and predictable costs of a

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4 The evils of the common-law remedies, which were not noticeable in the days of small and scattered shops, few employees, and simple tools, became intolerable in the days of crowded factories, equipped with complicated and dangerous machinery. The changes incident to this industrial development had not only largely increased the opportunities for avoidable injury, but had multiplied the dangers of inevitable accidents. . . . “The application of principles of the common law to suits for personal injuries sustained in hazardous employments resulted in many cases in injustice; . . . it filled the courts with litigation; it became the fruitful source of perjury; it engendered bitterness between employer and employee; it resulted in . . . economic waste, and it turned out an army of maimed and helpless people as dependents upon the charity of friends or the public. . . . [T]he loss has fallen on those least able to bear it . . . .” Mulhall v. Nashua Mfg. Co., 80 N.H. 194, 196, 115 A. 449, 451 (1921).
7 Insurance Arrangements, supra note 5, at 3-4.
workers' compensation system to the uncertain alternative costs of employer liability insurance or the spectre of increasingly successful employee negligence actions.\footnote{8}{D. Gagliardo, *American Social Insurance* 389 (1955).}

The then "modern" idea central to the concept of workers' compensation was that the cost of injuries, like wages and breakage of machinery, was part of the costs of production.\footnote{9}{Honnold, *Theory of Workers Compensation*, 3 Cornell L. Rev. 264, 268 (1918).} In the long run, the consumer public bore the costs.\footnote{10}{Nashua Mfg. Co., 80 N.H. at 198, 115 A. at 452; Brodie, *The Adequacy of Workmen's Compensation as Social Insurance: A Review of Developments and Proposals*, 1963 Wis. L. Rev. 57, 60.} Dean Pound stated that the twentieth century accepts the idea of insuring those unable to bear economic loss at the expense of the nearest person at hand who can bear the loss, a concept unacceptable to judges of the nineteenth century.\footnote{11}{Friedman and Ladinsky, supra note 6, at 74.}

Workers' compensation statutes were seen as radical departures from the common law tort system based on fault. The goal of the legislation was to provide compensation to the injured worker by direct payments under fixed rules without lawsuit or friction.\footnote{12}{Brenner v. Brenner, 127 Md. 189, 193, 96 A. 287, 288 (1915).} These benefits were paid to the employee regardless of fault, and no proof of the employer's negligence was required.\footnote{13}{Mitchell, supra note 1, at 352.} The goal of the system was to provide speedy and inexpensive relief to injured employees without resort to litigation.\footnote{14}{For an example of statutorily mandated liberal construction of workers' compensation, see Cal. Labor Code § 3202 (West 1971 & Supp. 1987). *See also* Maryland Casualty Co. v. England, 160 Ga. 810, 129 S.E. 75 (1925).} The workers' compensation laws, as remedial statutes, were viewed as being entitled to broad and liberal interpretation.\footnote{15}{See Continental Casualty Co. v. Haynie, 51 Ga. App. 650, 181 S.E. 126 (1935); Solc v. Kindelberger, 91 W. Va. 603, 114 S.E. 151 (1922).}

Workers' compensation has been termed the oldest of the American social insurance programs\footnote{16}{E. Burns, *The American Social Security System* 186 (1949).} and equivalent in its results to a species of insurance in favor of workmen.\footnote{17}{Haynie, 51 Ga. App. at 652, 181 S.E. at 128; Riesenfeld, *Workmen's Compensation and Other Social Legislation: The Shadow of Stone Tablets*, 53 Calif. L. Rev. 207, 210 (1965).} This emphasis on the lack of fault of either party and the spreading of the risk of loss among industry as a whole and, ultimately, the consumer contrasts with the common law system which preceded it. Workers' compensation in theory focused on injury rather than negligence and on compensation rather than on damages.\footnote{18}{D. Gagliardo, supra note 8, at 384.} Yet it was far from a complete shift in responsibility for risk of loss since responsibility for funding the system still reposed, for the most part, with private insurance companies.\footnote{19}{Professor Larson considers this fact significant in distinguishing workers' compensation from a true form of government-funded social insurance. According to Larson, the present American system is neither tort nor socialism but something in between. A. Larson, supra note 3, § 3.10, at 15.}
required causal connection between employment and disability.\textsuperscript{20} These two phrases together form a dual requirement of a connection between the cause of a disability and a disability itself.\textsuperscript{21} The requirement that the injury “arise out of the employment” is satisfied if the injury occurred as a result of a risk to which the employee was exposed because of his or her status as an employee by the nature, conditions, obligations or incidents of employment.\textsuperscript{22} The “course of employment” portion of the test refers to the time, place, and circumstances of the injury in relation to the employment.\textsuperscript{23} In theory, the workers’ compensation schemes of the states have rejected the proximate cause requirements of tort.\textsuperscript{24} Most courts still require some relationship between work and disability greater than a mere temporal relationship; that is, some increased risk of harm associated with the job in order to satisfy the “arise out of” test. This requirement that a disability “arise out of” the employment to some extent rather than being a harm caused completely by the physical or psychological make-up of the employee has proven to be a fertile source of litigation since the inception of workers’ compensation.\textsuperscript{25}

The earliest American cases required the risk of physical injury to be peculiar to the occupation of the injured worker.\textsuperscript{26} Larson notes that the peculiar risk test gradually disappeared in cases of physical injury.\textsuperscript{27} The doctrine is alive and well, however, in the areas of occupational disease\textsuperscript{28} and mental disability.\textsuperscript{29} The rationale for requiring a risk of harm peculiar to the occupation was to separate the occupational injury from that
which might happen to any person, thus preventing the employer from becoming a general insurer.\(^{30}\)

The injustice of the application of this test to physical injuries is readily apparent: an employee injured on the job should not be denied workers' compensation if the injury causing disability such as a slip and fall could have happened off-hours as readily as when the employee was performing a work function. Yet this same test is still employed by many courts in determining whether or not an occupational disease or mental disability is work-related.

II. Evolution of the Definition of "Injury"

The reluctance of courts and legislatures to allow workers' compensation benefits to claimants disabled by work-related stress recalls the restrictions once imposed on claimants disabled by physical injuries which could not be attributed to a definite time and place. For many years, a work injury in most states had to have been caused by a single, discrete incident in order to be considered compensable. Disabling conditions which resulted from gradual, repetitive trauma caused by the employee's normal work duties were not considered as being within the ambit of workers' compensation statutes. The majority of states have now come to recognize either by amendment to the language of the statute or by expansive judicial interpretation of the existing terminology that cumulative occupational trauma resulting in disability is indeed compensable.

The early workers' compensation laws frequently imposed a requirement that the injury be "accidental."\(^{31}\) To a great extent, the American statutes were modeled after the English workers' compensation scheme which provided that compensation should be paid in cases of "personal injury by accident."\(^{32}\) In other states, insistence on an accidental injury was a judicially imposed requirement.\(^{33}\) For example, section 301(c) of the Pennsylvania Workmen's Compensation Act defined "injury by accident" as including "all other injuries sustained while the employee [sic] is actually engaged in the furtherance of the business or affairs of the employer...."\(^{34}\) While this definition would appear to encompass nonaccidental injuries, narrow judicial interpretation of this statutory definition constituted a judge-made obstruction to the operation of the Workmen's Compensation statute.\(^{35}\) In Lacey v. Washburn & Williams Co.,\(^{36}\) the court held that the death of a worker who contracted pneumonia after spend-

\(^{30}\) See In re McNichol, 215 Mass. 497, 499, 102 N.E. 697, 697-98 (1913) where the court cited English precedent for the proposition that the "arise out of" test excludes an injury which cannot be fairly traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the business.

\(^{31}\) Thirty-four states and the District of Columbia use some form of the "accidental injury" formulation. A. Larson, supra note 3, § 37.10, at 7-1.


\(^{36}\) 309 Pa. 574, 164 A. 724 (1933).
ing an hour in a refrigerated room was not an “accident” but was the natural consequence of his entering and remaining in the refrigerated room.

The workmen’s compensation statute of Ohio adopted a similarly expansive definition of injury in 1913. Early Ohio decisions, however, construed this definition as requiring that a compensable injury be accidental and traumatic in origin in order to be compensable.

Another judicially adopted requirement similar to the “accident” requirement was the “wear and tear” doctrine of Massachusetts. The 1912 Massachusetts Workers’ Compensation statute required only that the personal injury for which compensation was sought be one arising “out of and in the course of employment.” Thus, no “accident” was required. The Massachusetts courts created their own “accident requirement” that physical disabilities resulting from “wear and tear” on the body rather than a specific incident were not entitled to workers’ compensation benefits. This doctrine was defined in 1917 as follows:

The act affords no relief against general disease. It is not a scheme for health insurance. It deals only with personal injuries following as an immediate result from the employment as its direct cause. . . . A disease of mind or body which arises in the course of employment, with nothing more, is not within the act. . . . A person may exhaust his physical or mental energies by exacting toil, and become unfit for further service, but he is not because of this entitled to compensation, for the reason that this condition cannot fairly be described as a personal injury.

Thus, whether or not the early state statutes used the term “accident,” many state courts imposed restrictive definitions of “injury” to mean sudden, unexpected, incidents attributable to a specific time and

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37 “Injury” is defined as “any injury, whether caused by external accidental means or accidental in character or result received in the course of, and arising out of, the injured employee’s employment.” OHIO REV. CODE ANN. § 4123.01(C) (Anderson 1980 & Supp. 1986). Section 1465.68 of the Ohio Session Laws provided that “every employee who is injured wheresoever such injury has occurred . . . shall be entitled to receive . . . such compensation for loss sustained on account of such injury or disease.” 103 Ohio Laws 79 (1913).

38 See, e.g., Courdray v. Industrial Comm’n, 149 Ohio St. 173, 38 N.E.2d 1017 (1942); Goodman v. Industrial Comm’n, 135 Ohio St. 81, 19 N.E.2d 508 (1939); Industrial Comm’n v. Franken, 126 Ohio St. 299, 185 N.E. 199 (1933); Renkel v. Industrial Comm’n, 109 Ohio St. 152, 141 N.E. 834 (1923); Industrial Comm’n v. Roth, 98 Ohio St. 34, 120 N.E. 172 (1918). As the court stated in Maynard v. B. F. Goodrich Co., 144 Ohio St. 22, 31, 56 N.E.2d 195, 199 (1944):

The statute does not expressly require the injury to be accidental. Neither is it expressly required therein that there be a causal connection between the injury and the employment. Yet there is the express provision that the injury must be received in the course of and arise out of the scope of employment. This essential cannot exist without such causal connection and, in turn, causal connection cannot exist unless the injury is accidental in character and result. See also Butler, supra note 33, at 5. While the requirement of accidental injury here was to distinguish an injury from a disease, the Ohio decisions have continued to insist on an “accidental” injury as a prerequisite for workers’ compensation. See Bowman v. National Graphics Corp., 55 Ohio St. 2d 222, 378 N.E.2d 1056 (1978) where the claimant developed back pain as a result of a gradually worsening condition caused by his employment. The court found the accident incompensable because there was no occurrence which was unforeseen, unexpected or unusual.


40 Note, supra note 22, at 297.

41 In re Maggelet, 228 Mass. 57, 61, 116 N.E. 972, 974 (1917).
place. Excluded were physical injuries caused by gradual cumulative trauma to the body, preexisting conditions aggravated by occupational trauma, and occupational diseases.\textsuperscript{42}

There are several explanations for the conservatism which characterized the early American insistence on accidental injury. Little legislative history exists from this period and it has been suggested that the American statutes simply adopted the requirements of the English statute, including "injury by accident."\textsuperscript{43} The English, however, quickly interpreted their statute as allowing compensation where disability ensued following normal performance of a worker's job.\textsuperscript{44} The American courts, in contrast, were reluctant to abandon the idea that an "accident" required an unusual or unexpected causal event as opposed to an unexpected result.\textsuperscript{45}

Critics suggest that workers' compensation was, at the time, viewed as a pioneering social experiment which required cautious and conservative application to increase the likelihood of success.\textsuperscript{46} The predominant argument was that a narrow definition of injury would keep controversy to a minimum by limiting compensation to cases where causation was obvious.\textsuperscript{47}

It is generally accepted that in many of the early cases, the courts interpreted the injury requirement narrowly in order to distinguish compensable workers' compensation injuries from noncompensable occupational diseases.\textsuperscript{48} 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.\textsuperscript{49} This conservatism appeared to stem from a fear that to adopt a broad definition of injury would lead to large numbers of cases being found compensable, thus resulting in great economic liability for employers. This is a theme

\textsuperscript{44} Fenton v. Thorley, House of Lords A.C. 443; 72 L.J. (K.B.) 787; 89 L.T. 314; 52 W.R. 81; 19 T.L.R. 684 (1903) (claimant sustained a rupture while doing his ordinary work without sustaining a blow or slip). See also G. Thomas, Leading Cases in Workman's Compensation 3 (1913).
\textsuperscript{45} Brodie, supra note 10, at 65-66.
\textsuperscript{46} E. Burns, supra note 16, at 186.
\textsuperscript{47} One of the earliest state workers' compensation schemes was struck down by a New York court as violating the state's due process clause. Brodie, supra note 10, at 59.
\textsuperscript{48} See Industrial Comm'n v. Brown, 92 Ohio St. 309, 311-12, 110 N.E. 774, 745 (1915):

The premium rates assessed and collected by the administering board . . . have been fixed on a basis of death and injuries by accident solely, to the entire exclusion of injury through disease. It is quite patent that any other construction would necessitate an immediate and striking horizontal elevation of all premium rates and would in all probability prove a serious menace to the law itself. . . . To seriously cripple [the law] by a construction that could readily be defended from a legal standpoint, and that would at the same time be held to be the more humane interpretation, would in the long run work a great injury to the industrial classes as a whole. An injustice would likewise be done to the employers of Ohio, who alone are contributing the millions that go to make up the fund.

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.

Eventually, the courts of most jurisdictions began to expand the definition of “injury by accident” to include disability caused by repetitive physical trauma which was not unusual and disability caused partially but not completely by occupational factors. Although this process took decades of judicial interpretation, the American decisions eventually followed those of Britain in holding that an injury is accidental where either the cause or the result is accidental and unforeseen, although the work being done is usual and ordinary. Gradually, an unexpected or unforeseen act was no longer required as a prerequisite to finding a disability compensable. It was sufficient that the employee’s disability was itself unexpected, assuming that the injury resulted from employment.50

Once courts crossed this conceptual hurdle, they soon concluded that accidental injuries could be the result of cumulative physical injuries which gradually brought about the claimant’s disability. Such a view comported with the liberal construction to be granted workers’ compensation statutes.51 One may surmise that the courts were sufficiently comfortable with the concept of workers’ compensation to warrant expansion of its applicability to nonaccidental injury. In 1972, the National Commission on State Workmen’s Compensation Laws concluded that the accident requirement had been largely discarded as barring compensation for injuries which were clearly work-related.52 A number of states have removed the “accident” requirement from the wording of their workers’ compensation statutes and instead have adopted a broader term such as “injury.”53 Other states have viewed work disabilities which have developed over a period of time as a series of minor accidents.54

Most jurisdictions have now adopted expansive views of the definition of the word “injury” as applied to physical work injuries. Occupational injuries caused by cumulative routine physical exertion, aggravation of preexisting conditions, and occupational factors as one of...
several causative factors contributing to disability have routinely been found to be injuries within the meaning of state workers' compensation acts. Gradual injuries caused by employment have been held compensable as have major or minor work injuries which have activated underlying nonwork related injuries or diseases.

Under the expansive view now generally accorded physical injuries, the occupational factors do not have to be the sole cause of a disability in order for it to be compensable. Several jurisdictions which formerly insisted on unusual stress or strain as a prerequisite for finding a physical injury have recently adopted the more modern view. This trend is not applicable to all workers' compensation injuries, however. The evolution of the definition of injury has been far less pronounced in heart injury cases and the older definitions of the accident requirement have shown a definite revival in cases of disability caused by nonphysical work stress.

Disabilities resulting from heart problems caused by or aggravated by occupational factors have been particularly troubling to the courts. While the majority of jurisdictions now reject the "unusual exertion" test in heart cases, a significant number of states retain the older standard which typically requires that a claimant prove either that the heart attack was caused by unusual occupational exertion or was caused by stress or strain greater than that experienced in normal life. The courts are far more likely to require these threshold requirements in cases involving heart conditions where the causal connection to employment is not obvious. It is particularly interesting to note that in two of these states, the "unusual stress" standard in heart cases was judicially promulgated in the face of a history of liberal interpretation of the accidental injury requirement. In Missouri, the term "accident" was originally construed as including injuries incurred in the usual and routine performance of an

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56 See, e.g., Harris v. Cessna Aircraft Co., 9 Kan. App. 2d 334, 678 P.2d 178 (1984) (When a worker with a preexisting condition is accepted for employment and a subsequent industrial injury aggravates, accelerates or intensifies his condition resulting in disability, he is entitled to compensation); Mulder v. Minnesota Mining and Mfg. Co., 361 N.W.2d 572, 576 (Minn. 1978) ("[T]he plaintiff was predisposed to develop such a condition, and the same injury to another person might not have resulted in a similar disability. But that is no defense. Where an accident combines with a preexisting condition to produce disability, the injured workman may recover compensation."); Starcher v. Chrysler Corp., 15 Ohio App. 3d 57, 472 N.E.2d 756 (1984) (aggravation need not be substantial).


59 Jaskowiak, supra note 43, at 547.

60 The majority of jurisdictions that now accept the "usual exertion" test in heart cases is three to one over those that reject it. A. LARSON, supra note 3, § 38.31(a), at 7-56.

61 Larson cites the workers' compensation statutes of New York, Nebraska, Illinois and Arkansas as codifying this standard. A. LARSON, supra note 3, § 38.31(c), at 7-109 to 7-110.
employee's duties.\textsuperscript{62} It was not until 1941 that the Missouri Supreme Court judicially constricted the definition of accident to require a finding of abnormal or unusual strain.\textsuperscript{63} In that case the worker sought compensation for a coronary sustained while carrying a forty-five pound weight. The court denied compensation because he frequently carried such weights. A similar development occurred in Nebraska where a liberal interpretation of the term "accident" was employed during the first twenty years of the workers' compensation statute. It was not until being called upon to decide a claim for benefits where the disabled worker alleged that his employment had caused his heart problem that the Nebraska judiciary required an event more strenuous than that ordinarily incident to employment as a predicate for compensable disability.\textsuperscript{64} In early cases in Indiana, the courts adopted a liberal standard that a victim's injury need only be unexpected for it to be considered an "accident" within the meaning of the workmen's compensation statute. They adopted a more restrictive view of the term "accident," however, in a case involving a worker's death from coronary occlusion while performing his normal physical work.\textsuperscript{65}

Thus, these courts chose to impose new requirements on their workers' compensation statutes when faced with the spectre of allowing compensation for medical conditions not obviously related to employment. Rather than allow the trier of fact to make reasoned decisions on the basis of the expert and lay testimony presented, the courts chose to limit the scope of the statutes. They apparently feared that the legal system could not rely on medical evidence to properly differentiate between work-related and nonwork-related stress.\textsuperscript{66}

The "unusual stress" test is far from moribund in heart cases.\textsuperscript{67} Although, as noted, the test is the minority rule, it is indicative of the concerns expressed by courts who wish to prevent workers' compensation statutes from being too widely applied. The purpose of the rule, and the purpose of the accidental injury requirement, is to provide some indicia of reliability to the ensuing disability. The courts, accustomed to negligence causes of action in tort which required physical impact to the body, applied the impact rule to workers' compensation as well. This

\begin{itemize}
\item \textsuperscript{63} State ex rel. Hussman-Ligonier Co., 348 Mo. 319, 326, 153 S.W.2d 40, 42 (1941).
\item \textsuperscript{65} United States Steel Co. v. Dykes, 238 Ind. 59, 154 N.E.2d 11 (1958). See also Jaskowiak, supra note 43, at 541.
\item \textsuperscript{66} See, e.g., Dykes, 238 Ind. 59, 154 N.E.2d 11, where the court explicitly expressed its concern with the problem of establishing a causal connection between heart attacks and work in view of the doctor's inability to evaluate the significance of a particular occupational stress as compared with nonoccupational stress.
\end{itemize}
occurred even though the avowed purpose of workers’ compensation was to provide a quick source of income to injured workers free of the strict requirements of tort. The purpose of the impact rule of tort was to prevent spurious claims. Tort law has moved away from requiring physical impact as a prerequisite for recovery for emotional distress. While the definition of “injury” or “accidental injury” in workers’ compensation law has undergone a corresponding liberalization, the courts bear a lingering distrust of claims for emotional injury and are still far more likely to retain or revive the older forms of analysis in such cases.

### III. Occupational Disease

The earliest workers’ compensation statutes did not provide for the compensation of occupational diseases. Some experts suggest that this reflected the then-current state of medical knowledge which was ill-informed of the existence of such diseases and their etiology. This is probably specious; knowledge of the connection between industrial disease and certain occupations had been observed since the time of the Renaissance. It is true, however, that state workers’ compensation statutes tended to follow the model of the English workers’ compensation statute which did not at first provide for compensability of disease. The use of the word “accident” showed legislative intent that occupational disease was not to be included. The English statute was quickly amended to include occupational disease. However, it was many years before the majority of states followed suit. In fact, some states expressly prohibited the compensation of occupational disease, or limited compensation to those cases where disease followed a physical injury. The “accident” requirement of most early workers’ compensation statutes proved to be a conceptual barrier to the acceptance of occupational disease. A disease by definition is not sudden or immediate and cannot

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68 Manson, *supra* note 2, at 376.
74 *See* Eke v. Hart-Dyke, 2 K.B. 677, 80 L.J. (K-B) 90; 103 L.T. 174; 26 T.L.R. 613 (1910).
75 Beers, *Compensation for Occupational Disease*, 37 Yale L.J. 579, 583-84 (1928).
76 The English statute included occupational disease by 1906; none of the early American statutes did. Brodie, *supra* note 10, at 61.
77 A. Larson, *supra* note 3, § 41.20, at 7-358.
in most cases be attributed to a single exposure or incident.\footnote{Note, Workmen's Compensation Acts—Occupational Disease as an Accidental Injury, 18 B.U.L. Rev. 256, 258 (1938).} If a disease could perchance be traced to a single event, it could be declared accidental and thus compensable.\footnote{One decision considered a disease to be accidental where there was specific exposure to paint which resulted in septicemia. Lockard v. State Compensation Comm'n, 115 Va. 144, 174 S.E. 790 (1934).} It was the rare disease that could be isolated to a particular exposure, the result being that few occupational diseases were compensated. The fact that this held true even after the corresponding liberalization in the "accident" definition as applied to injuries\footnote{See supra note 50 and accompanying text.} leads to the conclusion that legislatures and courts were hostile to the concept of compensating occupational disease. It was apparent to many contemporary commentators that there was no logic in allowing compensation for injury while denying it for disease.\footnote{See supra note 82 and accompanying text.} As one court reasoned, it was illogical to deny compensation to a man blinded by fumes and yet grant it to a man blinded by a blow.\footnote{See supra note 81 and accompanying text.} This distinction was critical because in many states a worker would have difficulty winning a tort action against an employer for a work-related occupational disease. Recovery at common law in most states was based on the failure of the employer to warn or to provide a safe place to work.\footnote{See, e.g., Jacque v. Locke Insulator Corp., 70 F.2d 680 (2d Cir. 1934); Jallico Coal Co. v. Atkins, 197 Ky. 664, 247 S.W. 972 (1925).} Many courts denied liability based on the rationale that a safe place to work did not mean a sanitary place. These decisions also noted that occupational diseases were unknown to the common law.\footnote{See supra note 85 and accompanying text.} Thus, employees were deprived of compensation for work related occupational disease through workers' compensation or tort.

The state legislatures eventually considered three alternative schemes for compensating occupational diseases. The first of these, following the lead of California and Massachusetts,\footnote{See supra note 86 and accompanying text.} was simply to provide for the consideration of occupational diseases as injuries. The most significant objection to this controversial alternative was the often ex-
pressed fear that such a scheme would allow for the compensation of diseases which were feared to be as likely to occur from a nonindustrial source as from the workplace. The concern was that this would render the employer responsible for "mere" aggravations of preexisting diseases. Difficulties in proving the source of such diseases would make the employer responsible for the off-hours conduct, constitution, and lack of health care of the worker, thus causing confusion as to whether diseases were strictly occupational or due to a combination of factors. Critics feared that the treatment of occupational disease on the same footing as injuries would be tantamount to general social insurance.

Even today, the fear of compensating diseases which are not peculiar to employment continues to be an underlying theme of occupational disease workers' compensation statutes. Most state laws have some type of statutory prohibition against compensating ordinary diseases of life, either explicit or as an adjunct to a definition of hazard or risk.

This reluctance to adopt a general definition of occupational disease results in part from concerns over lack of proof of job relatedness. Equally important, however, is the perception that it would be unfair, unwise, or expensive to allow compensation for diseases that the employee could just as easily have contracted outside of work. While to some extent the states are concerned about fraudulent claims, there is also a concern that a liberal definition of occupational disease would permit a disabled worker to collect workers' compensation benefits regardless of whether the employment relationship had placed the worker at a greater risk of contracting the disease. It is accepted as a given principle that employment must present a greater risk of contracting a disease to an employee in order for the disease to be considered occupational and therefore compensable. This has been termed "trade risk" or "posi-

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87 Many diseases can arise either from an industrial condition or from an ordinary source and it may be very difficult to determine which is the causal factor. *The Iowa Occupational Disease Law, supra* note 78, at 518.


89 Adoption of a broad occupational disease plan would be a form of health insurance. Comment, *supra* note 84. "Employees looked with apprehension upon a system which in effect furnished a form of insurance. The same consideration has manifested itself in the case of every enlargement of the compensation principle." Beers, *supra* note 75, at 580. See also Comment, *Occupational Disease Legislation in Pennsylvania*, 12 Temp. L.Q. 386, 387 (1938).


91 The Washington statute, like those of many states, defined an occupational disease as arising out of employment where it does not come from a hazard to which workmen would have been equally exposed outside of employment. 1941 Wash. Laws tit. 50, § 7679-1 (Supp. 1941) (repealed 1961).

92 See Beers, *Compensation for Occupational Diseases*, 7 Tenn. L. Rev. 19 (1929). Only a few states expressly extended the definition to cover occupational diseases as broadly as it covers injuries by accident. The reason for this is obvious. There is such difficulty and uncertainty tracing causal connection between the hazards of work and disease that the states have hesitated to carry the compensation principle to its logical conclusion.

93 See Note, *supra* note 79, at 264.


It is well established in this state that compensation is not due merely for injury caused by disease contracted while employed . . . the employee's risk of contracting the disease by
Professor Larson has offered explanations for the development of theories of risk in workers' compensation. The earliest theory was the peculiar risk doctrine, which required the claimant to show that the source of disability was in its nature peculiar to his occupation. Thus, if a worker was exposed to the same factors both in and out of work, no matter how disparate the amount, the claim would be denied. This doctrine gave way to the increased risk test which "differs from the peculiar risk test in that the distinctiveness of the employment risk can be contributed by the increased quantity of a risk that is qualitatively not peculiar to employment." More defensible, according to Larson, is the succeeding test of actual risk which only looks to whether or not the employment did create a risk of the harm. The majority of states follow the increased risk test, but a growing number of jurisdictions accept the positional risk doctrine which looks to whether the employment placed the employee in a position to be injured by a "neutral" risk unconnected with the employment or with the employee. Thus, a disability does not "arise out of" the scope of employment unless it satisfies one of these tests. The peculiar risk test is currently more common in occupational disease statutes than in those involving physical injuries.

While a minority of states have adopted a general definition of occupational disease as an injury, the majority initially followed the lead of the English statutes and allowed occupational disease compensation for a specified list of diseases which were closely connected with particular occupations. The Uniform State Law Commission in 1916 proposed a list of occupational diseases, as opposed to ordinary diseases, to be compensated. This was supported by "all well-considered precedents and by practically all expert European opinion." Occupational disease compensation was limited to those diseases which were strictly occupational in nature. This was viewed as removing many questions of causation and helping avoid fraudulent claims and the feared slide towards general health insurance for employees. The virtue of the employment must be materially greater than the general public, i.e., the injury must be a natural or probable result of the employment or conditions thereof. Bethlehem Steel Co. v. Industrial Accident Comm'n, 21 Cal. 2d 742, 744, 135 P.2d 153, 154 (1943). See also Goldberg v. 954 Marcy Corp., 276 N.Y. 313, 12 N.E.2d 311 (1938).

Sherman, supra note 88, at 514.


Id. at 763.

Id.

Id. at 761.


Sherman, supra note 88, at 522-23.

The Iowa Occupational Disease Law, supra note 78, at 517. It is interesting to note that the adoption of the "list" style of occupational disease statutes came at a time when some sectors of society were urging the adoption of general health insurance for all disease. The Federation of Labor in New York favored such insurance because it was afraid that it would be difficult to prove that occupational disease was caused by employment, thus resulting in few awards. Employers threw their support behind limited "list" occupational disease workers' compensation plans to avoid such
states which adopted the "list" type of statute followed two forms: The statute either listed both the disease and the process of industry which caused it, or it listed the disease alone. Either way, this method of providing for occupational disease limited the number of claims to which employers were subject. The fact that the resulting limitation on the right of workers to be compensated caused great hardship did not appear to concern lawmakers. As one commentator wrote in 1917:

If the problem of compensating for occupational diseases were one of reparation for wrongs, justice might require the provision of a legal remedy covering all possible cases, regardless of the difficulties in the way of defining the conditions to liability and of tracing the chain of causation. But no wrongs are involved . . . .

What are the maladies, if any, that are so certainly, demonstrably and largely due to special health hazards of occupations that it would be both just and expedient to reverse the natural law, which lets the loss from the risks of life rest upon the victims, and instead to require employers to assume the loss therefrom—or some high proportion of such loss. Apparently, there are very few such maladies. 104

A major justification for the limited listing of occupational diseases was economic. Some feared that the imposition of workers' compensation liability would seriously endanger the financial viability of certain industries where occupational disease was widespread. Thus, twenty states excluded known occupational diseases due to inhalation of different types of dust in order to avoid the potentially serious financial repercussions. 105

The primary purpose for adopting the schedule-type occupational disease legislation was to limit the responsibility of the system for such disabilities. 106 This goal has been fulfilled. Only five percent of those disabled from work-related occupational diseases currently receive workers' compensation benefits. 107

Some states now have a hybrid occupational disease statute with insurance. Andrews, Limitations of Occupational Disease Compensation, 8 AM. LAB. LEGIS. REV. 311 (1918). 104 Sherman, supra note 88, at 525.

105 Larson, Occupational Disease Under Workman's Compensation Laws, 9 U. RICH. L. REV. 87, 110 (1974). Other objections raised to occupational disease legislation were: The fear of economic disadvantage with states not requiring such compensation; (Ferguson, Pneumoconiosis and the Social Effects, 5 INDUS. MED. 31 (1936); Comment, supra note 85, at 1154; the fear that occupational disease legislation would make employers reluctant to hire persons of bad health (The Iowa Occupational Disease Law, supra note 78, at 518); a belief that the employee was at fault for failing to compel his employer to remedy the hazard; that the increasing responsibility of the employer for the health of the employee would increase employee irresponsibility (Comment, supra note 89, at 387); that requiring the employer to be responsible for the old age, disability unemployment on death of the employee would result in the loss of industry (Angerstein, New Illinois Occupational Disease Act, 3 J. MAR. 116, 117 (1937)); that providing relief for occupational disease under ordinary Workers' Compensation Acts would open the door to highly litigious claims (Checkver, Suggested Analysis for Treating Disease as Personal Injury by Accident Under Workmen's Compensation Acts, 14 U. VA. L. REV. 358, 361 (1928)); and, that it would be difficult to apportion responsibility between successive employers (Chamberlain, Workmen's Compensation for Disease Due to Employment, 10 A.B.A. J. 647 (1924)).

106 Special skill engineered the construction of these schedules so as to limit benefits to a minimum of cases and to types of diseases where disability would run relatively low. Wilcox, The "Schedule" Fraud in Occupational Disease Compensation, 24 AMER. LAB. LEG. REV. 120 (1934).

both a schedule of diseases and a "catch-all" provision providing for increased recognition of nonlisted occupational disease. The trend has been towards a broadening of statutory disease coverage yet a minority of states treat occupational disease on the same basis as traumatic injury, i.e., requiring only that the disease arise out of and in the scope of employment. Most states, even those with a general definition of occupational disease, retain a requirement that the disease be peculiar to or characteristic of the occupation and not a disease of ordinary life, or exist as a hazard in numerical terms more common to the occupation than to the general public.

The fears expressed by proponents of the schedule type of occupational disease statutes have not been realized. Some suggest that insurers themselves are in favor of expanding coverage of occupational disease. This circumvents possible common law actions against employers based on occupational diseases not covered (and thus not barred from common law tort actions) by workers' compensation.

The fact that even the most generally defined occupational disease legislation still restricts occupational disease by utilizing a type of peculiar risk test means that many occupational diseases are not being compensated. Many occupational diseases are not easily distinguished from "ordinary diseases of life." Restrictions which require occupational diseases to be peculiar to or characteristic of an occupation, when coupled with statutes of limitations and presumptions against compensation in the absence of specified hazard exposure, compound the barriers to compensation imposed by inherent medical complexities.

The inescapable conclusion is that the majority of states are still unwilling to treat occupational diseases in the manner that workers' compensation treats physical injuries—by allowing the administrative trier of fact to determine whether or not a given disability arises out of and in the course of employment. By requiring that diseases be shown to be pecu-

108 Morgis, Beauregard & Shaub, State Compensatory Provisions for Occupational Disease, United States Department of the Interior, Bulletin 623, Bureau of Mines (1967). An example of the catch-all type of workers' compensation occupational disease statute is that of New York which lists 28 diseases together with a 29th category providing for "any and all occupational diseases" resulting from any and all employments. N.Y. WORK. COMP. LAW § 3(2) (McKinney 1965).

109 A. LARSON, supra note 3, § 41.31, at 7-361 to 7-362.


111 Note that this requirement was long ago abandoned in physical injury cases.

112 After 17 years experience, Wisconsin, a full coverage state, reported that dubious cases and malingering were manageable. H. SOMERS, WORKMEN'S COMPENSATION 51 (1954).


114 H. SOMMERS, supra note 112, at 68.

115 Id. at 68-69.
liar to an occupation, the legislative bodies are displaying distrust of the very mechanisms set up to adjudicate the work-related nature of disability. While some may argue that a broad definition of occupational disease would result in the compensation of diseases whose causal connection to employment is tenuous,\textsuperscript{116} it is questionable whether it is preferable to require public insurance schemes such as social security and private insurance plans to pay for disability from occupational disease which in fact results from occupational exposure.\textsuperscript{117}

IV. Psychic Injury

In the past two decades the number of stress-related mental disability workers' compensation cases has increased markedly.\textsuperscript{118} The reason for this is unknown. Experts suggest that high unemployment and plant closings could be increasing stress in the workplace, or that an increase in recognition by all areas of law that mental disability may be as compensable as physical disability has lead to greater awareness of these claims.\textsuperscript{119}

Court decisions and commentators alike accept Professor Larson's classification of workers' compensation cases involving mental injuries: (1) physical trauma which produces a mental disorder; (2) mental stimulus which produces a physical disability; and (3) mental stimulus which produces a mental disorder.\textsuperscript{120}


\textsuperscript{117} The major sources of income support for those severely disabled from an occupational disease are: social security (53 percent), pensions (21 percent), veterans benefits (17 percent), welfare (16 percent), workers' compensation (5 percent), and private insurance (1 percent), \ldots Among those severely disabled from an occupational disease, one out of every four receive no income support payments. One in every three receive multiple benefits. An Interim Report to Congress on Occupational Disease, supra note 107, at 2-3.

\textsuperscript{118} See DeCarlo, Compensating "Stress" in the '80's, INS. COUNSEL J. 681 (Oct. 1985).

\textsuperscript{119} Id. at 683. More research is needed in this area. It has been suggested that the volume of workers' compensation cases increases in poor economic times. See Otjen, The Legal History of the Occupational Disease Law in Wisconsin, 22 MARQ. L. REV. 113, 123-24 (1938). Whether that holds true with mental disability claims as well or whether the increase in such claims reflects a change in the demographic make-up of the workforce is unknown. A 1983 study by the California Workers' Compensation Institute indicated that during 1980-82, stress claims more than doubled, while all other disability work injuries decreased 11% during the same period. The National Council on Compensation Insurance reported that 59% of gradual mental stress claimants were age 39 or less whereas 40% of other occupational disease claimants were younger than 40. Females accounted for more than one-half the gradual mental stress claims. It is unknown whether this study looked only at occupational disease claims. National Council on Compensation Insurance, EMOTIONAL STRESS IN THE WORKPLACE—NEW LEGAL RIGHTS IN THE EIGHTIES 5 (1985) [hereinafter NEW LEGAL RIGHTS IN THE EIGHTIES].

\textsuperscript{120} See, e.g., Pathfinder Co. v. Industrial Comm'n, 62 Ill. 2d 556, 564-65, 343 N.E.2d 913, 917-18 (1976); Townsend v. Maine Bureau of Pub. Safety, 404 A.2d 1014, 1016-17 (Me. 1979); Deziel v. Difco Laboratories, Inc., 403 Mich. 1, 22, 268 N.W.2d 1, 9 (1978); Wolfe v. Sibley, Lindsay & Currr Co., 36 N.Y.2d 505, 509, 330 N.E.2d 603, 605, 369 N.Y.S.2d 637, 640 (1975); A. Larson, supra note 3, §§ 42.00-42.23, at 7-575 to 7-679; Christensen, Psychological Injury in Workers' Compensation, 16 GA. S.B.J. 18 (1970); Joseph, The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective, 36 VAND. L. REV. 263, 287 (1983); Podlewski, supra note 70, at 734; Render, Mental Illness as an Industrial Accident, 31 TENN. L. REV. 288 (1964); Comment, Workers' Compensation: Pathfinder Co. v. Industrial Commission, 26 DRAKE L. REV. 472, 475 (1976-77); Comment, Georgia's Mental Block in Workers' Compensation, 36 MERCER L. REV. 971, 973 (1985); Comment, Mental Disability Resulting from Series of Stressful Work-Related Incidents is Compensable—Albanese's Case,
The first of these categories—physical trauma producing a mental disability—is accepted by most states as compensable. This rule was established as early as in the 1920s when the Supreme Court of Oklahoma found that "neurasthenia" resulting from a physical injury arising out of and in the course of employment was compensable.\textsuperscript{121}

More difficult is the second category of cases where there is no physical injury at all but rather mental stress or strain which produces a physical injury such as a stroke or heart attack.\textsuperscript{122} Courts have uniformly found compensability in situations where physical injuries are caused by mental stimulus.\textsuperscript{123}

Most courts, in deciding cases which fit into the second category, agree with the rationale stated in \textit{Insurance Department of Mississippi v. Dinsmore}: "It seems unthinkable that, if hypertension may be aggravated either by physical or mental and emotional exertion, courts should be willing to accept the physical causative, but reject, as not accidental, a disability proximately resulting from mental and emotional exertion."\textsuperscript{124} This reasoning closely parallels that used earlier in the century to agitate for compensation of occupational disease.

Where the work-related stress is relatively brief and occurs within a limited period of time, resulting physical injuries are likely to be held compensable.\textsuperscript{125} The courts are far more likely, however, to deny compensation where the work-related stress causing a physical injury is more protracted, either on the grounds that there was no "injury by accident"\textsuperscript{126} or that the strain causing the injury is no greater than that experienced by all persons generally.

The reluctance displayed by those courts faced with the prospect of compensating physical injuries such as heart attacks can also be seen when examining the compensation of mental injuries caused by work-related stress. While a majority of jurisdictions now allow compensation of mental-mental claims,\textsuperscript{127} these claims are not accepted without reservation. Most courts have been reluctant to treat mental injuries on the

\textsuperscript{122} See \textit{Rialto Lead & Zinc Co. v. State Indus. Comm'n}, 112 Okla. 101, 240 P. 96 (1925). See also the extensive list of cases cited by A. Larson, \textit{supra note} 3, \$ 42.22(a) n.68, at 7-602.
\textsuperscript{123} A. Larson, \textit{supra} note 3, \$ 42.21(a), at 7-586.
\textsuperscript{124} See A. Larson, \textit{supra} note 3, \$ 42.21(a), at 7-586; Comment, \textit{Compensability of Mental Injury: Wolfe v. Sibley, Lindsay & Curt Co.}, 21 N.Y. L. Forum 465, 470 (1976); Comment, \textit{Mental Disability Resulting From Series of Stressful Work-Related Incidents is Compensable—Albanese's Case}, 14 \textit{Suffolk U.L. Rev.} 174, 177 (1980). This opinion is not shared by all courts. See, e.g., \textit{King v. Wilson Bros. Drilling Co., Inc.}, 441 So. 2d 68, 71 (La. Ct. App. 1983) (denied compensation for an occupational stress-related heart attack because the stress was "not of a degree greater than that generated in every day non-employment"). See also \textit{Toth v. Standard Oil Co.}, 160 Ohio St. 1, 113 N.E.2d 81 (1953) (Compensation denied for cerebral hemorrhage caused by anxiety over a police investigation of a fatal car accident occurring within the scope of employment; the court concluded that anxiety and worry do not constitute an injury.) (overruled in \textit{Ryan v. Conner}, 28 Ohio St. 5d 406, 503 N.E.2d 1379 (1986)).
\textsuperscript{125} \textit{Miss. 569, 572, 102 So. 2d 691, 694 (1958)}.
\textsuperscript{126} \textit{See, e.g., Cabe v. Union Carbide Corp.}, 644 S.W.2d 397 (Tenn. 1983).
\textsuperscript{127} See A. Larson, \textit{supra} note 3, \$ 42.21(d), at 7-597. This proposition was inelegantly phrased by the court in \textit{Russell v. Department of Corrections}, 464 So. 2d 1202, 1203 (Fla. 1984): "Plaintiff suffered no job-related mental stress greater than that involved in everyday nonemployment life."
same basis as physical injuries because of the belief that such disabilities require a more cautious approach. The majority of jurisdictions have developed, by decision or statute, threshold barriers to such claims. These barriers resemble the cautious positions taken during the earliest days of workers’ compensation. The language of many decisions in this area show that the courts have revived the concerns which originally surfaced when questions of expanding the definition of physical injury and compensating occupational disease first arose. These concerns are voiced both in decisions accepting and decisions rejecting mental-mental claims. The courts, which once again fear turning workers’ compensation into general health insurance, are concerned that a liberal standard would “open the floodgates” to numerous, perhaps fraudulent, claims of mental injury, and are concerned that they cannot effectively evaluate claims of mental injury.

These reservations are frequently couched in terms that a stress related mental injury did not “arise out of and in the course of employment.” This serves as a convenient way in which to deny

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130 Seitz, 437 A.2d at 1345. See also McGarrah v. State Accident Ins. Fund Corp., 296 Or. 145, 675 P.2d 159 (1983) (stress disorder compensable as occupational disease where actual occupational stress conditions were the major contributing cause of disability).

We recognize that [if we conclude the occupational disease law allows compensation for mental diseases and disorders caused by on-the-job stressful events or conditions, that interpretation of the statute] may open a floodgate of claims from workers who simply cannot mentally cope with usual working conditions. Researchers tell us that people who suffer from psychological problems occupy more hospital beds in the United States than those who have a physical illness or injury. It is estimated that at any given time between 15 and 30 percent of the general population have diminished efficiency as a result of some type of mental or emotional dysfunction. The legislature must have been aware of the shift in costs from general welfare or general insurance to workers’ compensation that would occur if workers’ compensation provided coverage for mental and physical disorders caused by job stress.

Id. at 162, 675 P.2d at 169 (citations omitted). See also Shope v. Industrial Comm’n, 17 Ariz. App. 23, 495 P.2d 148 (1972) (anxiety reaction precipitated by argument but due to gradual occupational stress held noncompensable). “[T]o grant petitioner his requested relief would literally open Pandora’s Box permitting compensation to any disgruntled employee who leaves his job in a huff because of an emotional disturbance.” Id. at 25, 495 P.2d at 150.


[W]here, by reason of a diseased mind, a worker’s perception of his employment makes his
compensation for mental disability which courts and legislatures deem unwise due to economic considerations. The rationales are the same as those employed earlier in this century when many states excluded certain occupational diseases and cumulative physical injuries from workers' compensation. In many jurisdictions, once the analytical straight jacket of "injury by accident" was surmounted, the "arise out of" standard proved to be sufficiently elastic to include cumulative physical injuries. The fact that many mental-mental decisions have questioned whether mental disabilities "arise out of" employment reflects policy concerns over the economic repercussions of allowing such claims and an inherent distrust of psychiatric disability rather than any real belief that employment does not play a causal role in precipitating such disabilities. These concerns are illustrated by comparing the majority and dissenting opinions in Smith and Sanders, Inc. v Peery. The claimant, employed for seventeen years, suffered a "nervous breakdown" immediately after his employer laid him off. His stress became apparent when he threw a tool through a plate glass window immediately after being informed of his layoff. The claimant, who had demonstrated nondisabling mental difficulties during his employment, was diagnosed following his layoff as having severe depressive neurosis, obsessive compulsive neurosis and phobic neurosis caused by the notice of termination of employment. The court, in denying compensation, concluded that the legislative purpose of the Workers' Compensation Act was to provide compensation for injuries arising out of and in the course of employment rather than unemployment compensation or general health insurance. The court denied benefits because the claimant did not show an unusual occurrence, accident, or injury incident to employment. The claimant thus failed to prove that his injury was the type of injury covered by workers' compensation. In the opinion of the Peery court, economic layoffs are not unusual occurrences, and thus the claimant's injury could not be considered an accident. The court cited both the economic consequences of holding such disabilities compensable and the fact that the claimant had a history of prior mental problems. The court plainly concluded that compensation of such mental disabilities was economically unwise and employed an antiquated definition of injury to justify its conclusion. The Peery court must have been aware, however, that under Mississippi law, aggravations of preexisting conditions have been considered compensable and injuries resulting from routine, as opposed to unusual, conditions were

\[\text{condition more acute, we cannot grant what amounts to a lifetime pension at the expense of industry . . . . In such case, the societal duty to aid must, because mental illness did not arise out of employment, be met by some other quarter of society . . . .}\]

\[\text{Id. at 585, 429 A.2d at 1071.}\]

\[\text{133 473 So. 2d 423 (Miss. 1985).}\]

\[\text{134 "Were compensation proper for Peery, benefits could be held to extend to any employee who suffers depression or anxiety upon being rightfully discharged." Id. at 426.}\]

\[\text{135 See Jenkins v. Ogletree Farm Supply, 291 So. 2d 560 (Miss. 1974) (The claimant's employment from 1963 to 1969 gradually aggravated preexisting asthma which was held to be a compensable injury although the employer was entitled to apportionment.).}\]
likewise compensable.\textsuperscript{136} The Peery court thus deliberately ignored prevailing Mississippi law in order to deny compensation and to protect the economic interests of employers. The Peery dissent noted: "Peery was on the job on May 22, 1981 when he had the experience which in fact and in substantial part caused his disability."\textsuperscript{137} The dissent concluded that the injury was within the course of employment in that it occurred at work.\textsuperscript{138} The circumstances surrounding the manifestation of the injury—the notification of layoff followed promptly by the throwing of a piece of equipment through a window by the claimant, the claimant's request for psychiatric help and the ensuing hospitalization—gives rise to the conclusion that the notice of layoff at least precipitated the disability, or substantially aggravated the claimant's underlying and preexisting psychiatric condition. Thus, the injury in fact "arose out of" claimants' employment. Had the claimant's injury been a physical one, there is no question that his disability would have been compensable. The Peery dissent rejected the notion that there should be a special standard for mental injuries, noting that a liberal construction of the workers' compensation law is proper to accomplish its purpose as remedial social legislation. The dissent stated further that Mississippi law provided that a "mixed risk" (where a combination of employment and personal factors cause disability) should be compensable where work aggravates, accelerates or contributes to the injury, and that the "arise out of" standard is a minimum level of causation.\textsuperscript{139} Furthermore, the dissent answered the policy concerns of the majority by concluding that the inevitability of recessions and resulting layoffs in a capitalist economy are precisely the reason why any disability ensuing therefrom should be compensated, just as any other occupational risk resulting in injury is compensated.

The rapid increase in stress-related workers' compensation claims\textsuperscript{140} has resulted in an extraordinarily fertile legal field where states accept and reject the standards of other states.\textsuperscript{141} There has been recent legis-
lative activity in this area as some states seek to limit the compensability of stress-related claims. For example, Colorado now defines "accident", "injury" and "occupational disease" as not including disability or death caused by or resulting from mental or emotional stress unless it is shown by competent evidence that such mental or emotional stress is proximately caused solely by hazards to which the worker would not have been equally exposed to outside the employment; thus importing the "peculiar risk" doctrine of occupational disease. Michigan amended its workers' compensation statute in 1980 by requiring that mental disabilities be contributed to, aggravated or accelerated by employment in a significant manner by real events, not by subjective perceptions thereof. This is an apparent attempt to limit the subjective test of Deziel, although the actual impact is unknown as of this writing since the statute has prospective application only.

The development of the law on stress injuries in Arizona provides a particularly interesting example of the interplay between case law and legislative response. The Arizona workers' compensation statute originally provided workers' compensation for employees injured by accidents arising out of and in the course of employment. The Arizona courts allowed compensation for stress-related injuries and noted that to draw a distinction between a mental injury and a physical accident would be contrary to the intent of the workers' compensation statute. This rule was limited the next year by the Arizona judiciary to situations involving an "unexpected injury-causing event." The court also noted that the granting of compensation would "literally open Pandora's box permitting compensation to any disgruntled employee who leaves his job in a huff because of an emotional disturbance." This decision was in turn distinguished in Fireman's Fund Insurance Co. v. Industrial Commission. The Fireman's Fund majority found the facts presented sufficient to rule that the claimant had sustained a "personal injury" arising from an accident, and other states followed suit.

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146 See, e.g., Brock v. Industrial Comm'n, 15 Ariz. App. 95, 486 P.2d 207 (1971) (Employee with preexisting psychiatric problems which were aggravated by incident where he killed a pedestrian while driving a city truck was granted compensation.).
147 Shope v. Industrial Comm'n, 17 Ariz. App. 23, 495 P.2d 148 (1972) (Relief foremen in body shop who had long standing job difficulties denied compensation after argument with customer brought difficulties to a head.).
148 Id. at 24, 495 P.2d at 149.
149 Id. at 25, 495 P.2d at 150.
150 119 Ariz. 51, 579 P.2d 555 (1978) (Claimant who suffered mental breakdown as a result of additional responsibility and mounting pressure awarded compensation; affirmed Brock, 15 Ariz. App. 95, 486 P.2d 207 (1971)).
out of and in the course of employment. The dissent summarized the inherent conflict in workers' compensation as follows:

Although the Workmen's Compensation Act should be liberally construed to meet its intended purpose, we must not lose sight of the fact that the Act was not intended to be a general health and accident insurance substitute. . . . Today's approval of the award for a mental condition brought about by the gradual buildup of emotional stress over a period of time, without an injury causing event, paves the way for tomorrow's abuses of the workmen's compensation system.

This controversy was laid to rest in Arizona, at least for the time being, by the passage in 1980 of a statute which provides that a mental injury shall not be considered a personal injury by accident arising out of and in the course of employment unless some unexpected, unusual or extraordinary stress or some physical injury was a substantial contributing factor of the condition.

Individual states also disagree as to whether to consider mental disabilities as an injury or as an occupational disease. The majority of states treat mental disability as an injury. The nature of occupational disease legislation, which typically lists specific diseases that are peculiar to certain occupations and/or provides a general category of diseases which must meet a requirement of being more prevalent in the occupation than in the general population, tends to discourage this type of claim. Oregon has the most developed case law allowing compensation for mental disabilities caused by mental stress. The Oregon Workers' Compensation statute defines an occupational disease as any disease which arises out of and in the scope of employment and to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment. The Oregon Supreme Court interpreted this statute as allowing compensation where occupational factors are the major contributing cause of disability. Thus, Oregon treats mental disabilities on the same footing as any other occupational disease.

Some divergence of opinion exists as to whether or not the Texas Legislature intended to include gradually induced mental stress disabili-

151 Id. at 55, 579 P.2d at 559.
152 Id. at 55, 579 P.2d at 559 (Gordon, J. dissenting).
153 ARIZ. REV. STAT. ANN. § 23-1043.01(B) (1983). It is interesting to note that the Arizona statute does not require a showing of unexpected, unusual or extraordinary stress in order to recover compensation for heart disabilities. See Bush v. Industrial Comm'n, 136 Ariz. 522, 667 P.2d 222 (1983).
154 See Marable v. Singer Business Machs., 92 N.M. 261, 586 P.2d 1090 (N.M. Ct. App. 1978), where the court held that neurotic mental depression suffered by a female employee as a result of harrassment by male employees was not an occupational disease because it was not a natural incident of the employment or linked with the process of employment. The applicable New Mexico statute defined "occupational disease" as "any disease peculiar to the occupation in which the employee was engaged and due to causes in excess of the ordinary hazards of employment as such." N.M. STAT. ANN. § 59-11-21 (1953) (repealed 1984). See also Delaney v. Alaska Airlines, 693 P.2d 859 (Alaska 1985).
157 This rule is subject to the limitation that the stressful conditions actually exist, as opposed to being merely perceived as being stressful by the claimant. Id. at 165, 675 P.2d at 171.
ties within the Texas definition of occupational disease. The legislature’s elimination of the schedule of physically induced diseases and the substitution of a comprehensive definition of occupational disease as “any disease arising out of and in the course of employment” suggests that mentally induced occupational diseases are eligible for compensation under the 1971 amendment. The Texas courts, however, have taken a restrictive view of mental disabilities and have declined to extend the definition of occupational disease to include stress-related disabilities.

Interestingly, Ohio, one of the most conservative states in workers’ compensation matters, has recently held that disability caused by job stress may be compensable as a non-scheduled occupational disease. The Ohio occupational disease statute defines occupational diseases as peculiar to a particular occupation to which the employee is not normally subjected outside of his employment. In a 1984 case, the Court of Appeals of Ohio held that the trial court erred in ruling as a matter of law that disabilities caused by job stress can under no set of facts be compensable as a nonscheduled occupational disease.

Colorado recently classified a stress injury as an occupational disease in City of Aurora v. Industrial Commission. The claimant was an undercover police officer who was in constant danger and was required to use drugs as part of his cover. A fellow officer committed suicide and the claimant came under investigation for drug use. The court upheld an award for compensation, holding that the claimant’s severe chronic post-traumatic stress disorder was an occupational disease. In Martinez v. University of California, the claimants’ anxiety neurosis sustained from exposure to radioactive materials pursuant to his employment at a laboratory was held to be a compensable occupational disease.

It is difficult to categorize the varying state approaches to mental disability caused by non-physical work stress due to the differences in statutory language and the considerable divergence and overlap in judicial standards. One commentator identified two competing state

158 See Note, Nervous Disabilities Induced by Repetitious Mental Trauma Held Non-Compensable: Transportation Insurance Co. v. Maksyn, 33 Sw. L.J. 905, 911 (1979).
159 See Sames, Compensability of Mentally Induced Occupational Diseases Under Texas Workers Compensation Law, 10 St. Mary’s L.J. 148, 154 (1978).
161 Larson cites Ohio’s refusal to compensate mental injuries caused by occupational stress as “distinctly out of line” with the majority. A. Larson, supra note 3, § 42.21(a), at 7-585 to 7-591.
165 Id. at 1124. Colo. Rev. Stat. § 8-41-108(3) (1986) defines an occupational disease as resulting directly from work and the nature of employment, which can fairly be traced to the employment as a proximate cause and which does not come from a hazard to which the worker would have been equally exposed outside of the employment. But see Hennige v. Fairview Fire Dist., 99 A.D.2d 158, 472 N.Y.S.2d 204 (1984) where workers’ compensation benefits were granted to a firefighter who became disabled due to perfectionist tendencies on the theory that he suffered an occupational disease.
tests: The unusual stress test and the objective causation test. Under the former test, a claimant must show that mental disability resulted from workplace exposure to unusual, unexpected or extraordinary stress greater than that experienced by the average employee. Under the latter test, a claimant must establish a causal connection between the workplace and the mental disability without a showing of extraordinary stress. Another commentator employs the following categories: Gradual stress mental-mental, potentially compensable with no requirement that stress be unusual; gradual stress mental-mental, potentially compensable if stress is unusual; mental-mental, potentially compensable if stress is sudden, frightening, shocking; and mental-mental, not potentially compensable. Professor Larson subdivides his third mental-mental category into the following subcategories: Stimulus causing nervous injury; gradual stimulus causing nervous injury; the subjective causal nexus test; job loss or change as stress; and stress as an occupational disease. An examination of the case law on mental injuries caused by mental stress indicates that the above categories, while valuable for their ability to distinguish different elements of the problem, are too general to differentiate the subtle distinctions in existing law. This writer has identified nine different standards applied by the various state decisions in this area: Mental-mental injuries prohibited by statute; sudden stress equivalent to accidental injury; mental-mental injuries compensable if resulting from identifiable work-related incidents; mental-mental injuries compensable on the same basis as physical injuries; gradual stress resulting in mental injury compensable—subjective standard; gradual stress resulting in mental injury compensable if stress is real—objective test; the three-tier test for mental disability; mental disabilities potentially compensable as occupational disease—subjective standard; mental disabilities potentially compensable as occupational disease—objective standard.

A. Mental-Mental Injuries Prohibited by Statute or Decision

Several states explicitly reject the compensability of mental injuries caused by non-physical occupational trauma. For example, Louisiana workers’ compensation law defines “injury” as injuries by violence to the physical structure of the body. Applying this statute, a Louisiana court recently denied workers’ compensation benefits to a claimant who became disabled after a job transfer. Nebraska follows a similar rule.
The Nebraska workers’ compensation statute defines “injury” as violence to the physical structure of the body. In *Bekelski v. O.F. Neal Co.*, the Nebraska Supreme Court thus denied compensation to an elevator operator who spent thirty minutes in an elevator with a crushed and dying man who had been caught in the elevator machinery. The resulting disability was held noncompensable because the claimant’s stress was not considered violence to her body. It should be noted, however, that this type of statutory language does not bar mental-mental compensation in other states.

The workers’ compensation statute of Florida explicitly excludes compensation for mental or nervous injury due to fright or excitement. Thus, the Florida statute prevents compensation of mental-mental workers’ compensation claims. A number of courts choose to employ or retain the most conservative definition of injury or accidental injury thereby denying compensation for mental-mental claims. These courts frequently note that mental disability is not a hazard or risk peculiar to the given employment. This concern raises the inference that the courts could have adopted a more expansive

245 La. 33, 156 So. 2d 468 (1963) (compensation for a stroke caused by occupational stress permitted). *Danziger* was subsequently overruled by Ferguson v. HDE, Inc., 270 So. 2d 867 (La. 1972). *But see* Guillot v. Sentry Ins. Co., 472 So. 2d 197 (La. Ct. App. 1985) (Preexisting emotional condition making claims adjuster more susceptible to extreme mental strain did not disqualify him from receiving benefits after he suffered job-related nervous breakdown.).


177 4 N.W.2d 741 (Neb. 1942).

178 The Nebraska judiciary recognizes that its restrictive standard on the compensability of mental stress claims places it in the minority, but sees the decision to allow such claims as a legislative decision due to the resulting major shift of resources from general insurance to workers’ compensation. *See id.* at 743. *But see* Magouirk v. United Parcel Servs., 496 So. 2d 55 (Ala. Civ. App. 1986).

179 *See* Bailey v. American Gen. Ins. Co., 154 Tex. 430, 279 S.W.2d 315 (1955) where the court, construing a statute requiring damage to the physical structure of the body, held that the word “body” means the entire human organism, including the emotions.

180 *See* City Ice & Fuel Division v. Smith, 56 So. 2d 329 (Fla. 1952).


definition of injury had they been less concerned with the economic considerations involved. This emphasis on the concerns of employers is oddly misdirected, given the ostensible purpose of workers’ compensation statutes to aid disabled workers.

B. Sudden Stress Equivalent to Accidental Injury

Under this category fall cases where the stress is so unusual so as to allow the courts to analogize to a traditional injury. The courts tend to apply a type of “reasonable person” standard in analyzing whether the average person would have or could have suffered from mental disability after witnessing the particular event. An excellent example of this type of stress-producing incident occurred in Bailey v. American General Insurance Co. 184 In Bailey, the claimant suffered from a severe anxiety reaction after watching a coworker fall to his death from a moveable scaffold. All parties agreed that the experience directly produced the disability. Thus, the question of a causal link between the stimulus and disability was not in issue. 185

The requirement of a particularly shocking or startling event has been diluted in some of the more recent cases. 186 Most cases in this category, however, are early decisions which, for their time, were taking a progressive step in holding such disabilities compensable. The implicit equation of such stimuli with a “reasonable person” standard in some of these decisions is another example of courts’ tendencies to apply the negligence standards of tort to the workers’ compensation system; a system which was intended to be free of such technical legal concepts. 187

C. Mental-Mental Injuries Compensable on Same Basis as Physical Injuries

Another line of decisions allows the compensability of mental-mental disability without explicitly adopting either the subjective or objective requirement. These cases also do not make a distinction as to the type of stress, sudden or gradual. 188 There is a subcategory of cases

184 154 Tex. 430, 279 S.W.2d 315 (1955).
under this heading which, while rejecting an objective\textsuperscript{189} or subjective\textsuperscript{190} requirement, do impose a "preliminary link" between disability and employment.\textsuperscript{191} Fox v. Alascom, Inc. is an excellent example of a state decision which explicitly took the approach of treating mental-mental disabilities on the same basis as physical injuries and in doing so provides an intelligent discussion of the policy concerns which underlie most decisions in this area.\textsuperscript{192} The Fox court first identified the "arose out of" standard as a "political compromise" behind workers' compensation whereby the employee surrenders his or her common law right to sue in exchange for an assumption of the initial cost of compensation without fault by the employer.\textsuperscript{193} The decision noted that the question of whether mental injuries arise out of employment is exacerbated by their complex etiology, which in turn has led many jurisdictions to impose a requirement that the stress be greater than normally experienced.\textsuperscript{194} The Fox court rejected this approach because it only provides an appearance of genuineness and is not required in physical injury cases where causation is difficult to determine. The court concluded that requiring such a "per se" showing of unusual stress violates the fundamental principal of workers' compensation law that the employer take the employee as found.\textsuperscript{195}

D. Mental-Mental Injuries Compensable if Resulting from Identifiable Work-Related Incidents

The sole decision in this category moves away from reliance on stress that is accidental in the most traditional sense of workers' compensation—sudden and shocking—but still requires that specific identifiable stressors be not too protracted in time in order to distinguish them from stress that is gradual and cumulative.\textsuperscript{196} The decision rejects the "honest perception" test of Deziel\textsuperscript{197} because it does not look to whether the work

\textsuperscript{189} See infra notes 208-22 and accompanying text.

\textsuperscript{190} See infra notes 200-07 and accompanying text.


\textsuperscript{192} 718 P.2d at 977. "We conclude that this case should be analyzed in the same way as any other claim for workers' compensation benefits." Id. at 984.

\textsuperscript{193} Id. at 980.

\textsuperscript{194} Id. at 981.

\textsuperscript{195} Id. at 982-83.

\textsuperscript{196} In re Albanese, 378 Mass. 14, 389 N.E.2d 83 (1979) (identifiable stressful work-related incidents occurring over a relatively brief period of time compared with a twenty-year period of employment).

\textsuperscript{197} See infra note 199.
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198 The requirement of a "preliminary link" thus requires a showing that the employment played an active role in causing the disability.

E. Gradual Stress Resulting in Mental Injury
Compensable—Subjective Standard

The decision of the Michigan Supreme Court in Deziel v. Difco Laboratories has been frequently criticised and rarely followed. This case is credited or blamed for the so-called subjective test of mental injury. The Deziel court held that, as a matter of law, a claimant is entitled to compensation if it is factually established that he honestly perceives that he is disabled due to a work-related injury. The test thus operates from the claimant's own perception of reality. The court noted, however, the policy concerns opposed to such a standard: The possibility of malingering and the difficulty of substantiating such claims. The Deziel court also listed reasons for employing the subjective standard: A previous Michigan decision had impliedly employed such a test; an objective standard would not suffice since psychoneuroses are inherently subjective; the remedial nature of workers' compensation mandates a liberal construction of the statute; and workers' compensation referees have the ability to detect malingers.

Criticism of the Deziel standard has taken two approaches. Critics frequently state that the Deziel standard ignores the "arise out of" requirement by not requiring that the perceived stressors actually exist. The Deziel standard would allow compensation where the only causal relationship between employment and disability was the claimant's own irrational fears, thus permitting compensation for almost any mental disorder. Critics also object that the Deziel decision ignores the nature of neurotic disabilities which seek to fasten blame for unresolved inner conflicts on any convenient scapegoat such as one's employer. The belief that most mental disorders stem from childhood thus leads to a conclusion that trivial employment injuries should not be permitted to act as a "hook" on which neurotics can hang their troubles.

The Deziel standard may be moot, however, due to the 1980 amendment to the Michigan Workers' Compensation statute which provides that mental disabilities shall be compensable when arising out of actual

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198 See Fox, 718 P.2d at 983-84.
199 403 Mich. 1, 268 N.W.2d 1 (1978) (superceded by statute/rule as stated in Bentley, 347 N.W.2d 784 (Mich. 1984)).
200 See supra note 141.
202 403 Mich. at 37, 268 N.W.2d at 15.
204 403 Mich. at 26-27, 268 N.W.2d at 11.
206 See Diezel, 403 Mich. at 46, 268 N.W.2d at 25 (Coleman, J., dissenting). See also Joseph, supra note 201.
events of employment, and not unfounded perceptions thereof. 207

F. Gradual Stress—Usual but Objectively Real and Measurable Rather than Subjective

The jurisdictions of Pennsylvania and New Jersey employ a standard for mental-mental injuries that does not require stress to be greater than that normally experienced by workers in the same or other occupations but does require that the stress be real. The earliest Pennsylvania cases adopted a tort standard in denying compensability. 208 The current leading case in Pennsylvania is Thomas v. Workmen's Compensation Appeal Board. 209 In Thomas, the court denied compensation, noting that “[d]ue to the highly subjective nature of psychiatric injuries, the occurrence of the injury and its cause must be adequately pinpointed.” 210 The court further stated that “we cannot hold evidence of an employee’s subjective reaction to being at work and being exposed to normal working conditions as an injury under the Act.” 211 The court applied a reasonable man standard by requiring objectively measurable work stressors. What constitutes objectively measurable work stressors has been a troublesome question since the Thomas decision. For example, verbal harassment by a superior over a period of eight years was held sufficient evidence of something more than a subjective reaction to normal work conditions. 212 An engineer who had unfounded fears that he might lose his job, however, did not satisfy the test. 213

New Jersey imposes a similar standard. 214 In Williams, the court denied compensation to the claimant who alleged that his work on an assembly line aggravated a preexisting mental illness. The court, applying a standard requiring objective evidence which, viewed realistically, must show work to be a material contributing factor, found that the employment was a static fact and the claimant’s schizophrenic perception of his job was the moving and causative factor in his disability.

The New Jersey and the Pennsylvania courts cite cost 215 and suspi-

207 MICH. COMP. LAWS ANN. § 418.301(2) (West Supp. 1987).
209 55 Pa. Commw. 449, 423 A.2d 784 (1980) (claimant disabled after watching television report of refinery fire similar to a fire experienced by the claimant five years prior).
210 Id. at 455, 423 A.2d at 787.
211 Id. at 456, 423 A.2d at 788.
215 Where by reason of a diseased mind, a worker’s perception of his employment makes his condition more acute, we cannot grant what amounts to a lifetime pension at the expense of industry or the ultimate consumer. In such a case the societal duty to aid must, because the mental illness did not arise out of employment, be met by some other quarter of society.

Williams, 178 N.J. Super. at 585, 429 A.2d at 1071. If the claimant had a preexisting back injury which had been made “more acute” by his employment, he would have been entitled to compensation. The New Jersey court was clearly concerned with the economic cost of compensating mental injuries, as shown by footnote 3 of the decision, citing a present pragmatic legislative intent to “put
tion of psychiatric injuries,\textsuperscript{216} respectively, as policy concerns underlying their reluctance to adopt a liberal standard. The importance of good lawyering and a sympathetic claimant cannot be overemphasized.\textsuperscript{217}

The difficulty with the Pennsylvania and New Jersey standard is that what may not be stressful to a normal individual may be disabling to a claimant with a preexisting mental condition.\textsuperscript{218} It is questionable whether adequately pinpointed stress guarantees a valid claim anymore than a physical blow gives credence to a claim in tort.

One decision\textsuperscript{219} has discussed the problem of which control group should be used for the purpose of determining whether the job stress of a particular employee is abnormal. Three possible groups were identified: Fellow employees, workers in similar jobs but with different employers, and the working world at large. The court regarded the first two categories as preferable.\textsuperscript{220} Some of these decisions\textsuperscript{221} have been candid in noting that the standards for compensability of physical injuries should not be applied to mental injuries since all mental injuries would then be compensable.\textsuperscript{222}

\textsuperscript{217} In Williams, 178 N.J. Super. at 571, 429 A.2d 1063, the court pointed out that the claimant had filed two earlier petitions which made no mention of work stress, had twenty-one workers' compensation hearings, and was "inherently unreliable." Apparently, the only coworker who testified for him was terminated for sleeping on the job. Id. at 586, 429 A.2d at 1071. In Saunderlin v. E.I. duPont Co., 102 N.J. 402, 508 A.2d 1095 (1986), the testimony of a psychiatrist who had only seen the claimant for the purposes of trial preparation was rejected. A Pennsylvania court rejected a claim for psychiatric disorder caused by exposure to noise, dust and other conditions where no testimony was presented to show the extent of these conditions. Russella v. W.C.A.B., 91 Pa. Commw. 471, 497 A.2d 290 (1985). However, it accepted a claim where the objectively stressful work environment was identified by the testimony of a psychologist. Bell Tel. Co. v. W.C.A.B. (Demay), 87 Pa. Commw. 558, 487 A.2d 1053 (1985).
\textsuperscript{218} These decisions fail to recognize that assembly line jobs where employees have high psychological demands combined with little control over their work are among the most stressful environments and that even a 'normal' job may be disabling to an individual with a preexisting mental disturbance. Note, \textit{Recovery in New Jersey Under Workers' Compensation for Mental Disabilities Caused by Job Stress and a Proposal for Change}, 15 Rutgers L.J. 1033, 1054 (1984). For a current detailed discussion of Pennsylvania law on the issue of occupational stress-related disability, see Comment, \textit{Gray Areas and Gray Matter: Compensable Psychic Injury Under Pennsylvania Workmen's Compensation Law}, 91 Dickinson L. Rev. 583 (1986).
\textsuperscript{220} Id. at 193.
\textsuperscript{221} See, e.g., Swiss Colony, Inc. v. Department of Indus., Labor & Human Relations, 72 Wis. 2d 46, 240 N.W.2d 128 (1976) (manager overburdened and berated by supervisor granted compensation); Graves, 713 P.2d 187.
G. The Three-Tier Test for Mental-Mental Disability

Maine has adopted a test which requires that unusual job stress be the direct cause of injury, or that the ordinary stress of employment be, by clear and convincing evidence, the predominant cause of injury, or a combination of the two be, by clear and convincing evidence, the predominant cause of injury. This Solomonic compromise was an attempt to "navigate the beacon of a progressive Act and the shoals of potentially fraudulent claims coupled with the spectre of the employer as a universal insurer."223

The court summarized the competing considerations in its decision. The factors which militate in favor of compensating mental-mental disabilities include: The acceptance of gradual, cumulative trauma in physical injury cases; the acceptance of physical trauma leading to mental injury and mental stimulus leading to physical injury; a difficulty in separating gradual from sudden mental injuries; and the liberal interpretation to be given the Workers’ Compensation Act.224 Factors militating against such awards include: Fears of illusory claims; difficulty in establishing the cause of neurosis; and fear that simply requiring a "causal connection" between employment and disability would result in the compensability of virtually every mental condition and thus, in general, health insurance funded by employers.225

The concept behind Maine’s unique standard is that the requirement of greater than normal stress would act as a buffer against malingering claims and the spectre of general insurance. Nonetheless, those predisposed to mental injury could recover if they could meet the second test.

H. Mental Disabilities Potentially Compensable as Occupational Diseases

Of the minority of jurisdictions that have treated or considered treating mental-mental disabilities as injuries, Colorado and Ohio have not discussed the imposition of either an objective or subjective standard.226 A New Mexico court apparently adopted a subjective standard when a laboratory worker developed an anxiety neurosis due to a fear of death from exposure to radioactive materials. The court held the disease to be occupational.227

The remaining decisions employing an occupational disease theory are from Oregon and vacillate between objective and subjective interpre-

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224 Id. at 1016-17.
225 Id. at 1018-19.
227 Martinez v. University of Cal., 93 N.M. 455, 601 P.2d 425 (1979). The court stated: If the claimant is incapable, by reason of his inability to view rationally his disabling condition and its genesis, how is he any less disabled than one who, in full possession of his reasoning powers, can see and perceive a severed limb or a mangled arm? . . . We would make claimants with mental debilities more responsible for their psychic weaknesses which to them . . . are directly related to their work conditions . . . . This is not logical; it is not humanitarian . . . .
Id. at 457-58, 601 P.2d at 427-28.
tations of the work environment by the claimant. One case\textsuperscript{228} involved an "inflexible" older male worker who suffered stress related problems (headaches, upset stomach and diarrhea) resulting from constant turnover of younger supervisors, some of whom were women and some of whom gave conflicting instructions. The standard applied by the court was whether work was the major contributing cause of disability. The court held that the claimant's belief that he was harassed, whether or not it was true and even though his perceptions were the unconscious results of his limitations, was sufficient to support an award. To require an actual finding of harassment, according to the court, would inject an element of fault into the case.

In \textit{McGarrah v. State Accident Insurance Fund Corp.},\textsuperscript{229} a supervisor's vendetta against a deputy sheriff caused the claimant anxiety and depressive neurosis. The court found it compensable since the events actually occurred and were not simply conditions subjectively perceived by the claimant.\textsuperscript{230}

In a 1984 case, \textit{State Accident Insurance Fund Corp. v. Shilling},\textsuperscript{231} the Oregon court held that occupational stress must be real and must be measured in terms of the individual worker's actual reaction rather than in terms of whether it would cause disability in the average worker.

The variety in state standards illustrates the uncertainty and complexity of the law in this area and shows that the states are groping towards an acceptable manner of handling mental injury workers' compensation disability. All the previously mentioned classifications do little to explain why the state standards are in such conflict.\textsuperscript{232} It appears that much of the confusion demonstrated by the differing state standards stems from not only a long standing difficulty in deciding the meaning of the "arise out of and in the course of employment" standard and a prejudice against psychiatric claims as unfounded, but also from a deep-seated concern over how far to extend the scope of workers' compensation statutes. The courts continually parrot the long-standing assertion that workers' compensation was never intended as a substitute for general accident insurance. This conclusion is open to debate. The concern is a real one, however, and is deserving of more intelligent discussion than it has received. There is, in the words of one decision, an "elusive thread of consistency"\textsuperscript{233} underlying most cases involving mental stress; namely, a realization that if mental stress claims were treated the same way that physical injury claims are treated and the same causal tests applied, the result would be that an unacceptable number of workers' compensation stress claims would be compensable. Since this is not

\begin{itemize}
\item \textsuperscript{228} \textit{In re Leary}, 60 Or. App. 459, 655 P.2d 1293 (1982).
\item \textsuperscript{229} 296 Or. 145, 675 P.2d 159 (1983).
\item \textsuperscript{230} The court concluded that it was not its task to worry about "economic disasters" which might befall employers if an expansive test was adopted. \textit{Id.} at 160, 675 P.2d at 168.
\item \textsuperscript{231} 66 Or. App. 600, 675 P.2d 1081 (1984) (increase in workload major contributing cause of stress disability).
\item \textsuperscript{233} Seitz v. L & R Indus., Inc., 437 A.2d 1345, 1349 (R.I. 1981).
\end{itemize}
acceptable as a matter of social policy, the courts have been required to devise standards to separate mental stress claims deemed meritorious from those considered spurious.\textsuperscript{234}

V. Conclusion

The real problem may be not that the issue is so complicated but that it is so simple. The statutory and decisional law of most states would, absent the restrictive definitions imposed, allow stress claims to be compensated much as physical injuries are compensated by allowing workers’ compensation benefits where occupational factors play a significant role in causing, aggravating or precipitating disability. The fact that this result is unacceptable to most states has resulted in a complicated series of requirements designed to distinguish these injuries from their physical brethren. This result has been achieved not without some compromising of the liberal, remedial principles of workers’ compensation statutes. As previously noted, these statutes were really a political compromise between the interests of business and the reformist concerns of the middle class to which the human toll of the industrial revolution appeared too great a price to pay without some compensation. It may well be that the present cautious approach to mental-mental claims reflects the early concern that workers’ compensation, as a pioneering social program, move slowly so as not to upset this compromise. The English, on whose system American workers’ compensation statutes were modeled, have long since adopted a system whereby any disability is compensated, although those stemming from employment are compensated at a higher rate.\textsuperscript{235} As of this writing, the current federal administration has proposed some limited type of catastrophic illness protection. How far this country will go in copying the welfare states of Western Europe, of course, remains to be seen.

There can be little doubt that the compensability of mental disability caused by occupational stress will undergo some expansion and clarification, much as the treatment of cumulative injuries and occupational diseases was expanded earlier in this century. Like occupational diseases, however, mental-stress injuries will continue to be treated differently than physical injuries in most jurisdictions for economic reasons despite the resulting conflict with the liberal principles of workers’ compensation statutes. The historical conflict between the stated intent of these statutes and their conservative application will thus continue.

\textsuperscript{234} The \textit{Seitz} decision notes a reluctance “to avoid the creation of voluntary ‘retirement’ programs that may be seized on by an employee at an early age if he or she is willing or, indeed, even eager to give up active employment and assert a neurotic inability to continue.” \textit{Id.} at 1349.