Mental Stress and Ohio Workers' Compensation: When Is a Stress-Related Condition Compensable

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MENTAL STRESS AND OHIO WORKERS' COMPENSATION: WHEN IS A STRESS-RELATED CONDITION COMPENSABLE?

Fred J. Pompeani*

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I. INTRODUCTION

In 1986 the Supreme Court of Ohio acknowledged that "participating in the work force, in and of itself, is a stressful activity." Recent national studies have confirmed that workplace stress knows no occupational boundaries and, moreover, threatens the psychological well-being of the United States work force. Job-related mental stress exacts a toll on both

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2 See U.S. DEPT OF HEALTH AND HUMAN SERVS., PROPOSED NATIONAL STRATEGY FOR THE PREVENTION OF PSYCHOLOGICAL DISORDERS, PUB. NO. 89-137 (1988). This publication reports that occupational involvement in psychological disorders is not a matter of dispute in the mental health community. See 20 O.S.H. Reo. (BNA), No. 25, 1043-44 (Nov. 21, 1990). This article highlights a research institute survey by the National Institute for Occupational Safety and Health which found that psychosocial factors such as social environment at work and work content affect all occupations and, therefore, the potential exposure to health risks is "ubiquitous." See also 20 O.S.H. Rep. (BNA), No. 49, 1699-1700 (May 15, 1991). This article reports a study by the Minneapolis-based Northwestern Life Insurance Company, finding that one out of three U.S. workers thought seriously about quitting work in 1990 due to workplace stress, and the same number feared job burnout in the next year or two.
worker health and productivity,\(^3\) and the effects of such stress are frequently more devastating than physical industrial injuries.\(^4\) In short, workplaces are becoming mine fields of stress, endangering the physical and mental health of today's workers.

Undoubtedly because of the increase and prevalence of workplace stress, the incidence of workers' compensation claims related to such stress has exploded nationwide. In 1988, stress-related workers' compensation claims accounted for fourteen percent of all claims.\(^5\) In California alone, 70,000 stress claims were filed in 1986.\(^6\) Stress-related claims are expected to increase through the 1990s,\(^7\) and recent commentators fear that this predicted increase in stress-based claims will destroy some states' workers' compensation systems.\(^8\) Because of the potential for fraudulent claims and costly litigation, many states have moved to define and limit the situations in which workers are eligible for stress-related benefits. Limitations have come in the form of legislative enactments or judicial decisions establishing specific requirements or restrictions regarding stress claims.

Given this background, the issue for workers, employers, lawyers, and judges concerned with Ohio workers' compensation becomes: Under what circumstances can a physical or mental condition that is related to mental job stress be compensable under the workers' compensation law of Ohio? This is the question addressed by this article.

II. THE OHIO WORKERS' COMPENSATION ACT

In Ohio, workers are compensated for industrial injuries and diseases by rights granted to them by statute.\(^9\) In 1911, the Ohio General Assembly

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\(^3\) 19 O.S.H. Rep. (BNA) No. 27, 1224-25 (Dec. 6, 1989). This article reports a Center for Disease Control study that there is a substantial amount of empirical evidence that people exposed to a high degree of job stress have greater deterioration of overall health, more diseases of the upper respiratory tract, more allergies, a greater incidence of hypertension, and a greater risk of cardiac death and coronary heart disease. See also 11 O.S.H. Rep. (BNA) No. 45, 957 (Apr. 15, 1982). This article notes that a list of the 10 most serious occupational disease and injury categories ranked by division directors at the National Institute for Occupational Safety and Health includes psychological disorders.


\(^6\) Roger Thompson, Fighting the High Cost of Worker's Comp, NATION'S BUS., Mar. 1990, at 28.

\(^7\) Id. at 28; See National Council on Compensation Insurance, Emotional Stress in the Workplace-New Legal Rights in the 80's, 1985, at 7; William C. Nugent, When Employees Seek Workers' Compensation for Stress, 14 EMPL. REL. L.J. 239, 251 (1988); DeVader & Giampetro-Meyer, supra note 5, at 5, 9.

\(^8\) See DeVader & Giampetro-Meyer, supra note 5, at 1.

first enacted law to compensate industrial injuries. The current Ohio Workers' Compensation Act ("Act") is contained in chapter 4123 of the Ohio Revised Code ("O.R.C."). The remedy provided under the Act is the exclusive remedy for an industrial injury, disease or bodily condition. The burden of proving that a particular injury, disease, or bodily condition is work-related falls upon the worker. However, by express statutory provision, the terms of the Act are to be liberally construed in favor of workers and dependents of deceased workers.

The current Act allows compensation to workers in cases of injury, occupational disease, or death, provided the same were not: (1) purposely self-inflicted or (2) caused by intoxication or the influence of a controlled substance not prescribed by a physician. An "injury" under the Act is defined as follows:

(C) "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. "Injury" does not include:

(1) Psychiatric conditions except where the conditions have arisen from an injury or occupational disease;

(2) Injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body;

(3) Injury or disability incurred in voluntary participation in an employer-sponsored recreation or fitness activity if the employee signs a waiver of his right to compensation or benefits under Chapter 4123 of the Revised Code prior to engaging in the recreation or fitness activity.

The exclusion of psychiatric conditions from the definition of "injury" came by legislative amendment in 1986. Due to this amendment, psychiatric conditions cannot qualify as compensable injuries under the Act. An "occupational disease" under the Act is defined:

As used in this section and Chapter 4123 of the Revised Code, "occupational disease" means a disease contracted in the course of employment, which by its causes and the characteristics of its manifestation or the condition of the employment results in a hazard which distinguishes the employment in character from employment generally, and the employment creates a risk of contracting the disease in greater degree and in a different manner than the public in general.

10 1911 Ohio Laws 524.
11 OAC ANN. § 4123.74 (Baldwin 1990) [hereinafter O.R.C.].
13 O.R.C. § 4123.95
14 O.R.C. § 4123.54
15 O.R.C. § 4123.01(C).
17 O.R.C. § 4123.68.
The current definition of "occupational disease" is a codification of the holding of the Supreme Court of Ohio in the 1975 case of State, ex rel. Ohio Bell Telephone Co. v. Krise. Unlike the definition of "injury," the definition of "occupational disease" contains no express exclusion of psychiatric conditions.

III. Three Kinds of Stress Claims

There are three types or categories of stress-related workers' compensation claims. First, a worker could claim that a work-related physical injury or disease caused a mental condition (physical-mental claim). Second, a worker could allege that workplace stress caused a physical condition (mental-physical claim). Third, a worker could contend that workplace stress caused a mental condition (mental-mental claim). This third category is the most controversial one nationwide and is currently at issue before the Supreme Court of Ohio in two companion cases.

IV. Physical-Mental Claims

Longstanding Ohio case law has allowed a mental condition resulting from a physical industrial injury or occupational disease to be a com-
pensable condition under the Act. In a typical physical-mental claim, the worker initially files a claim with the Ohio Bureau of Workers' Compensation for a physical injury. If this claim is allowed, the worker has the right to participate in the Ohio Workers' Compensation Fund for a physical injury to a specific part or parts of the body. Once the physical claim is allowed, a worker can request that the claim be additionally allowed for a mental condition, claiming that the previously-allowed physical condition proximately caused the mental condition. It is not uncommon for a time period of several years to elapse between the date of the initial injury and the diagnosis of a related mental condition.

A classic example of this situation is found in Zavatsky v. Stringer, a case most-often noted for its discussion and holdings regarding the topic of "extent of disability" under O.R.C. § 4123.519. In Zavatsky, a worker, Caroline Williams, had a claim originally allowed for a physical injury described as "contusion of the scalp and abrasion of the left wrist." Three years later, Williams requested that her claim be additionally allowed to include a new medical condition described as "hysterical neurosis," alleging that this condition resulted from her initial physical injuries. The Ohio Bureau of Workers' Compensation granted this request and specifically ordered that the allowance of the claim be amended to include "hysterical neurosis."

In its opinion in Zavatsky, the Supreme Court of Ohio commented on the subject of additional allowances in Ohio workers' compensation claims:

> It is common knowledge that the vast majority of industrial claims are not contested. They are recognized by the employer and by the Bureau of Workers' Compensation as valid injuries to specific parts of the body and for specific physical conditions.

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21 See State ex rel. Buckeye Int'l, Inc. v. Indus. Comm'n, 436 N.E.2d 533 (Ohio 1982); State ex rel. Peeples v. Farley Paving Co., 420 N.E.2d 111 (Ohio 1981); State ex rel. Anderson v. Indus. Comm'n, 404 N.E.2d 153 (Ohio 1980), rev'd on other grounds, 584 N.E.2d 1032 (Ohio 1986); Zavatsky v. Stringer, 503 N.E.2d 1032 (Ohio 1987); State ex rel. Hatfield v. Indus. Comm'n, 165 N.E.2d 211 (Ohio Ct. App. 1960); see also, Dunn v. Mayfield, 584 N.E.2d 37 (Ohio Ct. App. 1990). Dunn held that a worker stated a cause of action under the Act for emotional disability by alleging in his complaint both physical injury (cut fingers, burning eyes and lungs) and emotional disability (posttraumatic stress syndrome) as being proximately caused by physical assault on him as a correctional officer at the hands of inmates. The court emphasized, however, that the worker faced "the unenviable task" of proving that his posttraumatic stress syndrome was proximately caused by his cut fingers, burning eyes and lungs and not the emotional stress from being held hostage by hostile inmates. Dunn, 584 N.E.2d at 41.

22 Zavatsky, 384 N.E.2d at 695.

23 The term "extent of disability" refers to the amount of benefits or compensation due to a worker for an allowed injury or condition. See Zavatsky, 384 N.E.2d at 695. See also State ex rel. Bosch v. Indus. Comm'n, 438 N.E.2d 415, 416 (Ohio 1982).
After a claim is recognized as valid for such a specific physical condition, claimants frequently allege that they also injured another part of the body in the same industrial accident, or allege that a physical condition, other than that originally claimed, has developed from the original injury. For example, a claimant with a recognized low back injury may later claim that he has developed a heart condition, a psychoneurosis, ulcers, etc., as the result of his recognized injury. A claimant's right to make such a claim is specifically recognized (R.C. 4123.84).24

It is interesting to note that the court, by this quoted language, apparently considered the additional allowance of "hysterical neurosis" by Williams to be a physical condition resulting from her initial injury three years earlier.

Despite the Zavatsky court's apparent misclassification of a neurosis as a physical condition, the historical practice of the Ohio Bureau of Workers' Compensation and the Industrial Commission of Ohio has been to allow physical-mental claims if the worker shows that the mental condition resulted from the previously-recognized physical injury or condition. In 1986 the Ohio General Assembly gave its stamp of approval to this historical practice by amending the definition of "injury" in O.R.C. § 4123.01(C) to exclude psychiatric conditions "except where the conditions have arisen from an injury or occupational disease."25 Thus, by statute and by case law, a mental condition resulting from a physical industrial injury or occupational disease is a compensable condition under the workers' compensation law of Ohio.

Physical-mental claims are not without their pitfalls, however. Like any claim involving mental disease, the authenticity of a mental condition is determined largely on the basis of observed behavior and subjective history; therefore, a mental condition is also subject to misdiagnosis and is less readily challenged than the authenticity of a physical condition, which often can be confirmed by physical and biological evidence.26 Dr. Phillip Resnick of Cleveland, Ohio, explains that although posttraumatic stress disorders do occur as a result of traumatic events at work, there is the possibility of malingered psychological symptoms after injury. However, "[a]ssessment of malingered psychiatric symptoms after traumatic events is difficult because self-reports of subjective symptoms are difficult to verify."27 Additionally, workers may engage in false imputation, meaning that authentic psychiatric symptoms due in fact to stresses at home may be falsely attributed to a traumatic event at work to gain compen-

24 Zavatsky, 384 N.E.2d at 697.
25 O.R.C. § 4123.01(C)(1).
27 Id. at 103.
sation. In contrast, some individuals may have a mistaken belief or genuine misperception that a relationship exists between an accident and their psychological disability.

The primary motive for a worker to either (1) feign mental illness as a result of a physical industrial injury or (2) falsely attribute a real mental illness to an industrial injury becomes the opportunity for financial gain in the form of additional workers' compensation benefits. Indeed, after the workers' compensation claim is filed, Dr. Resnick advises that:

[the efforts of attorneys for both the plaintiff and defendant may alter the patient's attitudes and the course of the illness. The plaintiff's lawyer may over dramatize the client's impairment to the point of being "a salesman of pain, sorrow, agony, and suffering." In contrast, defense attorneys often assume an attitude of disbelief and imply that the individual is not suffering from any genuine psychiatric symptoms. Such litigants may understandably become angry based on the belief they are going to be cheated.]

Consequently, there are several identifiable problems associated with physical-mental claims: misdiagnosis, malingering, false imputation, genuine misconception, and litigation. These problems are real and should be kept in mind by those concerned with these types of claims. Further, some or all of these same problems can be present in any kind of stress-related claim for workers' compensation.

V. MENTAL-PHYSICAL CLAIMS

Mental-physical claims have been compensable under the Act since the Supreme Court of Ohio's ruling in 

Ryan v. Connor, decided December 30, 1986. In a two-part syllabus, the court held:

1. A physical injury occasioned solely by mental or emotional stress, received in the course of, and arising out of, an injured employee's employment, is compensable under O.R.C. § 4123.01(C); and
2. In order for an injury occasioned solely by mental or emotional stress to be compensable, the claimant must show that the injury resulted from greater emotional strain or tension than that to which all workers are occasionally subjected.

In the first part of this ruling, the court established that a physical injury occasioned solely by mental job stress is a compensable workers' com-
pensation claim in Ohio. In the second part of this ruling, the court identified the type or degree of job stress required for a compensable claim to occur: The injury must have resulted from greater emotional strain or tension than that to which "all workers are occasionally subjected." The key words here are all and occasionally.

In Ryan, the worker had been employed with the same company for over forty-five years when, at a meeting one afternoon, management requested him to retire early. At a second meeting the same afternoon, when the worker advised he did not want to retire, he was informed he would be officially retired. Following this second meeting, the worker returned home, allegedly under great stress, ashen and gray in color, upset and agitated, and subject to physical shaking and trembling. That night he was unable to sleep; the next day he experienced chest pains while trimming some trees around his home. Shortly thereafter, he had a heart attack and died.

Prior to the Ryan decision, Ohio law denied workers' compensation to workers sustaining distinct physical injuries from workplace stress. This law, however, was a judicial limitation imposed by prior court decisions, rather than a restriction imposed by the statutory definitions of "injury" and "occupational disease," which made no distinction between physical and mental conditions until the definition of "injury" was amended in 1986. In departing from prior precedent and deciding that a physical injury occasioned solely by mental job stress can be compensable, the Ryan court relied upon two main factors: (1) court decisions of other states, which uniformly allow compensability when job-related mental stress causes physical injury; and (2) medical advances confirming a direct link between mental stress and physical disabilities. Noting that the plain language of the definition of "injury" in O.R.C. § 4123.01(C) does not restrict compensation only to those workers whose physical injuries resulted from "contemporaneous physical injury or physical trauma," the court stated that "it makes little sense to continue to impose a limitation on compensation that is not expressly set forth in Ohio's Workers' Compensation Act."

What must a worker show to establish a mental-physical claim? Ryan requires the worker to satisfy two separate tests. First, the worker must show that the injury resulted from "greater emotional strain or tension than that to which all workers are occasionally subjected" or, in other words, "unusual" workplace stress. Therefore, a worker who sustains a

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33 Id. at 1380.
34 Id.
35 Id.
36 Ryan, 503 N.E.2d at 1380.
37 Id.
38 Id.
40 Ryan, 503 N.E.2d at 1381.
41 Id. at 1382.
physical injury due to ordinary, everyday job stress will be denied compensation for such a condition. Ohio law still denies recovery to these types of workers (called "eggshell" claimants) because the stress which caused their injuries is not legally sufficient to cause a compensable injury. This first test is thus one of legal causation, relating to the type or degree of stress which must be present at the workplace.

Why did the court draw this distinction between "usual" and "unusual" stress? After all, the general rule in Ohio is that an employer takes a worker "as he finds him" and assumes the risk of the worker having a weakened condition becoming injured more easily than a healthy worker, who may not be injured under the same circumstances. Shouldn't this rule apply to stress-caused physical injuries as well? The Ryan opinion gives two clues to answer this puzzle. One, the court stated that mental-physical claims are different in that the causation of a physical-contact injury is usually more readily discernible than that of a stress-related injury. And two, the court wrote that:

Because stress is experienced by every person in everyday life, it is necessary to define what kind of mental or emotional stress is legally sufficient to give rise to a compensable injury. Much stress in the ... employment is simply a result of the demands of functioning in our society, and participating in the work force, in and of itself, is a stressful activity. In order for a stress-related injury to be compensable, therefore, it must be the result of mental or emotional stress that is, in some respect, unusual.

By giving these two clues, the court revealed its concerns about (1) difficulties in proving that workplace stress, not stress from some other source, caused the injury; and (2) too many claims for stress-related injuries. These concerns likely persuaded the court to adopt the test of "unusual" workplace stress used by a number of other jurisdictions.

In sum, the first test of Ryan is an objective test, squarely focusing on the stress experienced by all workers as a whole, not just to workers in a particular occupation or profession. To satisfy this test, the worker must distinguish the job stress at issue from the normal, everyday stress which all workers experience from time to time. The test relates to the stress itself, not to the worker's individualized or subjective response to the stress.

Once the worker meets the first Ryan test of proving "unusual" workplace stress, the worker must meet the second test of Ryan: The test of medical causation which requires proving that the stress from employment was, in fact, the medical cause of the claimed injury. This is easier

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43 Ryan, 503 N.E.2d at 1381-82.
44 Id.
45 Id. at 1382.
said than done in these types of cases. The worker must show by a preponderance of the evidence that a direct or proximate causal relationship existed between the job stress and the injury, or, in death cases, that the death was accelerated by a substantial period of time as a direct and proximate result of the job stress. This issue of causation is generally relegated to the medical experts and the triers of fact and is determined on a case-by-case basis.

Since Ryan, the Supreme Court of Ohio has not decided a case concerning a stress-related claim for workers' compensation. Ryan was not a unanimous decision by the court; there were strong dissenting opinions by Justices Holmes and Wright. These dissents raised significant and legitimate questions which the court may have to answer in future cases involving mental-physical claims for workers' compensation.

Justice Holmes criticized the standard of "unusual" stress adopted by the majority as imprecise and difficult to grasp. Moreover, discussions as to changes in job duties, promotions, demotions, early retirement, orhirings and firings are "hardly distinguishable from the ordinary experiences of most human beings" and thus not properly a basis for compensation. He also found inherent problems in showing causation whenever mental stress was at issue. These concerns are well-stated by one paragraph in his dissent:

[The standard enthroned by the majority, which measures the "greater emotional strain or tension than that to which all workers are occasionally subjected," is a far more imprecise measure than that utilized up to the present. The terms "all workers" and "occasionally subjected" are neither simple nor easily ascertainable. Likewise, the degree to which one experiences "emotional strain," i.e., stress, during times of decision, is largely a matter of personal temperament. Because stress is subjectively experienced, it is usually not, by itself, readily ascertainable or quantifiable. While I have previously conceded that stress may harm the body and may be found to be compensable if occasioned by definite job activity, it must be pointed out that no method presently exists to separate the stress allegedly engendered by some occurrence at the place of employment from the concomitant strain of consequential, non-work-related anxieties which follow. Such vagueness unleashed can only result in a plethora of cases and claims, each with its own suggestion of how the new standard should be interpreted.

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46 Id.
47 Id.
48 Ryan, 503 N.E.2d at 1385, 1387-88 (Holmes, J., and Wright, J., dissenting).
49 Id. at 1385 (Holmes, J., dissenting).
50 Id. at 1385-86 (Holmes, J., dissenting).
Justice Wright thought that the 1986 legislative amendment, which excluded psychiatric conditions from the definition of "injury," effectively precluded a stress-related condition from ever being compensable under the Act absent an accompanying physical injury or occupational disease. He felt that even if stress triggers a heart attack, the attack would be due primarily to the natural deterioration of the heart and, therefore, non-compensable under O.R.C. § 4123.01(C)(2). Further, he stated that "many factors contribute to heart disease, including diet, lack of exercise, smoking, diabetes and family history. Yet, the majority invokes a rule that employers must ultimately be responsible for the personal health habits of their employees." Justice Wright ended by asking some questions about the parameters of the Ryan decision:

Here we have a situation where a man has been subjected to some degree of stress which may have been a contributing factor to a fatal heart attack. I certainly can sympathize with anyone who has been subjected to continuing stress. However, is it good policy to judicially legislate a policy that obviates any possibility of defining such a claim? This claimant’s death came within a few days of the alleged stress while working at his home. Are there any time frames which would preclude a death claim? Are there any limits left to the parameters of an employee’s zone of employment? What have we really done as to death claims premised upon emotional distress arising out of dissatisfaction or boredom with one’s job?

Since Ryan, there has been a notable lack of Ohio court decisions, reported or unreported, dealing with mental-physical claims (now also referred to as “Ryan” claims) and the questions raised by the dissenting opinions of Justices Holmes and Wright. However, a 1991 case decided by the Lucas County Court of Appeals, Kennedy v. City of Toledo, did address a question about medical causation which arose from the syllabus of Ryan itself.

In the first paragraph of its syllabus, Ryan held that a physical injury occasioned solely by workplace stress is compensable under the Act. The only issue presented by the facts of Ryan was whether physical injuries occasioned solely by job stress were compensable. But what if the job-related stress was not the sole cause of the injury? That was the question presented in the Kennedy case.

51 See Ryan, 503 N.E.2d at 1387 (Wright, J., dissenting).
52 Id. (Wright, J., dissenting).
53 Id. (Wright, J., dissenting).
54 Id. at 1388 (emphasis in original) (Wright, J., dissenting).
56 Ryan, 503 N.E.2d at 1380.
In *Kennedy*, the worker, Richard Kennedy, was a fifteen-year police officer with the Toledo Police Department who, in July of 1983, was temporarily reassigned from his normal duties as a patrolman to office duties such as clerical work, phone intake, typing, and fingerprinting. This reassignment was due to a previous on-the-job knee injury. At trial, Kennedy testified that he found his office duties to be tense and frustrating, and he feared he would lose his job. After several months at his reassigned duties, Kennedy took a vacation upon being told he needed to start using his accumulated vacation time. While on vacation, Kennedy studied for his Sergeant's exam, believing that passing it was required to remain on the police force. On November 15, 1983, while still on vacation, he drove to the police academy to pick up materials needed for the test, drove home, and suffered a heart attack which necessitated bypass surgery.

On the issue of medical causation, Kennedy's medical expert, a Toledo physician, testified that Kennedy's unfamiliarity with his temporary office duties was extremely stressful and upsetting to Kennedy, but that Kennedy also had a paranoid personality. This physician's opinion was that the job stress Kennedy experienced combined with other factors of hypertension, smoking, diabetes, obesity, and a family history of heart disease to cause the heart attack. However, Kennedy's expert could not say that the job stress, by itself, was the proximate cause of the heart attack. The defense's medical expert testified that Kennedy's heart attack was not caused by any stress which Kennedy may have experienced due to his job reassignment.

After hearing the evidence, the jury returned a verdict for Kennedy, allowing him the right to workers' compensation benefits for his heart attack. The Industrial Commission of Ohio appealed, contending that *Ryan* allows such an injury only if workplace stress was the sole cause of the injury. The Commission also contended that the job stress which Kennedy experienced was not unusual, as *Ryan* requires, but was merely an exaggerated response to stress which all workers occasionally experience.

In response to the Commission's arguments, the Lucas County Court of Appeals held that the word "solely" in the *Ryan* syllabus is permissive and does not impose a requirement that a claimant prove that the injury resulted from workplace stress alone. Thus, the court ruled that when job stress combines with other factors to produce a physical injury, each factor is a proximate cause of the injury. The court also held that the jury could have reasonably concluded that the stress experienced by Kennedy was unusual. Therefore, the court upheld the jury verdict for Kennedy.

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58 *Id.* at *8-9.
59 *Id.* at *9.
60 *Id.* at *10.
61 *Id.* at *3.
This issue of what constitutes "unusual" stress under Ryan was recently discussed in an opinion by Judge Stuart Friedman of the Cuyahoga County Court of Common Pleas in Hall v. Gould Ocean Systems. The worker, Delores Hall, was required to take and pass an annual three-day soldering test. Hall had pre-existing peptic ulcer disease, and while taking the test in 1988 suffered gastrointestinal bleeding which prevented her from completing it. In granting summary judgment to Hall's employer, the court ruled that because Hall's co-workers were also required to take the annual test and because the co-workers were anxious and upset during the test, Hall's injury resulted from her own response to stress of the test, not the test itself. Thus, in deciding this question of "unusual" stress, the court compared the stress experienced by Hall to that experienced by Hall's own co-workers.

The Kennedy and Hall cases illustrate that questions raised by the dissenting opinions in Ryan remain unanswered. For instance, how can job stress be separated from all other possible sources of stress in the worker's life and identified as a proximate cause of the claimed physical injury? And what kind of evidence is needed to prove the requirement of "unusual" stress? In the end, these questions may simply be left for the triers of fact to determine on a case-by-case basis. However, counsel for the respective parties in a mental-physical claim should investigate whether there are co-workers with similar jobs and, if so, what their responses were to the stress at issue.

VI. MENTAL-MENTAL CLAIMS

While Ryan allows a physical injury caused solely by mental job stress to be compensable under the Act, the Supreme Court of Ohio has never decided the question whether a purely mental condition caused by mental job stress can be compensable, either as an injury or an occupational disease. However, as previously noted, the court now has before it two...
companion cases, *Rambaldo v. Accurate Die Casting* and *Rini v. City of East Cleveland*, which present the issue of whether a worker can file a mental-mental claim as an occupational disease. In both of these cases, the Cuyahoga County Court of Appeals held that the definition of "occupational disease" in O.R.C. § 4123.68 does not preclude compensation for purely psychiatric conditions and permits a worker to file a claim for such a condition. These holdings marked the first time that an Ohio appellate court squarely held that a purely mental condition due solely to mental job stress could be compensable under the Act, either as an injury or an occupational disease.

By amending the definition of "injury" in 1986 to exclude psychiatric conditions, the Ohio legislature has precluded the compensability of a mental-mental claim filed as an injury. Moreover, after *Ryan* was decided, a number of Ohio appellate courts addressed the issue of compensability of mental-mental claims filed as "injury" claims prior to the 1986 legislative amendment. These courts unanimously held that such claims did not qualify as injuries under O.R.C. § 4123.01(C), which then defined "injury" as "any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment." Compensability was denied since this court’s ruling in *Ryan*, supra, the legislature has not amended the definition of "injury" in R.C. 4123.01(C) to include psychiatric ailments resulting solely from stressful workplace conditions. In fact, R.C. 4123.01(C) now specifically states that "injury does not include psychiatric conditions except where the conditions have arisen from an injury or occupational disease." In light of this limitation, we are not prepared to assume that psychological disturbances arising solely from emotional stress in the workplace fit within the definition of "injury" in R.C. 4123.01.

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Compare Swain v. Western-Southern Inc. Co., No. 14845, (Summit County Ct. App. Apr. 10, 1991). In *Swain*, the worker filed an occupational disease claim described as "a nervous condition of the mind" after being accosted on two separate occasions. There was some indication that the worker was physically attacked on these occasions and thereby sustained physical injuries. The court of appeals overturned the trial court's order of summary judgment against the worker. See also Allen v. Goodyear Aerospace, 468 N.E.2d 779 (1984). In *Allen*, the worker filed an occupational disease claim for "situational stress, labile hypertension, and functional gastrointestinal stress" allegedly due to pressure from supervisors. Id. at 780. The trial court granted summary judgment against the worker, but the appellate court reversed, declining to say that a disability caused by job stress cannot be compensable under any circumstances as an occupational disease. See id. at 781.

whether the stress causing the mental condition arose from a sudden, unexpected event or gradual workplace stress. The reasons generally given by the appellate courts for denying these claims were that the Act historically had never compensated mental-mental claims and that Ryan had not removed the need for the existence of a physical injury to receive compensation under the Act.

This historical precedent was disregarded by the Cuyahoga County Court of Appeals in the Rambaldo and Rini cases, however. In Rambaldo, the worker filed an occupational disease claim alleging that, as a result of his employment as an industrial relations director, he contracted a disease described as "major depression and mixed personality disorder with narcissistic and obsessive features." This claim was filed prior to the 1986 amendment to O.R.C. § 4123.01(C) excluding psychiatric conditions from the definition of "injury." In Rini, the worker filed an occupational disease claim for "severe generalized anxiety disorder," alleging that such condition was acquired from the performance of his duties as an officer in the East Cleveland fire department. The claim in Rini was filed after the 1986 legislative amendment to the definition of "injury."

Both the Rambaldo and Rini claims were denied administratively by the Industrial Commission of Ohio. Both workers appealed to the court of common pleas. The common pleas court dismissed each of these complaints for failure to state a claim upon which relief could be granted. In both cases, the worker then appealed to the Cuyahoga County Court of Appeals, which heard the appeals as companion cases.

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In Hayes v. City of Toledo, 577 N.E.2d 379,379 (Ohio Ct. App. 1989), the worker was a police officer who accidentally shot her commanding officer at roll call and during weapons' inspection, resulting in posttraumatic stress disorder. In Fields v. City of Youngstown, No. 88C89 (Mahoning County Ct. App. May 30, 1989), the worker was a police officer who developed a posttraumatic stress disorder after a struggle with a suspect in which the suspect was killed. In Neil v. Mayfield, No. 10881 (Montgomery County Ct. App. July 22, 1988), the worker suffered depression after the backhoe he was operating suddenly lurched, causing the bucket to strike and kill a fellow worker. In Currier v. Roadway Express, No. CA-879 (Ashland County Ct. App. June 24, 1987), the worker was a truck driver who developed a depressive neurosis from his vehicle's involvement in a near-miss highway accident.

In Harover v. Norwood, 534 N.E.2d 88 (Ohio Ct. App. 1988) a police communications officer claimed to have sustained a complete mental breakdown from his job. In Wolf v. Northmont City Sch., 528 N.E.2d 589 (Ohio Ct. App. 1987), a janitor claimed to have sustained a posttraumatic stress disorder from verbal and psychological harassment by a school principal.

Rambaldo, No. 58588, slip op. at 1.
Rini, No. 58589, slip op. at 2.
In each case, the court of appeals reversed the trial court's dismissal by a two-one decision. The majority opinion in both cases noted that while the definition of "injury" now excludes psychiatric conditions, there is no such express limitation in the definition of "occupational disease" in O.R.C. § 4123.68. Consequently, the majority distinguished all of the previous Ohio appellate cases considering mental-mental claims filed as injuries. The majority concluded that because O.R.C. § 4123.68 does not prevent compensation for mental conditions, and because the claims were filed as occupational disease claims, the complaints stated valid claims for relief. By so holding, the court thus gave a literal reading and interpretation to the statutory definition of occupational disease. In contrast, the dissenting opinion in each of these cases, written by Judge Blanche Krupansky, contended that the mere filing of these claims as occupational diseases rather than injuries "is a distinction without a difference." The Supreme Court of Ohio must now decide whether a mental-mental claim can be compensable under the Act as an occupational disease.

Should Ohio recognize mental-mental claims? The balance of this section will examine this question by first looking at how other jurisdictions have dealt with this issue and then presenting opposing arguments for compensability.

A. Other Jurisdictions

Other states vary widely in their approaches to mental-mental claims. Until recently, many workers' compensation acts have not specifically addressed the issue of the compensability of purely mental conditions. Courts have struggled with this topic and are more reluctant to allow mental-mental claims than physical-mental and mental-physical claims.

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74 This is true for the definition of "occupational disease" in O.R.C. § 4123.68 both before and after the 1986 legislative amendments. See supra note 18.


76 In McGarrah v. SAIF, 675 P.2d 159, 161 (Or. 1983) the Oregon Supreme Court stated:

It seems that no problem in recent years has given courts and commissions administering workers' compensation more difficulty than on-the-job mental stress which results in either emotional or physical illness. The causal relationship between employment stress and a resulting mental or emotional disorder presents one of the most complex issues in workers' compensation law. See Darnell v. North Dakota Workers Compensation Bureau, 450 N.W. 2d 721 (N.D. 1990); see also, Thomas S. Cook, Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application, 62 Notre Dame L. Rev. 879 (1986-87); Lawrence Joseph, The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective, 36 Vand. L. Rev. 263 (1983).
This judicial reluctance is easily explained. The precise cause of most mental disorders remains unknown,77 thereby making proof of medical causation difficult, if not impossible. Diagnosis often depends on subjective complaints of the worker rather than objective measurement.78 What is stressful and debilitating to one worker may not be to another.79 Further-

77 The Supreme Court of Alaska aptly summarized this problem in Fox v. Alascom, Inc., 718 P.2d 977 (Alaska 1986):

There is an inherent difficulty, however, in determining whether a mental disorder "arises out of" employment. The problem is simply that "the body of knowledge regarding mental or emotional injuries is not certain enough to make rational determinations as to the true nature, extent and cause of injury." S. Sersland, Mental Disability Caused by Mental Stress: Standards of Proof in Workers' Compensation Cases, 33 Drake L. Rev. 751, 752 (1983-84).

Id. at 980. Another commentator put it this way:

The precise etiology of most mental disorders is inexplicable. Mental disorders result from an extraordinarily complex interrelation between an individual's internal or subjective reality and his external or environmental reality. . . . The precise psychogenesis of an individual's subjective reality is impossible to determine. Moreover, the interrelation between subjective and environmental realities is so profoundly complex that no method exists either to quantify or qualify the extent to which one reality and not the other is a cause of mental disorder. Therefore, the time lapse between an external stress and the manifestation of mental disorder symptoms, and the intensity, suddenness, or gradualness of the external symptoms are irrelevant in determining cause . . . When mental disorder symptoms appear in parts of the body other than the brain, medical science is able, in most cases, to attach a quantitative or qualitative etiological probability. Scientists cannot make this determination, however, when the symptoms manifest themselves subjectively. An individual who suffers a mental disorder has an a priori personal subjective vulnerability or predisposition to the disorder.


79 See Nugent, supra note 7, at 241, which states:

Stress claims can create a legal quagmire for both the attorney practitioner and the employee relations manager. Such cases are usually difficult to "get a handle on" because they often involve many subjective criteria. A situation that is stressful to one employee may not be so to another. Likewise, the capacity to function effectively under stressful conditions varies greatly among individuals. Finally, the diagnosis of a psychological condition sufficient to render an employee incapacitated for purposes of workers' compensation is usually grounded on the complaints of the employee rather than any objective criteria.

Employers fear that some employees faced with substantial occupational stress may simply "give up" and seek workers' compensation because they "can't cope" with their jobs anymore. Hence, employee burn-out may no longer simply involve a person quitting to find a more compatible working environment, but rather may entail a workers' compensation claim requiring the employer and its insurer to pay for psychological counseling, rehabilitation, and retraining, while compensating the employee for lost wages.
ther, workers can feign mental disabilities more easily than physical ones.\(^9\) Therefore, employers' concerns about the expanding number and cost of fraudulent claims are understandable.

Despite these concerns, a majority of states now provide compensation for mental-mental claims under certain circumstances.\(^{61}\) However, a strong minority of states continue to deny compensability to mental-mental claims.\(^{62}\) One study of these claims reported by Professor Arthur Larson showed that they are typically characterized by absence of physical injury, little lost time, low medical costs, but "a lot of litigation."\(^{63}\) Virtually all are litigated.\(^{84}\)

Courts allowing compensation for mental-mental claims have established different tests and/or threshold standards which must be met as a prerequisite to compensability. Some jurisdictions require the mental job stress to be sudden or dramatic, as opposed to gradual.\(^{85}\) Other jurisdictions have concluded that mental-mental claims should be treated like any other claim for workers' compensation and are compensable if gradual mental job stress contributed to cause the mental condition.\(^{86}\) Arizona compares the stress experienced by the worker to that experienced by others performing the same type of work by using the "unusual stress in the profession" test.\(^{87}\) A number of other jurisdictions allow mental-men-

\(^{80}\) DeVader & Giampetro-Meyer, supra note 5, at 11.
\(^{81}\) Larson, supra note 19, at § 42.23.
\(^{82}\) Id.
\(^{83}\) Larson, supra note 19, at § 42.25(a).
\(^{84}\) Id.

In today's highly competitive world it cannot be doubted that people often succumb to mental pressures resulting from their employment. These disabilities are as much a cost of the production process as physical injuries. The humanitarian purposes of the Workmen's Compensation Law require that indemnification be predicated not upon the label assigned to the injury received, but upon the employee's inability to work because of impairments flowing from the conditions of his employment. Royal State, 487 P.2d at 282 (footnote omitted).

tal claims if the worker proves that the mental job stress, whether gradual or sudden, was "greater... than the day-to-day mental stress and tensions which all employees must experience." The Michigan Supreme Court even adopted an "honest perception" test, allowing compensability if the worker honestly, even though mistakenly, believed that mental job stress caused a mental condition. Pennsylvania has developed a standard of "abnormal working conditions," requiring the worker to prove with objective evidence that the mental injury is other than a subjective reaction to normal working conditions. These differing standards most likely stem from the inherent difficulty in assessing the causal relationship between mental disorders and workplace stress. With the exception of Michigan, these jurisdictions have attempted to fashion an objective way


89 Deziel v. Difco Laboratories, Inc., 268 N.W.2d 1 (Mich. 1978). There was, however, a strong dissent in this case, contending that this subjective formula ignores the requirement that the condition arise out of employment and that it is highly unlikely that the worker's perception of causation will be anything but employment. The dissent argued:

There is no doubt that the decision today will be a costly burden to Michigan employers, small and large, who compete with out-of-state business and to the consumers who absorb those costs. The concern here expressed, however, is not only for employers and consumers but for employees. We have engaged in a seemingly inexorable march towards limiting the hiring of workers to only those persons in the top echelon of physical and mental condition.

While workmen's compensation costs are burgeoning, the benefits must be spread ever more thinly among the workers to accommodate new categories of disorders (and ever more remote accidents) which cannot be guarded against or controlled by an employer. Moreover, when businesses close or move to another state, jobs and tax revenues are lost. When expansions of existing businesses are taken to other states, Michigan residents lost opportunities for employment. These economic facts of life should not be overlooked when we expand legislation by judicial fiat.

We do no service to the people of Michigan with this open-door opinion. Id. at 27 (Coleman, J., dissenting). The Deziel test has been uniformly rejected by the other jurisdictions allowing mental-mental claims. In 1982, the Michigan legislature overturned the Deziel holding. See MICH. COMP. LAWS § 418.301(2) (1982). This new statute allows mental disabilities to be compensable when arising out of actual events of employment, not unfounded perceptions thereof.

to measure something inherently subjective.\textsuperscript{91}

Most of the courts ruling on the compensability of mental-mental claims have considered such claims as "injury" claims under their respective workers' compensation statutes. Courts which have allowed compensability generally apply a legal causation standard which requires the worker to be exposed to stress greater than the ordinary day-to-day stress which all workers experience. Professor Larson recommends this approach as the most straightforward and reasonable method of determining compensability.\textsuperscript{92} In explaining the rationale behind this test, the Maine Supreme Court explained:

Requiring a higher threshold level than simply the usual and ordinary pressures that exist in any working situation would erect an appropriate buffer between the employer and a host of malingering claims. It would also serve to filter out a sufficient number of cases so that an employer would not be thrust into the role of a general insurer while permitting compensation in those gradual mental injury cases which "in a just sense" can be attributed to the conditions of employment.\textsuperscript{93}

Courts which have adopted this test require the presence of "unusual" stress. This standard was adopted because of a reluctance to compensate all mental-mental claims and because of the problems inherent in proving that job stress, as opposed to other stress, was the substantial contributing factor to the mental disorder.\textsuperscript{94}

Only a handful of courts have addressed the specific question of whether a mental condition can qualify as an occupational disease under their respective acts. These courts are split, with some allowing compensability,\textsuperscript{95} some denying it,\textsuperscript{96} and some allowing for the possibility of com-

\textsuperscript{91} Regarding gradual, as opposed to sudden, mental stress, commentator Lawrence Joseph wrote:

Nonimpact mental stresses—the gradual stresses of employment—are no more subjective than mental stress that results from an identifiable traumatic event. A discernable objective event, however, a "badge of reliability," is not present when the alleged causal mental stimuli are gradual. Their subjective nature, therefore, is less visibly susceptible to objective measurement.

Joseph, supra note 76, at 291, n.113.

\textsuperscript{92} Larson, supra note 19, at § 42.23(b). Larson argues that the real distinction to be made is not between sudden and gradual mental stress, but between gradual stimuli that are sufficiently more damaging than those of everyday employment life to satisfy the normal "arising-out-of" test, and those that are not. See also Arthur Larson, Mental and Nervous Injury in Workmen's Compensation, 23 Vand. L. Rev. 1243 (1970).

\textsuperscript{93} Townsend v. Maine Bureau of Public Safety, 404 A.2d 1014 (Me. 1979).

\textsuperscript{94} Fox v. Alascom, Inc., 718 P.2d 977 (Alaska 1986).

\textsuperscript{95} McMahon v. The Anaconda Company, 678 P.2d 661 (1984); McGarrah v. SAIF, 675 P.2d 159 (Ore. 1983).

\textsuperscript{96} Marable v. Singer Business Machines, 586 P.2d 1090 (N.M. 1978); Transportation Ins. Co. v. Maksyn, 580 S.W.2d 334 (Texas 1979).
pensability. In two jurisdictions which allow compensability, Montana and Oregon, the courts follow a plain reading of statutory language defining "occupational disease" as any disease caused by employment. In contrast, the Texas and New Mexico courts decline to so interpret their respective statutes defining "occupational disease."

B. Alternative Routes: The Different Avenues the Supreme Court of Ohio Could Travel in Deciding Compensability of Mental-Mental Claims

1. For

The strongest argument in favor of a ruling which allows mental-mental claims in Ohio can be found in the statutory definition of "occupational disease" in O.R.C. § 4123.68. That definition makes no distinction between physical and mental diseases, and the words used by the General Assembly should be construed according to their plain meaning and common usage. Thus, mental-mental claims are allowable by the actual legislative words. Further, there is no medically valid distinction between physical and mental conditions, and there is no question that workplace stress can cause real mental disorders in today's workers. If job stress is the cause of a mental disorder in an Ohio worker and that worker meets the requirements of O.R.C. § 4123.68, then such disorder should be compensated just like any other work-related condition. To deny compensability would ignore the plain language and meaning of the statute and work a hardship upon those workers who legitimately acquire stress-related mental disease.

A similar situation was found in McGarrah v. SAIF, decided by the Supreme Court of Oregon in 1983. Henry McGarrah was a deputy sheriff who was continually pressured by his superior officer to resign or quit. The undisputed evidence showed that this pressure caused McGarrah to sustain anxiety and depressive neurosis. He then filed a claim for an occupational disease, then defined by Oregon statute to mean "any disease or infection which arises out of and in the scope of the employment, and to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein."

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97 Hennige v. Fairview Fire District, 472 N.Y.S.2d 204 (1984); Sawyer v. Pacific Indemnity Co., 233 S.E.2d 227 (Ga. Ct. App. 1977). See also Chicago Bd. of Educ. v. Industrial Comm'n, 523 N.E.2d 912 (Ill. Ct. App. 1988), in which it was stated: To recognize that our occupational disease law would allow compensation for any mental diseases and disorders caused by on-the-job stressful events or conditions would, in the words of one court, open a floodgate for workers who succumb to the everyday pressures of life. Id. at 917. See also Board of Educ. of Chicago v. Industrial Comm'n, 538 N.E.2d 830 (Ill. Ct. App. 1989).
98 Sears v. Weimer, 55 N.E.2d 413 (Ohio 1944); Eastman v. State, 1 N.E.2d 140 (Ohio 1936); O.R.C. § 1.42.
99 675 P.2d 159 (Or. 1983).
Oregon's high court interpreted this statutory language as affording compensation to workers with stress-related mental disease. In so holding, the court addressed the argument that its decision would encourage a floodgate of claims:

The vast majority of workers, if not all, face and deal with job stress on a daily basis. The Oregon occupational disease statute speaks of diseases the worker is exposed to on the job, but not ordinarily exposed to off the job. On-the-job stress is not a disease. On-the-job events and conditions produce stress which in turn can cause mental disorders. 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. We find no legislative words nor any evidence of legislative intent to indicate that the legislature either intended or did not intend to place that burden on the workers' compensation system.101

The Oregon court went on to state that it presumed most stress claims are made in good faith and that if the legislature wished to exclude mental disorders from coverage, then it may freely amend the statute to do so. The court held that mental conditions are compensable as occupational diseases if the worker proved that (1) the stressful conditions were real, not imaginary, and objectively existed on the job and (2) the employment conditions, when compared to non-employment conditions, were the "major contributing cause" of the mental disorder.102

In allowing compensability, Ohio's high court could also point to the instruction of O.R.C. § 4123.95, which requires the terms of Ohio's Act to be liberally construed in favor of the worker. Moreover, in 1986 the Ohio legislature did amend the definition of "injury" to exclude mental conditions, but refrained from making the same restriction in the definition of "occupational disease." This omission of a specific exclusion for mental conditions in the separate statute pertaining to occupational diseases may be viewed by the court as evidence of the legislature's specific intent to allow compensability to mental disease.

101 McGarrah, 675 P.2d 159 (Or. 1983).
102 Id.
2. Against

Opponents of mental-mental claim compensation in Ohio argue that the General Assembly, by amending the definition of "injury" in 1986 to exclude psychiatric conditions, specifically intended to eliminate mental-mental conditions from coverage under the Act. Prior to 1986, mental-mental claims were being filed as injuries rather than occupational diseases; therefore, the legislature had no need to consider the exclusion of psychiatric conditions from the definition of "occupational disease." A judicial decision allowing mental-mental claims to be filed as occupational diseases might very well result in all mental-mental claims being labelled and filed as "occupational diseases," thereby circumventing the 1986 legislative amendment to the definition of "injury" and rendering that amendment meaningless. The real object of judicial investigation in the construction of a statute is to give effect to the intent of the legislature's action. Therefore, the Ohio Supreme Court may conclude that the only reasonable judicial approach is to give effect to the meaning of that which the legislature did enact; to do otherwise would violate the rule against absurd results.

In denying compensability, the Ohio Supreme Court may be persuaded by those jurisdictions denying coverage to mental-mental claims on the ground that physical conditions are identifiable and traceable, whereas mental conditions, being related to such factors as worry, anxiety, pressure, and family history, are not. Mental conditions are simply incapable of objective measurement, and the judicial allowance of such claims in Ohio may open the floodgates to countless numbers of claims with unsolvable problems of definition and causation. The court could rationally decide that these burdens, plus the added financial burdens of higher workers' compensation premiums and litigation costs, should not be placed upon Ohio's employers without a specific legislative amendment to the definition of "occupational disease" including mental conditions resulting solely from workplace stress.

The Ohio Supreme Court could deny compensability to mental-mental claims by holding that the Ohio legislature, in its 1986 amendment to the definition of "injury," stated its clear purpose to eliminate all mental-mental claims from workers' compensation coverage. Although the definition of "occupational disease" was changed in 1986, the new definition did not contain a specific exclusion for psychiatric conditions. The court, however, could reason that this change merely codified the tripartite test set forth by the syllabus of State, ex rel. Ohio Bell Tel. Co. v. Krise. In

103 Slingluff v. Weaver, 64 N.E. 574 (Ohio 1902); Henry v. Central Natl. Bank, 242 N.E.2d 342 (Ohio 1968).
104 State, ex rel. Haines v. Rhodes, 151 N.E.2d 716 (Ohio 1958), paragraph two of the syllabus, which states: "The General Assembly is presumed not to intend any ridiculous or absurd results from the operation of a statute which it enacts, and, if reasonably possible to do so, statutes must be construed so as to prevent such results."
105 527 N.E.2d 756 (Ohio 1975).
Krise, the court did not concern itself with a claim for a mental condition, nor did it discuss whether such a condition would qualify as an occupational disease. Thus, the court would agree that to assume that the legislature, by adopting the Krise test, also meant to include mental conditions within the coverage of the Act is an unwarranted assumption, especially when the legislature at the same time expressly excluded psychiatric conditions from the definition of "injury." Moreover, the legislative silence or inaction regarding the enactment of a similar exclusion to the definition of "occupational disease" could not be soundly interpreted to mean that the legislature intended mental-mental claims to be compensable under O.R.C. § 4123.68.106

C. Leave it to the Legislature

At the very least, the legislature's exclusion of mental conditions from compensability as injuries shows an intent to preclude compensation for such conditions. However, if there is some question as to whether the legislature intended the present definition of "occupational disease" to impose upon employers liability for employees' mental conditions resulting from workplace stress, the Supreme Court of Ohio may deny compensability by ruling that this question should be presented to the legislature for its determination. To do so would allow for proper debate on this issue of public policy.107 On the other hand, a judicial decision in either Rambaldo or Rini allowing compensability for mental-mental claims under O.R.C. § 4123.68 will construe this statute in a manner probably not intended by the General Assembly.

In an analogous case, the Supreme Court of Minnesota declined to afford compensation to a mental-mental claim in Lockwood v. Independent School District No. 877.108 In that case, the worker was the principal of

106 See State v. Parrish, 465 N.E.2d 873 (Ohio 1984); Roosevelt Properties Co. v. Kinney, 465 N.E.2d 421 (Ohio 1984); Oliver v. Kaiser Community Found, 449 N.E.2d 938, 941, 942 (Ohio 1983) ("Legislative inaction is a weak reed upon which to lean in determining legislative intent.") (quoting with approval, Berry v. Branner, 421 F.2d 996, 998 (Or. 1966)).
107 See Nugent, supra note 7, at 251, stating:
The legislative forum provides a more favorable environment within which to weigh all competing interests when dealing with the issues involved in the compensability of stress claims. The very nature of case law requires a court to make policy decisions within the confines of a limited, and sometimes unique, set of facts. On the other hand, lawmakers have the opportunity to hold public hearings, conduct studies, and consider the interests of all affected parties before arriving at a solution to the problem. In addition, the nature of precedent is such that courts are reluctant to overrule prior decisions. Legislatures, on the other hand, are more apt to amend statutes that have not proved effective in carrying out legislative intent.
108 312 N.W.2d 924 (Minn. 1981).
a senior high school who claimed to have acquired a mental disease from job stress. The issue before the court was whether a mental injury caused by job-related stress without physical trauma was compensable under the Minnesota Workers’ Compensation Act, which then afforded compensation to “personal injury,” defined as “injury arising out of and in the course of employment and includes personal injury caused by occupational disease.”\textsuperscript{109} In denying coverage to this claim, the court explained:

\begin{quote}
We are unable to determine, however, whether the legislature in enacting the present law intended to impose on employers liability for compensation for an employee's disabling mental condition resulting from work-related mental stress. Under the prior law no employee had claimed compensation for such a disability, and it seems unlikely that the legislature contemplated the possibility of such claims when it enacted the 1953 revision. Undoubtedly, sound medical opinion can often relate mental injury to employment stresses. Until recently, workers’ compensation has not extended to such injuries, and historically health disability insurance has provided benefits for them. Reallocating the costs resulting from stress-related disability between health insurance and workers’ compensation insurance is a major policy determination. In the absence of proof that the legislature considered the far-reaching ramifications of extending workers’ compensation coverage to employees who are mentally disabled by employment-related stress, we decline to construe the Workers’ Compensation Act in a manner probably not intended by that body. As in \textit{Johnsrud v. State, Dep't of Employment Services}, 306 Minn. 295, 237 N.W.2d 362 (1975), the issue raised in this case involves a policy determination which we believe should be presented to the legislature as the appropriate policy-making body. If it wishes to extend workers’ compensation coverage to mental disability caused by work-related mental stress without physical trauma, it is free to articulate that intent clearly. In the absence of a clearly expressed legislative intent on the issue, however, we will not hold such disability to be compensable.\textsuperscript{110}
\end{quote}

Well said, and food for thought.

\textsuperscript{109} MINN. STAT. § 176. 011, subd. 16 (1980).
\textsuperscript{110} 312 N.W.2d 924; See also James Richard Fenwick v. Oklahoma State Penitentiary, 792 P.2d 60 (Okla. 1990) (declining, without a legislative mandate, to alter the rule that disability unaccompanied by physical injury is not compensable under the Oklahoma Act.); Lather v. Huron College, 413 N.W.2d 369 (S.D. 1987) (following \textit{Lockwood}).
What if mental stress due to either an industrial injury or workplace stress results in suicide? Ohio's Act prohibits workers' compensation for a purposely self-inflicted injury, occupational disease, or death. However, dependents may recover compensation for a death by suicide, provided that they satisfy a three-part test pronounced in 1991 by the Supreme Court of Ohio in *Borbely v. Prestole Everlock, Inc.* By deciding *Borbely*, the court changed the legal standard applied to suicide cases since 1935. The prior standard was established by the syllabus of *Industrial Commission v. Brubaker*.

The worker in *Brubaker*, Robert E. Brubaker, strained his hip while lifting a box at work, and his claim for this injury was allowed. Delays in the receipt of the compensation due him and in his return to work caused Brubaker to worry. Within a week after the compensation award was made, but before the check was received, Brubaker committed suicide by shooting himself.

In denying suicide benefits to Brubaker's widow, the Supreme Court of Ohio held:

> In order for dependents to recover under the Workmen's Compensation Law of Ohio for death by suicide, they must prove by the greater weight of the evidence: First, an injury in the course of employment; second, that the injury produced mental derangement to the extent that the employee could not entertain a fixed purpose to take his own life; and third, that the suicide was the direct result of that lack of purpose that characterizes an insane mind.

This three-pronged test focused upon the decedent's own understanding of the nature and consequences of the act of suicide. The court's opinion stated that "the mere fact of suicide presents no presumption of insanity." As to the second prong of the test, the court explained that "mere mental derangement is not sufficient in a case of this character. It must go to the extent of destroying the free moral agency of the actor and be of such potency as to prevent him from fixing in his mind the purpose to commit self destruction." Thus, to recover for suicide under *Brubaker*, dependents were required to show that the deceased did not know what he or she was doing when committing suicide.

The *Brubaker* test required a heavy burden of proof from the dependents of workers who had committed suicide. In recent years this test, partic-

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111 O.R.C. § 4123.54.
113 196 N.E. 409 (Ohio 1935).
114 Id.
115 Id. at 410.
116 Id. at 411.
ularly its "fixed purpose" standard, was criticized for being outdated and irrelevant to the purpose of workers' compensation statutes, which is to provide financial compensation to the victims of work-related injuries and their families, regardless of fault. At the time of the Borbely decision, a majority of jurisdictions adopted a less stringent "chain of causation" or "but for" test, which allowed benefits for suicide if the worker sustained an industrial injury which caused a mental disturbance which resulted in the suicide.

The facts of Borbely showed that the worker received physical injuries from two separate work incidents occurring almost three years apart. Due to these injuries, the worker needed psychiatric treatment. About three years after his second injury, the worker committed suicide by shooting himself in the head. The court, in overruling the Brubaker "fixed purpose" standard, stated why a new standard was appropriate:

In our view, simply because a person is capable of having a fixed purpose to commit suicide does not necessarily mean that the resulting suicide is voluntary. Thus, we believe that the emphasis and focus on determining whether a particular suicide is compensable should rest on precisely what caused the person to commit suicide, not on the person's understanding of the act and its consequences.

Based upon this rationale, the Borbely case set forth the new legal standard in suicide cases in Ohio:

In order for dependents to recover workers' compensation benefits for a death by suicide, they must establish by a preponderance of the evidence that (1) there was initially an injury received in the course of, and arising out of, the employee's employment as defined by O.R.C. § 4123.01(C); (2) the work-related injury caused the employee to become dominated by a disturbance of the mind of such severity as to override normal rational judgment; and (3) the disturbance resulted in the employee's suicide.

The court found this new "chain-of-causation" standard more logical and enlightened, and "most consistent with the constitutional purpose of workers' compensation, which is to 'provide compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment.'"

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117 Borbely, 565 N.E.2d at 578.
118 Id.
119 Id. at 578.
120 Id. at 579.
121 Id. at 579.
Returning to the hypothetical case of a worker's suicide resulting from a mental condition caused solely by mental job stress, it appears that the dependents of such worker would not be entitled to compensation under Borbely. This is so because the first element of the new standard requires a showing of an injury as defined by O.R.C. § 4123.01(C). Because such statute specifically excludes psychiatric conditions from the definition of "injury," the suicide must, therefore, be preceded by a work-related physical injury which then caused a mental disturbance ending in the suicide.

VIII. CONCLUSION

The subject of mental stress in the workplace is now a national issue, being the topic of study, debate, and much litigation. In Ohio, mental stress related to the workplace can lead to compensable workers' compensation claims in certain situations. A mental condition caused by a work-related physical condition is compensable. A physical condition due to mental job stress is also compensable, provided that such condition resulted from greater job stress than that occasionally experienced by all workers.

The question of whether a mental condition caused solely by job-related mental stress is compensable is less-clearly answered. If the worker files a mental-mental claim as an "injury," it is not compensable. On the other hand, if such a claim is filed as an "occupational disease," the Cuyahoga County Court of Appeals has held that the statute defining "occupational disease" permits compensation. Now this question whether a mental-mental claim can be a compensable occupational disease is squarely before the Supreme Court of Ohio. The decision will turn on whether the court is able to determine the intent of the Ohio legislature on this issue. If the court allows compensability, the key will be what test of legal causation is adopted. Whatever the decision, it will certainly be of interest to all Ohio workers and employers.