

COMMENT

STRESS IS [NOT] PART OF THE JOB: FINDING THE APPROPRIATE BALANCE BETWEEN FAIRNESS AND EFFICIENCY TO COMPENSATE POSTTRAUMATIC STRESS DISORDER UNDER WORKERS' COMPENSATION STATUTES

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The time has come for workers' compensation systems to provide coverage for mental-mental injuries, such as Posttraumatic Stress Disorder (PTSD). Unfortunately, tragic workplace events continue to occur and trigger PTSD, even in occupations that are traditionally nontraumatic. Yet, despite the guiding philosophy of workers' compensation and current scientific understanding surrounding mental injuries, many state workers' compensation systems continue to deny coverage for such injuries. This Comment argues that state workers' compensation systems should cover PTSD as a mental-mental injury. It also provides model "accidental injury" and causal nexus statutes to accomplish this purpose and defend against common inadequacies in existing statutes.

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INTRODUCTION

The federal government and state legislatures have given much attention to providing workers’ compensation coverage for Posttraumatic Stress Disorder (PTSD) to veterans and first responders.¹ Recently, however, a different group of workers have developed a unique need for such coverage: teachers and school officials who have witnessed school shootings.² This Comment argues that state workers’ compensation statutes should cover PTSD as a mental-mental injury,³ thereby ensuring

1. See, e.g., Christine Stuart, *Connecticut Bill Seeks to Cover PTSD Treatment for First Responders*, J. EMERGENCY MED. SERVICES (Mar. 19, 2014), <http://www.jems.com/article/news/connecticut-bill-seeks-cover-ptsd-treatm>; *PTSD Workers’ Comp Claims*, U.S. DEPARTMENT ST., <http://www.state.gov/m/med/dsmp/c44957.htm> (last visited Apr. 2, 2014).

2. *Malloy Signs Bill to Help Sandy Hook Responders*, NBC CONN. (Mar. 12, 2013, 2:19 PM), <http://www.nbcconnecticut.com/news/local/Malloy-Expected-to-Sign-Bill-to-Help-Sandy-Hook-Responders-197300821.html>; Tom Robertson, *Red Lake Teachers Seek Compensation for PTSD*, MPR NEWS (Dec. 10, 2010), <http://www.mprnews.org/story/2010/12/10/red-lake-teachers-shooting-ptsd>.

3. Mental-mental injuries involve a mental or emotional stimulus, as opposed to a physical stimulus, which gives rise to a primarily “nervous” injury, such as PTSD. 4 LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW § 56.04 (Matthew Bender rev. ed. 2014). This Comment focuses on PTSD as a “mental-mental” injury and does not consider instances in which PTSD is a result of a physical injury obtained in the workplace. See *infra* Part II.

that employees ranging from teachers to first responders are able to recover for PTSD related injuries.⁴ Moreover, this Comment proposes model accidental injury and causal nexus workers' compensation statutes to effectuate this purpose.⁵

On March 21, 2005, a 16-year-old high school student went on a shooting rampage at the Red Lake Indian Reservation's High School in Minnesota.⁶ In the worst school shooting since Columbine, the student-gunman killed 10 people: his grandparents, five students, a teacher, a security guard, and himself.⁷ The gunman, after killing his grandparents in their home, went to school armed with his grandfather's shotgun and two pistols.⁸ Once he arrived at Red Lake High School, the gunman walked into a classroom, shot several students—despite their pleading with him to stop—and then shot a teacher and, finally, himself.⁹

Following the shooting, about a dozen former teachers who were in class the day of the shooting, but who were not physically injured, were diagnosed with PTSD.¹⁰ The teachers sought workers' compensation for their mental injuries.¹¹ At the time, however, Minnesota did not provide compensation for mental injuries that were not associated with physical injuries.¹²

One such teacher, Matt Salander, said that he was not the same man he was before the shooting.¹³ His classroom was right next door to the classroom where the student-gunman killed a teacher and three students.¹⁴ The student-gunman pointed a gun at Salander and fired several shots into his classroom.¹⁵ Salander was able to teach for two more years after the shooting but then suffered from a breakdown.¹⁶ In discussing the experience, Salander commented that “[h]e was plagued by flashbacks, depression and moments of crippling anxiety. He no

4. To frame the discussion, this Comment uses teachers as a recurring example. However, the issues and solutions presented apply to all workers.

5. See *infra* Part II.A.

6. Robertson, *supra* note 2.

7. Jodi Wilgoren, *Shooting Rampage by Student Leaves 10 Dead on Reservation*, N.Y. TIMES, Mar. 22, 2005, at A1.

8. *Id.*

9. *Id.*

10. See Robertson, *supra* note 2.

11. *Id.*

12. *Id.* Minnesota has recently amended its workers' compensation laws to provide coverage for PTSD. See MINN. STAT. ANN. § 176.011 (West Supp. 2015).

13. See Robertson, *supra* note 2.

14. *Id.*

15. *Id.*

16. *Id.*

longer teaches, and doubts he ever will.”¹⁷ Salander found it “confusing that society takes care of U.S. soldiers suffering from PTSD, but not teachers traumatized in the workplace.”¹⁸

Sadly, similar issues arose following the Sandy Hook Elementary school shooting. On December 14, 2012, in the second-worst school shooting in U.S. history,¹⁹ a 20-year-old gunman killed 26 people: 20 students and six adults.²⁰ Before going to the school, the gunman killed his mother.²¹ Once at Sandy Hook Elementary, the gunman, armed with a semi-automatic assault rifle and two pistols, shot an entrance into the school.²² The gunman then approached two classrooms—kindergartners and first graders—killing all of the students in the first classroom and six students in the second classroom.²³

Following the shooting, first responders and teachers were diagnosed with PTSD.²⁴ However, Connecticut’s workers’ compensation laws did not provide them with compensation for their PTSD, and this inadequacy led to considerable discussion about the state’s workers’ compensation scheme.²⁵ Connecticut’s workers’ compensation laws do not allow first responders and others to take time off of work for PTSD.²⁶ While private donors have created a special fund to assist the first responders and teachers involved in the Sandy Hook shooting,²⁷ this is far from a permanent solution; the fund raised only enough money to cover about one-third of the claims.²⁸

17. *Id.*

18. *Id.*

19. Becky Bratu, *Connecticut School Shooting Is Second Worst in US History*, NBC NEWS (Dec. 14, 2012), http://usnews.nbcnews.com/_news/2012/12/14/15909827-connecticut-school-shooting-is-second-worst-in-us-history?lite.

20. *Sandy Hook Shooting: What Happened?*, CNN, <http://www.cnn.com/interactive/2012/12/us/sandy-hook-timeline/> (last visited Feb. 25, 2014).

21. *Id.*

22. *Id.*

23. *Id.*

24. See Keith M. Phaneuf, *Newtown Sparks Workers’ Compensation Debate*, CT MIRROR (Jan. 21, 2013), <http://ctmirror.org/2013/01/21/newtown-sparks-new-workers-compensation-debate/>.

25. *Id.*

26. CONN. GEN. STAT. ANN. § 31-275(16)(B)(ii) (West 2011 & Supp. 2014); *Malloy Signs Bill to Help Sandy Hook Responders*, *supra* note 2.

27. Stuart, *supra* note 1. The Connecticut Legislature’s Public Safety Committee approved a bill “that gives first responders, like the teachers and police officers who witness tragic events, an opportunity to qualify for workers’ compensation benefits.” *Id.* However, a similar bill failed in Connecticut’s Senate last year. *Id.* The outcome remains to be seen.

28. *Id.*

Unfortunately, school shootings demonstrate just one area, among many,²⁹ in which employees who are not first responders or military personnel experience traumatic, though nonphysical, events at work that lead to PTSD. While the hope is that employees will never experience traumatic workplace events that lead to PTSD, in the event that employees do, workers' compensation laws need to provide such coverage if it is needed.

This Comment argues that states' workers' compensation laws better uphold the purpose of workers' compensation by explicitly providing coverage for PTSD as a mental-mental injury. Part I briefly explains PTSD and the history of workers' compensation. In addition, this Part provides an overview of the primary approaches states have taken to compensating mental-mental injuries. Next, Part II argues that PTSD should be compensated as a mental-mental injury under state workers' compensation schemes. Further, it offers a model workers' compensation statute to cover PTSD. And finally, Part III concludes that the proposed model statute provides policy makers with the appropriate balance of fairness and efficiency within the workers' compensation system.

I. POSTTRAUMATIC STRESS DISORDER AND WORKERS' COMPENSATION: A BRIEF HISTORY

States implement different approaches in addressing PTSD and workers' compensation. Therefore, a basic knowledge of PTSD is useful to interpret why states hesitate to compensate mental-mental disorders. Furthermore, states weigh numerous policy concerns related to the objectives of workers' compensation. These competing policy objectives dictate how each state compensates workers for mental-mental injuries. In general, there are four approaches: mental-mental injuries are compensable if caused by gradual stress, even if the stress is not unusual; mental-mental injuries are compensable if the stimulus is unusual and/or sudden (these two approaches are often combined with one another); and mental-mental injuries are never compensable.

29. For example, "[o]n Aug. 3, 2010, Hartford Distributors employee Omar Shariff Thornton responded to his dismissal by fatally shooting eight people in the company's Manchester warehouse before killing himself." Phaneuf, *supra* note 24.

A. What Is PTSD?

According to the *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*,³⁰ “[t]he essential feature of [PTSD] is the development of characteristic symptoms following exposure to one or more traumatic events.”³¹ PTSD can be triggered by directly experiencing or witnessing, in person, “[e]xposure to actual or threatened death, serious injury, or sexual violence.”³² Examples of witnessed events that could trigger PTSD include: “serious injury, unnatural death, physical or sexual abuse of another person due to violent assault, domestic violence, accident, war or disaster, or a medical catastrophe in one’s child.”³³

In addition to being exposed to a traumatic event, a PTSD diagnosis requires the presence of one or more “intrusion symptoms associated with the traumatic event(s).”³⁴ “Intrusion symptoms” include experiencing “[r]ecurrent, involuntary, and intrusive distressing memories” or dreams associated with the traumatic event.³⁵ A diagnosis of PTSD also requires that an individual (1) persistently avoid stimuli associated with the traumatic event; (2) experience “[n]egative alterations in cognitions and mood associated with the traumatic event[,]” such as feeling detached or estranged from others and experiencing a diminished interest in participating in significant activities; and (3) experience “alterations in arousal and reactivity associated with the traumatic event[,]” such as irritability and angry outbursts, reckless and self-destructive behavior, problems with concentration, and sleep disturbances.³⁶ The symptoms must last longer than one month, and they cannot be attributed to the psychological effects of a substance, such as medication or alcohol, or to another medical condition.³⁷

30. AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (5th ed. 2013).

31. *Id.* at 274.

32. *Id.* at 271.

33. *Id.* at 274.

34. *Id.* at 271.

35. *Id.*

36. *Id.* at 271–72.

37. *Id.* at 272.

Rates of PTSD are higher among veterans and others whose vocation increases the risk of traumatic exposure (e.g., police, firefighters, emergency medical personnel). Highest rates (ranging from one-third to more than one-half of those exposed) are found among survivors of rape, military combat and captivity, and ethnically or politically motivated internment and genocide.

B. History of Workers' Compensation Laws

As Professor Larson explains, “[t]he ultimate social philosophy behind [workers’] compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries.”³⁸ The basic principle of workers’ compensation is that “an employee is automatically entitled to certain benefits when she suffers a ‘personal injury by accident arising out of and in the course of employment’ or an occupational disease.”³⁹ Employees who sustain work-related injuries have traditionally relied on tort remedies to recover damages.⁴⁰ However, employees have found recovering under tort law to be unsatisfactory “because the employer often prolonged the litigation with numerous legal defenses that either prevented recovery or placed a significant financial hardship on the worker so that [employees] could not continue the lawsuit.”⁴¹ In response, workers’ compensation laws were created to ensure recovery for employees who were injured on the job.⁴² Thus, “negligence and fault are largely immaterial, both in the sense that the employee’s contributory negligence does not lessen his or her rights and in the sense that the employer’s complete freedom from fault does not lessen its liability.”⁴³ In a compromise, employees gave up their rights to sue their employers for massive tort awards, while employers agreed to provide assured, albeit modest, benefits.⁴⁴ Based on this system of compromise, it is curious that workers who incur work-related mental-mental injuries are not guaranteed compensation under many workers’ compensation systems.⁴⁵

Id. at 276.

38. 1 LEX K. LARSON, *LARSON’S WORKERS’ COMPENSATION LAW* § 1.03[2] (Matthew Bender rev. ed. 2014).

39. *Id.* § 1.01.

40. Natalie D. Riley, *Mental-Mental Claims—Placing Limitations on Recovery Under Workers’ Compensation for Day-to-Day Frustrations*, 65 MO. L. REV. 1023, 1029 (2000).

41. *Id.* at 1029 n.49.

42. *Id.* at 1029.

43. LARSON, *supra* note 38, § 1.01.

44. *Id.*

45. See N.D. CENT. CODE § 65-01-02(10)(b)(10) (2010 & Supp. 2013) (providing that a mental injury that arises from a mental stimulus is not a compensable injury); OHIO REV. CODE ANN. § 4123.01(C)(1) (LexisNexis 2007 & Supp. 2014) (providing that injury does not include “[p]sychiatric conditions except where the claimant’s psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant’s psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate”); S.D. CODIFIED LAWS § 62-1-1(7) (2009 & Supp. 2014) (“[Injury] does not include a mental injury arising from emotional, mental, or nonphysical stress or

C. Current Approaches to Coverage for Mental-Mental Injuries

Legislatures and courts are often reluctant to compensate mental-mental injuries for five reasons. First, due to the subjective nature of mental injuries and the fact that individuals react differently to mental stimuli, judges are uncomfortable evaluating such injuries.⁴⁶ Second, there is a fear that because mental injuries are more difficult to evaluate, they may be easier to falsify.⁴⁷ Third, “diagnosis depends on self-reporting and a victim may not reveal the information needed to make a reliable diagnosis.”⁴⁸ Fourth, establishing a direct causal link between the mental disorder and the workplace may be difficult when outside factors, such as an employee’s personal life, could have also contributed to the injury.⁴⁹ And finally, “there is concern that compensating mental-mental claims will diminish funding for claims for physical injuries because of the increase in mental claims and the litigation expenses involved.”⁵⁰ Based on such concerns, the amount of coverage provided for mental-mental injuries varies from state to state. However, there are four basic approaches to compensating mental-mental injuries.⁵¹

1. MENTAL-MENTAL INJURY IS COMPENSABLE IF CAUSED BY GRADUAL STRESS, EVEN IF THE STRESS IS NOT UNUSUAL

The first approach, used by nine states,⁵² is to provide coverage for mental injuries caused by gradual stress, even if the stress was “not unusual by comparison with that of ordinary life or employment.”⁵³ The

stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence.”); *infra* Part I.C.3.

46. Frances Codd Slusarz, *Workplace Stress Claims Resulting from September 11th*, 18 LAB. LAW. 137, 139 (2002).

47. *Id.* at 140.

48. *Id.*

49. *Id.*

50. Riley, *supra* note 40, at 1032.

51. LARSON, *supra* note 3, § 56.06[2].

52. The nine states are as follows: California, CAL. LAB. CODE § 3208.3 (West 2011 & Supp. 2015); Delaware, *State v. Cephas*, 637 A.2d 20, 21 (Del. 1994); Hawaii, HAW. REV. STAT. ANN. § 386-3 (LexisNexis 2010); Indiana, *Hansen v. Von Duprin, Inc.*, 507 N.E.2d 573, 576 (Ind. 1987); Massachusetts, MASS. ANN. LAWS ch. 152, § 1 (LexisNexis 2000 & Supp. 2014); Michigan, MICH. COMP. LAWS ANN. § 418.301 (West Supp. 2014); Minnesota, MINN. STAT. ANN. § 176.011 (West Supp. 2015); New Jersey, *Simon v. R. H. H. Steel Laundry, Inc.*, 95 A.2d 446, 450 (Hudson County Ct. 1953), *aff’d*, 98 A.2d 604, 605 (N.J. Sup. Ct. App. Div. 1953); Oregon, OR. REV. STAT. § 656.802 (2013).

53. LARSON, *supra* note 3, § 56.06[2].

states that follow this approach are sympathetic to mental-mental injuries and do not require a certain type of stimulus for coverage to be provided. As Professor Larson explains, “[t]he jurisdictions in this group say, in effect, ‘We do not ask whether the stress is greater than that of ordinary life or employment; it is enough that this stress contributed to this breakdown.’”⁵⁴

For example, the Supreme Court of Delaware adopted such a standard in *State v. Cephas*.⁵⁵ Cephas was a staff lieutenant at the Delaware Correctional Center.⁵⁶ His primary responsibility “was to handle the classifications and grievances for approximately 375 inmates. As a result, he was responsible for an average of 30 complaints per week and for determining the movement of inmates into different security units.”⁵⁷ “Cephas also made parole recommendations and . . . supervised between 30 to 60 correctional officers on any given shift.”⁵⁸ When Cephas assumed the duties of another staff lieutenant, he increased “his caseload from 375 inmates to approximately 1100 inmates and [took on] 16 hours of overtime per week.”⁵⁹

Shortly after the increase in responsibility, “Cephas began to experience severe headaches, flashes of light in his eyes, blackouts, nausea, vomiting, and hives.”⁶⁰ Cephas attributed the symptoms to the tension he was under due to his increased workload and testified that his symptoms would subside once he went home.⁶¹ The court affirmed Cephas’ award of compensation and held that “a mental injury is compensable even if: (1) there was no prior physical trauma; (2) the injury was the result of gradual stimuli rather than a sudden shock; and (3) the job-related stress causing the injury was not unusual.”⁶²

2. MENTAL-MENTAL INJURY IS COMPENSABLE IF THE STIMULUS IS UNUSUAL AND/OR SUDDEN

The second and third approaches to compensating mental-mental injuries, followed by 23 states,⁶³ require that the mental stimulus be

54. *Id.* § 56.06[7].

55. 637 A.2d 20 (Del. 1994).

56. *Id.* at 21.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 21–22.

61. *Id.* at 22.

62. *Id.* at 21.

63. The 23 states are as follows: Alaska, ALASKA STAT. § 23.30.010 (2012); Arizona, ARIZ. REV. STAT. ANN. § 23-1043.01 (1995); Colorado, COLO. REV. STAT. ANN.

unusual⁶⁴ and/or sudden.⁶⁵ The two standards are closely related. For example, Arizona's workers' compensation statute provides coverage for mental-mental injuries when caused by "some unexpected, unusual or extraordinary stress related to the employment."⁶⁶ This standard encompasses both an unusual and sudden stimulus.

One state that follows the unusual-stimulus approach is Wisconsin.⁶⁷ In *School District Number 1 v. Department of Industry, Labor & Human Relations*,⁶⁸ the Wisconsin Supreme Court addressed whether a high school guidance counselor sustained a compensable injury.⁶⁹ The counselor experienced an acute anxiety reaction when she received a list of student recommendations that, among other things, asked for her dismissal.⁷⁰ The copy of the recommendations that the counselor received had been blacked out, making it extremely difficult to discern the students' recommendation to remove the counselor from the staff.⁷¹

The Wisconsin Supreme Court, in ruling that the guidance counselor did not sustain a compensable injury, explained:

§ 8-41-301 (West 2013); Illinois, *Pathfinder Co. v. Indus. Comm'n.*, 343 N.E.2d 913, 917 (Ill. 1976); Iowa, *Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 855 (Iowa 1995); Louisiana, LA. REV. STAT. ANN. § 23:1021 (2010 & Supp. 2015); Maine, ME. REV. STAT. ANN. tit. 39-A, § 201 (2001); Maryland, *Means v. Baltimore Cnty.*, 689 A.2d 1238, 1242 (Md. 1997); Mississippi, *Dillon v. Roadway Express, Inc.*, 823 So. 2d 588, 591 (Miss. Ct. App. 2002); Missouri, *Fogelsong v. Banquet Foods Corp.*, 526 S.W.2d 886, 892 (Mo. Ct. App. 1975); Nebraska, NEB. REV. STAT. ANN. § 48-101.01 (LexisNexis 2012 & Supp. 2013) (coverage limited to first responders); Nevada, NEV. REV. STAT. ANN. § 616C.180 (LexisNexis 2012); New Mexico, N.M. STAT. ANN. § 52-1-24 (LexisNexis 2004); New York, N.Y. WORKERS' COMP. LAW § 2 (McKinney 2013); North Carolina, *Lane v. Am. Nat'l Can Co.*, 640 S.E.2d 732, 735 (N.C. Ct. App. 2007); Pennsylvania, *C. Hannah & Sons Constr. v. Workers' Comp. Appeal Bd. (Days)*, 784 A.2d 860, 865 (Pa. Commw. Ct. 2001); Rhode Island, R.I. GEN. LAWS § 28-34-2 (2003); South Carolina, S.C. CODE ANN. § 42-1-160 (Supp. 2013); Utah, UTAH CODE ANN. § 34A-2-402 (LexisNexis 2011); Vermont, *Bedini v. Frost*, 678 A.2d 893, 894 (Vt. 1996); Virginia, *Teasley v. Montgomery Ward & Co.*, 415 S.E.2d 596, 598 (Va. Ct. App. 1992); Washington, *Rothwell v. Nine Mile Falls Sch. Dist.*, 206 P.3d 347, 352 (Wash. Ct. App. 2009); Wisconsin, *Sch. Dist. No. 1, Vill. of Brown Deer v. Dep't of Indus., Labor & Human Relations*, 62 Wis. 2d 370, 377-78, 215 N.W.2d 373 (1974).

64. LARSON, *supra* note 3, § 56.06[6]. Unusual stress is typically defined as "greater than the stress of everyday life, or sometimes greater than that of ordinary employment." *Id.*

65. *Id.* § 56.06[5].

66. ARIZ. REV. STAT. ANN. § 23-1043.01.

67. *See, e.g., Sch. Dist. No. 1, Vill. of Brown Deer*, 62 Wis. 2d at 377-78.

68. 62 Wis. 2d 370, 215 N.W.2d 373 (1974).

69. *Id.* at 371.

70. *Id.* at 371-72.

71. *Id.* at 371.

[I]t is the opinion of this court that mental injury nontraumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience. Only if the “fortuitous event unexpected and unforeseen” can be said to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury will liability under [Wisconsin’s Workers’ Compensation Act] be found.⁷²

Thus, the court found that the counselor’s injury was not compensable because “[t]he mere receipt of a partially blacked-out list of suggestions prepared by the student council which asked for her dismissal could not be deemed to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury.”⁷³

One state that follows the sudden-stimulus approach is Illinois.⁷⁴ In *Pathfinder Company v. Industrial Commission*,⁷⁵ the claimant worked as a packager and assembler for Pathfinder.⁷⁶ After showing another employee how to use the punch press, the claimant turned away and shortly thereafter heard cries for help.⁷⁷ The claimant turned back and saw that the employee had caught her hand in the press.⁷⁸ Further, when the claimant went to help the injured woman, the claimant pulled out the woman’s severed hand.⁷⁹ The claimant fainted at the sight of the severed hand and, about a year later, was diagnosed with peripheral neuritis and residual anxiety.⁸⁰ The court, in concluding that the claimant did in fact suffer a compensable injury, explained that “an employee who, like the claimant here, suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm has suffered an accident within the meaning of [Illinois’ Workers’ Compensation Act], though no physical trauma or injury was sustained.”⁸¹

72. *Id.* at 377–78.

73. *Id.* at 378.

74. *See, e.g., Pathfinder Co. v. Indus. Comm’n.*, 343 N.E.2d 913, 917 (Ill. 1976).

75. 343 N.E.2d 913 (Ill. 1976).

76. *Id.* at 914.

77. *Id.* at 914–15.

78. *Id.*

79. *Id.* at 915.

80. *Id.*

81. *Id.* at 917.

3. MENTAL-MENTAL INJURIES ARE NEVER COMPENSABLE

The final approach, followed by 18 states,⁸² is to not compensate mental-mental injuries at all.⁸³ In these jurisdictions there must be some physical component to the injury.⁸⁴ For example, in Florida:

A mental or nervous injury due to stress, fright, or excitement only is not an injury by accident arising out of the employment. Nothing in this section shall be construed to allow for the payment of benefits under this chapter for mental or nervous injuries without an accompanying physical injury requiring medical treatment. A physical injury resulting from mental or nervous injuries unaccompanied by physical trauma requiring medical treatment shall not be compensable under this chapter.⁸⁵

States that follow this approach are not sympathetic to workers who suffer from mental-mental injuries.

II. PROPOSAL OF A MODEL STATUTE: FINDING THE APPROPRIATE BALANCE

States should explicitly recognize and cover PTSD as a mental-mental injury in their workers' compensation statutes. Despite

82. The 18 states are as follows: Alabama, ALA. CODE § 25-5-1(9) (LexisNexis 2007); Arkansas, ARK. CODE ANN. § 11-9-113(a)(1) (2012) (stating that the physical injury limitation does not apply to “any victim of a crime of violence”); Connecticut, CONN. GEN. STAT. ANN. § 31-275(16)(B) (West 2011 & Supp. 2014); Florida, FLA. STAT. ANN. § 440.093(1) (West 2009); Georgia, *Columbus Fire Dep’t v. Ledford*, 523 S.E.2d 58, 61 (Ga. Ct. App. 1999); Idaho, IDAHO CODE ANN. § 72-451 (2006); Kansas, *Bernard v. Daskocil Cos.*, 861 F. Supp. 1006, 1016 (D. Kan. 1994); Kentucky, KY. REV. STAT. ANN. § 342.0011(1) (LexisNexis 2011); Montana, MONT. CODE ANN. § 39-71-119(3) (2013); New Hampshire, N.H. REV. STAT. ANN. § 281-A:2(XI) (LexisNexis 2008 & Supp. 2014); North Dakota, N.D. CENT. CODE § 65-01-02(10) (2010 & Supp. 2013); Ohio, OHIO REV. CODE ANN. § 4123.01(C) (LexisNexis 2007 & Supp. 2014) (allowing recovery if PTSD arose “from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate”); Oklahoma, OKLA. STAT. ANN. tit. 85A, § 13(A)(1) (West Supp. 2015); South Dakota, S.D. CODIFIED LAWS § 62-1-1(7) (2009 & Supp. 2014); Tennessee, TENN. CODE ANN. § 50-6-102(15) (2014); Texas, *Duncan v. Emp’rs Cas. Co.*, 823 S.W.2d 722, 725 (Tex. App. 1992); West Virginia, W. VA. CODE ANN. § 23-4-1f (LexisNexis 2010); and Wyoming, WYO. STAT. ANN. § 27-14-102(xi) (2013 & Supp. 2014).

83. LARSON, *supra* note 3, § 56.06[1][c].

84. *Supra* note 82.

85. FLA. STAT. ANN. § 440.093.

PTSD's controversy,⁸⁶ or the fact that rates of PTSD are higher in veterans and first responders,⁸⁷ the purpose of workers' compensation has always remained the same: to compensate employees for workplace injuries.⁸⁸ Thus, when tragic events such as school shootings occur, people in traditionally nontraumatic careers should be able to recover for their workplace injuries in a timely manner.⁸⁹

This Part presents a model statute that allows workers who suffer from mental-mental injuries to receive workers' compensation benefits. The proposed model statute effectuates the purpose of workers' compensation by addressing the two main components of such statutes: a definition of "accidental injury"⁹⁰ and a causal nexus standard.⁹¹ States' interpretations of the phrase "accidental injury" determine which workplace injuries will be compensable.⁹² The causal nexus requirement provides the parameters for what injuries are considered sufficiently connected to the workplace to receive compensation.⁹³

Following an overview of the model statute, this Part provides a more in-depth analysis of each component. This analysis demonstrates how the model statute addresses the policy and pragmatic concerns of legislatures and employers. Further, it illustrates how society's current understanding of mental injuries renders the coverage of such injuries fundamental under workers' compensations laws.

A. Overview of Model Statute

This Section proposes a model statute that appropriately balances the states' policy concerns in two ways. First, it defines "accidental injury" in such a way that both mental and physical injuries are covered,

86. Robert L. Spitzer, Michael B. First & Jerome C. Wakefield, *Saving PTSD from Itself in DSM-V*, 21 J. ANXIETY DISORDERS 233, 233 (2007) ("Since its introduction into DSM-III in 1980, no other DSM diagnosis, with the exception of Dissociative Identity Disorder (a related disorder), has generated so much controversy in the field as to the boundaries of the disorder, diagnostic criteria, central assumptions, clinical utility, and prevalence in various populations.").

87. AM. PSYCHIATRIC ASS'N, *supra* note 30, at 276.

88. LARSON, *supra* note 38, § 1.03[2].

89. Presently, only two states, Connecticut and Minnesota, explicitly cover PTSD in some fashion. CONN. GEN. STAT. ANN. § 31-275 (West 2011 & Supp. 2014); MINN. STAT. ANN. § 176.011 (West Supp. 2015). In Connecticut, however, coverage is limited to firefighters in specific situations. CONN. GEN. STAT. ANN. § 31-275(16)(B)(ii).

90. LARSON, *supra* note 38, § 1.01.

91. *Id.*

92. See James M. Inman, Note, *Where Are You Hurt? Kentucky Redefines Workers' Compensation Injury in a Post-Traumatic Stress Disorder World*, 96 KY. L.J. 465, 474 (2008).

93. *See id.*

thereby effectuating the purpose of workers' compensation: to provide employees with certain benefits when they suffer from a workplace injury.⁹⁴ Second, it sets parameters for the causal nexus requirement that provide the flexibility and discretion to allow the fact finder to evaluate cases individually and exclude fraudulent claims.

1. MODEL DEFINITION FOR "ACCIDENTAL INJURY"

States better uphold the intent of workers' compensation laws by following Wisconsin's lead in defining accidental injury as "mental or physical harm to an employee,"⁹⁵ while explicitly including PTSD as a covered mental illness. This definition is clear yet broad enough to encompass both mental and physical injuries, thereby acknowledging the primary goal of the workers' compensation system: that employees are automatically entitled to certain benefits when they suffer from a workplace injury.⁹⁶ Further, because this definition is broad and inclusive up front, thus allowing more claims to be brought into the workers' compensation system, it allows states to use the causal nexus requirement on the back end to appropriately limit coverage. Accordingly, employers are incentivized to challenge claims on the basis that employees do not meet the causal nexus requirement, as opposed to asserting that the injury is not covered, thereby focusing litigation on the critical issue: whether the injury was caused by the employment.⁹⁷

By recognizing that workplace injuries are compensable whether mental or physical in nature, policy makers and employers send a message that "[t]he nature of a mental injury does not make it less deserving of coverage."⁹⁸ And further, because it may not be prudent to compensate *every* workplace injury, limiting the types of injuries that are compensable on the back end allows policy makers to experiment with what limitations are necessary, as opposed to denying claims outright for certain types of injuries. Such an approach allows policy makers to experiment to find the most pragmatic balance of fairness and efficiency within each state's workers' compensation system.

The natural response to this suggestion is that policy makers *have* experimented and have found a balance. And while this may be true,

94. LARSON, *supra* note 38, § 1.01.

95. WIS. STAT. § 102.01(2)(c) (2013–14).

96. LARSON, *supra* note 38, § 1.01.

97. While employers may prefer to have both defenses available, redirecting workers' compensation schemes away from the distracting question and toward resolving whether or not there is a causal link between the injury and the workplace is more aligned with the purpose of workers' compensation. *See id.*

98. *State v. Cephas*, 637 A.2d 20, 25 (Del. 1994).

despite policy makers' best intentions, the current balance struck by workers' compensation systems is simply not good enough. If it were, the plight faced by the teachers and first responders involved in the Red Lake and Sandy Hook school shootings would have been nonexistent; the workers' compensation system would have provided them with the compensation they needed to treat their injuries. We, as a society, *cannot* be okay with a balance that allows workers who have sustained PTSD as a result of situations like the Red Lake and Sandy Hook school shootings to go uncompensated.⁹⁹

2. MODEL CAUSAL NEXUS STANDARD

A model causal nexus statute should read:

(1) Mental injuries shall be compensated under this title, unless they arise under subsection (3), if:

(a) a claimant offers clear and convincing evidence demonstrating objectively that his or her working conditions were actually stressful and that such conditions were a substantial cause of claimant's mental injury;¹⁰⁰ and

(b) the mental injury is diagnosed by a psychologist or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered, using the latest criteria of the American Psychiatric Association's Diagnostic and Statistics Manual of Mental Disorders (DSM).¹⁰¹

(2) Under subsection (1), a claimant need not prove that:

(a) there is any physical component to the injury;

(b) the injury was the result of a sudden shock or stimulus rather than the result of gradual stress or gradual stimulus; or

(c) the job-related stress causing the injury is unusual.¹⁰²

(3) Mental injuries that result from "disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer," shall not be compensable.¹⁰³

This proposed standard addresses many of the issues discussed later in this Comment. Section 1(a) articulates that the claimant must suffer from injuries that are actually caused by the claimant's stressful employment. Section 1(a) adopts the common view that a claimant's subjective opinion alone that her employment substantially caused her

99. See Robertson, *supra* note 2; Stuart, *supra* note 1.

100. Cephias, 637 A.2d at 27.

101. See IDAHO CODE ANN. § 72-451 (2006).

102. Cephias, 637 A.2d at 21.

103. See ALASKA STAT. § 23.30.010 (2012).

injuries is insufficient.¹⁰⁴ What section 1(a) does *not* do is require that the claimant prove that other people similarly situated would have felt the same amount of stress.¹⁰⁵ Rather, section 1(a) allows the fact finder to exercise discretion in deciding whether or not the claimant's injury was substantially caused by workplace stress. In doing so, section 1(a) grants the flexibility that is necessary to evaluate cases individually and exclude fraudulent claims.

Section 1(b) requires that the latest DSM recognize the claimant's mental injury. This ensures that the claimant is suffering from an actual illness that can be diagnosed by a psychologist or psychiatrist. In doing so, section 1(b) eliminates some of policy makers' and employers' concerns surrounding fraud.¹⁰⁶

Section 2 eliminates any physical injury requirement as well as any requirements that the stress be "sudden" or "unusual." Because the fact that a stimulus causing a mental injury is "sudden" or "unusual" does not guarantee the legitimacy of a claim nor that there is a causal link between the claim and the claimant's employment,¹⁰⁷ section 2 altogether eliminates the issue, thereby avoiding useless litigation. Further, by allowing "gradual" stress claims, section 2 acknowledges that stress-induced injuries are a type of injury that workers are exposed to, much like a factory worker may be exposed to a back or shoulder injury.¹⁰⁸

Section 3 includes general exclusions that allow employers to effectively run and manage their businesses without fear of being liable for mental injuries that result from such actions. Section 3, by having a good faith requirement, balances the pragmatic notion that employers need to discipline, evaluate, fire, and take similar actions with employees with the acknowledgement that employers can go too far in taking such actions.¹⁰⁹ In such instances, the employer could potentially be liable for mental injuries caused to an employee.

B. Defining "Accidental Injury"

The first component of workers' compensation statutes is that employees are entitled to benefits when they suffer from an "accidental

104. See *supra* Part II.C.3.

105. See Interview with John Neal, Partner & S'holder at Stafford, Neal & Soule, S.C., and Adjunct Professor at the Univ. of Wis. Law Sch., in Madison, Wis. (Nov. 15, 2013).

106. See Slusarz, *supra* note 46.

107. See Victoria L. Ruhga, Comment, *Mental Stress and Workers' Compensation in Nebraska*, 69 NEB. L. REV. 842, 866 (1990).

108. See *infra* note 113.

109. See *infra* Part II.C.1.

injury.”¹¹⁰ “Deciding what injuries are compensable is a legal determination and is a function of how inclusive a state wants its workers’ compensation to be.”¹¹¹ Although courts interpreting workers’ compensation statutes often note that such statutes should be “liberally construed” to accomplish their goals and purposes, courts and legislatures have to make some initial policy determination about what to cover and what not to cover.¹¹²

Specifically, courts and legislatures are forced to make decisions as to where they want to strike the zero-sum balance between fairness and efficiency.¹¹³ As the fairness of workers’ compensation systems increase, their efficiency decreases.¹¹⁴ Thus, defining accidental injury “is crucial

110. LARSON, *supra* note 38, § 1.01.

111. Inman, *supra* note 92, at 473–74.

112. See, e.g., *Pathfinder Co. v. Indus. Comm’n*, 343 N.E.2d 913, 917 (Ill. 1976).

113. Interview with John Neal, *supra* note 105. During my interview with Mr. Neal, he shared his thoughts and insights about workers’ compensation systems compensating mental-mental injuries. Among the many things we discussed, I found three of Mr. Neal’s observations particularly insightful. First, we discussed what type of workers’ compensation system best meets the underlying policy objectives of workers’ compensation statutes. Mr. Neal explained that, as with any legal system, the two competing objectives are efficiency and fairness. He explained that efficiency is about getting cases through the system, not having a lot of litigation, and not spending a lot of money. On the other hand, fairness is concerned with paying the right people the right amount of money, which requires more litigation, which incurs more costs. As such, efficiency and fairness have an inverse relationship. Thus, when determining the appropriate balance between these two competing concerns, policy makers have to ask what the system is willing to sacrifice. Second, Mr. Neal expressed his concern with the stigma attached to claimants who allege that they suffer from mental-mental injuries. He explained that implicit in the fears of judges, commentators, and employers that compensating mental-mental injuries will “open the floodgates” to fraudulent claims is the stigma that people do not actually suffer from mental injuries. Following this logic, if a claimant claims to suffer from a mental-mental injury, she must be lying. To the contrary, mental injuries such as PTSD do occur and have severe effects on the lives of many. Finally, Mr. Neal reflected upon Wisconsin’s *School District No. 1 v. Department of Industry, Labor & Human Relations* decision and its treatment of mental-mental injuries. He characterized the court’s standard as not being concerned with the individual claimant and the effect that the stressor had upon her, but instead as focusing on hypothetical considerations of whether other people in the claimant’s profession would have reacted the same way to the stressor. Thus, based on this standard, if other hypothetical employees would not have reacted in the same way, the claimant does not get compensated because it is unclear whether the stress of the job caused the mental-mental injury, as opposed to some outside factor. Mr. Neal found this logic to be curious. He analogized that if a claimant worked as a ceiling tile installer and his shoulder wore out, would the relevant inquiry be whether the injury he sustained also happened to most other ceiling tile installers? The obvious answer to this question is no. The claimant would be compensated without regard to how the same type of work affected another worker’s body.

114. *Id.*

to any workers' compensation system because it has an immediate effect on costs to businesses and the protection of workforce employees."¹¹⁵

This Section argues that the model "accidental injury" definition offers an appropriate balance of fairness and efficiency for two principal reasons. First, the statute eliminates the outdated requirement that employee's sustain a physical injury to have an eligible workers' compensation claim. In doing so, the statute acknowledges that mental injuries can occur without a physical stimulus. Second, the model statute defines "mental injury" in such a way that while PTSD is explicitly covered, other mental injuries such as anxiety disorders are not categorically excluded.

1. PHYSICAL INJURY REQUIREMENTS ARE OUTDATED AND DO NOT REFLECT CURRENT UNDERSTANDING OF MENTAL INJURIES

The first component of defining accidental injury is determining whether a physical injury must occur for coverage to be triggered. For states to cover PTSD as a mental-mental injury, state law and policy makers must accept "that there can be liability for a mental stimulus producing a mental or nervous result, with no physical component."¹¹⁶ Modern medicine and understanding has advanced to the point where society and the medical profession recognize that mental or "nervous" injuries can and do occur.¹¹⁷ As Professor Larson explains:

[T]here is no really valid distinction between physical and "nervous" injury Perhaps, in earlier years, when much less was known about mental and nervous injuries and their relation to "physical" symptoms and behavior, there was an excuse, on grounds of evidentiary difficulties, for ruling out recoveries based on such injuries, both in tort and in workmen's compensation. But the excuse no longer exists.¹¹⁸

Thus, "[t]he nature of a mental injury does not make it less deserving of coverage."¹¹⁹ For example, in *City of Norman v. Helm*,¹²⁰ the claimant was a firefighter who sustained PTSD when he responded to an incident where on a hot, 103-degree summer day, two young boys

115. Inman, *supra* note 92, at 473–74.

116. LARSON, *supra* note 3, § 56.06[3].

117. *Id.* § 56.04[1].

118. *Id.*

119. *State v. Cephas*, 637 A.2d 20, 25 (Del. 1994).

120. 2012 OK CIV APP 106, 291 P.3d 640.

were trapped and suffocated in the trunk of a car.¹²¹ The claimant's employer did not deny that the claimant was suffering from PTSD as a result of the incident.¹²² Rather, the employer argued that the claimant's PTSD was not compensable because the claimant did not sustain a physical injury.¹²³ Despite the claimant's argument that PTSD "causes physiological changes in the brain itself, [and] therefore, it's a physical injury," the claimant was denied coverage.¹²⁴ It is puzzling and arbitrary that the claimant's PTSD, which undisputedly arose from a workplace event, was not compensable, and yet if the claimant had been physically injured in some way and *then* suffered from PTSD, his injury would have been compensable.¹²⁵ While policy makers must make determinations about what types of injuries will be compensated, they should not draw lines that allow these types of results.

a. The physical injury requirement produces inefficient and arbitrary results

The outcome of *City of Norman v. Helm* demonstrates that workers' compensation panels and courts reach inefficient and arbitrary results when the focus of workers' compensation coverage is on whether there was a physical component to a given mental injury. "[A] 'shred of the physical' does not ensure a causal relation between a mental disorder and employment because the existence or non-existence of a physical injury does not make it any more or less likely that a *bona fide* mental or emotional disability has resulted from a given stimuli."¹²⁶ Thus, it would be more prudent for workers' compensation hearings to focus on the merits of the alleged mental injury. For example, in *Olin Industries, Inc. v. Industrial Commission*,¹²⁷ the claimant was injured while cleaning a machine when a metal guard weighing about 75 pounds struck her right breast.¹²⁸ She did not experience any fractures or breaks, and her treating physician testified that despite her diagnosis of a contusion of the chest,

121. *Id.* ¶¶ 2, 4.

122. *Id.* ¶ 3.

123. *Id.*

124. *Id.* ¶¶ 3, 26, 28.

125. See OKLA. STAT. ANN. tit. 85A, § 13 (West Supp. 2015).

126. Adam Tucker, Comment, *A Matter of Fairness: How Denying Mental-Mental Claims Frustrates the Central Purposes of Workers' Compensation Law*, 31 J. LEGAL MED. 467, 479 (2010) (quoting Lawrence Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 VAND. L. REV. 263, 291 (1983)).

127. 68 N.E.2d 259 (Ill. 1946).

128. *Id.* at 260.

there was no objective evidence of injury.¹²⁹ Yet, because the claimant sustained a physical injury, the claimant's psychological disorder was covered under Illinois' workers compensation statute.¹³⁰

However, in *Armstrong v. John R. Jurgenson Company*,¹³¹ the claimant was denied coverage for his PTSD despite suffering from physical injuries.¹³² The claimant was involved in an automobile accident while operating a one-ton dump truck.¹³³ The claimant was rear-ended while stopped at a yield sign on the highway and was treated for cervical, thoracic, and lumbar strains.¹³⁴ The claimant's workers' compensation claim was allowed for his physical injuries and his PTSD, but the employer appealed the award for the claimant's PTSD:

Both Armstrong and Jurgensen presented expert testimony regarding the cause of Armstrong's PTSD. Armstrong presented the videotaped deposition testimony of Jennifer J. Stoeckel, Ph.D., who evaluated Armstrong and diagnosed his PTSD. Dr. Stoeckel testified that Armstrong developed PTSD as a result of the accident and that his physical injuries contributed to and were causal factors in his development of PTSD. Jurgensen, on the other hand, presented the testimony of William L. Howard, Ph.D., who agreed with Dr. Stoeckel that Armstrong suffered from PTSD as a result of the accident, but opined that Armstrong's physical injuries did not cause his PTSD. Dr. Howard testified that the PTSD was caused by witnessing the accident and "the mental observation of the severity of the injury, the fatality, [and] the fact that it could have been life-threatening to him at some point." Dr. Howard believed that Armstrong would have developed PTSD even without his physical injuries.¹³⁵

By focusing on the physical component, both sides engaged in a battle of the experts that seemed to overlook the critical issue: whether the claimant's PTSD had been caused by a workplace injury. Instead, the experts focused on whether the complainant's injury had the requisite physical component to be compensable.¹³⁶ Rather than misplace

129. *Id.*

130. *See id.* at 262.

131. 136 Ohio St. 3d 58, 2013-Ohio-2237, 990 N.E.2d 568 (2013).

132. *Id.* at 569–70.

133. *Id.* at 569.

134. *Id.*

135. *Id.* at 570.

136. *See, e.g., City of Norman v. Helm*, 291 P.3d 640, 641 (Okla. 2012).

emphasis on the physical component, it would be more prudent for experts to focus on whether or not the injury was caused by a workplace event.

Even though removing the physical injury requirement would not eliminate the battle of the experts, the resources expended by the parties would be more appropriately channeled into considering the merits of the case, as opposed to peripheral issues.¹³⁷ For example, in *McKenzie v. Mental Health Care, Inc./Summit Claims Center*,¹³⁸ the “[c]laimant, a registered nurse, worked in a treatment center that house[d] patients with behavioral and mental disorders.”¹³⁹ While at work, the claimant was struck in the neck and throat by a violent patient and, as a result, was diagnosed with laryngeal contusion and vocal cord hematoma.¹⁴⁰ “These physical injuries required medical treatment,” and “the employer[] accepted these claims as compensable.”¹⁴¹ However, the claimant also claimed psychiatric injuries, including PTSD, and requested treatment by a psychiatrist.¹⁴² The employer alleged the psychiatric injuries were not compensable, and the parties argued before the Judge for Compensation Claims (JCC).¹⁴³ The JCC ruled in favor of the employer, and the claimant appealed.¹⁴⁴

On appeal, the district court remanded because the parties misunderstood the “nuances” of the statute.¹⁴⁵ Specifically, the parties did not understand the differences between a mental or nervous injury “accompanying” a physical injury, as opposed to a mental or nervous injury “manifesting” as a result of an earlier physical injury.¹⁴⁶ Thus, even after arguing before the JCC and district court, neither the JCC nor the district court judge reached the merits of the claim.¹⁴⁷ Had there been no physical injury requirements, the parties could have saved the time and resources spent understanding the semantics of the statute and instead could have argued the merits of the case.

Finally, focusing on the merits of claims will produce more equitable results. Claimants, even if ultimately unsuccessful, would gain the dignity of having the merits of their claim heard. Over the past several decades, research has established that litigants are more likely to

137. See LARSON, *supra* note 38, § 1.03.

138. 43 So. 3d 767, 768 (Fla. Dist. Ct. App. 2010).

139. *Id.* at 768.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 771.

146. *Id.* at 770.

147. *See id.* at 771.

be satisfied with the outcome when they perceive that a decision-making process is fair.¹⁴⁸ Thus, if claimants are able to focus on the core issue—whether they sustained a workplace injury—as opposed to the peripheral issue of how their mental injury fits in with physical injury requirements, claimants will be more likely to feel as if they were heard.

b. Statutory exceptions to the physical injury rule are so narrow that they are inadequate to protect workers that sustain work-related mental injuries

Some states have exceptions to their physical injury rules that allow claimants to recover for mental injuries if they are victims of a crime, even when there is no physical component.¹⁴⁹ Though such exceptions are a step in the right direction, they do not go far enough in allowing employees to recover for mental injuries. “Victim of a crime” exceptions typical of the physical injury rule are very limited in their reach and only allow a small group of workers to recover for their mental injuries.

For example, a convenience store clerk who is robbed at gunpoint is likely able to recover for PTSD triggered by the robbery.¹⁵⁰ However, this exception is still not helpful to a wide array of people. Workers who experience workplace mental injuries that do not include a physical component or who are not the victim of a crime are not helped by this exception. For example, the claimant in *City of Norman v. Helm*, who suffered from PTSD after responding to an incident where two young boys suffocated in the trunk of a car on a hot summer day,¹⁵¹ would not be helped by the exception to the physical injury rule, as he was not a victim of a crime. All workers, not just those who are victims of crime, deserve to have their mental-mental injuries compensated.¹⁵²

2. MENTAL INJURY: THE IMPORTANCE OF SEMANTICS

The second component of defining “accidental injury” is to define mental injury. While workers’ compensation statutes among the 50 states are not uniform, they often use similar terminology.¹⁵³ However, this is

148. See JOHN THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS 77 (1975).

149. See, e.g., ARK. CODE ANN. § 11-9-113 (2012).

150. See *Ritchie Grocery v. Glass*, 16 S.W.3d 289, 290 (Ark. Ct. App. 2000).

151. *City of Norman v. Helm*, 291 P.3d 640, 641–42 (Okla. 2012).

152. Further, workers’ compensation systems need to be equipped to compensate mental-mental injuries and should not rely on ad hoc procedures.

153. For example, most, if not all states use the term “occupational disease,” though the specifics of the definition may vary from state to state. See, e.g., ALA. CODE

not so when it comes to defining mental injury.¹⁵⁴ States use a plethora of terms to describe mental injuries, including: “mental injury caused by mental stress”,¹⁵⁵ “mental injury, illness or condition”,¹⁵⁶ “psychiatric injury”,¹⁵⁷ and “mental and nervous injuries.”¹⁵⁸ While all of these terms appear to include a diagnosis of PTSD, states need a term that is clear and encompasses all mental conditions. Semantics are especially important in workers’ compensation statutes because the definition of a given term can be altered from its general meaning to limit compensability. For example, in Minnesota, “mental impairment” is statutorily defined as exclusively including PTSD.¹⁵⁹ However, in Tennessee “mental injury” has a much broader statutory definition that includes any “loss of mental faculties or a mental or behavioral disorder.”¹⁶⁰ Thus, defining mental injury is critically important not only to whether a state’s workers’ compensation system will cover PTSD, but also to whether other mental injuries such as anxiety disorders will be covered. The pragmatic approach to defining mental injury is for policy makers to adopt a definition that is broad enough to cover a wide range of mental disorders yet explicitly states PTSD as one of the covered disorders.¹⁶¹ This approach balances two competing concerns. First, this approach reduces the risk of having so narrow a definition that PTSD is the only mental disorder covered.¹⁶² While employers and claimants with PTSD may be more supportive of such a restrictive definition, in the aggregate, such a definition would likely hurt employees who suffer from other mental disorders. Also, such a restrictive definition would make it difficult for policy makers who want to cover a wide array of mental injuries, as it would be absurd for policy makers to list *every* mental disorder that is covered under workers’ compensation. Second, by policy makers adopting a broad definition of mental injury while clearly stating that PTSD is covered, the concern that an employer will argue that a claimant’s PTSD does not meet the definition of mental injury will be alleviated.

§ 25-5-110 (LexisNexis 2007); MINN. STAT. ANN. § 176.011 (West Supp. 2015); ME. REV. STAT. ANN. tit. 39-A, § 603 (2001); R.I. GEN. LAWS § 28-34-1 (2003).

154. Compare ALASKA STAT. § 23.30.010 (2012), and ARIZ. REV. STAT. ANN. § 23-901 (2012), with CAL. LAB. CODE § 3208.3 (West 2011).

155. ALASKA STAT. § 23.30.010.

156. ARIZ. REV. STAT. ANN. § 23-901.11.

157. CAL. LAB. CODE § 3208.3.

158. FLA. STAT. ANN. § 440.093 (West 2009).

159. MINN. STAT. ANN. § 176.011, subd. 15(d) (West Supp. 2015).

160. TENN. CODE ANN. § 50-6-102(16) (2014).

161. See *supra* Part II.A.1.

162. See, e.g., MINN. STAT. ANN. § 176.011, subd. 15(d).

C. Causal Nexus Requirement: Setting the Parameters for What Injuries Are Covered by Workers' Compensation

The second of the two main components of workers' compensation statutes is that injuries must "aris[e] out of and in the course of employment."¹⁶³ This is known as the "causal nexus requirement."¹⁶⁴ This determination is critically important because it provides the parameters for what injuries are sufficiently connected to the workplace to receive compensation.

This Section argues that the model "causal nexus" definition offered appropriately balances the fairness and efficiency concerns of the workers' compensation system. First, by adopting general exclusions, the model statute provides employers with the ability to effectively run their businesses and manage their employees. Second, out of the two categories of causal nexus standards—subjective and objective—the model statute adopts an objective causal nexus standard. In doing so, the model statute provides the flexibility and discretion that allows fact finders to undertake the individual assessment necessary to exclude fraudulent claims without categorically eliminating classes of workplace injuries.

1. GENERAL EXCLUSIONS

Most workers' compensation statutes that cover mental injuries have certain standard exclusions. These exclusions typically state that mental injuries that result "from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer" do not arise out of or in the course of employment.¹⁶⁵ Such exclusions, while seemingly standing for the proposition that not *every* workplace injury deserves compensation, are quite necessary.

Pragmatically speaking, for workers' compensation systems to be fair and efficient, not every injury will be compensable. General exclusions are necessary to ensure that employers are able to effectively run their businesses, as employees encounter "countless emotional strains" during their working lives.¹⁶⁶ While the workers' compensation system certainly seeks to provide coverage for workplace injuries, it does not, and should not, do so at the price of severely inhibiting an

163. LARSON, *supra* note 38, § 1.01.

164. Inman, *supra* note 92, at 474.

165. See ALASKA STAT. § 23.30.010 (2012).

166. *Sch. Dist. No. 1, Vill. of Brown Deer v. Dep't of Indus., Labor & Human Relations*, 62 Wis. 2d 370, 378, 215 N.W.2d 373 (1974).

employer's ability to interact with and manage its employees. And though employers can certainly go too far¹⁶⁷—thereby not meeting the good faith requirement—generally, employers need to be able to discipline, evaluate, demote, transfer, and terminate their employees without fear of being liable for causing mental injuries that are the result of such actions.

2. SUBJECTIVE CAUSAL NEXUS REQUIREMENT

The subjective causal nexus standard is the most liberal and least restrictive standard for determining causation.¹⁶⁸ It is rooted in the eggshell rule of tort law that “the defendant must take the victim as the defendant finds him or her.”¹⁶⁹ Thus, foreseeability does not affect the defendant's liability, meaning that “[a]n injured person is entitled to recover full compensation for all damages that proximately result from a defendant's tortious act, even if some or all of the injuries might not have occurred but for the plaintiff's preexisting physical condition, disease, or susceptibility to injury.”¹⁷⁰

The Michigan Supreme Court, in *Deziel v. Difco Labs, Inc.*,¹⁷¹ articulated the subjective causal nexus standard.¹⁷² *Deziel* was a consolidation of three cases that concerned when mental injuries were compensable.¹⁷³ The lead case concerned Deziel, an employee of Difco responsible for “handling test tubes, mixtures and various chemicals.”¹⁷⁴ In January of 1969, “a test tube that [Deziel] was filling broke, causing glass to get into her eye.”¹⁷⁵ Three months later, in April, a test tube filled with iodine that Deziel was working with slipped from her hand and hit the table, causing iodine to splatter around Deziel's eyes.¹⁷⁶ Deziel did not return to work after the April incident and filed a workers' compensation claim asserting that she could not work “because of pain in the back of her eyes, anxiety, headaches, tiredness, and occasional dizziness, nausea and tightness in the chest.”¹⁷⁷ Doctors found no

167. *Id.* (“We do not believe that an average man who, after being criticized and berated by an employer or whomever for a significant period of time, suffers a mental injury should be denied compensation.”).

168. Tucker, *supra* note 126, at 483.

169. 2 JACOB A. STEIN, STEIN ON PERSONAL INJURY DAMAGES § 11:1 (3d ed.).

170. *Id.*

171. 268 N.W.2d 1 (Mich. 1978).

172. *Id.*

173. *Id.*

174. *Id.* at 3.

175. *Id.*

176. *Id.*

177. *Id.*

physical cause for Deziel's symptoms.¹⁷⁸ However, the employer's psychiatrist presented a disease theory "that Deziel ha[d] always suffered from an obsessive-compulsive character which attached to the eye injury and developed into a psychosis."¹⁷⁹ The Michigan Supreme Court held:

[T]hat in cases involving mental (including psychoneurotic or psychotic) injuries, once a plaintiff is found disabled and a personal injury is established, it is sufficient that a strictly subjective causal nexus be utilized . . . to determine compensability. Under a "strictly subjective causal nexus" standard, a claimant is entitled to compensation if it is factually established that claimant honestly perceives some personal injury incurred during the ordinary work of his employment "caused" his disability. This standard applies where the plaintiff alleges a disability resulting from either a physical or mental stimulus and honestly, even though mistakenly, believes that he is disabled due to that work-related injury and therefore cannot resume his normal employment.¹⁸⁰

Thus, "[t]he focal point of [the subjective causal nexus] standard is the plaintiff's own perception of reality."¹⁸¹

This standard has not fared well. The Michigan Legislature later repudiated the *Deziel* holding by enacting an amendment that "[m]ental disabilities [shall be] compensable [when] arising out of actual events of employment, not unfounded perceptions thereof."¹⁸² Other states have also "emphatically rejected the doctrine," and rightfully so.¹⁸³ The subjective causal nexus standard is *too* liberal and, as a result, conflicts with the basic premise of the workers' compensation system: "[a]lthough mental injuries have a largely subjective component, the primary issue remains whether the injured worker's disability was *caused* by employment."¹⁸⁴ "The subjective causal nexus standard frustrates this factual inquiry by only asking whether the worker actually *believes* the disability has been caused by employment."¹⁸⁵ Thus, by being overly broad, the subjective causal nexus standard "fail[s] to deter fraudulent claims and allow[s] a weak causal link between the job stress and the

178. *Id.*

179. *Id.*

180. *Id.* at 11 (emphasis omitted) (citations omitted).

181. *Id.* (emphasis omitted).

182. MICH. COMP. LAWS ANN. § 418.301(2) (West Supp. 2014).

183. LARSON, *supra* note 3, § 56.04[4].

184. Tucker, *supra* note 126, at 483.

185. *Id.*

mental injury.”¹⁸⁶ Such a standard, while better for employees, is not the appropriate balance between efficiency and fairness.

3. OBJECTIVE CAUSAL NEXUS STANDARD

Objective causal nexus standards are most common among workers’ compensation statutes.¹⁸⁷ There are three objective standards used to determine whether a given injury is sufficiently connected to the workplace to receive compensation.¹⁸⁸ Of the three standards—the gradual stress test, the unusual stimulus test, and the sudden stimulus test¹⁸⁹—the gradual stress test most appropriately balances the goals of the workers’ compensation system.

The gradual stress test provides for broad coverage of mental injuries while not being overly broad like the subjective causal nexus standard. As articulated by the Supreme Court of Indiana: “Whether the injury is mental or physical, the determinative standard should be the same. The issue is not whether the injury resulted from the ordinary events of employment. Rather, it is simply *whether the injury arose out of and in the course of employment*.”¹⁹⁰ Such coverage upholds the basic policy of workers’ compensation systems: providing automatic benefits to employees who suffer from workplace injuries.¹⁹¹

The workers’ compensation system is based on the assumption that workers are normally exposed to the risk of injury, and that employers should ordinarily bear a portion of the cost.¹⁹² “In the nineteenth century, industrial accidents were commonly viewed as easily avoidable by the worker,” and “[u]nfortunately, current judicial attitudes toward mental and emotional illness mirror nineteenth-century attitudes toward industrial accidents.”¹⁹³ By focusing on whether or not the stress leading up to a mental injury arose from the claimant’s employment, as opposed to requiring that the stress was sudden or unusual, the gradual stress standard recognizes that stress-induced injuries are a type of injury that workers are exposed to.¹⁹⁴ Thus, the school teacher who experiences a

186. Ruhga, *supra* note 107, at 867.

187. See Ashley Bailey, Appendix: Post Traumatic Stress Disorder (PTSD) Compensability Among State’s Worker’s Compensation Statutes when the Result of a Mental-Mental Injury (Apr. 3, 2014) (unpublished manuscript) (on file with author).

188. See *supra* Part I.C.

189. See *id.*

190. *Hansen v. Von Duprin, Inc.*, 507 N.E.2d 573, 576 (Ind. 1987) (emphasis added).

191. LARSON, *supra* note 38, § 1.01.

192. Tucker, *supra* note 126, at 482.

193. *Id.*

194. See *supra* Part I.C.1.

school shooting is just as able to receive compensation for his or her PTSD as the emergency medical technician who responds to fatal and horrific car accidents.

In contrast, the “sudden” and “unusual” causal nexus standards are arbitrary and unfair to workers.¹⁹⁵ Much like the physical injury requirement, requiring that the stimulus causing a mental injury is “sudden” or “unusual” does not guarantee the legitimacy of the claims, nor does it guarantee that there is a causal link.¹⁹⁶ A unique hurdle of determining whether a causal nexus exists between the workplace and a given mental injury is whether or not outside sources have contributed to injury.¹⁹⁷ An employee’s home life, including personal relationships, family, and financial stresses can undoubtedly contribute to his or her mental health.¹⁹⁸ Thus, workers’ compensation systems must be concerned with how many outside sources have contributed to any given injury.

The more stringent objective causal nexus standards, such as the “unusual” and “extraordinary” stress tests, attempt to ensure that a given stimulus is in fact the cause of a mental injury.¹⁹⁹ Although it may be more likely that the mental injury is connected to the workplace, there are no guarantees when a given stimulus involves an unusual or extraordinary circumstance. As such, policy makers are faced with the decision of either utilizing a higher causal nexus standard in hopes of excluding more fraudulent and nonfraudulent claims or utilizing a more liberal causal nexus standard with the knowledge that more fraudulent claims may be adjudicated.

It is possible that more stringent causal nexus requirements may better exclude fraudulent claims.²⁰⁰ However, they also almost certainly result in the exclusion of legitimate claims. For example, in *Bentley v. Spartanburg County*,²⁰¹ a deputy sheriff was not able to recover for his

195. Ruhga, *supra* note 107, at 866. These standards are used by the majority of states that compensate mental-mental injuries. *See supra* note 63.

196. Ruhga, *supra* note 107, at 866.

197. *Id.* at 852.

198. *Id.* at 843.

199. *Id.* at 856.

200. For example, if a state compensates mental-mental injuries only when caused by a sudden or unusual stimulus, a claimant who fraudulently claims that she has sustained PTSD as a result of gradual stress associated with her job will not be compensated. However, if a claimant brings that same claim nonfraudulently and has, as a result of the continued stress of her job, sustained PTSD, she will also not be compensated. Simply put, it may be easier to fact check and believe a claimant suffering from mental injuries caused by sudden and unusual events, such as school shootings, than it is to fact check and believe that a claimant has sustained a mental injury due to many minor stressors over a number of years.

201. 730 S.E.2d 296 (S.C. 2012), *reh’g denied* (Aug. 10, 2012).

PTSD following a job-related fatal shooting because the incident was not extraordinary or unusual, as the claimant knew that he may have to use deadly force on the job, including firing his weapon.²⁰² Employers and policy makers need to move beyond “nineteenth-century attitudes” and recognize that stress-induced injuries are a risk that workers face, much like industrial risks.²⁰³

Further, “the creation of any standard that differentiates between ‘extraordinary’ and ‘usual’ injuries will inevitably lead to recurrent and expensive litigation.”²⁰⁴ Determining whether a job risk is unusual “necessarily requires judgments about ‘what *should* be considered a usual part of work and life.’”²⁰⁵ Rather, employers and employees should spend time litigating the merits of the case as opposed to peripheral issues.

CONCLUSION

“The nature of a mental injury does not make it less deserving of coverage.”²⁰⁶ As this Comment has shown, the time has come for all employees to receive compensation when a workplace accident triggers a diagnosis of PTSD. Not only is the spirit of the workers’ compensation system left unfulfilled when employees are denied compensation for mental-mental injuries, but denying such compensation also ignores our current medical and scientific understanding that mental injuries are very real.

If the proposed model statute had been utilized by Minnesota and Connecticut, the teachers and first responders involved in the Red Lake and Sandy Hook school shootings would have been compensated for their PTSD. And though the compensation would not have undone the horrific events the teachers and first responders experienced, it would have conveyed to them that their mental-mental injuries were just as real and deserving of compensation as any physical injury. In short, had Minnesota and Connecticut adopted the approach advocated by the model statute, their workers’ compensation systems would have fulfilled their purpose.

Providing workers’ compensation coverage for mental-mental injuries such as PTSD is in line with the reality that, like physical industrial injuries, workers are often exposed to stress injuries. By

202. *Id.* at 302.

203. Tucker, *supra* note 126, at 482–83.

204. *Id.* at 482.

205. *Id.* (quoting Martha T. McCluskey, *The Illusion of Efficiency in Workers’ Compensation “Reform,”* 50 RUTGERS L. REV. 657, 801 (1998)).

206. *State v. Cephas*, 637 A.2d 20, 25 (Del. 1994).

crafting statutes such as the model statute provided in this Comment, policy makers can work toward finding a better balance between fairness and efficiency within workers' compensation systems. Specifically, by expanding the definition of "accidental injury" to include mental-mental injuries, policy makers can utilize the causal nexus requirement as a way to limit compensable injuries. Following this approach eliminates the need for mental-mental injuries to be denied outright and allows the purpose of workers' compensation to be fulfilled as policy makers seek to find the appropriate balance between fairness and efficiency.