

# The Law & Psychology in Workers' Compensation Claims

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The objective of this article is to describe the legal foundation relevant to workers' compensation (WC) law, focusing on the compensability of psychological and psychiatric injuries in light of work-related injuries. The authors will also address the necessary steps to a solid and thorough forensic psychological evaluation in WC cases where psychological/psychiatric injury is in question.



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In Ohio, the WC system is administered by a government agency, the Bureau of Workers' Compensation. Claim disputes are adjudicated by the Industrial Commission of Ohio (with certain appeal rights to court). In most other states, it is managed by private parties, usually insurance companies. Traditionally before

WC law, an employee injured in the course of his employment had to be compensated through tort law. Employers could raise legal defenses such as contributory negligence, assumption of the risk, and the fellow servant rule. Many families were ultimately not compensated for their WC claims. The WC system was designed to change these results. Subsequently, employers have a duty to insure their workers against work-related injuries and except in certain situations, they must waive the various defenses available in tort.

The goal of workers' compensation law is to both compensate and rehabilitate the worker who is disabled or partially disabled by a work-related injury, so that he can resume a productive role in society. Although this system has noble objectives, the majority of claimants report mistrust, stigmatization, payment delays, and refusal of insurer personnel to pay benefits.

## COMPENSABILITY OF PSYCHIATRIC CONDITIONS UNDER OHIO WORKERS' COMPENSATION LAW

### Statutory Definition of Injury

As part of Ohio Senate Bill 7, the Ohio legislature revised the definition of injury under Ohio Revised Code (O.R.C.) §4123.01(C)(1). The effective date of this revision was October 11, 2006. The statute provides in relevant part as follows:

"Injury" includes any injury, whether caused by external or 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 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.

The change in the definition of "injury" eliminates the opportunity for a claimant to recover benefits for a psychiatric condition when there is no accompanying physical injury, except in situations where the claimant is forced by physical threat of harm to engage in sexual conduct. The definition of sexual conduct is directly taken from O.R.C. Chapter 29, the Criminal Code, and requires actual touching. Prior to the amendment of the definition of injury under O.R.C. Chapter 4123, psychological injuries caused solely by sexual assault where there was no physical injury were not compensable (*Martin v. Pechiney Plastic Packaging*, 2004 Ohio 147 (2004)).



Even before the recent amendment of the statutory definition of "injury," the Ohio Supreme Court confirmed that an employee cannot recover for purely psychological injuries under the WC system; rather a mental condition is a compensable workers' compensation injury only when it is accompanied by a physical injury. *Bunger v. Lawson Company*, 82 Ohio St. 3d 463, 1998 Ohio 407; *McCrone v. Bank One Corp.*, 107 Ohio St. 3d 272, 2005 Ohio 6505, 839 N.E.2d 1. In *Bunger*, the Ohio Supreme Court held that while claimant could not recover for mental stress related to the employee's work conditions without that condition arising out of a physical injury, it did find that the employee who suffered the psychological injuries during a robbery could seek recovery through common law causes of action. The Ohio Supreme Court in *McCrone* held that the definition of "injury" under O.R.C. §4123.01 (C)(1), permitting compensation for mental conditions only when it is accompanied by physical injury, does not violate the equal protection clause of the U.S. Constitution since the State has a legitimate interest in protecting the self-supporting nature of the WC fund.

Also prior to the amendment of the definition of injury under Ohio's WC statute, an injured worker could recover for psychiatric injuries sustained as a result of *witnessing* a co-employee sustain a compensable (physical) injury at work pursuant to the Ohio Supreme Court's decision in *Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St. 3d 38; 2001-Ohio-236; 741 N.E.2d 121. This Supreme Court ruling was abrogated by the amended definition of injury in Ohio Senate Bill 7. However, the *Bailey* ruling arguably still applies to claims with dates of injury prior to October 11, 2006.

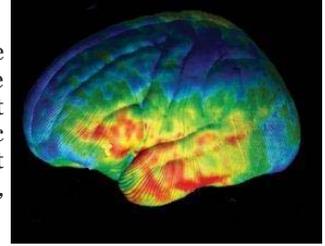
While an employee may seek compensation through Ohio's WC system for psychological injury arising out of a physical injury, an employee may also seek compensation under the WC system for physical injuries arising out of stress at work. *Ryan v. Connor* (1986), 28 Ohio St. 3d 406; 503 N.E.2d 1379 (finding that an employee could receive WC benefits for a heart attack caused by stress at work.)

## Proving the Psychiatric Condition Compensable

The Industrial Commission's Joint Resolution R03-1-01 (February 10, 2003) provides as follows:

All motions or applications requesting the recognition of a condition of a psychiatric or psychological nature shall be accompanied by supporting evidence consisting of a medical report by either a licensed psychiatric specialist or a clinical psychologist, or a report by a licensed professional clinical counselor, or a licensed independent social worker.

Under O.R.C. §4123.84, an employee's WC claim for a psychiatric condition must be filed within two years of the date that the employee knew, or should have known, of his psychiatric condition. In determining whether the employee knew or should have known of the psychiatric condition, it is not necessary that the employee be told that he is suffering from a specific named psychiatric condition; rather, an employee discovers that he has a psychiatric condition if the facts reveal that the employee knew, or should have known, the existence of the condition and that the condition was related to his or her previous physical injury. *Tatum v. Buckeye Steel Castings Company*, 1996 Ohio App. LEXIS 5829.



### Causation

One aspect of psychological injuries in the WC context that is often overlooked by physicians and attorneys is the requirement that the claimant establish that the previously allowed physical injury is the proximate cause of the new psychological injury. Proximate cause must be established by a reasonable probability, not a mere possibility, of expert medical testimony. *Shumaker v. Oliver B. Cannon & Sons, Inc.* (1986), 28 Ohio St. 3d 367; 504 N.E.2d 44. Under workers' compensation laws, an injury may have more than one proximate cause. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St. 3d 585; 575 N.E.2d 828. In Ohio, when two factors combine to produce damage or illness, each is a proximate cause. *Norris v. Babcock & Wilcox Co.* (1988), 48 Ohio App. 3d 66; 548 N.E.2d. In such cases, if it is shown that the non-work related causes would have produced the psychological condition independently, then the condition is not proximately caused by the work injury. Stated another way, if, but for the work injury, the claimant would not have sustained the psychological condition, then the psychological condition is compensable. See: *Jones v. Medical Mutual of Ohio*, 2004 Ohio 746; 2004 Ohio App. LEXIS 705; *Bell v. Babcock & Wilcox Co.* 1993 Ohio App. LEXIS 4387.

The fact that a claimant's psychiatric condition pre-existed the date of injury, and that he suffers from other non-work related medical conditions and has multiple personal problems causing stress and anxiety is generally sufficient for a court to determine that the work injury is not a proximate cause of the psychiatric condition. See *Jones v. Medical Mutual of Ohio supra*.

In addition, the question of what it means for a psychiatric condition to "arise from" an injury or occupational disease deserves closer inspection. In *Mohler v. Mayfield*, 1989 Ohio App. LEXIS 1119, the court affirmed the trial court's judgment against the plaintiff based on evidence that an employee's psychiatric condition arose from the difficulty he had in pursuing his workers' compensation claim, rather than the injury or occupational disease itself.



Intervening causes of a psychological injury can sever the chain of causation in a WC claim for a psychological allowance. *Stiller v. Leaseway of Ohio*, 1996 Ohio App. LEXIS 3919. In *Stiller*, the court upheld a trial court's decision denying the plaintiff's claim for additional allowance of a psychological condition where the claimant did not file for the additional allowance until six years after the injury, which coincidentally was the same time that his disability benefits were terminated causing him great financial stress. A claimant worrying about his WC physical injury and the stress in litigating the WC claim does not establish the requisite proximate cause between the physical injury and the psychological condition. See *Harper v. LTV Steel Co.* (1993), 68 Ohio St. 3d 1409; 623 N.E.2d 566.

One other type of psychiatric condition that may be compensable under a WC claim is the *aggravation* of a pre-existing psychiatric condition. As part of Senate Bill 7, Ohio's WC statute was recently revised to require that the aggravation be *substantial* (O.R.C. Section 4123.01(C)(2)). The claimant must present *objective* medical evidence to support this finding. In addition, if an aggravation of a pre-existing condition is allowed in the claim, no compensation or benefits are payable for that condition once it has returned to the level that would have existed if no injury had occurred.

## FORENSIC PSYCHOLOGICAL/PSYCHIATRIC EXAMINATIONS IN WORKERS' COMPENSATION CASES

In the past, workers suffering from job-related psychological and psychiatric injuries were often denied compensation because of courts' suspecting malingering and the intangibility of mental injuries. Over time, courts have considered these mental injuries as compensable. Mental health professionals (psychologists and psychiatrists) have responded to these legal changes and are often asked to evaluate mental injuries in WC cases. The forensic examiners are asked by attorneys and insurance carriers to perform independent medical examinations (IME's) or independent psychological examinations (IPE's). For the purposes of this article, the authors will focus on the assessment rather than the treatment in WC cases.

For there to be compensation in a WC case, there must be a direct causal connection between the work conditions and the physical or mental impairment. Insurance companies often define disability narrowly as an inability to adequately perform the job functions of the job the claimant had before they experienced the injury. A mental health evaluation will often include a formal psychiatric diagnosis which often will support a disability that entitles a claimant to damages.

Popular emotional-related diagnoses related to WC cases include depression and posttraumatic stress disorder (PTSD). The physically injured person will often claim depressive features such as loss of interest in activities, sadness, isolation, poor energy, fatigue and low self-esteem - due to their inability to work - and are often physical immobility. If they experience a markedly threatening event, they may claim stress from this trauma.

Claimants who qualify for PTSD often have coexisting diagnoses of mood or anxiety disorders and some are prescribed psychotropic medications. Many claimants who suffer from physical injuries will present with Somatoform Disorders in which there is a presence of physical symptoms that suggest a general medical condition, and yet are not fully explained by a general medical condition. In many cases, there is an underlying psychological element to the physical symptoms.

It is often the case that psychiatric disorders have similar and overlapping symptoms. It is important for the forensic examiner to differentiate these disorders from one another. Some frequent psychiatric disorders in WC cases include but are not limited to:

- (1) Depressive Disorders;
- (2) Posttraumatic Stress Disorder & Acute Stress Disorder;
- (3) Somatization Disorder;
- (4) Conversion Disorder;
- (5) Pain Disorder due to psychological factors;
- (6) Hypochondriasis.

## Malingering Mental Illness

One psychiatric diagnosis that is quite relevant in these cases and should always be assessed for is *malingering*. Malingering is a deliberate behavior for a known external purpose. The behavior is often the fabrication of psychiatric symptoms of mental illness. The reason why malingering is so relevant in WC cases, and in torts for emotional distress rising out of a personal injury claim, is that some individuals will fabricate symptoms with the goal of being compensated financially. Accordingly, malingering should always be evaluated in these types of claims.

Malingering can occur in the context of other mental illnesses (one can be malingering mental illness and yet legitimately and genuinely be mentally ill). Malingering can be expressed in different ways. The person may falsify all symptoms or he may partially mangle by having genuine symptoms and yet exaggerating the impact which they have upon daily functioning. Another form of malingering is false imputation in which the individual has valid symptoms but is dishonest as to the source of the problems, attributing them, for example, to an automobile accident when the cause was in fact an injury occurring in the home.

In WC cases, one can fabricate a medical condition and report a series of non-existent problems. An example could include a claimant engaging in months of chiropractic treatment for low back pain, or physical therapy and report no improvement. This is not to be confused with those patients who have legitimate serious injuries that fail to respond to conservative treatment. The malingeringer may endorse a significant discrepancy between his symptoms and the medical and mental health assessment findings. They may argue with medical professionals' advice and assessments and fail to cooperate with treatment suggestions.



Given the importance of providing a thorough evaluation to the referral source, a forensic examiner should always incorporate an assessment for malingering. The forensic psychologist can consider instruments including:

- (1) Validity Indicator Profile (VIP);
- (2) Structured Interview of Reported Symptoms (SIRS);
- (3) Test of Memory Malingering (TOMM);
- (4) Minnesota Multiphasic Personality Inventory (MMPI-2);
- (5) Personality Assessment Inventory (PAI);
- (6) Structured Interview of Malingered Symptomatology (SIMS).

## Concluding Remarks

A useful workers' compensation psychological evaluation will contain the following elements:

- (1) Gathering collateral information, especially relevant to the injury, rehabilitation/treatment, and prior psychological/psychiatric records. For example, many back injury cases will consist of MRI examinations, neurological reports, back injury medical records, physical therapy, chiropractic records, and will involve several medical disciplines and numerous specialists who prescribe the claimant multiple medications;
- (2) A thorough assessment of mental disorder including differentiating diagnoses;
- (3) An assessment of malingering;
- (4) An assessment of the baseline state of psychological functioning prior to the work-related injury;
- (5) Assess the causal connection factor between the work-related injury and the reported mental injury.

Finally, the forensic examiner must be aware of the potential for bias in the evaluation. Specifically, the examiner is not obligated to satisfy the party who pays for the evaluation by setting forth a negative evaluation and ultimately failing to establish a link between the work injury and the mental injury. However, there is a financial incentive for the forensic examiner to find for the injurer in order to receive more future referrals.

The forensic examiner must consider multiple sources of information, attempt to keep an unbiased approach to the examination, consider the adversary nature of the examination and its impact on the claimant, assess for malingering of the claimant, and submit a carefully written, data-based report with well-documented findings while considering the serious psycho-medical-legal consequences of the report.