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ARTICLES

REDUCING MANAGERIAL DISTRESS ABOUT STRESS: AN ANALYSIS AND EVALUATION OF ALTERNATIVES FOR REDUCING STRESS-BASED WORKERS' COMPENSATION CLAIMS

Christy L. DeVader*
Andrea Giampetro-Meyer**

I. INTRODUCTION

The rise in stress-based workers' compensation claims threatens to destroy some states' workers' compensation systems.¹ Other states that are just beginning to feel the strain triggered by burgeoning stress-based claims may one day face a workers' compensation system on the verge of collapse.² More importantly, excess job stress jeopardizes the quality of life of our country's most important business resource—employees.³

The purpose of this article is to consider ways in which practicing attorneys and employment relations managers can encourage supervisors to reduce stress-based workers' compensation claims. Section II explains the workers' compensation system. Section III examines the rise in stress-based

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1. See Thompson, *Fighting the High Cost of Worker's Comp*, NATION'S BUS., Mar. 1990, at 20-28. This Article highlights problems in several states' workers' compensation systems. California appears to be suffering more than other states from the rise in stress-based workers' compensation claims. See *California's Radical Proposal*, NATION'S BUS., Mar. 1990, at 22.

2. See generally Thompson, *supra* note 1. See also DeCarlo, *Compensating "Stress" in the '80s*, 52 INS. COUNSEL J., Oct. 1985, at 681. This author presents data about the rise in stress-related workers' compensation cases.

3. See generally M. GRELLER & D. NEE, FROM BABY BOOM TO BABY BUST: HOW BUSINESS CAN MEET THE DEMOGRAPHIC CHALLENGE 1 (1989).

workers' compensation claims and offers possible explanations for this rise. Section IV reviews the legal issues that have arisen as a consequence of this relatively new kind of workers' compensation claim and provides an eclectic review of how states resolve these issues. Section V draws from social science research and outlines major alternatives for reducing stress-based claims. The final section evaluates the alternatives presented in Section V from both a legal and managerial perspective. This section considers the delicate balance between employer and employee rights. It also recognizes the complicated interrelationship among the factors of health insurance costs, employee turnover, productivity, and quality of work life that generate tension which underlies this pressing employment issue of the 90's.

II. BACKGROUND

Workers' compensation statutes were designed to compensate employees for physical injuries. These statutes were enacted in most states in the early twentieth century. In the nineteenth century, employees who were injured on the job could sue their employers at common law, but typically lost.⁴ Courts required employees to prove fault on the employer's part, which was difficult.⁵ Employees who were successful in proving the employer's negligence often ultimately lost their cases because employers were able to prove one of three defenses available to them—assumption of risk, contributory negligence and the fellow servant rule.⁶ When employees prevailed in spite of the preceding obstacles, their awards were often low because medical bills, attorney fees and other expenses were deducted from them.⁷ Physical injuries contin-

4. Before states adopted workers' compensation laws, approximately eighty percent of injured employees lost their cases against the employer for work-related injuries. S. HOROVITZ, CURRENT TRENDS IN BASIC PRINCIPLES OF WORKMEN'S COMPENSATION 467-69 (1947).

5. See Comment, *The Exclusive Remedy Provision of Michigan's Workers' Disability Compensation Act*, 63 U. DET. L. REV. 453, 453 (1986).

6. See *id.*

7. See Comment, *supra* note 5, at 453. Because these common law theories typically precluded recovery against the employer, the employee's legal recovery was usually limited to proceeding against a co-worker who may have caused the accident. Co-workers typically had little money, so as a practical matter injured employees had no remedy available to them. See R. GILBERT & R. HUMPHREYS, JR., MARYLAND WORKERS' COMPENSATION HANDBOOK 14 (1988).

ued to rise in the workplace as the industrial revolution changed America.⁸ The country was faced with workers who could not work to full capacity, and dependents of those workers who needed financial support.⁹ States began to consider adopting workers' compensation laws.¹⁰

States examined laws enacted by European legislatures in the late nineteenth century for guidance in enacting their own laws. Lawmakers paid particular attention to British and German approaches to workers' compensation, and determined that these statutes could promote safety without undermining technological success.¹¹

In 1902, Maryland became the first state in the country to initiate a workers' compensation program.¹² The legislature established the "Employers and Employees Cooperative Insurance Fund," which benefited employees, but was both complicated and limited in coverage.¹³ By 1911, twenty-five states had enacted workers' compensation statutes.¹⁴ All of these laws offered employees an alternative to the problematic avenue of pursuing common law remedies for physical injuries.

Workers' compensation laws presently enforced in the states are varied regarding their specific provisions,¹⁵ but are consistent regarding their two primary goals. First, workers' compensation statutes aim to benefit employees accidentally injured on the job by providing immediate compensation for lost wages, medical expenses, and rehabilitation services without requiring employees to prove employer fault.¹⁶ Second, the statutes aim to benefit employers by

8. See R. GILBERT & R. HUMPHREYS, JR., *supra* note 7, at 14.

9. See R. GILBERT & R. HUMPHREYS, JR., *supra* note 7, at 14.

10. See R. GILBERT & J. HUMPHREYS, JR. *supra* note 7, at 14. Alternatives to workers' compensation existed. One, injured workers could become beggars. Two, states could have provided welfare to injured employees and their dependents.

11. See R. GILBERT & J. HUMPHREYS, JR., *supra* note 7, at 15-16.

12. See R. GILBERT & J. HUMPHREYS, JR., *supra* note 7, at 16.

13. See R. GILBERT & J. HUMPHREYS, JR., *supra* note 7, at 16. The Act benefited employees who worked in private transportation, quarry and mining operations, and municipal or private construction contract work. The law failed in less than two years because of the nominal amount of its coverage, its application to only death cases, and its inherent complexity.

14. See R. GILBERT & J. HUMPHREYS, JR., *supra* note 7, at 16.

15. See generally COMPENDIUM ON WORKERS' COMPENSATION (Nat'l Comm'n on State Workmen's Compensation Laws ed. 1973); *U.S. Chamber of Commerce, Analysis of Workers' Compensation Law 1982* (1982).

16. See, e.g., *Queen v. Agger*, 287 Md. 342, 412 A.2d 733 (1980);

providing them with immunity from negligence-based civil lawsuits.¹⁷ This delicate balance between employer and employee rights is reflected in a key provision in every workers' compensation statute, the exclusive remedy provision.

The exclusive remedy principle in workers' compensation legislation requires that an employee's only remedy for injuries suffered on the job is through the workers' compensation system.¹⁸ Injured employees may not pursue civil claims against their employers.¹⁹ Several courts have interpreted this exclusive remedy provision broadly. As a result, workers have given up the right to sue their employers at common law for nearly all claims, even claims for which no remedy is available under the workers' compensation system.²⁰

One specific feature of workers' compensation laws that has drawn attention recently is compensation for both physical and mental stress-based injuries. Before considering the legal issues triggered by stress-based injuries, this article considers why stress-based injuries are burgeoning in the United States today.

III. STRESS-BASED WORKERS' COMPENSATION CLAIMS: WHY ARE THEY ON THE RISE?

Although workers' compensation statutes were designed to remedy the economic devastation incurred by workers who were physically injured on the job as a consequence of physical accidents, these statutes are now often responding to the devastation incurred by workers who are physically or mentally injured on the job as a consequence of a stressful

Bethlehem-Sparrows Point Shipyard v. Damasiewicz, 187 Md. 474, 50 A.2d 799 (1947).

17. See, e.g., Brady v. Ralph Parson Co., 308 Md. 486, 520 A.2d 717 (1987); Larrimore v. American Ins. Co., 69 Md. App. 631, 519 A.2d 743 (1987); Wood v. Aetna Cas. & Sur. Co., 260 Md. 651, 273 A.2d 125 (1971).

18. Ballam, *The Workers' Compensation Exclusivity Doctrine: A Threat to Workers' Rights Under State Employment Discrimination Statutes*, 27 AM. BUS. L.J. 95, 95-96 n.2 (1989).

19. See, e.g., Flood v. Merchants Mut. Ins. Co., 230 Md. 373, 187 A.2d 320 (1963); Cox v. Sandler's, Inc., 209 Md. 193, 120 A.2d 674 (1956); Hart v. Sealtest, Inc., 186 Md. 183, 46 A.2d 293 (1946); Baltimore Transit Co. v. State, 183 Md. 674, 39 A.2d 858 (1944).

20. Ballam, *supra* note 18, at 108; see also Note, *The Treatment of Sexual Impairment Injuries Under Workers' Compensation Laws*, 30 HASTINGS L.J. 1207, 1229 (1979).

work environment. These statutes are increasingly used in the latter case. This section explains why this phenomenon is occurring.

The nature of work is changing. Accompanying these changes are new worker expectations, as well as new attitudes and behaviors towards employers.²¹ These changes indicate that the rise in stress-related claims witnessed by the courts since the early 1980's is not an anomaly.²² The Society for Human Resource Management reports that in 1988, stress-related workers' compensation claims accounted for 14 percent of all claims.²³ In fact, we can safely assume that employers and the courts have yet to experience the full effect of recent changes in the demographics of the U.S. work-force and the changing nature of work. Stress-related claims will continue to rise in future years.²⁴ What follows is a general consideration of the causes and prevalence of stress, followed by a more specific examination of the changes in work and workers that may explain the rise in stress-based workers' compensation claims.

A. *The Causes and Prevalence of Stress*

Physiological, medical, and social science researchers have given serious attention to stress and its causes and consequences only recently. As these researchers continue their studies and conduct more effective research, work stress has multiple causes.²⁵ The causes fall into several categories such as: organizational characteristics and processes, job demands and role characteristics, and individual characteristics and expectations.²⁶ Within each stress category, multiple sources of stress exist. For example, common job demands

21. See generally J. HALLETT, *WORK-LIFE VISIONS: REDEFINING WORK FOR THE INFORMATION ECONOMY* (1987).

22. See *In California from 1980 to 1988 Stress Claims Increased by 700% to 9,400*, *ISSUES IN HR*, Mar. 1990, at 6.

23. See *WORKPLACE MANAGEMENT*, Apr. 1990, at 5 (A newsletter of the Society for Human Resource Management) [hereinafter *WORKPLACE MANAGEMENT*].

24. See King, *Stress Claims are Making Business Jumpy*, *BUS. WK.*, Oct. 1985, at 152, 154.

25. See Beehr & Newman, *Job Stress, Employee Health, and Organizational Effectiveness: A Facet Analysis, Model, and Literature Review*, 31 *PERSONNEL PSYCH.* 665-700 (1978).

26. See A. BRIEF, R. SCHULER & M. VAN SELL, *MANAGING JOB STRESS* 66 (1981).

and role characteristics that cause stress include crowding, lack of privacy, poor spatial arrangements, noise, excessive heat or cold, inadequate lighting, air pollution, repetitive work, time pressures, competition, and conflict within or between groups.²⁷

Research can help indicate what factors can cause stress and what consequences are likely to result from repeated, prolonged, or intensive exposure to certain stressors. The intensive study of the relationship between stress and worker health and performance will continue at unprecedented levels. Some authors think that the increased media attention given to work stress in itself contributes to increased numbers of stress-related claims.²⁸

Researchers have hypothesized a relationship between an emotional response (stress) and physical health problems for decades.²⁹ Researchers also have found that the same jobs are more stressful for some incumbents than others. Some jobs that researchers have identified as stressful are not ones that are typically associated with high stress. These jobs include welfare workers, dentists, health technicians, waiters and waitresses, and nurses.³⁰ Other jobs associated with high stress include air traffic controllers, physicians, and managers.³¹

B. *Changes in Work*

One change in the nature of work over time has been that jobs are performed differently today. Identical jobs within an industry have changed over time. For example, an automobile assembler's job is much different in 1990 than the same job was in the early 1900s.³² Ford's original factory bears little resemblance to the auto plants of Saturn, GM, and Chrysler today.³³ The injuries and stresses commonly

27. *Id.*

28. See Fletcher, *Employers Facing More Mental Stress Claims*, BUS. INS., Apr. 13, 1987, at 34.

29. See generally P. ASTRANT & K. RODAHL, *TEXTBOOK OF WORK PHYSIOLOGY* (1970).

30. See A. BRIEF, R. SCHULER & M. VAN SELL, *supra* note 26, at 77-78.

31. See M. SINGER, *HUMAN RESOURCE MANAGEMENT* 371 (1990).

32. See generally J. HALLETT, *supra* note 21, at 72-79.

33. See generally Farver, *Factory of the Future: Turn the Lights On*, AUTOMATION, Apr. 1990, at 52; Maglitta, *Ford Parts Division Has A Better Idea*, COMPUTERWORLD,

experienced by a worker in the early 1900's are different than those experienced by a similar employee in the 1990's.³⁴

Specifically, employees' jobs today often require manipulating and using information.³⁵ In the past, workers performed jobs that required more physical than mental effort. Today, even employees in manufacturing settings often spend more time monitoring the production process and operating the equipment that performs the actual job than they actually spend doing the physical labor.³⁶

Second, another change in the nature of work is that the U.S. is rapidly shifting from a manufacturing to a service providing society.³⁷ Thus, the very nature of work is changing. Fewer members of the work-force are employed in blue collar and manufacturing occupations. The last decade has seen large increases in the numbers of white collar and service-oriented workers. The technology, work environment, task requirements, and social setting in which the work is performed differs greatly from that usually experienced by blue collar workers.³⁸ Clearly, for the majority of workers, the stresses of the job have changed. Although many jobs have a significant physical component, an equal or larger number of jobs have a significant mental (intellectual and social) component. Furthermore, work is not performed only at the workplace. In a recent survey, 70 percent of the managers said they took work home with them.³⁹

Employees recognize that work injury is caused not only by physical harm but by non-physical factors. Workers also indicate that their actual injuries in the workplace are not

Apr. 1990, at 63.

34. See J. HALLETT, *supra* note 21, at 11.

35. See J. HALLETT, *supra* note 21, at 21-31.

36. See J. HALLETT, *supra* note 21, at 21-31.

37. J. HALLETT, *supra* note 21, at 41. Hallett states that:

[i]n general, the economy has shifted to one where the new jobs are in the service and information sectors and the old industrial giants have lost their market and financial power. The result has been a decade of plant closings, layoffs and early retirement programs that have eliminated millions of the highest paying blue-collar jobs.

Id.

38. See *Is Stress Holding Back Productivity?*, ISSUES IN HR., Mar. 1990, at 6 (This is an information source published by the Society for Human Resource Management).

39. *Id.*

always physical.⁴⁰

A final change in the nature of work is the fact that job insecurity is more widespread today. In the early twentieth century, people went to work and typically stayed with the same company until retirement. Not so with today's workers.⁴¹ Many factors contribute to worker mobility. Common factors affecting large numbers of workers today include plant closings, technological obsolescence, mergers and acquisitions, the replacement of people with technology, and downsizing.⁴² The list is a long one, but the net effect of each factor is the same: employees live with uncertainty and with the knowledge that their jobs are in constant jeopardy.⁴³ In all likelihood, they will change jobs several times before they retire. In fact, a large percentage of the workers will not be employed with the same company five years from now. A sense of immediacy and impermanence exits with many current employment relationships. This situation triggers employee stress.

C. *Changes in Workers*

Workers have changed significantly over time. One major change is that the demographic characteristics of workers have changed dramatically. For instance, women and minorities are entering the work-force in increasing numbers.⁴⁴ These new workers have expectations that differ from earlier generations. Their expectations result largely from historical factors. Most women and minorities entering or returning to

40. See generally Hood & Milazzo, *Shift Work, Stress and Well Being*, PERSONNEL ADMIN., Dec. 1984, at 95.

41. See J. HALLETT, *supra* note 21, at 15. Hallett states that:

Already, one in five people switches jobs each year, one of 10 switches careers, and 33 percent of all jobs today will be obsolete by 1992. The likelihood of being with the same organization for more than five years - to say nothing of 30 years or more - is very low.

Id.

42. See generally J. HALLETT, *supra* note 21, at 41. "From 1979-84 alone, it is estimated that more than 11 million manufacturing jobs in basic industries were eliminated and they continue to be eliminated at the rate of 50,000 to 60,000 a month." *Id.*

43. See Greco & Woodlock, *Downsizing The Organization*, PERSONNEL ADMIN., May 1989, at 105.

44. E. MILLER, E. BURACK & M. ALBRECHT, *MANAGEMENT OF HUMAN RESOURCES* 33 (1980).

the work-force today grew up in an environment that was, and still is, radically different from that experienced by earlier generations.⁴⁵ These groups are entering the work-force with an increased sense of social power, influence, and confidence as a result of social legislation such as the Age Discrimination in Employment Act,⁴⁶ the Civil Rights Act,⁴⁷ and the Equal Pay Act.⁴⁸ They enter the work-force with a knowledge of, and the ability to use, due process procedures and legislative and judicial proceedings to ensure fairness and equity. They will, and certainly are entitled to, continue to use these skills and knowledge in acquiring social influence and power.

Another important change in workers is that their value priorities have changed over time. Workers believe that fairness and equity are of primary importance.⁴⁹ Also, individuals want, expect, and feel free to ask employers to contribute to a quality working life.⁵⁰ Quality of work-life means an environment that is physically and psychologically safe.⁵¹ Quality of work-life is of major importance to employees, and it will continue to remain so.

In sum, it is not likely that the number of stress related workers' compensation claims will decrease in the near future. In fact, the opposite is more probable given the changes in work and workers in the United States.

IV. STRESS-BASED WORKERS' COMPENSATION CLAIMS: THE LEGAL ISSUES

Perhaps the most difficult legal question that arises in stress-based workers' compensation claims is whether a disability or injury arose from the work relationship. Most state statutes require the injured employee to show that the injury arose "out of and in the course of employment."⁵² Employ-

45. See generally J. HALLETT, *supra* note 21, at 56.

46. Age discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602.

47. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

48. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56.

49. See generally C. FISHER, L. SHOENFELDT & J. SHAW, HUMAN RESOURCE MANAGEMENT 23 (1990); see E. ROSEMAN, MANAGING EMPLOYEE TURNOVER 90-91 (1981).

50. See C. FISHER, L. SHOENFELDT & J. SHAW, *supra* note 49, at 23.

51. Walton, *Quality of Working Life: What Is It?*, SLOAN MGMT. REV. 11 (1973).

52. See Cook, *Workers' Compensation and Stress Claims: Remedial Intent and*

ers typically wonder whether the stress-based injury was a consequence of a stressful situation outside the employee's work life, such as the employee's family relationships or finances.⁵³ Additionally, employers are suspicious of employees who are unable to cope with the stress that other workers handle with little difficulty.⁵⁴

These general questions that provide the underpinnings for nearly all employer challenges to worker' compensation claims are typically presented through the use of more precise legal questions. This section considers the two areas of legal analysis that state courts have struggled with the most.⁵⁵

A. *The Role of a Physical Cause or Effect*

Although workers' compensation law varies from state to state, some generalizations can be made about this area of law. One important generalization centers on the role of a physical cause or effect.

Claims in which workers allege that their physical disability was caused by a mental stimulus, and cases in which a physical stimulus yields a mental disability have presented courts with fewer difficulties than cases in which workers allege that a mental stimulus caused a mental disability.⁵⁶ In other words, courts are more sympathetic to employees in physical-mental and mental-physical cases than in mental-mental cases.⁵⁷

One typical example of a physical-mental case is *Hohlstein v. St. Louis Roofing Co.*⁵⁸ In this case, a physical stimulus caused the mental disability of a worker. This employee fell

Restrictive Application, 62 NOTRE DAME L. REV. 879 (1987).

53. See DeCarlo, *supra* note 2, at 683-84.

54. See generally Nugent, *When Employees Seek Workers' Compensation for Stress*, 14 EMPLOYEE REL. L.J. 239, 241 (1988).

55. For a comprehensive review of all the legal issues surrounding stress-based workers' compensation claims, see, e.g., Comment, *Gradual Stress: Compensable Under Workers' Compensation Law?*, 56 UMKC L. REV. 567 (1988); Juge & Shraberg, *Marking Out Boundaries: The Relationship Between Work and Psychological Disorders, A Legal and Medical Analysis*, 30 LOY. L. REV. 249 (1984); Comment, *Workers' Compensation and Gradual Stress in The Workplace*, 133 U. PA. L. REV. 847 (1985).

56. See generally Nugent, *When Employees Seek Workers' Compensation for Stress*, 14 EMP. REL. L.J. 239 (1988).

57. See *id.* at 240-41.

58. 49 S.W.2d 226 (Mo. Ct. App. 1932).

from the roof of a building and was physically injured.⁵⁹ Then the employee developed mental disability.⁶⁰ As such, the employee was entitled to workers' compensation.⁶¹ A typical example of a mental-physical claim is the situation in which an employee who works in a mentally stressful work environment suffers the physical disability of a heart attack.⁶²

An example of a mental-mental case is *Bailey v. American General Insurance Co.*⁶³ In this case, an iron worker suffered a severe anxiety neurosis after watching a co-worker fall to his death off a scaffolding. This worker knew that he would have fallen also, had he not become entangled in cables. As a consequence of a mental stimulus, he suffered a mental disability that prevented him from continuing to work in this occupation.⁶⁴ The court in *Bailey* ruled that this claim was compensable.

When comparing these typical examples, it becomes clear why courts are more reluctant to grant employees' claims in mental-mental claims than in physical-mental and mental-physical claims. Employers and courts are more convinced by physical-mental and mental-physical claims because it is easier to establish the extent and cause of something physical. Employees have a greater opportunity to feign mental disabilities because they are less clearly diagnosed. Employees also can feign a mental stimulus because it is difficult to measure how strong a mental stimulus is to a particular individual.

In sum, one major legal factor to consider in stress-based workers' compensation claims is whether a physical cause or effect is involved. Claimants in this situation generally fare better, although courts are becoming more sympathetic to employees in mental-mental cases.

59. *Id.* at 227.

60. *Id.*

61. *Id.*

62. See generally McLemore, *Heart Attacks and the Pennsylvania Workmen's Compensation Act: Establishing the Causal Relationship Between Employment and Injury*, 81 DICK. L. REV. 111 (1976).

63. 154 Tex. 430, 279 S.W.2d 315 (1955).

64. *Id.*

B. *Mental-Mental Cases: The Issue Whether The Mental Issue Was Caused by a Sudden Event or Gradual or Cumulative Mental Stimuli.*

The other major area of legal concern focuses specifically on the most difficult claims: the mental-mental claims. Courts have developed different tests for determining whether these claims are compensable. Some states refuse to compensate these claims under any circumstances.⁶⁵ Most states, however, provide compensation for these claims in some circumstances. In general, courts are more likely to compensate employees who can point to a specific, sudden precipitating event than employees who develop a mental disability through gradual or cumulative mental stimuli.⁶⁶ Specific tests for determining liability, however, vary considerably from state to state.

For example, some states require employees to prove that a specific event caused the mental injury. *Bailey v. American General Insurance Co.*,⁶⁷ described earlier, is one example of a case in which the employee was required to show that a distinct event—the death of a co-worker—triggered a mental disability.

Another possible standard is to require employees to demonstrate that the gradual stress that an employee incurred was greater than the average employees' stress.⁶⁸ Notice how this standard embodies the suspicion that employers have about employees who suffer stress-based claims stemming from circumstances that other employees do not find stressful. An example of a case in which the court uses this standard is *Pomperleau v. U.P.S.*⁶⁹ In this case, an employee won a workers' compensation case after he proved that his work stress was extraordinary and unusual compared with the stress experienced by average employees and that the work stress was the predominant cause of the mental injury.⁷⁰ This claim was triggered by the employee receiving

65. See generally Nugent, *supra* note 56, at 242.

66. See generally Nugent, *supra* note 56, at 242.

67. 154 Tex. 430, 279 S.W.2d 315 (1955).

68. See generally Nugent, *supra* note 56, at 245.

69. 464 A.2d 206 (Me. 1983).

70. *Id.*

poor job performance evaluations. Also, the employer had increased supervision of this employee.

In some states, the test is much simpler: ordinary stress is compensable. For example, in *Carter v. General Motors Corp.*,⁷¹ an employee received compensation for ordinary stress. This employee developed schizophrenia as a consequence of emotional pressures produced by his job as an assembly line worker in an auto plant. He received workers' compensation even though he could point to no sudden, specific event that triggered his mental injury.⁷²

Thus, it is clear that states react differently to mental-mental claims. This area of law is still developing and will continue to develop in response to the changing employment environment.

V. STRESS-BASED WORKERS' COMPENSATION CLAIMS: STRATEGIES FOR ATTORNEY PRACTITIONERS AND EMPLOYMENT RELATIONS MANAGERS TO REDUCE CLAIMS

Clearly, workers' compensation claims based upon stress are burgeoning. Several factors justify the rise in these claims.⁷³ Legally, states have reacted differently to these claims. Major trends, however, can be identified. Overall, courts are willing to tailor workers' compensation law to cover both physical and mental stress-based claims. A premise underlying state workers' compensation laws is that they should be interpreted broadly to protect workers.⁷⁴ States with more experience in the stress-based claims area are seeing the need to place limits on coverage for these claims.⁷⁵ Overall, then, courts are willing to protect workers, but once claims based upon stress rise significantly, they develop limits on these claims.

Perhaps the best way to remedy stress-based workers' compensation claims is to encourage managers to take steps that will reduce or eliminate stress in the workplace. If stress

71. 361 Mich. 577, 593, 106 N.W.2d 105, 112 (1960).

72. *Id.*

73. See *supra* notes 21-52 and accompany text.

74. See, e.g., *Bethlehem-Sparrows Point Shipyard v. Hemfield*, 206 Md. 589, 112 A.2d 488 (1955) (The Workmen's Compensation Act should be construed as liberally in favor of injured employees as its provisions will permit in order to effectuate its benevolent purposes).

75. See *Thompson*, *supra* note 1, at 20.

can be reduced or eliminated, employees will not be injured either physically or mentally, and consequently courts will not be required to grapple with technical issues such as whether the stress suffered by workers was "sudden" or "gradual."⁷⁶

This section also offers alternatives to reduce or eliminate stress in the workplace. It also offers suggestions for changes that managers can make in the nature of work, and changes that managers can encourage to alter the workers themselves. First, however, this section considers the issue of cost, which is significant to businesses, and, therefore, significant to attorney practitioners who advise businesses.

A. The Role of Cost in Reducing Stress-Based Workers' Compensation Claims

No one advocates a work environment that is completely stress-free because stress motivates workers to achieve. Alternatively, no one advocates an extremely stressful workplace because workers will be inhibited if they feel extreme pressure on the job.

Employers and employees often strive for goals that are inconsistent. One primary goal of employers is to reduce the cost of stress-based workers' compensation claims. This concern is not as important to employees, as their concern is that they will be compensated fully for their work-related injuries. Prior to reviewing specific alternatives for reducing stress-based workers' compensation claims, this section provides seven ideas for the cost-conscious manager or practicing attorney who advises businesses.

First, employers should develop a system that monitors and tracks workers' compensation claims. Developing a tracking system enables the organization to identify the "typical profile" of an employee who experiences an accident/injury, identify where accidents/injuries are occurring in the organization, and helps organizations design stress reduction programs that are maximally effective. The system should be capable of tracking and summarizing information needed by the organization for decision-making purposes.⁷⁷

76. See *supra* notes 66-73 and accompanying text.

77. H. HENEMAN, D. SCHWAB, J. FOSSUM & L. DYER, PERSONNEL/HUMAN RESOURCE MANAGEMENT 686 (1986). Employers should include the following information: 1) profile of who is filing workers' compensation claims for your

Second, attorneys or employers should educate employees and management regarding costs of the claim. For example, the United States Postal Service recently introduced the Accident Injury Cost System.⁷⁸ The system serves three primary purposes. First, it increases employees' awareness of compensation and other accident-related expenses. It also helps managers establish future cost reduction goals. Its third purpose is to provide information to managers about the direct costs of workers' compensation, accidents, injuries, limited-duty programs, and property damage by installation.⁷⁹

Third, employees should develop a limited duty program. Limited duty programs can reduce workers' compensation and associated expenses by providing work to partially disabled employees recovering from an injury.⁸⁰ For example, the U.S. Postal Service assigned 29,032 employees to limited-duty work consistent with their medical restrictions throughout fiscal year 1989.⁸¹

Fourth, employers should enact rehabilitation programs. For example, the Department of Labor/USPS Rehabilitation Program held down expenses again in 1989 by returning 397 injured employees to their jobs after modifying the jobs in accordance with their medical restrictions.⁸² The USPS has saved \$72 million and has returned 5,417 employees to work since the program's inception in 1979.⁸³

Fifth, employers should adopt a third party recovery program. After paying on a compensation claim in some states, an employer or insurance carrier is allowed to recover the amount of the claim from a third party that is legally responsible for the worker's injuries.⁸⁴ The U.S. Postal Service has

specific business, 2) functional area of claims (e.g., what department), 3) length of employment with the organization, 4) average cost of claim, 5) days lost due to the accident or injury, 6) type of claim, (7) organizational programs the employee participated in prior to and after the accident/injury.

78. UNITED STATES POSTAL SERVICE: HUMAN RESOURCES GROUP 1989 ANNUAL REPORT (1989) [hereinafter USPS].

79. *Id.*

80. *Id.*

81. *Id.* at 14.

82. *Id.*

83. *Id.*

84. Cohen, *Subrogation: The Recovery Route*, BEST'S REV., July 1989, at 65-66, 90-91.

collected \$4.3 million from third parties responsible for injuries to its workers.⁸⁵

Sixth, employers should work towards integrating employment related health services to improve continuity of employee care. Larger employers can develop contracts with providers that offer services which integrate health screening, promotion, and employee assistance programs (offered by the company or an outside provider) with medical care services for industrial injury and illness already provided by the medical/health insurer.⁸⁶

Finally, one approach to reduce the number of fraudulent claims filed is to require an employee to sign a statement verifying the validity of the claim.⁸⁷ In addition, employers should inform employees that falsified claims are subject to employee discipline procedures.

The preceding actions are not inclusive, but do indicate that employers have many avenues that they can explore in their efforts to reduce the costs associated with workers' compensation claims and the rise in mental-mental claims. Although changes in the workplace have altered the types and number of claims filed by employees, these same changes were also accompanied by an increase in options available to organizations for reducing the existence of, and negative effects associated with, stress in the workplace.

B. *Changes in Work*

Alternatives for making changes in the work performed by employees fall into two major categories. First, employers can change the nature of actual jobs to reduce stress. Second, employers can enact personnel policies to minimize the problem of stress-based claims. This section considers each category in turn.

Employers have more than one alternative for changing actual jobs. First, employers should redesign jobs. Employers must recognize that the workplace is not a constant; it is not unchangeable. Just as people can change, the job and/or the way the work is performed can also be changed. Many suc-

85. See UNITED STATES POSTAL SERVICE, *supra* note 78.

86. See Polakoff & O'Rourke, *Workers' Compensation - Managing The Cost Crunch*, RISK MANAGEMENT, Mar. 1988, at 52-53.

87. See WORKPLACE MANAGEMENT, *supra* note 23.

cessful work redesign efforts are documented.⁸⁸

Second, employees should examine the total work environment. Employees do not work in isolation. Multiple factors impinge upon and determine how they experience the work environment. Often, employers, upon sensing the multiple factors that can create stress individually or interactively, immediately feel overwhelmed. Employers should realize that the multiple causes of stress can also be used advantageously as mechanisms to reduce stress. For example, the stress created by a possible merger can be alleviated for most employees by effective supervision, as well as by managers who can communicate openly and regularly with employees.⁸⁹

Employers have options in changing personnel policies to reduce stress-based claims. Employers should consider selecting individuals who are stress resistant. The research on stress and its occurrence in the population indicates that people respond differently to stress. One approach for employers to use is to hire individuals who are "stress resistant."⁹⁰ The converse is to exclude those people who are "stress prone."

Several approaches exist for how to identify stress resistant individuals. The most common approach is to utilize self report information that asks individuals to respond how they have behaved in other situations or how they would expect to behave under certain conditions.⁹¹

Another approach is to conduct realistic job previews. Give applicants a realistic preview of the job (RJP) before they are offered employment.⁹² The premise of a realistic job preview (RJP) is that the more information and the more

88. See Walton, *Work Innovations in the United States*, in READINGS IN HUMAN RESOURCE MANAGEMENT 508 (M. Beer & B. Spector eds. 1985)[hereinafter READINGS]; see also J. Hackman, *Work Redesign for Organization Development*, in READINGS, at 528-44.

89. Greco & Woodlock, *Downsizing the Organization*, PERSONNEL ADMIN., May 1989, at 105-106.

90. Most measures of stress resistance are self report behavioral measures. Individuals respond to a series of statements and identify how they either have or would expect themselves to respond to particular events. Well-known measures include the 1) Type A/Type B Inventory and 2) Holmes' Life-Events Questionnaire. Some organizations use medical screening (hypertension, heart rate, etc.) as a way to determine an individual's potential response to stress. J. GIBSON, J. IVANCEVICH & J. DONNELLY, ORGANIZATIONS: BEHAVIOR, STRUCTURE, PROCESSES 243 (1988).

91. *Id.* at 244

92. See FISHER, SCHOENFELDT & SHAW, *supra* note 49.

accurate the information about the job the applicant receives, the better the applicant can assess his/her potential fit with the position. RJPs help job applicants make better decisions primarily by encouraging informed self-selection in the job choice process. RJPs should also help new employees cope better with initial job stresses by adjusting their prior expectations.⁹³ Employers giving an RJP before hire are likely to achieve a better match between the person and the job because some people will self-select themselves out of the job.

RJPs have their strongest effect on the stress experienced early in the employment relationship. The potential benefits to organizations are large since OSHA studies find that employees with one year or less experience account for 40% of all workers' compensation claims filed.⁹⁴

Employers should also emphasize placement.⁹⁵ Mid-size and large organizations can further improve the employee-job match by emphasizing placement. Individuals with special strengths and weaknesses (or specific stress reactions) can be placed in positions or work environments that capitalize on their strengths or reduce the negative effect of their weaknesses. Placement is not necessarily a one time decision. By conducting individual stress audits, a picture of the employee can be obtained regarding how she or he responds to stress that exists in the workplace. Combining the stress audit with a listing of job openings and the job requirements associated with those positions within the organization can allow for the rotation or transfer of individuals to places in the organization that best meet both the organization's and the individual's needs.⁹⁶

Additionally, employers should conduct physicals and physical abilities screening. Some employers are conducting pre-employment health and fitness screening. Some consultants (St. Paul's Human Factors Loss Control Program) offer screening programs for this purpose.⁹⁷ One approach is *not*

93. See J. WANOUS, ORGANIZATIONAL ENTRY 21-84 (1980); Breaugh, *Realistic Job Previews: A Critical Appraisal and Future Research Directions*, 8 ACAD. MGMT. REV. 612, 612-19 (1983).

94. See *Employers Look to Cut Costs of Workers' Compensation*, WORKPLACE MGMT., Apr. 1990, at 5.

95. B. BASS & G. BARRETT, PEOPLE, WORK & ORGANIZATION 399-400 (1981).

96. See A. BRIEF, R. SCHULER & M. VAN SELL, *supra* note 26, at 98-99.

97. Jones, *Breaking the Vicious Stress Cycle*, BEST'S REV. 74, 75 (1988).

to examine the health and fitness results unless two or more candidates are equally qualified for the job. The healthier and fitter job candidate is then given preference.

Other organizations conduct a job analysis to determine the knowledge, skills, and abilities, both mental and physical, that are required for the job. Based on this analysis, physical fitness and health requirements are determined. Medical and performance tests are then identified that measure the existence of these attributes. The test results are then used as one criterion for hire. Toyota uses a variation of this procedure as one step in the organization's extensive selection process.⁹⁸ A major airline demonstrated the cost-effectiveness of using physicals and physical-abilities tests as part of the selection and placement process. Eight hundred employees were tested and then assigned jobs. This group of employees later had an injury rate of 5.1 percent compared to an injury rate of 18.3 percent in a comparable group of untested employees.⁹⁹

Employers must exercise caution, as the validity and legality¹⁰⁰ of these approaches is questionable. Organizations that have adopted these approaches, or are considering them, must carefully evaluate their procedures.

Finally, employers should screen jobs.¹⁰¹ Specifically, employers should identify the amount and source of stress that exists in various jobs. This view of stress recognizes that certain situations can create stress. Because the source of stress primarily emanates from the job, organizational stress reduction efforts are targeted at those jobs that are considered high stress. When the stress cannot be reduced or eliminated, it is appropriate to periodically test employees to determine what kind of stress they are experiencing, the level of stress, and how they are coping with the stress. Individuals who are experiencing higher than normal levels of stress can then be directed towards various programs that specifically meet their needs and result in stress reduction.¹⁰²

98. Wellins, *Choosing The Right People*, HR. MAG., Mar. 1990, at 66-68, 70.

99. WORKPLACE MANAGEMENT, *supra* note 23.

100. See *infra* notes 128-132 and accompanying text.

101. See M. SINGER, *supra* note 31.

102. See C. FISHER, L. SHOENFELDT & U. SHAW, *supra* note 49.

C. *Changes in Workers*

A second category of approaches to reduce the negative effects of stress in the workplace includes those activities that focus on changing or altering employee behaviors, attitudes, physiological effects, and cognitive responses to stress.¹⁰³ Employers have several options to encourage changes in workers themselves to minimize stress-based workers' compensation claims.

First, employers should provide employees with coping mechanisms by instituting employee assistance programs (EAPs).¹⁰⁴ EAPs are developed to meet the dual goals of providing treatment to troubled employees so that they can function normally and be productive organizational members. Traditionally, EAPs incorporate several types of activities, including drug abuse programs, emotional counseling, family and marital counseling, financial counseling, legal counseling, and career counseling because EAPs are based on the premise that early identification of these problems results in early intervention and rehabilitation before a work related disability claim occurs.¹⁰⁵

Typically, employees who receive assistance (treatment) early when experiencing stress are better able to cope with the stress. In addition, they experience a reduced chance of reoccurrence. Early intervention can also slow or stop the development of stress-related effects, thereby further reducing the probability that an employee will file a disability claim.

Second, employers should develop health and wellness programs. The primary reason for developing organizational health programs is to improve employees' physical well-being and consequently have a positive impact on human resource outcomes and other organizational benefits, such as reductions in health care costs.¹⁰⁶

103. See T. COX, *STRESS* 92 (1978). Cox is credited with identifying the five potential consequences of effects of stress. His categories include: subjective effects, behavioral effects, cognitive effects, physiological effects, and organizational effects.

104. For examples of employee assistance programs, see Dickman & Emener, *Employee Assistance Programs: Basic Concepts, Attributions, and an Evaluation*, PERSONNEL ADMIN., Aug. 1982, at 55-62.

105. Polakoff & O'Rourke, *supra* note 86, at 52-53.

106. See C. FISHER, L. SHOENFELDT & U. SHAW, *supra* note 49, at 576.

Diverse models of health programs exist. One program used by Metropolitan Life Insurance Company consists of antismoking, blood pressure control, cholesterol reduction, weight control, and stress management components.¹⁰⁷ Other companies, such as Xerox, emphasize and/or include physical fitness facilities or programs.¹⁰⁸ Such programs can include a combination of swimming, golfing, running, aerobics, and tennis programs.¹⁰⁹

Third, employers should conduct stress screening. This view of stress recognizes that what is stressful is a person's reaction to the situation. Stress results when a person's reactions to the situation taxes his/her psychological and/or physical resources. These reactions are called stress reactions and can involve disturbances in thought, mood, and behavior which over time may result in physical disorders.¹¹⁰

Because stress responses occur in people and not in jobs, screening efforts should be directed at people rather than at positions. Stress screening involves three phases to identify whether an individual is stressed, to determine why such stress reactions have occurred, and to help him or her to develop healthy alternative means of coping with problems.¹¹¹

Fourth, employers should emphasize the development of effective working relationships. People who cause others to stress, yet show few or no signs of stress themselves, are "stress carriers." Bosses and co-workers are potential stress carriers in the workplace. This is important because research has shown that a poor relationship with one's supervisor can actually trigger physical health problems and increase employee withdrawal behaviors such as absenteeism.¹¹²

Managers and employees alike can be assessed for characteristics and behaviors that facilitate the development and

107. Brennan, *Worksite Health Promotion Can Be Cost-Effective*, 28 PERSONNEL ADMIN., Apr. 1983, at 39-46.

108. Kondrasuk, *Corporate Physical Fitness Programs: The Role of the Personnel Department*, 29 PERSONNEL ADMIN., Dec. 1984, at 75-80.

109. See Brennan, *supra* note 107; see also Hoffman, Jr. & Hobson, *Physical Fitness and Employee Effectiveness*, 29 PERSONNEL ADMIN., Apr. 1984, at 101-13.

110. See A. BRIEF, R. SCHULER & M. VAN SELL, *supra* note 26, at 77-78.

111. A. Ostell, *Where Stress Screening Falls Short*, 18 PERSONNEL ADMIN. 33-37 (1986).

112. See R. GILBERT & R. HUMPHREYS, JR., *supra* note 7, at 133.

maintenance of effective working relationships. Employers can reduce the prevalence of stress carriers in the organization by identifying those managerial behaviors that cause stress in subordinates. Managers and subordinates can be trained in how to develop and maintain effective working relationships.¹¹³

Finally, employers should offer safety training. Organizations that make employee safety a top priority can realize significant monetary gains.¹¹⁴ The most effective safety programs teach employees more than how to perform specific aspects of the job, such as appropriate lifting methods. Safety programs should consider the entire job, not just specific aspects of a job. Sometimes physical injuries occur for reasons other than not knowing how to perform the job appropriately.¹¹⁵ For example, a lack of sensory or intellectual stimulation can lead to boredom and inattention and, thus, increase the likelihood of an accident.¹¹⁶ Organizations should identify what the root of the injuries are. If inattention (also often labeled as "operator error") caused an accident, the next question to ask is what caused the inattention? Was it too much stimulation in the work environment? Were too many tasks competing for attention? Too few tasks? Lack of appropriate operator training? Too much or too little supervision? Did the equipment/work station design contribute to the error? Clearly, the organization's solution should depend upon the final answer to the question of precisely what caused the operator's inattention.

Organizations must recognize that corporate policies, rewards, structure and cultures can create stress. The stress may manifest itself as a physical or mental injury. Alternatively, as is common in the manufacturing environment, stress may first manifest itself by requiring more of the employee's effort to remain focused on the task and when the job demands exceed a specified level, the individual's "reserve capacity" is exceeded and an error, accident, or injury occurs. Safety programs that take a broader definition of safety and

113. Ivancevich, Matteson & Preston, *Occupational Stress, Type A Behavior, and Physical Well-Being*, 25 ACAD. MGMT. J. 373, 373-91 (1982).

114. See C. FISHER, L. SHOENFELDT & J. SHAW, *supra* note 49.

115. See C. FISHER, L. SHOENFELDT & J. SHAW, *supra* note 49.

116. See R. GILBERT & R. HUMPHREYS, JR., *supra* note 7.

injury will better serve today's employees and employers.

VI. STRESS-BASED WORKERS' COMPENSATION CLAIMS: EVALUATING THE ALTERNATIVES

Now that this article has presented several alternatives for reacting to stress-based workers' compensation claims, the article evaluates these alternatives. This section offers a managerial evaluation and a legal evaluation. Then, this section ties those two perspectives together and offers some bottom-line suggestions for managers and attorney practitioners who advise businesses.

A. *Managerial Considerations*

From a managerial perspective, work-related stress is now an important enough issue that employers must begin to identify where stress is experienced in the organization and who is experiencing stress. Identification of stress is the necessary first step of any long term solution to reducing stress-related claims of a physical or mental nature.

Because individuals respond differently to stress, the stress reduction strategies that emphasize people over jobs or positions should be most effective. Emphasizing people over jobs has several managerial implications. First, the employees are central to the development of any stress management program. Employees can and must assist in identifying where stress is experienced, causes of organizational stress, how to reduce stress, and who experiences stress. It is inappropriate to try to reduce stress by redesigning the work, installing new equipment, or developing new work procedures and policies if these strategies are initiated, developed, and implemented solely by engineers, human relations specialists, or management. Successful stress reduction techniques require first obtaining extensive information of the type indicated above from employees who do the job, operate the equipment, work in the organizational environment, and live with the organizational policies.

Options such as educating employees and management regarding the costs of the claim fit within this category, as does conducting regular stress screening of individuals rather than jobs.

Limited duty programs will be useful in mental stress

related cases. Rarely is the mental stress claim such that the employee is incapable of performing any work. Even in the atypical cases where an employee witnessed the death or dismemberment of a co-worker, the employee is likely to be capable of performing some work during or after recovery, though the work may have to be at another location, performing a different job, or working with new co-workers.

Second, two primary causes of stress are uncertainty and feelings of little control over events, life, and work. Organizations should examine current practices and policies to determine whether uncertainty and control can be increased without compromising organizational objectives. Increased control and reduced uncertainty can be achieved in such simple ways as instituting progressive discipline and grievance procedures. Uncertainty is reduced because employees know if X is done, then Y is the result. Control is increased because an employee can exercise an option to appeal, and be given written notice and opportunities to improve. An employee has several clearly defined options that he or she can pursue.

Specific techniques identified earlier can accomplish this goal which includes developing effective working relationships. Management should look for policies, procedures, and practices in all parts of the organization that increase uncertainty and reduce employees' control over events and activities.

Stress can be found in any and all parts of the organization. Further complicating the problem is the knowledge that any and all employees may experience stress at some time. The full effects of stress related claims have not yet been felt by employers. Employers must develop a multifaceted and integrated approach to preventing and ameliorating the effects of stress related claims.

B. *Legal Considerations*

Legally, issues surrounding stress-based workers' compensation claims are of utmost importance. When reviewing the current status of workers' compensation statutes throughout the country, one commentator has stated that a dark cloud in the form of runaway costs has settled over workers' com-

pensation insurance.¹¹⁷ On a national scale, costs as a proportion of payroll subject to workers' compensation rose to a record 1.98 percent in 1986.¹¹⁸ Forecasts indicate that workers' compensation premiums will absorb between three and five percent of the payroll in the next five years.¹¹⁹ In some more hazardous industries, such as construction and mining, rates already run in excess of ten percent of payroll.¹²⁰ In sum, attorneys who specialize in workers' compensation law believe there is a crisis in the law, and that many states will seek to reform their laws.¹²¹

When considering how to lower these workers' compensation costs, one suggestion is that states should establish clearer rules regarding new types of stress and occupational disease claims.¹²² This suggestion is taken especially seriously by states with significant numbers of stress-based claims. In California, for instance, 70,000 stress-related claims were filed in 1986.¹²³ This number represents seventeen percent of all lost-time injuries.¹²⁴

In the area of stress-based claims, employers worry about fraud and costly litigation.¹²⁵ If these fears trigger strict reforms of guidelines to outline situations in which an employee may recover, stress-based claims may be curtailed significantly. Assuming, however, that stress-based claims will remain a serious concern, attorneys must advise their clients who might be responding to stress-based workers' compensation claims with care.

From a legal perspective, the most appropriate advice is that employers should pursue all possible strategies to reduce stress in the workplace, as long as these strategies do not violate any laws. This advice is especially true in light of the rising costs associated with stress-based claims. This advice sounds straight-forward, but, in reality, it is not.

117. Thompson, *supra* note 1, at 20.

118. This figure is the most recent figure available. Thompson, *supra* note 1, at 20.

119. Thompson, *supra* note 1, at 20.

120. Thompson, *supra* note 1, at 20.

121. Thompson, *supra* note 1, at 20.

122. See Thompson, *supra* note 1, at 20.

123. Thompson, *supra* note 1, at 28.

124. Thompson, *supra* note 1, at 28.

125. Thompson, *supra* note 1, at 28.

Employers should pursue certain strategies because they are clearly consistent with legal principles. For example, employers should give truthful, realistic job previews, so potential employees can determine for themselves whether they are suited for a particular job in light of its degree of stressfulness. Additionally, employers should develop educational programs. From a legal standpoint, it is important to encourage workers to be healthy in all ways, including mentally. Keeping employees healthy reduces employers' costs in terms of insurance premiums, absenteeism and turnover. Similarly, safety training is an effective means of promoting employee welfare and, ultimately, reducing costs.

The most serious legal concern with some of the suggested legal strategies is that they might violate laws that protect handicapped individuals. Especially suspect is the strategy of hiring or promoting individuals who are "stress resistant." For federal employers, the Rehabilitation Act of 1973¹²⁶ precludes these employers from discriminating against handicapped individuals in hiring, promotion, and pay.¹²⁷ Although stress prone individuals are not a protected group, other protected handicaps overlap with the group of individuals we may believe are stress prone. For instance, heart attack victims are protected.¹²⁸ Additionally, mental disorders may be considered handicaps under this law.¹²⁹

In the private sector, several states protect handicapped individuals from discriminatory behavior.¹³⁰ Thus, even private employers must think carefully prior to adopting strategies for eliminating stress prone individuals from employment. Private employers should be especially concerned in light of the passing of the Americans with Disabilities Act,¹³¹ which expands protection offered to handicapped

126. 29 U.S.C. § 701 et. seq (1982).

127. *Id.*

128. A "handicapped individual" is any person who:

- (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,
- (ii) has a record of such impairment, or
- (iii) is regarded as having such impairment.

29 U.S.C. § 706(8)(B) (1982).

129. *See id.*

130. For example, Maryland's Fair Employment Practices Act prohibits discrimination in employment and public accommodations because of an individual's physical and mental handicap.

131. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104

individuals.

Because of concerns about discrimination against handicapped individuals, employers should avoid selecting stress-resistant individuals for employment. Instead, employers should rely on realistic job previews, which allow employees to decide for themselves whether they are capable of handling a particular job. Also, employers should place individuals carefully within the organization and continually educate employees on how to handle stress.

In sum, although job screening activities that avoid stress prone individuals are not currently illegal, employers who pursue them may one day soon face greater legal scrutiny.

C. *Tying Together Managerial and Legal Considerations*

Managerial and legal critiques of alternatives to reduce stress-based workers' compensation claims are not inconsistent. Both suggest that the employer's best course of action is to be sensitive to employees' needs. Identifying stress is critical. Next, it is important for employers to make sure individuals are suited to their jobs, without discriminating against them. Employers should be concerned about employees and the stress they incur on the job because it is in the employer's financial best interest to do so.

In sum, employers should identify stress, educate employees and management about how to reduce stress, demonstrate sensitivity to employees' needs, and make sure employees are suited to their jobs. Employers should also be careful not to discriminate against handicapped individuals.

VII. CONCLUSION

As the nature of work and workers has changed, state courts and legislatures have modified workers' compensation law to redefine the balance between employee and employer rights. In the area of physical and mental injuries that arise from stress in the workplace, state courts and legislatures have interpreted statutes to protect employee rights to compensation for work-related injuries. Additionally, when necessary, states have readjusted their laws to reflect concerns about an abundance of stress-based claims, some of which

may lack validity.

From a managerial perspective, employment relations managers have strived to prevent claims by reducing unproductive stress in the workplace. Some alternatives for addressing this issue have been more successful than others. Therefore, managers and attorney practitioners who advise businesses must be selective in pursuing and recommending strategies for resolving this issue.

In the future, we can anticipate that stress-based claims will rise. Courts, legislatures, managers and attorneys must become more sophisticated in reacting to stress and its subsequent workplace injuries.