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# Where Are You Hurt? Kentucky Redefines Workers' Compensation Injury in a Post-Traumatic Stress Disorder World

James M. Inman<sup>1</sup>

## INTRODUCTION

JUSTICE Oliver Wendell Holmes, Jr. once said, "A page of history is worth a volume of logic."<sup>2</sup> This observation might apply to a recent Kentucky Supreme Court workers' compensation decision. In June 2006, the Kentucky Supreme Court decided a case that redefined the meaning of injury under the workers' compensation statute.<sup>3</sup> Prior to that decision, the statutory definition of injury clearly indicated that mental injuries that are work-related are not compensable unless they are the "direct result of a physical injury."<sup>4</sup> *Richard E. Jacobs Group, Inc. v. White* seemingly erased the statutory requirement that a compensable mental injury be the direct product of a physical injury.<sup>5</sup> The decision is based primarily on some dizzying statutory interpretation<sup>6</sup> and earlier decisions that whittled away at the statutory requirements. The pre-*White* cases incrementally disposed of the statutory language but never fully dispensed with the clear requirement of a physical injury.<sup>7</sup> Justice Holmes's advice seems extremely relevant to the analysis not simply for its view of precedent but in a general view that case decisions often make the most sense in historical context. The *White* decision should be viewed as the natural result of greater awareness and acceptance of mental injuries within the general public. The tragedy of September 11th and the wars in Iraq and Afghanistan have altered the perceptions of the public about mental injuries, such as post-traumatic stress disorder. The Kentucky Supreme Court's decision to eliminate the

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<sup>1</sup> J.D., expected, 2008, University of Kentucky College of Law; B.A. 2000, Centre College. The author served in Iraq in 2003. The author must thank the Hon. Donald R. Todd for his assistance with this Note. This Note is dedicated to those in the armed forces who have witnessed too much in service to their country. The author is grateful for the support, patience, and love of his wife Elizabeth.

<sup>2</sup> *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

<sup>3</sup> See *Richard E. Jacobs Group, Inc. v. White*, 202 S.W.3d 24 (Ky. 2006).

<sup>4</sup> *Id.*; KY. REV. STAT. ANN. § 342.0011(1) (West 2006).

<sup>5</sup> *White*, 202 S.W.3d at 27.

<sup>6</sup> *Id.* The dissenting opinion in *White* offers a scathing criticism of the majority's interpretation of the workers' compensation statute. *Id.* at 28 (Roach, J., dissenting).

<sup>7</sup> See *Lexington-Fayette Urban County Gov't v. West*, 52 S.W.3d 564 (Ky. 2001).

requirement of a physical injury in workers' compensation cases reflects the sea change of understanding ushered in by the attacks of 9/11 and the War on Terror.

This Note examines the historical context of *White* to make sense of the Kentucky Supreme Court's decision. Part I of this Note centers on the *White* decision, its background, and some earlier decisions that played a key role in the outcome.<sup>8</sup> Part II of this Note focuses on how other jurisdictions have handled various types of workers' compensation injuries and where *White* might fall within established parameters.<sup>9</sup> Finally, Part III tries to explain the court's decision based on the impact that events like September 11th and the War on Terror had on legitimizing mental injuries generally.<sup>10</sup>

### I. *WHITE* AND THE DIFFICULTY OF DEFINING INJURY

In 1996, Kentucky's General Assembly changed the workers' compensation laws significantly.<sup>11</sup> In his address to the General Assembly opening the First Extraordinary Session of 1996, Governor Paul Patton called for significant changes to workers' compensation laws in Kentucky in order to attract businesses while still protecting the interests of Kentucky's workers.<sup>12</sup> Attracting businesses required reducing the costs of administering the workers' compensation system relative to competing states such as West Virginia.<sup>13</sup> One way of achieving this goal meant reducing litigation and court costs by shortening the period for resolving cases from "9 to 18 months [under] the present system" to "90 days."<sup>14</sup> Avoiding protracted workers' compensation disputes and streamlining the system through statutorily rigorous standards for determining compensability and amounts of compensation also served to reduce the costs associated with the prior system.<sup>15</sup> The statutory rules were designed as a quick reference for administrative law judges to decide compensability without lengthy court proceedings. As Governor Patton stated, workers' compensation is not "an entitlement program for attorneys, or health care providers, or rehabilitation services companies."<sup>16</sup>

Reforming Kentucky's workers' compensation laws focused in part on eliminating overly litigious areas while retaining strict requirements for

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<sup>8</sup> See *infra* notes 11–82 and accompanying text.

<sup>9</sup> See *infra* notes 83–114 and accompanying text.

<sup>10</sup> See *infra* notes 115–69 and accompanying text.

<sup>11</sup> KY. REV. STAT. ANN. § 342.0011; Governor Paul E. Patton, 1996 1st Extraordinary Sess. of the Gen. Assembly, at 3 (Ky. 1996) [hereinafter Patton Speech].

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 4.

<sup>14</sup> *Id.* at 5.

<sup>15</sup> *Id.* at 3–4.

<sup>16</sup> *Id.* at 3.

proving “actual physical impairment . . . in order to draw compensation.”<sup>17</sup> With these goals in mind, one area of change for the General Assembly was the definition of “injury.” The revised definition of injury played a critical role in the Supreme Court’s decision in *White*. The amended definition of injury under Kentucky Revised Statutes section 342.0011(1) provides:

“Injury” means any work–related *traumatic event or series of traumatic events*, including cumulative trauma, arising out of and in the course of employment which is the proximate cause *producing a harmful change in the human organism* evidenced by objective medical findings. “Injury” does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. “Injury” when used generally, unless the context indicates otherwise, shall include occupational disease and damage to a prosthetic appliance, *but shall not include a psychological, psychiatric, or stress–related change in the human organism, unless it is a direct result of a physical injury.*<sup>18</sup>

The first sentence of the statute suggests that psychological or mental injuries incurred while on the job are compensable when they cause a “harmful change in the human organism.”<sup>19</sup> However, the last sentence appears to eliminate this possibility. It requires that mental injuries directly result from physical injury.<sup>20</sup> The apparent goal of this change was to eliminate mental injuries resulting from mental stimuli.<sup>21</sup>

A. *Breaking from Plain Meaning:*  
Lexington–Fayette Urban County Government v. West

Despite an apparently clear definition of when a psychological change in the human organism is compensable, the Kentucky Supreme Court interpreted this passage of the statute differently.<sup>22</sup> In *Lexington–Fayette Urban County Government v. West*, the court held that an “event that involves physical trauma may be viewed as a ‘physical injury’ without regard to whether the harmful change that directly and proximately results is physical, psychological, psychiatric, or stress–related.”<sup>23</sup> The court appears to have taken the first sentence of the statute and reinserted it again in the

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<sup>17</sup> *Id.* at 5.

<sup>18</sup> KY. REV. STAT. ANN. § 342.0011(1) (West 2006) (emphasis added).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*; see 3 ARTHUR LARSON, WORKERS’ COMPENSATION LAW § 56.06[1](b) (Matthew Bender 2007).

<sup>21</sup> Patton Speech, *supra* note 11, at 5.

<sup>22</sup> See *Richard E. Jacobs Group, Inc. v. White*, 202 S.W.3d 24, 28–31 (Ky. 2006) (Roach, J., dissenting).

<sup>23</sup> *Lexington–Fayette Urban County Gov’t v. West*, 52 S.W.3d 564, 566 (Ky. 2001).

last sentence.<sup>24</sup> The last sentence under the court's interpretation might read: [injury] shall not include psychological, psychiatric, or stress-related changed . . . unless it is a direct result of a physically traumatic event.<sup>25</sup> Later decisions explained the court's interpretation of the statute to mean that harmful mental change must result from physical trauma in order to be compensable.<sup>26</sup> The glaring problem with this interpretation is that it ignores the common sense, general definition of trauma completely. The court has disallowed "injury" as a way to define "physical trauma" and has not fully explained what it means if not "physical injury."<sup>27</sup>

Notwithstanding the erosion of the definition of physical injury and the seemingly circular definition the Kentucky Supreme Court has used in deciding these cases, the court has been able to distinguish later cases factually. In *West*, a police officer applied for workers' compensation after suffering from post-traumatic stress disorder following an incident where "she was physically assaulted by a knife-wielding suspect."<sup>28</sup> *West* appeared, in theory, to allow compensation for mental injuries born out of physically traumatic events but without a physical injury to the claimant. In reality, the only case to adopt this theory into practice was *White*.<sup>29</sup> All others since *West* and pre-*White* have featured at least minor physical injuries which opens the door to compensation of mental injuries.<sup>30</sup>

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<sup>24</sup> *White*, 202 S.W.3d at 30 (Roach, J., dissenting).

<sup>25</sup> *Id.*; *West*, 52 S.W.3d at 566-67.

<sup>26</sup> *Kubajak v. Lexington-Fayette Urban County Gov't*, 180 S.W.3d 454 (Ky. 2005); *Ryan's Family Steakhouse v. Thomasson*, 82 S.W.3d 889 (Ky. 2002).

<sup>27</sup> Borrowing from U.S. Supreme Court Justice Scalia's analytical toolkit, note that Webster's Dictionary defines trauma as "[a]n injury or wound to a living body caused by the application of external force or violence . . . [or] a psychological or emotional stress . . . that may produce disordered feelings or behavior." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2432 (Philip B. Gove, ed., 2002). "Trauma" under the Kentucky court's definition becomes difficult to parse because the General Assembly expressly included the term "physical" before it. Thus, the court seems to have ignored the modifying term "physical" in the statute and followed a meaning closer to that found in the dictionary.

<sup>28</sup> *West*, 52 S.W.3d at 564-65.

<sup>29</sup> Compare *White*, 202 S.W.3d 24, with *Kubajak*, 180 S.W.3d at 459 ("evidence indicat[ed] that the cause of the claimant's psychiatric harm was an after-the-fact exposure to scenes of physical trauma to others . . ." and not the same type of "physical encounter with a suspect" that occurred in *West*), with *Ryan's Family Steakhouse*, 82 S.W.3d at 893 (The Supreme Court of Kentucky reiterated that a mental injury must result from a physically traumatic event and that physical exertion at work could constitute a physically traumatic event).

<sup>30</sup> See *Kubajak*, 180 S.W.3d at 455 (Claim was denied because claimant police officer failed to produce objective medical evidence that his post-traumatic stress disorder resulted from a physically traumatic event. Claimant's disorder was found to be related to observation of "gruesome crime scenes"); *West*, 52 S.W.3d at 565 ("scratches, abrasions, and soreness . . . [were] severe enough to comply with the term 'physical injury'"). Cf. *McCowan v. Matsushita Appliance Co.*, 95 S.W.3d 30, 32-33 (Ky. 2002) (mentally traumatic events that directly result in a physical injury are compensable under Kentucky's Workers' Compensation Act).

*B. Richard E. Jacobs Group, Inc. v. White:  
Eroding the Requirement of a Physical Injury*

The *White* decision truly represented a change in workers' compensation law in Kentucky. The Supreme Court of Kentucky effectively overlooked both the plain statutory requirement that mental injuries directly result from a physical injury and the case law that had developed in the wake of *West*.<sup>31</sup> *White* expanded the nebulous definition of "physically traumatic" event that was adopted by the Kentucky Supreme Court in *West*.

Chris White served as a Lexington–Fayette Urban County Government police officer.<sup>32</sup> In his time off, Detective White worked as a security guard at a shopping mall in Lexington, Kentucky.<sup>33</sup> As part of his regular police duties, Detective White was required to carry a firearm in order to respond to emergency situations.<sup>34</sup> On the evening of January 5, 2001, Detective White was working at the shopping mall in plainclothes.<sup>35</sup> He received notice that a man "dressed in a security guard uniform, armed with a night stick, and threatening suicide" was somewhere on the premises.<sup>36</sup> Once Detective White finally located the man in the parking lot, the suspect produced a gun.<sup>37</sup> Detective White drew his own weapon and identified himself to the man as a police officer.<sup>38</sup> Nevertheless, the man aimed his weapon at Detective White. Detective White then shot the man several times in the chest.<sup>39</sup> He continued to advance against Detective White

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<sup>31</sup> See *Lexington–Fayette Urban County Gov't v. West*, 52 S.W.3d 564 (Ky. 2001); KY. REV. STAT. ANN. § 342.0011(1) (West 2006).

<sup>32</sup> *Richard E. Jacobs Group, Inc. v. White*, 202 S.W.3d 24, 25 (Ky. 2006).

<sup>33</sup> *Id.* Kentucky Revised Statutes § 95.015 authorizes police officers to "exercis[e] their rights and privileges [in] entering into any endeavor enjoyed by all other citizens of the city in which they reside" provided they "abide by and adhere to the rules, regulations and laws set forth by the Kentucky Revised Statutes, and the legislative body of the city in which they are employed." KY. REV. STAT. ANN. § 95.015 (West 2006). Officer White had approval from the LFUCG police department to work at the mall. See also LFUCG Division of Police General Order 73–15/G, Dec. 12, 1994 (Off–Duty Employment) ("[O]ff–duty employment in general . . . may prove mutually beneficial to the officer and the private sector . . .").

<sup>34</sup> *White*, 202 S.W.3d at 25. See also LFUCG Division of Police General Order 73–15/G (Dec. 12, 1994) (Off–Duty Employment) ("a police officer's primary duty . . . must remain with the Lexington–Fayette Urban County Division of Police"); *White v. Lexington–Fayette Urban County Gov't*, WC Claim No. 03–00075, Ky. Office of Workers' Claims, at 3 (Jan. 29, 2004) (A.L.J. opinion and order) ("Major Bosse [testified] that off–duty police officers are required to have their sidearms accessible and to respond to high priority situations 24 hours per day") [hereinafter A.L.J. Opinion].

<sup>35</sup> *White*, 202 S.W.3d at 25.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* For a fuller description of the events see A.L.J. Opinion, *supra* note 34, at 2–5.

<sup>39</sup> *White*, 202 S.W.3d at 25.

despite being shot in the chest.<sup>40</sup> Detective White continued firing until the man fell.<sup>41</sup> He then tried to keep the man alive by performing CPR.<sup>42</sup> After those efforts failed, Detective White was “directed not to clean the blood off his extremities” until investigators could examine him.<sup>43</sup> He was not permitted to clean himself for “many hours.”<sup>44</sup> The only physical contact between Detective White and the man was during Detective White’s first-aid efforts.<sup>45</sup> Since the suspect’s blood was not tested for any diseases, Detective White was required to undergo regular testing to determine whether he had contracted any blood-borne contagion from the suspect.<sup>46</sup>

After the incident, Detective White suffered from a number of mental ailments. He experienced severe anxiety and worry over whether the internal investigation into the shooting would prevent him from returning to work.<sup>47</sup> He also worried that the prolonged contact with the assailant’s blood and body fluids might have infected him with “a disease such as AIDS or tuberculosis.”<sup>48</sup> After returning to work three months later, Detective White continued to suffer from nightmares, paranoia, and flashbacks related to the incident.<sup>49</sup> He was treated by a psychologist and “subsequently applied for and received disability retirement.”<sup>50</sup> Detective White did not sustain any physical injury;<sup>51</sup> in fact, the Assaulted Officer Report filed at the time of the incident did not “reflect any physical trauma or harm.”<sup>52</sup>

Detective White applied for workers’ compensation benefits for the post-traumatic stress disorder that resulted from the incident.<sup>53</sup> Five psychiatrists diagnosed Detective White with chronic post-traumatic stress

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Brief of Petitioner at 2, *White v. Lexington–Fayette Urban County Gov’t*, WC Claim No. 03–00075 (Ky. Workers’ Comp. Bd. Mar 25, 2004) [hereinafter Petitioner’s Brief].

<sup>44</sup> *Id.* at 3.

<sup>45</sup> *White*, 202 S.W.<sub>3d</sub> at 26. See Petitioner’s Brief, *supra* note 43, at 2 (Detective White “plac[ed] his fingers inside the bullets holes in an attempt to stop the bleeding . . . [White] was sure that he had been shot . . . because there was blood and mucous all over his face”).

<sup>46</sup> *White v. Lexington–Fayette Urban County Gov’t*, WC Claim No. 03–00075, Ky. Workers’ Comp. Bd. at 2 (June 23, 2004) [hereinafter Board Opinion].

<sup>47</sup> *Id.* at 6.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> A.L.J. Opinion, *supra* note 34, at 5.

<sup>51</sup> *Id.*

<sup>52</sup> *Richard E. Jacobs Group, Inc. v. White*, 202 S.W.<sub>3d</sub> 24, 26 (Ky. 2006).

<sup>53</sup> *Id.* at 25.

disorder stemming from the incident at the mall.<sup>54</sup> All agreed that he could not return to police work.<sup>55</sup>

Procedurally, the various opinions at each stage of Detective White's claim for compensation revealed the same issues that exist in reconciling the statutory definition of injury and the *West* definition. The Administrative Law Judge (A.L.J.) that first heard Detective White's case dismissed his claim.<sup>56</sup> While conceding that White suffered from post-traumatic stress disorder,<sup>57</sup> the A.L.J. denied compensation for his post-traumatic stress disorder under Kentucky's statute because he failed to adduce "lay or medical evidence of any physical assault or even a minor physical injury."<sup>58</sup> Furthermore, the A.L.J. believed that the *West* case was "inapposite to [White's] situation" and found that the lack of even minor physical injuries failed to "bring the resultant psychiatric condition within the statutory definition."<sup>59</sup>

On White's appeal, the Workers' Compensation Board affirmed the A.L.J.'s opinion.<sup>60</sup> The Board's opinion largely transcribed the opinion of the A.L.J. below,<sup>61</sup> but the opinion features a strong call for change either from the courts or the General Assembly.<sup>62</sup> The Board's opinion stated "the distinction between direct exposure to possibly tainted blood as opposed to minor scrapes and abrasions appears Draconian . . . [and u]ntil precedent exists that a mere touching may, under certain circumstances, constitute a physically traumatic event, a psychological claim such as White's cannot prevail."<sup>63</sup>

The Kentucky Court of Appeals, relying heavily on *West*, reversed the decision of the Board<sup>64</sup> and remanded the case after holding that White's incident "most assuredly involved physical trauma."<sup>65</sup> The court noted that Detective White "endured the physical impact of being coated with bodily fluids with a threat of much more serious health consequences than scratches and abrasions."<sup>66</sup> The reasoning utilized amounted to

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54 A.L.J. Opinion, *supra* note 34, at 6–8.

55 *Id.*

56 *Id.* at 11.

57 *Id.* at 10.

58 *Id.* at 10.

59 *Id.* at 9.

60 Board Opinion, *supra* note 46, at 15.

61 *See id.* at 2–11.

62 *Id.* at 15.

63 *Id.* at 15.

64 *See White v. Lexington–Fayette Urban County Gov't*, No. 2004–CA–001457–WC, 2005 Ky. App. LEXIS 127, at \*1 (Ky. Ct. App. May 27, 2005); Bruce Shreiner, *Ex–Officer Ruled Eligible in Workers' Comp Case*, COURIER–JOURNAL (Louisville), May 28, 2005, at B3.

65 *White*, 2005 Ky. App. LEXIS 127, at \*1, \*10.

66 *Id.* at \*11.



a comparison of the relative harms that the claimants in *West* and *White* endured. No clear definition of injury emerged from the opinion. The main opinion defined physical trauma in *White* as a “seriously intimate physical encounter with a criminal suspect.”<sup>67</sup> A concurring opinion from the Court of Appeals defined physical injury as “physical confrontation” to seemingly avoid the appearance of compensating White’s post-traumatic stress disorder on the basis of a “mere touching.”<sup>68</sup> The dissenting opinion offered yet another definition. The dissent accused the Court of Appeals of allowing compensation based on a definition of physical injury equal to a “life-threatening situation.”<sup>69</sup>

The Kentucky Supreme Court affirmed the Court of Appeals decision but for different reasons.<sup>70</sup> In contrast to the Court of Appeals decision that “contact with another’s blood and body fluids during a lifesaving attempt constituted physical trauma,” the Supreme Court held that the “physical exertion of performing CPR and first aid on an individual with multiple gunshot wounds is a physically traumatic event.”<sup>71</sup> Relying on *West* and another post-*West* decision,<sup>72</sup> the court explained that a “physical trauma need not involve an impact from an outside force; it may involve physical exertion.”<sup>73</sup> The court thus expanded the definition of injury, based in part on the faulty reasoning of *West*. Under the court’s decision in *White*, physical exertion can be substituted for an “impact from an outside force.”<sup>74</sup> But even the *West* decision required that physical exertion lead to physical trauma before mental injuries are compensable.<sup>75</sup> The court has left us with another circular definition. Under *West*, the court ignored the plain reading of the statute that required a physical injury and said that physical trauma is acceptable as a source of directly resulting mental injuries. However,

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67 *Id.* at \*10–11.

68 *Id.* at \*11 (Combs, J., concurring).

69 *Id.* at \*12–13 (Minton, J., dissenting).

70 *See* Richard E. Jacobs Group, Inc. v. White, 202 S.W.3d 24, 25 (Ky. 2006).

71 *Id.* *See also* KY. REV. STAT. ANN. § 342.0011(1) (West 2006) (“‘Injury’ does not include . . . any communicable disease unless the risk of contracting the disease is increased by the nature of the employment”).

72 The court uses *Ryan’s Family Steakhouse v. Thomasson*, 82 S.W.3d 889, 893 (Ky. 2002), as support for its reasoning. In that case a restaurant worker experienced severe neck pain after exerting herself to clean an elevated shelf at work. The claimant in that case did not claim any mental injury. The court noted that the 1996 changes by the General Assembly to “injury” were intended to “limit compensation for psychological, psychiatric, and stress-related claims more effectively.” *Id.* at 893. Also, the court reasoned the legislature was targeting mental injuries only by changing the definition from injury to trauma. *Id.* The court’s decision to use this case as support is curious. Why use a case that limits compensation for mental injuries in support of a decision that expands compensation?

73 *White*, 202 S.W.3d at 27.

74 *Id.*

75 *See* Lexington–Fayette Urban County Government v. West, 52 S.W.3d 564, 566–67 (Ky. 2002).

trauma, in the general common usage of the word, means injury.<sup>76</sup> What is left is a phrase—“physically traumatic event”—without meaning after the *White* decision. *White* ignored the problems of *West* and further pushed the boundaries of what physical trauma is compensable. In contrast to the claimant in *West* and others since, Detective White experienced no physical injury. Including physical exertion in the class of physically traumatic events only dilutes that requirement further than *West*. The *White* decision might allow a worker executing their daily duties to be compensated for mental injuries resulting from exertion. Exertion cannot be viewed as the same quantum as injury, which is what the statute requires. Ignoring the language of the statute undermines the General Assembly’s 1996 attempt to limit compensation for mental injuries.<sup>77</sup> It is not clear from *White* if other incidents such as physical situations,<sup>78</sup> physical confrontations,<sup>79</sup> or touching<sup>80</sup> would make resulting mental injuries compensable. The court’s physically traumatic event definition is expanding and based on problematic reasoning.<sup>81</sup>

One important observation from *White* and its procedural history relates to the “Draconian distinction” pointed out by the Workers’ Compensation Board. As this Note suggests, the problem lies with denying compensation for these mental injuries in the first place. Relying on a bright line rule authorizing compensation based on minor scrapes and abrasions but not severely traumatic exposure, touching, or events that might be more worthy of compensation is also problematic.<sup>82</sup> Kentucky is not alone in this struggle. In fact, other states have wrestled with which work-related mental injuries are compensable. The next part outlines the various types of workers’ compensation injuries and where Kentucky’s system fits. This examination is useful in determining how to clarify “physical trauma” and outline a course for changes to the Kentucky workers’ compensation statute.

## II. DECIPHERING *WHITE* IN COMPARISON TO OTHER WORKERS’ COMPENSATION SYSTEMS

The key problem with *White* is its inconsistency with the statutory definition of injury. Defining injury is crucial to any workers’ compensation system because it has an immediate effect on costs to businesses and the

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<sup>76</sup> See *supra* note 27 and accompanying text.

<sup>77</sup> See Patton Speech, *supra* note 11.

<sup>78</sup> *White v. Lexington–Fayette Urban County Gov’t*, No. 2004–CA–001457–WC, 2005 Ky. App. LEXIS 127, at \*12 (Ky. Ct. App. May 27, 2005) (Minton, J., dissenting).

<sup>79</sup> *Id.* at \*11 (Combs, J., concurring).

<sup>80</sup> *Id.* at \*13 (Minton, J., dissenting).

<sup>81</sup> *Richard E. Jacobs Group, Inc. v. White*, 202 S.W.3d 24, 28–31 (Roach, J., dissenting).

<sup>82</sup> Board Opinion, *supra* note 46, at 15.

protection of workforce employees. The criticism of *White* is not a judgment on compensation for mental injuries. In fact, many states have dealt with work-related mental injuries differently and allow compensation for none, some, or all of these types of injuries.<sup>83</sup> It is helpful to understand other approaches in order to develop solutions to Kentucky's issue. Perhaps other approaches offer a more satisfying basis for avoiding compensation of mental injuries.

Examining workers' compensation statutes is an exercise in semantics. Words such as "injury," "harm," "trauma," and "stimulus" take on myriad meanings across state borders. The first step to understanding a workers' compensation statute is to understand the meaning of these critical terms. For example, a change in the definition of injury can dramatically alter the number of compensable claims within a workers' compensation system.

Another important part of workers' compensation is the distinction between deciding if there is in fact an injury—mental, physical, or both—and determining whether that injury is compensable. Making a factual determination involves deciding if an injury is legitimate based on medical evaluations of a worker.<sup>84</sup> Deciding what injuries are compensable is a legal determination and is a function of how inclusive a state wants its workers' compensation to be, but the forms of injuries fall generally into three categories when mental injuries are involved. First, physical-mental injuries are widely recognized.<sup>85</sup> Physical-mental injuries result when a physical stimulus or trauma directly results in, or causes, a mental injury.<sup>86</sup> Second, mental-physical injuries involve a mental stimulus that provokes a physical injury.<sup>87</sup> The prototypical example would be one where a worker perhaps experiences severe mental anguish or stress that induces a heart attack, aneurysm, or other physical injury.<sup>88</sup> Finally, there are mental-mental cases where a mental stimulus causes a mental or nervous injury, such as post-traumatic stress disorder.<sup>89</sup>

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83 See *infra* notes 95–109 and accompanying text.

84 See KY. REV. STAT. ANN. § 342.0011(1) (West 2006) ("evidenced by objective medical findings"); FLA. STAT. ANN. § 440.09(1) (West 2006) ("objective relevant medical findings" are those objective findings that . . . are confirmed by physical examination findings"); W. VA. CODE, § 23-4-8 (West 2006) ("The commission [may] . . . order a claimant of compensation for a personal injury . . . to appear for examination before a medical examiner").

85 3-56 LARSON, *supra* note 20, § 56.03. See also NORMAN E. HARNED, KENTUCKY WORKERS' COMPENSATION § 13.01 (3d ed. 2006).

86 *Id.*

87 See LARSON, *supra* note 20, § 56.02. Kentucky's Supreme Court held mental-physical claims valid in *McCowan v. Matsushita Appliance Co.*, 95 S.W.3d 30, 32-33 (Ky. 2002). See *supra* note 30; see also HARNED, *supra* note 85, § 13.05.

88 LARSON, *supra* note 20, § 56.02[2].

89 See LARSON, *supra* note 20, § 56.04. See also HARNED, *supra* note 85, § 13.06. *But cf.* Richard E. Jacobs Group, Inc. v. White, 202 S.W.3d 24 (Ky. 2006) (The *White* case is too recent a decision for this edition of HARNED'S KENTUCKY'S WORKERS' COMPENSATION).

The mental–mental category can be further subdivided based on whether states compensate for mental–mental injuries. After *White*, Kentucky moved out of the physical–mental category, but the amorphous definition of “physically traumatic” makes categorizing Kentucky’s position difficult. *White* falls within the mental–mental category based on the fact that White experienced no physical injury. The first subcategory includes states that never allow compensation for mental–mental injuries of any kind.<sup>90</sup> The next subcategory allows compensation for work–related mental–mental injuries when they are caused by gradual or sudden stimuli.<sup>91</sup> The third subcategory additionally requires that a stimulus be unusual.<sup>92</sup> Last is the subcategory that allows compensation when they are caused by a sudden stimulus and are not the product of a “series of stressful incidents.”<sup>93</sup>

Kentucky’s workers’ compensation statute appears to fit in the subcategory that never allows compensation for mental–mental injuries.<sup>94</sup> However, as noted above, *White* changed the statutory definition and allowed compensation for mental–mental injuries. In comparison, Florida’s statute regarding injury does not explicitly require a physical injury in order for a mental injury to be compensable.<sup>95</sup> Ironically, Florida’s Supreme Court has interpreted the statutory definition of “accident” to deny compensation for mental–mental claims.<sup>96</sup> Kentucky has moved in the opposite direction, expanding a statutory definition to allow mental–mental claims.

In the next grouping are states that allow mental–mental compensation whether they are the result of gradual or sudden stimuli.<sup>97</sup> Virginia takes an interesting approach to mental–mental cases that is a promising way of dealing with these types of injuries. For example, post–traumatic stress disorder “may be compensable as an injury by accident” or as an “occupational disease.”<sup>98</sup> The critical distinction between Virginia’s system and Kentucky’s is the wording of the pertinent statutory definition. As in Kentucky, Virginia’s code includes occupational disease in the definition of injury,<sup>99</sup> but Kentucky’s *statute* still requires that both occupational diseases (in this case, a disease of the mind) and mental injuries be the

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90 See LARSON, *supra* note 20, § 56.06[4].

91 See *id.* § 56.06[5].

92 See *id.* § 56.06[6].

93 See *id.* § 56.06[7].

94 See KY. REV. STAT. ANN. § 342.0011(1) (West 2006).

95 FLA. STAT. ANN. § 440.02(1) (West 2006).

96 City of Holmes Beach v. Grace, 598 So. 2d 71, 74 (Fla. 1992).

97 LARSON, *supra* note 20, § 56.06[7].

98 Fairfax County Fire and Rescue Dep’t v. Mottram, 559 S.E.2d 698, 703–04 (Va. 2002).

99 VA. CODE ANN. § 65.2–101, 65.2–400 (West 2006). See also N.J. STAT. ANN. § 34:15–31 (West 2006).

result of a physical trauma.<sup>100</sup> Perhaps Kentucky's Supreme Court could utilize a less strained interpretation of the statute by relying on the two-pronged approach to mental-mental claims from Virginia, allowing compensation under the occupational disease portions of the statute when the circumstances dictate.<sup>101</sup>

In some jurisdictions, compensation for mental-mental injuries depends on the nature of the stimulus involved.<sup>102</sup> Some of these states require an unusual stimulus to allow compensation. Within this group, some states require a comparison of the effect of the stimulant on the claimant versus its effect on the general public to determine if it is unusual.<sup>103</sup> Other states require a comparison between its effect on the claimant and the claimant's coworkers—is the stimulus greater for the claimant than her coworkers?<sup>104</sup> For example, a teacher might claim compensation for mental injuries that result from chronic stress in daily teaching duties such as disciplining unruly students.<sup>105</sup> In a jurisdiction requiring an unusual stimulus, compensation for resulting mental injuries depends on whether the stress is greater than other teachers experience or greater than what the general public experiences. In Kentucky, both the *White* and *West* decisions intimate that one factor in deciding compensability is the unusual nature of the stimulus, but neither decision expressly adopts this requirement.<sup>106</sup> Certainly, a requirement that a stimulus be unusual limits compensation more greatly than allowing a gradual or sudden stimulus alone. Limiting compensation based on how unusual the stimulus is would satisfy the legislative intent behind Kentucky's 1996 workers' compensation changes.

Finally, some states require that a stimulus be sudden for mental-mental claims to be compensable.<sup>107</sup> An example would be a worker who develops mental injuries such as depression, anxiety, or excessive worrying related to a gradual stimulus at work.<sup>108</sup> Jurisdictions within this group disallow compensation for gradual stimuli because it is easier to establish

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100 KY. REV. STAT. ANN. § 342.0011(1) (West 2006).

101 Interestingly, West Virginia's legislature amended their workers' compensation statute to expressly supersede *Breeden v. Workmen's Compensation Commissioner*, 285 S.E.2d 398 (W. Va. 1981), which had authorized compensation for mental-mental injuries or disease. See W. VA. CODE ANN. § 23-4-1f (West 2006).

102 LARSON, *supra* note 20, § 56.06[6].

103 *See id.*

104 *Id.*

105 *See also* *Baggett v. Indus. Comm'n*, 775 N.E.2d 908, 914-15 (Ill. 2002); *Spencer v. Time Warner Cable*, 717 N.Y.S.2d 711, 712 (N.Y. App. Div. 2000).

106 *See* *Richard E. Jacobs Group, Inc. v. White*, 202 S.W.3d 24, 25 (Ky. 2006) (Police officer feared he contracted a communicable disease after contact with an injured person's blood); *Lexington-Fayette Urban County Gov't v. West*, 52 S.W.3d 564 (Ky. 2001).

107 LARSON, *supra* note 20, § 56.06[5].

108 *See* *Goodloe v. Tennessee*, 36 S.W.3d 62, 67 (Tenn. 2001) (compensation denied where employee's depression gradually worsened due to poor work relationship with superiors).

causation for a mental injury when there is a requirement for a sudden or unexpected work-related stimulus.<sup>109</sup> Kentucky's workers' compensation statute might fit within this category. Unfortunately, *West* eliminated this possibility because that decision clearly allowed compensation for a mental injury based on the cumulative effect of trauma after the *West* claimant's initial physical encounter.<sup>110</sup> Additionally, Kentucky's statute expressly includes "cumulative trauma" in the definition of injury.<sup>111</sup> *White* makes no mention of a requirement that a mental-mental injury be the result of a sudden stimulus, although the claimant in *White* experienced a sudden, well-defined stimulus.<sup>112</sup>

Kentucky's compensation for mental-mental injuries after *White* appears to fit the "unusual" subcategory best. However, the *White* opinion described the injury Detective White felt as a physical trauma leading to post-traumatic stress disorder. As noted above, the substance of the decision in *White* allows mental-mental compensation despite its form.<sup>113</sup> An argument could be made that *White* places Kentucky in the category compensating mental-mental injuries when the stimulus is gradual or sudden. However, any decision from the court that tries to firmly place *White* in the physical-mental category will require a firmer definition of "physically traumatic event." If later decisions concede that Kentucky's courts have authorized compensation for mental-mental injuries, as *White* suggests, then more guidance is needed to determine the criteria for what types of stimuli are compensable.

Regardless of where Kentucky's changes fall, it is interesting to note the varied approaches to compensation for mental-mental injuries. Every jurisdiction has an opinion. As noted above, the issue generally is not whether a claimant has suffered mental injuries such as post-traumatic stress disorder. The issue is usually a matter of cost—whether to compensate workers for these injuries and thus increase the costs to employers.<sup>114</sup> The problem with a cost approach to workers' compensation is the somewhat arbitrary distinction between injuries where one claimant's physical condition is less disabling than another's mental condition but the latter's claim is not compensable. There is growing consideration for mental injuries, whatever the level of compensation.

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109 See *McCallum v. Dana's Housekeeping*, 940 P.2d 1022, 1024 (Colo. Ct. App. 1996) (The statutory provision requiring sudden stimulus in mental-mental claims "was enacted to prevent frivolous and unnecessary claims by providing an objective basis for the proof of stress-related claims which arise independent of a physical injury").

110 See *Lexington-Fayette Urban County Government v. West*, 52 S.W.3d 564 (Ky. 2002).

111 KY. REV. STAT. ANN. § 342.0011(1) (West 2006).

112 See *Richard E. Jacobs Group, Inc. v. White*, 202 S.W.3d 24, 25 (Ky. 2006).

113 See *supra* notes 31–82 and accompanying text.

114 See *supra* notes 11–17, 21 and accompanying text.

## III. LEGITIMIZING MENTAL-MENTAL CLAIMS POST-9/11

Although the Kentucky Supreme Court's reasoning in *White* may be flawed and determining the exact parameters of "physically traumatic event" is difficult, the decision reflects a growing appreciation within the general public and the medical community of the seriousness of mental-mental injuries. Events from 2001-2007 have played a key role in this shift. The terrorist attacks on September 11th and the War on Terror have raised awareness of nervous injuries resulting from mental stimuli. Subsequent studies have lent scientific credibility to claims for compensation more than in any other historical period.<sup>115</sup> These events provided a unique opportunity for scientists to study the effects mental stimuli have on mental injuries in the general public, "first responders," and combat veterans, thus legitimizing mental-mental claims in the process. *White* represents a shift in Kentucky that reflects the reality that mental-mental injuries can be as debilitating as purely physical work-related injuries.

Historically, comprehensive studies and understanding of mental injuries such as post-traumatic stress disorder were limited. Not surprisingly, willingness to compensate workers for these types of injuries was also limited. Only as new studies about conditions like post-traumatic stress disorder have been conducted has understanding increased. Post-traumatic stress disorder was commonly known as "shell shock" or "combat fatigue."<sup>116</sup> It was thought to only afflict combat veterans, but psychologists have applied it increasingly to others as well. Initially, this meant studying people who experienced some trauma directly or had a close relative or friend directly affected.<sup>117</sup> Studies of post-traumatic stress disorder typically followed combat veterans.<sup>118</sup>

September 11th provided an opportunity for greater study of the general public than ever before. The World Trade Center attack is often compared to the attack on Pearl Harbor in 1941, but they differed in that major psychological studies were conducted immediately after 9/11 to gauge the effect of mass trauma on the population of New York City and the rest of the country.<sup>119</sup> The Iraq War has also provided a fertile environment for the study of post-traumatic stress disorder and other mental injuries. Studies

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115 See 9/11: MENTAL HEALTH IN THE WAKE OF TERRORIST ATTACKS (Yuval Neria et al. eds., 2006); PSYCHOLOGY OF TERROR (Bruce Bongar, et. al. eds., 2007).

116 Felicia R. Lee, *Is Trauma Being Trivialized?*, N.Y. TIMES, Sept. 6, 2003, at B9.

117 See 9/11: MENTAL HEALTH IN THE WAKE OF TERRORIST ATTACKS, *supra* note 115; PSYCHOLOGY OF TERROR, *supra* note 115.

118 Erica Goode and Emily Eakin, *Threats and Responses: The Doctors*, N.Y. TIMES, Sept. 11, 2002, at A2.

119 9/11: MENTAL HEALTH IN THE WAKE OF TERRORIST ATTACKS, *supra* note 115, at 592-594; PSYCHOLOGY OF TERROR, *supra* note 115, at 81; see also Goode and Eakin, *supra* note 118, at A2.

of Iraq War veterans have added to prior studies of Vietnam veterans.<sup>120</sup> Undoubtedly, 9/11 has changed the way mental–mental type injuries are viewed. Studies of combat veterans and the military's methods for dealing with mental–mental injuries implicate changing attitudes towards these types of injuries and offer solutions for the general public's treatment of workers' compensation injuries.<sup>121</sup>

The terrorist attacks on September 11th initially sparked concern that not enough psychiatric assistance would be available to treat large–scale mental injuries in the general public.<sup>122</sup> One benefit of the enormous influx of medical professionals was the ability to at least partly document the reaction to such a tragic and traumatic event.<sup>123</sup> The first studies about the mental effects of 9/11 have been completed. They alter the way in which post–traumatic stress disorder, in particular, and other mental ailments are viewed medically.<sup>124</sup> It was assumed that “the highest prevalence of [post–traumatic stress] would be in the [New York City] borough where the [World Trade Center] was located.”<sup>125</sup> In fact, many people experienced “mental disorder . . . who were very far from the buildings” and some were affected across the country.<sup>126</sup> Essentially, there are those who experienced clear physical–mental injuries, but for many the indirect stimulus of witnessing the events of 9/11 from afar caused serious mental–mental type injuries as well. The post–9/11 studies suggest that existing definitions of when a person can be affected injuriously by a mental stimulus need revision. Concededly, there are no perfect criteria for determining who will be affected by a traumatic event.<sup>127</sup> What these studies have demonstrated

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120 See Felicia R. Lee, *Is Trauma Being Trivialized?*, N.Y. TIMES, Sept. 6, 2003, at B9 (“[Post–traumatic stress disorder] was first diagnosed by the American Psychiatric Association in 1980 after trauma symptoms were seen in returning Vietnam War veterans”).

121 See *infra* notes 150–169 and accompanying text.

122 Goode and Eakin, *supra* note 118, at A2.

123 See *id.*

124 Medical definitions of post–traumatic stress disorder have typically required that the victim directly observe a traumatic event. However, studies after 9/11 have shown that because the incidence of post–traumatic stress disorder is so high in relation to the portion of the general population meeting the directly–witnessing criteria, there is need for a revision of this definition to account for the indirect effects of such stimuli. See 9/11: MENTAL HEALTH IN THE WAKE OF TERRORIST ATTACKS, *supra* note 115, at 36.

125 *Id.* at 35.

126 *Id.* at 17. In one *New York Times* article, a doctor offered the following: “If you lived across from the World Trade Center, you were obviously directly affected. What’s less obvious is that if you were sitting in Des Moines and your granddaughter just started working in the World Trade Center, that’s a pretty direct exposure.” Goode and Eakin, *supra* note 118, at A2.

127 Researchers have been unable to identify “who would fall ill, although they could name some factors—proximity, a history of trauma, a feeling of unreality . . . that seemed to make people more vulnerable.” Goode and Eakin, *supra* note 118, at A2. See also 9/11: MENTAL HEALTH IN THE WAKE OF TERRORIST ATTACKS, *supra* note 115, at 64–65.



is that the current definitions and parameters no longer accurately describe the psychological impact of a traumatic event.

A particular problem in conducting studies after 9/11 was dealing with “first responders,” such as police and firefighters. Their job was to respond to the attacks and many were undoubtedly affected directly by the events of that day. Yet studies conducted after 9/11 offer conflicting assessments of the impact of mental trauma on these individuals.<sup>128</sup> One study suggests that “first responders” “experiences, afford them the emotional skills required to function in dangerous and tragic environments.”<sup>129</sup> Another points to the high incidence of mental disorders in “first responders” following 9/11 and the fact that many suffering from disorders would not seek medical treatment because of the perceived stigma.<sup>130</sup> Still, these studies focus on the mental stimulus that confronted “first responders.” Certainly many were physically injured but a great number were only influenced by what they experienced and witnessed. The studies suggest that the stimulus need not originate from a physical injury in order to result in mental disorders such as post-traumatic stress disorder.<sup>131</sup> The mental trauma of the day caused significant mental injuries without the aid of physical trauma or injuries. An important question for Kentucky would be how many “first responders” would be disabled by mental injuries had those events occurred in Kentucky and how many would be compensated for their diminished capacity to work.

As those directly affected by 9/11 and the general public dealt with the tragedy of that day, later events provided constant stress that exacerbated the effect of mental injuries from 9/11 and raised consciousness of mental-mental injuries.<sup>132</sup> The anthrax scare in 2001 contributed to a general sense of fear within the United States.<sup>133</sup> The American public had to cope with the threat of a deadly biological attack, launched from an unknown source and delivered to their home with the electric bill. The military invasions of Afghanistan and Iraq brought deep concerns within the public of a large-scale retaliation in the form of a future indeterminate terrorist attack.<sup>134</sup> The government implemented a threat level system to help predict

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<sup>128</sup> See generally 9/11: MENTAL HEALTH IN THE WAKE OF TERRORIST ATTACKS, *supra* note 115; PSYCHOLOGY OF TERROR, *supra* note 115.

<sup>129</sup> PSYCHOLOGY OF TERROR, *supra* note 115, at 420.

<sup>130</sup> 9/11: MENTAL HEALTH IN THE WAKE OF TERRORIST ATTACKS, *supra* note 115, at 350.

<sup>131</sup> *Id.* at 334-35.

<sup>132</sup> See *id.* at 64-65 (“Our results over the first 18 months after the attacks suggest the importance of prior mental health history, prior life traumas, as well as the significant role of subsequent stressors, in explaining the distress and symptomatology over time. In addition, our findings from the Iraq war survey suggests that stress symptoms in response to one event—in this case, the Iraq war—may be strongly related to responses to a prior event—the September 11th attacks”).

<sup>133</sup> *Id.* at 592.

<sup>134</sup> *Id.* at 592-93.

when a terrorist attack might occur, but the system created confusion and stress because an attack always seemed imminent.<sup>135</sup> Unfortunately, “[m]ismanaged alarm procedures do the terrorists’ work for them.”<sup>136</sup>

For the most part, only a portion of the population was affected directly by these events, but the public in general reacted to the mood of fear—a mental stimulus—by avoiding air travel, preparing wills, and buying guns.<sup>137</sup> Perhaps a more subtle result of these “constant stressors” was to raise the general consciousness about the effects of these mental stimuli on the public psyche and mental health.<sup>138</sup> Of course, this is part of the goal of terrorism. “[T]he strategic intent of modern terrorists is to create huge numbers of secondary psychological casualties by means of large-scale physical attacks . . . [T]errorists want a lot of people dead—and even more people crippled by fear and grief.”<sup>139</sup>

The media plays a crucial role in this mental–mental equation, as it can provide the conduit through which the mental stimulus of traumatic events, such as 9/11, cause mental injuries in the public located many miles away.<sup>140</sup> “[Media] must report terrorist attacks as they happen . . . [and] they are part of the reason these incidents occur in the first place.”<sup>141</sup> As previously discussed, acts of terrorism are most effective when witnessed by more people.<sup>142</sup> The terrorist benefits from having television coverage of their misdeeds because their damaging effects reach a wider audience. Viewers watched the attacks on the World Trade Center, the Pentagon, and the hijacked plane crash in Pennsylvania, live from locations all over the country.<sup>143</sup> The simple fact that the attack took place in New York City and not a more media–remote location amplified the terrorists’ message.<sup>144</sup> Moreover, replays of the events of 9/11 and the non–stop coverage immediately following reinforced the terrorist’s message and undoubtedly

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135 PSYCHOLOGY OF TERROR, *supra* note 115, at 359. “In an investigative report dated October 12, 2005, MSNBC commentator Keith Olberman analyzed the [then–]recent threats against the New York City subway system in light of previous terror alerts. He documented 13 cases between May 2002 and October 2005 in which a significant political downturn by the Bush administration was immediately followed by a terror warning within a matter of days.” *Id.* at 368.

136 *Id.* at 361.

137 *Id.* at 23.

138 See 9/11: MENTAL HEALTH IN THE WAKE OF TERRORIST ATTACKS, *supra* note 115.

139 PSYCHOLOGY OF TERROR, *supra* note 115, at 5.

140 See *id.* at 81–86.

141 *Id.* at 81.

142 See *supra* note 139 and accompanying text.

143 PSYCHOLOGY OF TERROR, *supra* note 115, at 81. Other events including the anthrax scare in 2001 and the wars in Iraq and Afghanistan have provided more opportunities for media to serve as a conduit for terrorist acts. *Id.* at 84. See *supra* notes 132–39 and accompanying text.

144 PSYCHOLOGY OF TERROR, *supra* note 115, at 84.

reached an even greater audience.<sup>145</sup> Osama bin Laden commented, “[S]even out of every ten Americans suffer[ed] psychological problems following the attacks on New York and Washington.”<sup>146</sup> In one sense, the media served to demarcate those directly affected by the attacks and the public watching at home. Clearly, viewers in distant locations were not physically impacted by the attacks. However, many viewers reported mental injuries, such as post-traumatic stress disorder, many miles from New York City and Washington, D.C.<sup>147</sup> Billions of viewers came into contact with a mental stimulus in the form of these terrorist attacks and many developed mental injuries as a result.<sup>148</sup> With so many people experiencing those events, the general public became more aware of their effects on abilities to work and function in society.<sup>149</sup>

The wars in Afghanistan and Iraq have contributed greatly to enhancing the public’s understanding of and sympathy for mental–mental injuries. The military’s treatment of soldiers and sailors dealing with post-traumatic stress disorder offers a microcosmic view of how states might reform their workers’ compensation laws to deal with mental–mental injuries. The recent wars in Iraq and Afghanistan have received tremendous media coverage allowing the public to witness the military’s medical treatment of combat veterans suffering from mental diseases like post-traumatic stress disorder.<sup>150</sup> Since studies of post-traumatic stress disorder historically have focused on combat veterans, the military has had a head start on dealing with this issue.<sup>151</sup>

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<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 175.

<sup>147</sup> See *supra* notes 124–27 and accompanying text.

<sup>148</sup> Mental–physical injuries can also result from the same sort of stimuli. Mass psychogenic illness is a term used to describe the presence of physical injuries and illnesses that have a psychological origin, such as might result from witnessing “vigorous emergency response to suspected or actual . . . terrorism (and consequent intense media attention) . . . . Direct exposure to an agent is not required to develop somatic symptoms.” *PSYCHOLOGY OF TERROR*, *supra* note 115, at 156–57.

<sup>149</sup> For an examination of the functional outcomes of psychological trauma, see *PSYCHOLOGY OF TERROR*, *supra* note 115, at 400–13. “[S]urvival with impairment . . . is the condition to which much of the traumatic stress literature applies, such as when someone experiences chronic and disabling posttraumatic stress or depression symptoms.” *Id.* at 402. See also 9/11: MENTAL HEALTH IN THE WAKE OF TERRORIST ATTACKS, *supra* note 115, at 335 (“[F]ive key outcomes of disaster on individuals and communities [are]: (1) ‘psychological problems,’ such as post-traumatic stress disorder . . . (2) ‘non-specific distress;’ (3) ‘health problems,’ . . . (4) ‘chronic problems in living,’ such as increased interpersonal, occupational, and financial stressors; and (5) ‘psychosocial resource losses . . . .’”)

<sup>150</sup> See *Frontline: The Soldier’s Heart* (PBS television broadcast Mar. 1, 2005), available at <http://www.pbs.org/wgbh/pages/frontline/shows/heart/> (last visited Feb. 18, 2007); Felicia R. Lee, *Is Trauma Being Trivialized?*, N.Y. TIMES, Sept. 6, 2003, at B9; Goode and Eakin, *supra* note 118, at A2.

<sup>151</sup> See discussion *supra* notes 120–21 and accompanying text.

Research has demonstrated the clear relationship between mental injuries and combat experiences in past wars.<sup>152</sup> Exposure to combat conditions results in “increased risk of posttraumatic stress disorder . . . major depression, substance abuse, functional impairment in social and employment settings, and the increased use of health care services.”<sup>153</sup> Nine hundred and forty-four soldiers were removed from Iraq between the beginning of the war and December 2004 because of psychological stress related to combat experiences.<sup>154</sup> Admittedly, many soldiers diagnosed with post-traumatic stress disorder are also physically injured but others suffer mental injuries as a result of witnessing or participating in horrifying events—the sights, sounds, and smells of combat.<sup>155</sup> The effect of mental injuries resulting from combat experiences is seen in the numbers of soldiers leaving military service after deployments to Iraq or Afghanistan.<sup>156</sup> Roughly seventeen percent of soldiers reported symptoms of mental injuries after returning from combat theaters.<sup>157</sup> The military offers treatment for mental injuries such as post-traumatic stress disorder as part of efforts to stem attrition and manage the huge psychological crisis afflicting the country's military.<sup>158</sup>

For some soldiers, treatment does not resolve their injuries and they are unable to continue serving in the military. The military will discharge soldiers with mental injuries impairing their ability to perform their duties.<sup>159</sup>

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152 Charles W. Hoge, et. al., *Mental Health Problems, Use of Mental Health Services, and Attrition from Military Service After Returning from Deployment to Iraq or Afghanistan*, 295 J.A.M.A. 1023, 1023 (2006).

153 *Id.*

154 Scott Shane, *Military Plans a Delayed Test for Mental Issues*, N.Y. TIMES, Jan. 30, 2005.

155 *Frontline: The Soldier's Heart*, *supra* note 150.

Through modern conditioning, we've trained them not just to shoot, but to shoot accurately. But if we haven't prepared ourselves emotionally for the act ahead of time, and we just tricked you into killing, the magnitude of the trauma can be significant, because we're having to live with something that your body says is not right, that you didn't want to do. And if you fail to be able to accept what you've done and rationalize what you've done, then you spin down one of the paths to [post-traumatic stress disorder].

*Id.* (interview with LTC David Grossman, U.S. Army–Ret.).

156 Hoge, *supra* note 152, at 1027.

157 Shane, *supra* note 153.

158 *See id.* “In an effort to better identify soldiers suffering serious psychological problems as a result of combat duty in Iraq, the Defense Department plans to perform an additional health assessment of servicemen and women three to six months after they come home . . . .” *Id.*

159 10 U.S.C. § 1201 (2000) (service members may be retired because physical disability renders them unfit to perform their duties). The military has adapted this definition to fit mental injuries. For example, the Army defines “physical disability” to include “disability

The typical scenario for these soldiers features a stimulus while in combat that causes a mental injury. This injury, very often post-traumatic stress disorder, then leads to various treatment regimes within the military. If the level of disability precludes the soldier from returning to duty, that soldier will generally be medically discharged.<sup>160</sup> After a discharge is approved, treatment through the Department of Veterans Affairs is available.<sup>161</sup> Compensation for the disability is provided through Veterans Affairs.<sup>162</sup> The monthly compensation amounts range from \$115 to \$2,935.<sup>163</sup> Note that Veterans Affairs does not base compensation for disability on the cause of the injury, only on the level of impairment; compensation can be sought for mental-mental injuries.<sup>164</sup> Higher compensation is allowed based on the level of impairment and the soldier's family situation, whether the soldier has a spouse, dependent children, or parents.<sup>165</sup> The military's guidelines for diagnosing post-traumatic stress disorder are found in the Diagnostic and Statistical Manual of Mental Disorders.<sup>166</sup> In summary, the military recognizes a soldier's disability from mental-mental injuries, understands the limitations this places on the soldier's job-performance, and compensates the soldier for that disability both monetarily and with post-separation health care.

The military has created a regime designed to compensate workers—soldiers, sailors, and airmen—for the mental-mental injuries they incur while on the job. Of course, the military has had years to study these types of injuries and slowly developed treatment and, later, compensation for them.<sup>167</sup> For whatever reason, state workers' compensation statutes have

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due to mental disease." Army Regulation 635-40, *Physical Evaluation for Retention, Retirement, or Separation*, at 116 available at [http://www.usapa.army.mil/pdffiles/r635\\_40.pdf](http://www.usapa.army.mil/pdffiles/r635_40.pdf).

<sup>160</sup> 10 U.S.C. § 1201 (2000).

<sup>161</sup> 38 U.S.C. § 1710 (2000).

<sup>162</sup> 38 U.S.C. § 1110 (2000).

<sup>163</sup> The amounts cited are based, respectively, on 10% impairment with no dependents and 100% impairment with a spouse, two parents, and a child. For current Department of Veterans' Affairs Compensation Rate Tables, see <http://www.vba.va.gov/bln/21/Rates/compo1.htm> (last visited Feb. 18, 2007).

<sup>164</sup> *Id.* But cf. KY. REV. STAT. ANN. 342.0011(1); *Ryan's Family Steakhouse v. Thomasson*, 82 S.W.3d 889, 893 (Ky. 2002) (statutory changes designed to limit compensation for mental-mental injuries).

<sup>165</sup> 38 U.S.C. §§ 1114-1115 (2000).

<sup>166</sup> IRAQ WAR CLINICIAN GUIDE 23 (Paula P. Schnurr & Stephen J. Cozza, eds., 2d ed. 2004) available at [http://www.ncptsd.va.gov/ncmain/ncdocs/manuals/nc\\_manual\\_iwcguide.html](http://www.ncptsd.va.gov/ncmain/ncdocs/manuals/nc_manual_iwcguide.html) (last visited Mar. 24, 2007). "According to the [*Diagnostic and Statistical Manual of Mental Disorders*], posttraumatic stress disorder may occur following exposure to an extremely traumatic stressor when a person has directly witnessed situations that result in actual or threatened mortality or physical injury and the individual's response to this situation includes a strong affective component of intense fear, helplessness, and/or horror." PSYCHOLOGY OF TERROR, *supra* note 115, at 42.

<sup>167</sup> See *supra* notes 116, 118, 120-21, 155 and accompanying text.

been slow to match the progressive actions of the military. In Kentucky, the reason was cost and the desire to attract businesses to the Bluegrass State.<sup>168</sup> As discussed above, the Supreme Court of Kentucky ameliorated the harsh statutory rules that denied mental–mental claims by interpreting the statute to include physical exertion as a physically traumatic event.<sup>169</sup> Kentucky's Supreme Court got it right as a policy matter but interpretive problems still persist. For example, the vagueness of “physical exertion” leaves open numerous possible mental–mental claims. If Kentucky truly intends to attract businesses by creating more favorable workers' compensation statutes, this ambiguity will need resolution. Perhaps the General Assembly might look to the military's example and offer compensation based on the degree of impairment and the worker's family situation. Kentucky should match the military's focus on actual disability.

#### CONCLUSION

The *White* decision presented Kentucky employers, employees, and legal practitioners with the prospect of workers' compensation for mental–mental injuries. The decision clearly ignored the plain meaning of Kentucky's workers' compensation act and allowed compensation for mental–mental injuries. Kentucky has never allowed such compensation, claiming that disallowing compensation served important interests. Yet the *White* decision is unsurprising.<sup>170</sup>

World events may have changed the mood in this country regarding the compensability of mental–mental injuries. Awareness of post–traumatic stress disorder has crept into the public consciousness in the aftermath of September 11th and the wars in Iraq and Afghanistan.

Ultimately, allowing compensation for mental–mental injuries in Kentucky avoids the “Draconian result” that worried the Workers' Compensation Board in *White*.<sup>171</sup> Degree of impairment and disability should control because to do otherwise allows workers with minimal physical–mental injuries to benefit while those with possibly more debilitating mental–mental injuries get nothing. In clearing up the inconsistencies between *White* and the statute, Kentucky's General Assembly should adopt the holding in *White* and look to other states and the military as models for implementing it.

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168 Patton Speech, *supra* note 11, at 3–4.

169 Richard E. Jacobs Group, Inc. v. White, 202 S.W.3d 24, 27 (Ky. 2006).

170 On remand, the A.L.J. held the physical exertion of CPR caused the claimant's mental injuries.

171 See Board Opinion, *supra* note 46, at 15.

