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Comments

Mental Stimulus Causing Mental Disability: Compensability Under the Pennsylvania Workmen's Compensation Act

I. INTRODUCTION

A Workmen's Compensation Law which meets the test of reasonableness in compensation as between the employee who *receives* and the employer who *pays* is one of the most socially beneficial enactments which statesmanship is capable of producing. On the other hand, a Workmen's Compensation Law which places upon any industry a burden so crushing that it makes that industry's existence either impossible or, to its owners, economically undesirable, is a measure which the workmen themselves should emphatically condemn and reject, for it paralyzes the very activities on which their economic well-being depends. Unprofitable industries soon become idle industries; idle industries mean idle capital, and in all ages and countries, idle capital has always meant idle men.¹

Those words written by Justice Maxey for the Pennsylvania Supreme Court in 1939 still ring true today and should be given due consideration by the Pennsylvania courts and legislature when considering any expansion of pre-existing notions as to what constitutes a compensable injury² under the Workmen's Compensation Act. Certainly one of the most troublesome problems faced by workmen's compensation authorities is whether to recognize any mental disorder which arises in whole or in part from work-related stress as an "injury" under the Pennsylvania Workmen's Compensation Act.

This comment will address the complex issues involved in determining whether work-related stress that is a cause of a mental or nervous disorder should be considered an "injury" under the Act

1. Rich Hill Coal Co. v. Bashore, 334 Pa. 449, 460-61, 7 A.2d 302, 308 (1939).

2. See The Pennsylvania Workmen's Compensation Act, § 301(c)(1), PA. STAT. ANN. tit. 77 § 411(1) (Purdon Supp. 1984-85).

as it is presently written.³ The following discussion will emphasize that conflicting objectives must be weighed and carefully balanced. On one hand, it is imperative to provide sure, prompt, and reasonable wage replacement and medical care to those who suffer a work-related disability. This honorable and ideal objective, however, must be counter-balanced by the reality that if the system is abused or becomes too burdensome to the employer the whole community will suffer due to the loss of that employer's business and the revenues which his business has provided for the community.

This comment concludes that, at least until full legislative inquiry and action is completed, a claim for work-related mental disability should be recognized but limited to allow compensation only when the worker can demonstrate: (1) that his work situation was *substantially* more stressful than the ordinary day-to-day mental strains and tensions which all workers generally are expected to encounter without resulting serious mental injury; and (2) by unequivocal medical evidence that this abnormal work situation was the *primary* source of stress or anxiety which caused the mental injury.⁴

II. SHOULD DISABILITY CAUSED BY WORK-RELATED STRESS BE AN INJURY UNDER THE ACT?

Section 301(a) of the Pennsylvania Workmen's Compensation Act states that: "[e]very employer shall be liable for compensation for personal injury to, or for the death of each employe, by an injury in the course of his employment"⁵ Section 301(c)(1), in turn, provides that:

[t]he terms "injury" and "personal injury" as used in this act, shall be construed to mean an injury to an employe, regardless of his previous *physical* condition, arising in the course of his employment and related thereto, and such disease or infection as *naturally* results from the injury or is aggravated, reactivated or accelerated by the injury.⁶ (emphasis added)

3. *Id.*

4. Such a standard is consistent with the majority position which supports compensability where work-related mental stimulus causes mental injury but which also recognizes the need for some threshold greater than ordinary day-to-day stress so as to sufficiently meet the "arising out of employment" causation requirement. See generally 1B A. LARSON, WORKMEN'S COMPENSATION LAW § 42.23 (1982), which provides a summary of the different standards required by other states.

5. PA. STAT. ANN. tit. 77 § 431 (Purdon Supp. 1984-85).

6. PA. STAT. ANN. tit. 77 § 411(1) (Purdon Supp. 1984-85).

The first Pennsylvania case to hold that a work-related mental illness can be a compensable injury under the Act was *University of Pittsburgh v. Perlman*.⁷ The court in *Perlman* was impressed by the fact that the legislature, in amending the Act,⁸ had removed the specific language that an injury be to the "physical structure of the body."⁹ The court did concede that because the Act still refers to "injury . . . regardless of . . . previous *physical* condition" it would be plausible to conclude that there must still be an injury to the physical structure of the body.¹⁰ The court, however, was apparently swayed by the widely accepted policy rule which mandates that the commonwealth court liberally construe the Act so that its humanitarian purpose of protecting the worker is realized,¹¹ as well as by the teachings of Professor Arthur Larson, because the court concluded that when the legislature removed the "injury to the physical structure of the body" wording it effectively abolished any requirement that there be some nexus between the injury and the physical structure of the body.¹² According to Professor Larson, there is no longer any real difference between physical and mental injuries and that, therefore, any jurisdiction which refuses to extend workmen's compensation because the injury is purely mental is disregarding the intent of the Workmen's Compensation Act without being able to ground that determination on either legal or medical theory.¹³ Other objectives should also be considered, however, and substantial questions about the extent of psychological and psychiatric advances should have been answered

7. 49 Pa. Commw. 347, 352, 405 A.2d 1048, 1051 (1979). In *Perlman*, a medical doctor was employed as the director of a health care clinic, as a coordinator of its ambulatory health care program, and as a professor of internal medicine. The commonwealth court accepted testimony and the referee's findings of fact that the pressures of his extensive responsibilities and the frustration at his inability to obtain support and cooperation from various departments with which he dealt created an impossible situation that caused a psychotic depressive reaction. As a result of this condition the doctor became possessed by an uncontrollable mental attitude or frenzy that prompted him to take his life. The court found the psychotic depression to be a compensable injury and awarded death benefits to the doctor's widow. *Id.* at 348-52, 405 A.2d at 1049-1051.

8. The Pennsylvania Workmen's Compensation Act, § 301(c), as amended by Act of March 29, 1972, P.L. 159 (1984).

9. 49 Pa. Commw. at 351-52, 405 A.2d at 1050-51. Before the 1972 amendments, Section 301(c) of the Act read: "The terms 'injury' and 'personal injury,' as used in this act, shall be construed to mean only violence to the physical structure of the body, and such disease or infection as naturally results therefrom . . ." *Id.* at 351, 405 A.2d at 1050.

10. *Id.* at 352, n.4, 405 A.2d at 1051, n.4. (emphasis added).

11. *Id.*

12. *Id.* at 352-53, 405 A.2d at 1051.

13. *Id.* See 1B LARSON, *supra* note 4, § 42.23(a) at 7-632.

before the court expanded the Act to include mental disorders which arise in whole or in part from work-related stress or anxiety.

While the humanitarian purpose of protecting the worker should always be considered and given great weight in interpreting the Act, it should not be considered in isolation from other important policies underlying the successful operation of the Workmen's Compensation Act. Leo G. Knoll, a former chairman of the Workmen's Compensation Board of Pennsylvania and author of the Foreword to Title 77 of Purdon's Pennsylvania Statutes Annotated, has pointed out that an underlying concern of the legislature in enacting the workmen's compensation system was to protect both management and labor by forming a system which would not impair Pennsylvania's extensive industrial structure yet would still be beneficial to the employees of the state.¹⁴ The dual protective purposes of the Act require that Pennsylvania's appellate courts make their decisions in light of both the burdens upon industry and the humanitarian purposes of the Act.¹⁵ Thus, as the Pennsylvania courts develop a position on the issue of whether or to what extent mental disorders caused by work-related stress should be compensable, they should not construe the Act in a way which so greatly expands the coverage of the Act as to disregard the fact that the system emerged from political compromise and protects the interest of not only the worker, but also the employer's business. Responding to such an expansive judicial construction, Chief Judge Breitel of the Court of Appeals of New York gave the following warning:

In a era marked by examples of overburdening of socially desirable programs with resultant curtailment or destruction of such programs, a realistic assessment of impact of doctrine is imperative. An overburdening of the compensation system by injudicious and open-ended expansion of compensation benefits, especially for costly, prolonged and often only ameliorative psychiatric care, cannot but threaten its soundness or that of the enterprises upon which it depends.¹⁶

Furthermore, it is unlikely that the Pennsylvania legislature gave any serious consideration to the multifaceted issues involved in mental disability claims when it amended the Act in 1972. Justice Manderino suggested¹⁷ that the legislature was primarily re-

14. PA. STAT. ANN. tit. 77, at ix (Purdon 1952 & Supp. 1984-85).

15. *Id.*

16. *Wolfe v. Sibley, Lindsay & Curr Co.*, 36 N.Y.2d 505, 513-14, 330 N.E.2d 603, 608, 369 N.Y.S.2d 637, 644 (1975) (Breitel, C.J., dissenting).

17. *See Workmen's Compensation Appeal Bd. v. Bernard S. Pincus Co.*, 479 Pa. 286,

acting to criticism of the "unusual strain doctrine"¹⁸ upheld by Justice Jones in *Hamilton v. Procon, Inc.*,¹⁹ and general dissatisfaction with the rule that work-related injuries were not compensable except upon a showing of an accident.²⁰ It therefore appears that the 1972 amendments were enacted to rectify the problems of interpretation and proof inherent in the "unusual strain" and "unusual pathological result" doctrines.²¹ It is significant that both doctrines dealt with injuries involving some objective physical connection and have no relationship to the issues involved in the mental stimulus causing mental disability issue.

It seems likely that the legislature answered the plea of Justice Jones²² and determined that the Act should be expanded to cover "an injury" so long as two requirements are met: (1) the injury must arise in the course of employment and (2) the injury must be related to that employment.²³ Furthermore, by shifting the focus from injuries *by accident* in the course of employment to injuries *arising from and related to* the course of employment it is reasonable to conclude that the legislature intended to expand workmen's compensation coverage to include stress heart attack victims.²⁴ A

294-95, 388 A.2d 659, 663 (1978).

18. *Id.* The "unusual strain doctrine" was applied in heart attack cases where the claimant was afflicted with a pre-existing heart condition. In order to support a finding of an "accident" as was required prior to the 1972 amendments, the claimant had to show that the injuries resulted from unusual strain or exertion in the course of employment. *Id.*

19. 434 Pa. 90, 95, 252 A.2d 601, 604 (1969). Justice Jones, in refusing to overrule the unusual strain doctrine, recognized that any adoption of a totally new concept should be preceded by legislative investigation in an effort to determine the latest medical knowledge on the issue. *Id.* at 97, 252 A.2d at 604. In making a plea to the Pennsylvania legislature to undertake such an investigation, he concluded that the courts are not in a position to evaluate the potential impact on the insurance industry that might stem from liberalizing any rule of recovery and strongly suggested that the court could not and should not provide workmen's compensation coverage in an area where group life and health insurance coverage had always been the primary source of recovery. *Id.*

20. 479 Pa. at 294-95, 388 A.2d at 663.

21. *Id.* Under the "unusual pathological result doctrine" the courts stretched the meaning of "accident" to include injuries which occurred when the worker tore tissue or broke bones while performing usual work in the usual fashion. *Id.* (quoting the commonwealth court in *Commonwealth v. United States Steel Corp.*, 31 Pa. Commw. 329, 376 A.2d 271 (1977)). In fact, no "accident" occurred in either the "unusual strain" or "unusual pathological result" situations but compensation was granted, nonetheless, when the injury was clearly related to employment. *Id.*

22. See *supra* note 19.

23. See *Krawchuk v. Philadelphia Elec. Co.*, 497 Pa. 115, 120, 439 A.2d 627, 630 (1981) (1972 amendments construed so as not to require claimant to prove that off premises heart attack victim was actually engaged in the furtherance of employer's business at the time of the heart attack so long as condition originated while in the course of employment).

24. *Id.*

stress heart attack, however, is a physical injury caused by a mental stimulus and is *not* a mental injury caused by a mental stimulus. The latter category of injuries simply does not appear to have been considered by the legislature when it amended the Act in 1972.

Certainly it would have been easy enough for the General Assembly to include the term "mental injury" in Section 301(c) if it had meant to include mental disability caused by a mental stimulus within the scope of the Act. The reasons given by Justice Jones in *Hamilton v. Procon, Inc.* for refusing to overrule the unusual strain doctrine are even more compelling when applied to the issue of mental disability caused by mental stimulus:

Researchers tell us that people who suffer from psychological problems occupy more hospital beds in the United States than those who have a physical illness or injury. It is estimated that at any given time between 15 and 30 percent of the general population have diminished efficiency as a result of some type of mental or emotional dysfunction.²⁵

The statistics point out the overwhelming potential burden on the compensation system and should alert the Pennsylvania courts to tread softly and carefully, exercising substantial restraint, if they are to continue to construe the purely mental disability as compensable under the Act. Given the fact that no mention of mental injury is made in Section 301 as it is presently written, any construction of the Act that provides relief for even the most traumatic and seemingly obvious work-related psychic injury is a very liberal construction which can only be justified by the argument that in such a case the humanitarian purposes of the Act outweigh any burden to industry and the compensation system. A construction of the Act that provides benefits for any but the most obvious work-related mental disability, however, would be an abuse of judicial discretion in light of the tremendous potential burden on the compensation system and the failure of the legislature to give any clear indication that it intended to include mental disability caused by a mental stimulus within the scope of the term "injury" as it is used in the Workmen's Compensation Act.

III. PROBLEMS OF PROOF

The other line of reasoning which apparently impressed the

25. See P. CARONE, S. KIEFFER, L. KRINSKY & S. YOLLES, *THE EMOTIONALLY TROUBLED EMPLOYEE: A CHALLENGE TO INDUSTRY* 57 (1976).

commonwealth court in *University of Pittsburgh v. Perlman*²⁶ was the aforementioned opinion of Professor Larson²⁷ that advances in the field of medicine have made the evidentiary difficulties inherent in proving a compensable physical or nervous injury virtually the same; and that, because both can be equally disabling, there is no reason to treat the mental injury any differently than the physical injury.²⁸ Idealistically, this approach sounds very persuasive and humanitarian. Realistically, while there is little doubt that mental disorders can be just as disabling as physical disorders, there may be substantial statutory interpretation and policy reasons for not treating them equally.²⁹ Furthermore, serious questions still exist with respect to whether the fields of psychology and psychiatry have advanced to the point where it is possible to consistently give a credible and unequivocal opinion regarding causation. The results of an international research study indicate that the diagnostic skills of the American psychiatrist are "quite poor."³⁰ The intellectual leadership in the fields of psychiatry and psychology responded to the above mentioned concerns by producing DSM-III,³¹ a manual which has become the primary source for standard psychiatric diagnosis.³² DSM-III attempts to fully describe what the manifestations of the mental disorders are, and only rarely attempts to account for *how* the disturbances come about.³³ The author of DSM-III's introduction indicates that:

The major justification for the generally atheoretical approach taken in DSM-III with regard to etiology is that the inclusion of etiological theories would be an obstacle to use of the manual by clinicians of varying theoretical orientations, since it would not be possible to present all reasonable etiological theories for each disorder.³⁴

It is further pointed out in DSM-III that:

[F]or most of the categories the diagnostic criteria are based on clinical

26. 49 Pa. Commw. 347, 405 A.2d 1048 (1979).

27. See *supra* note 13 and accompanying text.

28. *Id.*

29. See *supra* notes 14-25 and accompanying text.

30. Erlich, *The Defense Attorney and the Psychiatric Expert Witness*, COUNTERPOINT, June 1984, at 6.

31. American Psychiatric Association, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3rd ed. 1980) [hereinafter cited as DSM-III].

32. Erlich, *supra* note 30, at 7. See Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 *VAND. L. REV.* 263 n.18 (1983).

33. DSM-III, *supra* note 31, at 7.

34. *Id.*

judgment, and have not yet been fully validated by data about such important correlates as clinical course, outcome, family history, and treatment response. Undoubtedly, with further study the criteria for many of the categories will be revised.³⁵

It thus becomes apparent that neither psychology nor psychiatry has advanced to the point where the precise cause of most mental disorders can reasonably be ascertained.³⁶

In addition, because the symptoms of mental disabilities are manifested subjectively, the potential for malingering is much greater than in the usual case of a physical injury where there is some objective finding upon which the existence of an injury can be substantiated.³⁷ Likewise, even when the mental disability itself is real, there is a greater potential for the claimant to successfully make self-serving statements on a conscious or unconscious level.³⁸ According to one commentator there is a highly complex interrelation between an individual's internal or subjective reality and his external or environmental reality.³⁹ "No method exists either to quantify or to qualify the extent to which one reality and not the other is a cause of the mental disorder."⁴⁰ Thus, the door is left wide open for the claimant who has filed or plans to file a workmen's compensation claim to emphasize the stresses of his workplace over the numerous other personal, social and environmental stresses⁴¹ which have contributed to his mental disorder. Unless the psychiatrist or psychologist has reason to believe that the claimant is not giving a full and accurate history, it is highly possible, if not probable, that he will accept the claimant's emphasis on the work stress and conclude that the disorder was primarily the result of those stresses.⁴²

35. *Id.* at 8.

36. *See* Joseph, *supra* note 32, at 271-73. The author argues that the causation issue for the mental disability claim is so complicated and uncertain that courts must resort to normative evaluations which can frustrate the underlying compromise policies embodied in the workmen's compensation system. *Id.* at 310-13.

37. *Id.*

38. *See* Erlich, *supra* note 30, at 7. The author makes an interesting and convincing argument for the proposition that there are inherent biases and attitudes in psychiatric practice that favor the plaintiff's position while making it very difficult for the defense to get a favorable opinion regardless of the actual nature of the plaintiff's condition. *Id.*

39. Joseph, *supra* note 32, at 271.

40. *Id.* at 272.

41. *Id.* at 271, n.27. "It is clear . . . that a variety of stresses—personal, social, and environmental—contribute to human mental . . . illness." *Id.*

42. *See, e.g.,* Seitz v. L & R Indus., Inc., 437 A.2d 1345, 1350 (R.I. 1981) (compensation denied where the treating psychiatrist based his conclusions largely on claimant's statement that she was unable to return to work).

In short, while the fields of psychology and psychiatry continue to show significant advancements in providing clearer descriptions of diagnostic categories, substantial disagreement remains as to causation.⁴³ What this means in terms of the Pennsylvania Workmen's Compensation Act (assuming that mental disability is within its scope) is that while a psychiatrist sometimes can reasonably determine that a person *is* mentally disabled and unable to perform the duties of his job, the psychiatrist can not base an opinion as to whether that disability *arose* in the course of employment upon any theory that even approaches universal acceptance by those in his own field.⁴⁴ Thus, under most circumstances, when a court accepts the testimony of a psychiatrist that a mental disability was caused by work-related stresses, the court, in effect, makes a policy decision to accept one theory espoused by a particular psychiatrist even though that same theory is not generally accepted by those in the best position to measure its relative worth—other psychiatrists.⁴⁵ A policy decision to recognize or reject psychiatric theories of causation should ultimately be made by the Pennsylvania legislature and not by the courts.⁴⁶ If the Pennsylvania courts feel compelled to continue to act upon this issue without legislative guidance, they should, at the very least, indicate that they are aware of the related problems of proof,⁴⁷ statutory interpretation,⁴⁸ and conflicting objectives.⁴⁹ Unfortunately, the courts have been expanding the Act to include mental injuries without giving these issues a full explanation and analysis.⁵⁰

43. DSM-III, *supra* note 31, at 6-7.

44. See DSM-III, *supra* note 31, at 6-7. The authors of this 494 page study recognized that for most mental disorders the etiology is unknown and that while a number of theories have been suggested the supporting evidence is often unconvincing. *Id.*

45. *Id.*

46. See *supra* note 19 which indicates that the Pennsylvania Supreme Court took this position when confronted by the analogous situation presented by the heart attack cases.

47. See *supra* notes 29-45 and accompanying text.

48. See *supra* notes 5-12, 17-23 and accompanying text.

49. See *supra* notes 14-16 and accompanying text.

50. See generally Joseph, *supra* note 32, at 316-17, wherein the author suggests not only that a court should *expressly* recognize and acknowledge these problems but should likewise require the litigants to argue the potential positive and negative effects that any proposed standard would have on the working community, the business community, the workmen's compensation system, and the judicial system. *Id.*

IV. A HISTORY AND ANALYSIS OF THE CURRENT PENNSYLVANIA STANDARD

In *University of Pittsburgh v. Perlman*⁵¹ the commonwealth court held that a work-related mental illness can be a compensable injury under the Act if competent and unequivocal medical testimony supports a determination that the employee is disabled by such a mental illness.⁵² Thus, the standard applied to the mental disability claim was essentially the same standard as that applied to the physical disability claim.⁵³ One year later, however, in *Thomas v. Workmen's Compensation Appeal Board*,⁵⁴ the court seemed to apply a more restrictive standard of proof in rejecting an employee's contention that his daily fear of re-experiencing another workplace explosion and fire constituted a compensable injury.⁵⁵ The court stated that "due to the highly subjective nature of psychiatric injuries, the occurrence of the injury and its cause must be adequately pinpointed."⁵⁶ The *Thomas* court did not give any specific, objective guideline as to the parameters of "adequately pinpointed," but did point out that in previous cases allowing recovery for emotional injury, an identifiable work-related physical injury had accompanied the mental illness and the two injuries, physical and mental, occurred close in time to each other.⁵⁷ The court went on to hold that an employee's subjective reaction to being at work and being exposed to *normal* working

51. 49 Pa. Commw. 347, 405 A.2d 1048 (1979). See *supra* notes 7-13 and accompanying text.

52. 49 Pa. Commw. at 353, 405 A.2d at 1051.

53. See, e.g., *Westmoreland Casualty Co. v. Workmen's Compensation Appeal Bd.*, 36 Pa. Commw. 307, 387 A.2d 683 (1978) (where no obvious connection exists between a claimant's injury and the alleged cause, unequivocal medical evidence not based on mere possibilities must be produced to establish the relationship).

54. 55 Pa. Commw. 449, 423 A.2d 784 (1980). In *Thomas*, the claimant had experienced fires in 1970 and 1974 and an explosion in 1971 at his place of employment. *Id.* at 450-51, 423 A.2d at 785-86. In 1975, he suffered a nervous reaction after watching a news broadcast of a fire at a nearby refinery and contended that a disabling injury had occurred in 1975 due to the culmination of this series of traumatic events. *Id.* at 451-52, 423 A.2d at 786.

55. *Id.* at 453-56, 423 A.2d at 787-88.

56. *Id.* at 455, 423 A.2d at 787.

57. *Id.* The court cited several examples including *Stump v. Follmer Trucking Co.*, 448 Pa. 313, 292 A.2d 294 (1974) (emotional excitement after truck accident leading to heart attack); *University of Pittsburgh v. Perlman*, 49 Pa. Commw. 347, 405 A.2d 1048 (1979) (work-related stress leading to suicide); and *Dill Prods. v. Workmen's Compensation Appeal Bd.*, 42 Pa. Commw. 563, 401 A.2d 409 (1979) (physical injury to foot leading to severe emotional strain).

conditions did not constitute an injury under the Act.⁵⁸ No guidelines, however, were given which would indicate exactly what would be perceived as *normal* working conditions. This was unfortunate, since the term "normal" can be used in various contexts. The term can be interpreted as the actual, usual, expected work environment of the particular claimant or it can mean those conditions which are expected to naturally and generally occur in that particular profession as a whole. It seems more probable, however, that the court used the term in a context which entailed measuring the particular work situation of the claimant against the socially accepted amount of day-to-day strain and tensions which all employees are generally expected to encounter without succumbing to serious mental injury.⁵⁹ In short, the *Thomas* opinion was appropriate for the given fact situation but gave little objective guidance in terms of supplying a standard that could be easily understood and applied by the workmen's compensation authorities. What the *Thomas* court did make clear was that a stricter standard of proof than was applied in physical injury cases is required for mental disability cases.⁶⁰

Four commonwealth court cases⁶¹ since *Thomas* have dealt to some degree with the propositions enunciated therein. The meanings of "adequately pinpointed"⁶² and "normal" working conditions,⁶³ however, are no clearer today than they were in 1980 when *Thomas* was decided. In *Kitchen v. Workmen's Compensation Ap-*

58. 55 Pa. Commw. at 456, 423 A.2d at 788 (emphasis added).

59. See generally *School Dist. No. 1 v. Department of Industry, Labor and Human Relations*, 62 Wis. 2d 370, 215 N.W.2d 373 (1974); *Albanese's Case*, 378 Mass. 14, 389 N.E.2d 83 (1979), which are but two examples of similar approaches taken in other jurisdictions and which support the postulated interpretation of "normal" working environment.

60. See 55 Pa. Commw. at 455-56, 423 A.2d at 787-88. Analogy to the gradual or cumulative physical injury cases was specifically rejected by the court as not being persuasive since those cases involved harm to the employee which was objectively measurable. *Id.* at 456, 423 A.2d at 788.

61. See *infra* notes 64-112 and accompanying text. See also *Hepp v. Workmen's Compensation Appeal Bd.*, 67 Commw. 330, 447 A.2d 337 (1982) (psychiatric condition precipitated by notice of termination received at claimant's home did not arise in furtherance of employer's business and was therefore not compensable); *Pryor v. Workmen's Compensation Appeal Bd.*, — Pa. Commw. —, 471 A.2d 1323 (1984) (referee not in error by refusing to accept the sole medical testimony in a case where the referee found that testimony was based solely on observations of claimant, and that the testifying psychiatrist had not been apprised of all the relevant facts and circumstances). The latter cases also dealt with the mental stimulus-mental disability issue but were decided on other grounds without discussing *Thomas*.

62. See *supra* notes 56-57 and accompanying text.

63. See *supra* notes 58-60 and accompanying text.

peal Board,⁶⁴ the claimant had alleged in an earlier petition that he was disabled because of pulmonary fibrosis contracted from exposure to silica in the company's foundry.⁶⁵ That petition was dismissed by the referee on the basis of medical testimony that Kitchen was not suffering from silicosis.⁶⁶ The claimant then filed a second petition contending that he was disabled because of an anxiety neurosis which caused him to believe that he suffered from silicosis.⁶⁷ The treating psychiatrist variously ascribed the claimant's illness to exposure to silica dust for a period exceeding twelve years in the foundry, to a silica dust storm, to a subsequent diagnosis of silicosis, and to the workmen's compensation hearings themselves.⁶⁸ The court found that the psychiatrist's opinions were equivocal as to the cause of the disorder and, citing *Thomas*, indicated that clearly, in this case, the occurrence of the injury and its cause were not adequately pinpointed.⁶⁹ Furthermore, the court quoted with apparent approval from the opposing report of a board-certified psychiatrist-neurologist which concluded that Kitchen's psychiatric disorder was not work-related.⁷⁰ According to that report:

Protests, objections or squawks which an individual may have about a loss or a situation of life or work are not the obligatory or intrinsic effects of that situation or that stress. They are individual reactions and therefore cannot be inherently due to the stress. Such emotional reactions cannot therefore be blamed on the situation.⁷¹

Thus, it would seem reasonable to conclude that after *Kitchen*, a claimant would have to make two separate showings before a mental disability would be considered compensable. First, there must be a work-related stressor greater than protests, objections or squawks that a worker may have about a situation of work before an emotional reaction can be blamed on the situation.⁷² Second, the cause of the disability would have to be specifically delineated so as to exclude any non-work-related stimuli and/or reaction to subjectively perceived but imagined work-related stimuli.⁷³ Such

64. 73 Pa. Commw. 289, 458 A.2d 631 (1983).

65. *Id.* at 290, 458 A.2d at 632.

66. *Id.*

67. *Id.*

68. *Id.* at 291, 294, 458 A.2d at 632, 634.

69. *Id.* at 294-95, 458 A.2d at 634.

70. *Id.* at 292-93, 458 A.2d at 633.

71. *Id.* at 293, 458 A.2d at 633.

72. *Id.*

73. *See id.* at 294-95, 458 A.2d at 634. It appears likely that the court found the claim-

an interpretation would have somewhat narrowed the standards of *Thomas* and given more specific guidelines to workmen's compensation authorities. No such test was specifically proclaimed by the *Kitchen* court, however, and in the cases that have followed *Kitchen* it is apparent that the commonwealth court generally has not accepted this interpretation.

In *McDonough v. Workmen's Compensation Appeal Board*,⁷⁴ the claimant testified that from 1962 until 1970, his superior regularly singled him out for criticism in the presence of other persons at the workplace.⁷⁵ This allegedly caused him to develop a fear of going to work, which in turn caused him to report late or to use vacation days to avoid going to work at all.⁷⁶ In 1970, the claimant collapsed while at work and was advised to seek psychiatric help though it does not appear that he actually did so.⁷⁷ From 1970 till 1979, the claimant worked under a different supervisor who did not criticize the claimant in the manner in which the previous supervisor had, but the negative feelings toward work and the tardiness continued.⁷⁸ The claimant did not consult the clinical psychologist who testified on his behalf until December 14, 1978.⁷⁹ The psychologist testified that the claimant's work experience was a substantial cause of his mental illness; though, on cross-examination, he admitted that it was also possible that something other than work could have caused the mental illness.⁸⁰ The referee found that from 1962 to 1970, "the claimant's boss . . . was critical of claimant's work in a voice loud enough for co-employees to hear," but denied compensation on the grounds that the psychologist's testimony was "highly speculative" and, as such, insufficient to establish a proper causal connection between the claimant's mental condition and his job.⁸¹ The Workmen's Compensation Appeal Board affirmed the referee's decision and indicated that "even if the work did play a part in causing the claim-

ant's reaction to his illness not to be work-related since any impairment of pulmonary function was found to be the result of cigarette smoking. *Id.* at 290, 458 A.2d at 632. Furthermore, since his illness was not, in fact, caused by the work environment, his belief that it was so related was subjective and imagined.

74. — Pa. Commw. —, 470 A.2d 1099 (1984).

75. *Id.* at 1100.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 1100-01.

81. *Id.*

ant's disability, it was merely the claimant's subjective reaction to normal working conditions."⁸² The commonwealth court reversed and held without reference to the *Thomas* "adequately pinpointed" causation standard, that the psychologist's⁸³ testimony⁸⁴ was sufficiently unequivocal to meet the claimant's burden of proof.⁸⁵ In so holding, the court apparently put the standard of medical proof back on equal terms with the unequivocal medical standard required for physical disability cases.⁸⁶ Furthermore, the court held that the claimant's work environment from 1962 to 1970 wherein he was criticized by his boss in a voice loud enough for co-employees to hear was surely not a *normal* working condition.⁸⁷ Such circumstances, however, would seem to fall squarely into the category of protests, objections or squawks that an employee might have about a work situation (criticism by the supervisor), and which the *Kitchen* court had accepted as an emotional reaction that could not be blamed on the situation.⁸⁸ It should be noted that the finding of the referee was merely that "from 1962 to 1970, the claimant's boss . . . was critical of claimant's work in a voice loud enough for co-employee's to hear."⁸⁹ It is not clear why the claimant was criticized or how often he was criticized. If he was criticized occasionally for not doing his job properly, then it certainly would not be abnormal for a supervisor to occasionally criticize him in a loud manner. While such behavior may not be the *ideal* way to handle the employee, it is extremely doubtful that it is an abnormal way to handle such a situation. What is clear is that, once again, the court provided no objective test for determining what will be considered "normal."

A few months later, in *Hirschberg v. Workmen's Compensation Appeal Board*,⁹⁰ a claimant with a history of chronic anxiety neu-

82. *Id.* at 1101 (quoting decision of Worker's Compensation Appeal Board).

83. It is not clear why the court recognized the testimony of a psychologist as being *medical* testimony in the first place. A psychologist is not a medical doctor and to accept this testimony as *medical* testimony would seem to warrant some explanation.

84. *See supra* note 80 and accompanying text.

85. 470 A.2d at 1101-02.

86. *Id.* This conclusion is grounded on the court's reliance upon *Pertman*, *see supra* notes 52-53 and accompanying text, and Philadelphia College of Osteopathic Medicine v. Workmen's Compensation Appeal Bd., 77 Pa. Commw. 202, 465 A.2d 132 (1983) (physical injury case), without reference to the more restrictive "adequately pinpointed" language of the *Thomas* and *Kitchen* cases. *Id.*

87. *Id.* at 1101.

88. *See supra* notes 70-72 and accompanying text.

89. 470 A.2d at 1100.

90. — Pa. Commw. —, 474 A.2d 82 (1984).

rosis contended that his supervisor's mistreatment of him, whether real or imagined, aggravated his pre-existing neurosis and caused him to become totally disabled.⁹¹ The referee had chosen to believe the employer's testimony that the claimant was not, in actuality, mistreated by his supervisors, and thus denied the claim on the grounds that there was no causal relationship between the actual work situation and the disability.⁹² On this occasion the commonwealth court upheld the conclusions of the referee and, citing both *Thomas* and *Kitchen*, re-emphasized that because of the highly subjective nature of mental injuries, an injury's occurrence and cause must be specifically delineated.⁹³ The court then quoted the familiar excerpt from *Thomas*: "that evidence of an employee's subjective reaction to being at work and being exposed to normal working conditions is not an injury under the Act" and concluded that under this standard a claimant must establish that his mental condition was aggravated or precipitated by actual, and not merely perceived or imagined, employment events.⁹⁴ The court went on to hold that "an honest, but mistaken perception of job harassment that aggravates a pre-existing anxiety neurosis and which results in disability is not an injury under Section 301(c) of the Act."⁹⁵ In short, the *Hirschberg* court made clear that distorted, subjective reactions cannot provide the necessary causal connection between employment and mental disability, and re-emphasized the need for a more restrictive causation standard when dealing with mental injuries because of the subjective nature of the injuries themselves.⁹⁶

The most recent case of mental stimulus causing mental disability decided by the commonwealth court was *Bevilacqua v. Workmen's Compensation Appeal Board*.⁹⁷ In *Bevilacqua*, the claimant was an employee in a business owned and operated by his family.⁹⁸ He worked there for fifteen years as a sheet metal worker until he was promoted and worked five years as an estimator before he was considered totally disabled.⁹⁹ The estimator's position consisted of supervising other employees, performing estimates for customers, answering telephones in the office and preparing and sending bills

91. *Id.* at 84.

92. *Id.*

93. *Id.*

94. *Id.* at 85.

95. *Id.*

96. *Id.* at 84-85.

97. ___ Pa. Commw. ___, 475 A.2d 959 (1984).

98. *Id.* at 960.

99. *Id.*

and other paperwork.¹⁰⁰ His two uncles who ran the business did not pressure him to do more work but he was not personally satisfied with the manner in which he was performing his duties.¹⁰¹ The claimant and his treating psychologist believed that the changes in his work duties caused him to become mentally disabled.¹⁰² The referee found in favor of the claimant but was reversed by the Appeal Board.¹⁰³ The Board, citing *Thomas*, reasoned that the claimant's disability was caused by his subjective reaction to being at work and being exposed to normal working conditions and, as such, the claimant had not suffered a compensable injury under the Act.¹⁰⁴ The commonwealth court in reversing the Board distinguished *Thomas* apparently by finding that while nothing unusual occurred at Thomas' workplace at or near the time that he contended he suffered his disabling mental injury,¹⁰⁵ the change to a position of greater responsibility in *Bevilacqua* was somehow unusual and therefore, Bevilacqua's subjective reaction was caused by abnormal work conditions and should be considered an injury under the Act.¹⁰⁶

The *Bevilacqua* court supported this proposition by pointing out that as long as the claimant attempted to perform his new duties, his condition deteriorated in an objectively discernible manner.¹⁰⁷ The court, however, never explained why a job promotion or a change in work duties should be deemed unusual or abnormal. Indeed, it certainly does not seem unusual or abnormal for a worker to hope and expect to be promoted someday to a position of greater responsibility. Rather, such expectations are more likely the norm. Furthermore, there can be little doubt that promotions are extended and changes in duties occur every day in the general workplace.

It appears then that the *Bevilacqua* court equates *normal* working conditions with *never changing* working conditions.¹⁰⁸ Such a position may ultimately do more harm than good for the working community as a whole, for it sends a message to employers not to promote from within the existing ranks, and not to give the em-

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 960-61.

105. *See supra* notes 54-55 and accompanying text.

106. 475 A.2d at 961.

107. *Id.*

108. *See id.*

ployee who has been toiling at menial tasks an opportunity to improve his position. If the employer does give an employee such an opportunity and the employee subsequently develops or aggravates an emotional problem which he can convince a psychologist or psychiatrist is due to the change in duties,¹⁰⁹ the employer will be responsible for costly psychiatric care and compensation for as long as the problem lasts.¹¹⁰ Under *Bevilacqua*, the employer can avoid this potentially costly dilemma by refusing to promote his present employees, choosing, in the alternative, to hire someone new, since by starting and keeping a new employee at a given level, the duties will *never change*, and those duties will be that new employee's normal working conditions.¹¹¹ If the duties for which the new employee was hired to perform are not inherently abnormal, then it becomes irrelevant for purposes of workmen's compensation whether the new employee can emotionally handle the duties of that job. Such a distinction seems arbitrary and pointless, and it is hoped that a more meaningful standard will be considered and adopted by the Pennsylvania courts in the near future.¹¹²

V. CONCLUSION

The Pennsylvania Commonwealth Court has expanded the meaning of injury as used in Section 301(c) of the Pennsylvania Workmen's Compensation Act to include mental disability.¹¹³ It has done so without being able to point to any specific legislative directive.¹¹⁴ Thus, this expansion of the coverage of the Act has been a judicial policy decision; yet, the judiciary has not adequately explained how or why it arrived at the decision to recog-

109. See *supra* notes 36-42 and accompanying text for the position that it is not difficult to convince certain psychologists or psychiatrists that a mental problem is work-related regardless of whether the changed work environment is or is not a substantial factor in reality.

110. Before *Perlman* was decided in late 1979, such disabilities were covered only by individual or group health and accident plans or disability insurance policies. While the cost of group policies is provided in whole or in part by the employer, he can provide policies with limited coverages to effectively limit and control his costs. In contrast, since payment for psychiatric care is unlimited and compensation continues as long as the claimant is considered to be disabled under the Pennsylvania Workmen's Compensation Act, the cost to the employer will be much greater.

111. See *supra* notes 105-08 and accompanying text.

112. See *infra* notes 122-23 and accompanying text for the author's suggested standard.

113. See *supra* notes 7-13 and accompanying text.

114. See *supra* notes 17-23 and accompanying text.

nize mental disabilities.¹¹⁵ No discussion in any of the cases relates to the potential adverse impact on industry and the workmen's compensation system that such a policy decision could have.¹¹⁶ Certainly, before such a far-reaching policy determination is reached there should be a consideration and balancing of both the possible adverse results¹¹⁷ and the possible positive results that might stem from that policy. While the court in *Perlman* relied upon the humanitarian purposes of the Act and the opinion that modern medical advances have made proof of mental disability virtually the same as proof of physical disability in determining that mental disabilities should be covered by the Act,¹¹⁸ it is nowhere apparent that the court recognized that such a determination could have adverse implications¹¹⁹ or that psychologists and psychiatrists strongly disagree about the extent of their ability to diagnose a mental problem and to pinpoint its cause.¹²⁰ Furthermore, while *Thomas* and its progeny have recognized that the highly subjective nature of mental injuries requires a somewhat detailed and restrictive standard of proof and causation, the standards are vaguely worded and have been applied in a manner which is more apparent than real.¹²¹

In short, the complex and substantial issues raised herein should be given full consideration by both the legislature and the courts before there is any broad acceptance of the mental disability claim and corresponding broad expansion of the Workmen's Compensation Act. Because these issues have apparently not been given full consideration, a more restrictive and objective standard is urged. Compensation should be granted only when a worker can demonstrate: (1) that his work situation was *substantially* more stressful than the ordinary day-to-day mental strains and tensions which all workers generally are expected to encounter without resulting serious mental injury,¹²² and (2) by unequivocal medical evidence that his abnormal work situation was the *primary* source of stress or anxiety which caused the mental injury.¹²³ Such a test would pro-

115. See *supra* notes 13-29 and accompanying text.

116. See *supra* note 25 and accompanying text.

117. See *supra* notes 47-50 and accompanying text.

118. See *supra* notes 11-13 and accompanying text.

119. See *supra* note 16 and accompanying text.

120. See *supra* notes 30-36 and accompanying text.

121. See *supra* notes 56-59 and accompanying text.

122. See *supra* notes 4 and 59.

123. Given the variance in etiological theories within the fields of psychology and psychiatry, see *supra* notes 35-47 and accompanying text, it is suggested that due consideration

vide an appropriate compromise situation whereby compensation would be granted to those who have been subjected to a socially unacceptable work environment, but denied where the issue of causation is too murky and the potential for malingering too great.

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be given to setting up a board of examiners consisting of one or more psychiatrists, psychologists and neurologists who would consider the medical evidence prior to or contemporaneously with the hearings and give their suggestions and advice to the referee hearing the case.

