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Don’t Presume the Presumption Has Been Applied Properly

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Abstract

In recognition of the humanitarian purpose of the District of Columbia Workers' Compensation Act of 1979, D.C. Code as amended, §32-1501 *et seq*. and the legislative policy favoring awards even in arguable cases, a claimant is entitled to a presumption of compensability ("Presumption") when applying for workers' compensation benefits. By establishing a causal connection between the injured worker's disability and a work-related event, the Presumption enables a claimant to establish entitlement to benefits more easily; however, an analysis of decisions issued by the Compensation Review Board from 2005 – 2019 reveals the Presumption frequently is misapplied. For example, the aggressor defense in work-related fight cases requires the claimant prove a connection between employment and the altercation, but despite the fact that proving the first prong of the *Bird* test satisfies the requirements for invoking the Presumption, if the claimant started the fight the claim is not compensable. Similarly, misapplication of the Presumption makes it more difficult for claimants to prove work-related psychological injuries because they must satisfy additional requirements (including a credibility requirement) not imposed on claimants who sustain physical injuries even though when invoking the Presumption any suspicion of deception should apply equally to both types of injuries. Moreover, contrary to Marc Galanter's position in *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, in District of Columbia private sector workers' compensation cases, One-Shotter-Claimants (Have-Nots) have distinct advantages built into the architecture of the system, not the least of which is the Presumption, yet despite the advantages, because misapplication of the Presumption has little effect on the outcome of remanded cases, the Repeat-Player-Employers (the Haves) continue to come out ahead.

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Judge Jones is admitted to practice law in New York, the District of Columbia, Maryland, and Virginia. She is not engaged in the practice of law, and the contents of this dissertation are not intended to provide legal advice. Views expressed in this dissertation represent commentary concerning the law, the legal system, and the administration of justice. These views should not be mistaken for the official views of the United States Government, the United States Department of Labor, the Benefits Review Board, nor for Judge Jones' opinion in the context of any specific case. The views expressed in this article do not necessarily represent the policies of the United States Government, the United States Department of Labor, or the Benefits Review Board, and no official endorsement by the United States Government, the United States Department of Labor, or the Benefits Review Board is intended or should be inferred.

Dedication

This dissertation is dedicated to my father, Norman Harry Weiss. Dad, now your name will live on forever.

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Chapter 1
District of Columbia Workers' Compensation Fundamentals

Introduction

Workers' compensation laws were enacted to provide employees with a swift system of adjudication for work-related injuries and employers with predictable liability that could be passed along to the consumer.[1] These social welfare acts have an underlying humanitarian purpose of providing "financial and medical benefits to employees injured in work-related accidents."[2] In the District of Columbia this purpose is promoted through a

[1] Employees gave up the right to sue in tort; employers gave up the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule.

[2] *Grayson v. Dep't of Employment Servs.*, 516 A.2d 909, 912 (D.C. 1986). Regretfully, the humanitarian purpose of the Act has been referenced without explanation to support granting advantages. *Hiligh v. Dep't of Employment Servs.*, 935 A.2d 1070 (D.C. 2007) (The Court overruled the Compensation Review Board's conclusion that the claimant's compensation rate should be his average weekly wage at the time of his injury; the Compensation Review Board reasoned that in Maryland when a claimant's average weekly wage is less than the minimum compensation rate, a claimant is compensated at the rate of the actual weekly wage which purportedly was in furtherance of the purpose of the Act; however,

> [t]he Board's reliance on the law of our sister jurisdiction [] is misplaced. Maryland's law expressly provides that claimants will receive their actual average weekly wage as compensation where that wage is less than the statutory minimum compensation rate. MD. LABOR AND EMPLOYMENT §§ 9-621, -626 (2005). While this court appreciates that the Act is [to] be interpreted in a manner consistent with its humanitarian purpose, that mandate is not so broad as to allow the Board to create statutory remedies that are inconsistent with other express provisions of the Act. The District of Columbia's Act clearly states, without exception, "in case of disability total in character, but temporary in quality, 66 2/3% of the employee's average weekly wages shall be paid . . . ." D.C. Code § 32-1508 (2). As there is no provision in the District's statute from which the Board's interpretation can reasonably arise, we conclude that the Board's conclusion is legally erroneous. *Weaver Bros. v. District of Columbia Dep't of Employment Servs.*, 473 A.2d 384, 388 (D.C. 1984) (reversing where the agency's interpretation is inconsistent with the section's language).

Id. at 1075.) See also *Stevenson v. Dep't of Employment Servs.*, 845 A.2d 523, 524-525 (D.C. 2004) (footnotes omitted):

> The [Department of Employment Services'] Director reviewed and affirmed the Compensation Order, reasoning: "To allow the Carrier [Hartford] to avoid paying workers' compensation benefits to the claimant [Stevenson] would work an undue and unfair hardship upon the claimant and contravene the humanitarian purposes of the Act where doubts are resolved in favor of the injured worker." The Director, citing to *Hall v. Spurlock*,

presumption of compensability by paying employees for work-related injuries even in arguable cases by resolving doubts about the facts in favor of the claimant and by interpreting the law liberally[3] "for the benefit of the employee."[4] If the presumption of compensability is misapplied, the purpose of the Act is circumvented.

> 310 S.W.2d 259 (Ky. Ct. App. 1957), concluded, "Given the circumstances of this case, the Carrier is estopped from denying coverage."
>
> We conclude that the Director committed reversible error. First, the Director asserted that Hartford was denying benefits to Stevenson, but the record reflects that Hartford acknowledged that Stevenson was entitled pursuant to its policy to benefits in Maryland but not in the District. Second, while the Director was quite correct in noting that *doubts* must be resolved in the worker's favor given "the humanitarian purposes of the [Workers' Compensation] Act," this did not permit the Director to favor an injured worker by entertaining his claim when he concededly does not meet the Act's definition of an "employee." Finally, and most importantly, [the Department of Employment Services] does not have jurisdiction to enforce contracts; rather, the applicable statute charges it with the responsibility of applying the worker's compensation law of the District of Columbia which, unlike the Maryland statute, does not allow a sole proprietor to be covered as though he were an employee.
>
> Accordingly, we are persuaded under the particular circumstances here that the Director's decision was plainly wrong and inconsistent with the applicable statute. *National Geographic Soc'y v. District of Columbia Dep't of Employment Servs.*, 721 A.2d 618, 620 (D.C. 1998). Therefore, the Director's decision must be reversed and the case remanded for appropriate disposition.

Prior to December 2004, the Director of the Department of Employment Services ruled on appeals of Compensation Orders. The Compensation Review Board assumed administrative appellate review of Compensation Orders at that time. Section 32-1521.01 of the District of Columbia Workers' Compensation Act of 1979.

[3] Liberal interpretation is a doctrine of statutory construction that effectuates the humanitarian purpose of the Act. It is not the humanitarian purpose *per se*, but it can operate as a pseudo-presumption of compensability. Nonetheless, resolution of a case still must be consistent with the plain language of the Act:

> [L]iberal construction is not reconstruction. While the principle of liberal construction of workers' compensation laws "allows doubts to be resolved favorably to the employee, it does not relieve the courts of the obligation to apply the law as it is written and in accordance with its plain meaning."

Adjei v. Dep't of Employment Servs., 817 A.2d 179, 184 (D.C. 2003).

[4] *Hively v. Dep't of Employment Servs.*, 681 A.2d 1158, 1163 (D.C. 1996).

That is not to say that every hurt that happens at work is compensable. In order to be compensable under the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq.* ("Act"),[5] an accidental injury must arise out of and in the course of employment.

Compensable Injuries

To satisfy the Act's definition of an accidental injury,[6] the claimant must prove "something unexpectedly goes wrong within the human frame."[7] An "accidental injury" encompasses two concepts:

> First, the nature of the activity or event which results in or contributes to the injury may occur in the "usual and ordinary" course of work. *Commercial Casualty Ins. Co.,* . . . 64 U.S. App. D.C. at 159, 75 F.2d at 678, *quoted in Hancock v. Einbinder*, 114 U.S. App. D.C. 67, 71, 310 F.2d 872, 876 (1962). The work need not be unusual or unexpected; "it is sufficient that the injury itself, the effect, be unexpected." *Trimmer v. A.G. Prada Co., Inc.*, H&AS No. 84-185, [Department of Employment Services] Final Order at 4 ([Department of Employment Services], October 23, 1985).
>
> Second, the nature of the potential cause of the disability need not be a discrete, particularized event. *See Vozzolo, supra*, 126 U.S. App. D.C. at 265, 377 F.2d at 150 ("the record does not isolate a specific event as the catalyst for the [coronary] infarction, but the argument on this score also seems to incorporate a misapprehension"); *Trimmer*, … [Department of Employment Services] Final Order at 4 (no need to isolate "an unusual or unexpected external event, happening or circumstance as the cause of the

[5] The District of Columbia has three workers' compensation acts in full force an effect simultaneously. In addition to the Act which governs claims brought by private sector employees, the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq.* governs workers' compensation claims brought by public sector employees and the District of Columbia Police and Firefighters Retirement and Disability Act of 1916, as amended, D.C. Code §5-701 *et seq*. governs police officers and firefighters.

[6] "'Accident' refers to the event causing the harm, 'injury' to the harmful physical . . . consequences of that event which need not occur or become obvious simultaneously with the event." *Poole v. Dep't of Employment Servs.*, 77 A.3d 460, 466 (D.C. 2013).

[7] *Washington Metro. Area Transit Auth. v. Dep't of Employment Servs.*, 506 A.2d 1127, 1130 (D.C. 1986).

> injury"). Of course, the specification of a discrete work-related event causing the disability is sufficient to satisfy the causality requirement. *See, e.g., Howrey & Simon v. District of Columbia Dep't of Employment Services*, 531 A.2d 254 (D.C. 1987) (accounting clerk totally disabled after tripping over a heavy box left on the office floor); *Washington Metropolitan Area Transit Authority v. District of Columbia Dep't of Employment Services*, … 506 A.2d 1127 (bus driver injured neck when he turned around to tell passengers not to smoke marijuana); *Commercial Casualty Ins. Co.*, . . . 64 U.S. App. D.C. 158, 75 F.2d 677 (grocery store clerk died of heart attack after one evening of lifting heavy sacks of potatoes). Such specification, however, is not necessary. It is sufficient to show that a work condition or activity which is gradual or progressive in nature potentially resulted in or contributed to the disability.[8]

Unlike in some jurisdictions, in the District of Columbia there is no requirement that an unusual occurrence cause the accidental injury.[9] Consequently, cumulative trauma, repetitive stress, or cumulative exposure resulting in a disabling injury is compensable.[10]

If a claimant sustains an accidental injury, in order to be compensable that injury must arise out of and in the course of employment. "Arising out of" and "in the course of" are two distinct elements of every workers' compensation claim. Arising out of refers to "the origin or cause of the injury;"[11]

> an accident occurs "in the course of employment" when it takes place within the period of employment, at a place where the employee may reasonably be expected to be, and while he [or she] is reasonably fulfilling duties of his [or her] employment or doing something reasonably incidental thereto.[12]

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[8] *Ferreira v. Dep't of Employment Servs.*, 531 A.2d 651, 656-657 (D.C. 1987).

[9] *Capital Hilton Hotel v. Dep't of Employment Servs.*, 565 A.2d 981 (D.C. 1989).

[10] See *Ferreira*, 531 A.2d 651.

[11] *Kolson v. Dep't of Employment Servs.*, 699 A.2d 357, 361 (D.C. 1997).

[12] *Id.*

In the course of refers to "the time, place and circumstances under which the injury occurred;"[13]

> the "in the course of" requirement may be satisfied where an injury occurs "in the performance of an activity related to employment, which may include . . . an activity of mutual benefit to employer and employee." *Kolson*, 699 A.2d at 360 (internal quotation marks omitted). Under *Kolson*, what counts for the purposes of the "in the course of" analysis is whether the activity at issue "relate[s] to [one's] employment." That an activity is beneficial to both the employer and the employee *may*, but does not necessarily, illustrate that relation.[14]

When assessing "arising out of and in the course of employment" a quantum approach applies:

> That approach to analysis of "arising out of and occurring in the course of employment" questions derives from *Larson's Workers' Compensation* Law, §29.01 (2000 Ed.)(*Larson's*), which includes the following:
>
> > The discussion [in the treatise] of the coverage formula, "arising out of and in the course of employment", was opened with the suggestion that, while "course" and "arising" were put under separate headings [in the treatise] for convenience, some interplay between the two factors would be observed in various categories discussed [footnote omitted] . . . . The two tests, in practice, have not been kept in air-tight compartments, but have to some extent merged into a single concept of work-connection. One is almost tempted to formulate a sort of quantum theory of work-connection [footnote omitted]: that a certain minimum quantum of work-connection must be shown, and if the "course" quantity is very small, but the arising quantity is large, the quantum will add up to the necessary minimum, as it will also when the arising quantity is very small but the "course" quantity is relatively large.

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[13] *Id.*

[14] *Bentt v. Dep't of Employment Servs.*, 979 A.2d 1226, 1235 (D.C. 2009).

> But if both the "course" and "arising" quantities are small, the minimum quantum will not be met.[15]

So long as the conditions and obligations of employment placed the claimant in the position where the injury was sustained, the injury arises out of employment.[16] This test is known as the positional risk test, and it applies when determining if the presumption of compensability[17] has been invoked.[18]

When evaluating whether an injury "arises out of" employment, there are three possible origins of that injury:

1. Risks distinctly associated with the employment,
2. Risks personal to the claimant, and
3. Risks with no particular employment or personal character.

Risks associated with employment universally are compensable; risks personal to the claimant universally are not compensable.[19] The positional risk test determines the compensability of neutral risks: "Under the positional-risk test, an injury arises out of employment so long as it would not have happened but for the fact that conditions and obligations of the employment placed claimant in the position where she was injured."[20]

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[15] *Lewis v. Finnegan & Henderson*, CRB No. 04-50, AHD No. 04-130, OWC No. 590009 (February 16, 2006).

[16] *Grayson*.

[17] See "Presumption of Compensability," *infra*.

[18] *Acosta v. Il Creation, Inc.*, CRB No. 13-017, AHD No. 12-431, OWC No. 681972 (May 14, 2013).

[19] *Bentt* at 1232.

[20] *Georgetown Univ. v. Dep't of Employment Servs.*, 830 A.2d 865, 872 (D.C. 2003).

If employment conditions reasonably or incidentally exposed the claimant to the risk or danger connected to the accident, the resulting injury is compensable:

> The positional-risk test "is a 'liberal' standard which obviates any requirement of employer fault or of a causal relationship between the nature of the employment and the risk of injury. Nor need the employee be engaged at the time of the injury in activity of benefit to the employer."[21]

Again, not every hurt that happens at work is compensable. Some injuries arise spontaneously or from an unknown cause; some injuries are peculiar to the individual. Such injuries are known as idiopathic, and idiopathic injuries are not compensable. As explained above, if an injury does not arise out of employment or does not occur in the course of employment, it is not compensable.

Aggravation of a pre-existing condition that was asymptomatic until a work-related accident made it symptomatic to a point that it interferes with the claimant's ability to perform work duties is compensable.[22] Importantly, the preexisting injury need not be work-related,[23] and the work-related event or condition need not be the only factor contributing to the aggravation. Once evidence of a work-related aggravation is offered, the presumption of compensability applies to establish a causal connection between the work-related event and any disability resulting from the aggravation,[24] and so long as the disability arose at least in part from work-related activities, compensation is awarded.[25]

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[21] *Gaines v. Dep't of Employment Servs.*, 210 A.3d 767, 771 (D.C. 2019).

[22] *Holley v. Freestate Elec. Constr. Co.*, CRB No. 11-063, AHD No. 07-266B, OWC No. 630732 (January 23, 2012).

[23] *Jackson v. Dep't of Employment Servs.*, 955 A.2d 728, 734 nt. 7 (D.C. 2008).

[24] *Washington Vista Hotel v. Dep't of Employment Servs.*, 721 A.2d 574, 579 (D.C. 1998).

[25] *Washington Hosp. Ctr. v. Dep't of Employment Servs.*, 744 A.2d 992 (D.C. 2000).

The same rules apply to a new injury. In order to establish a causal relationship between a disability and a work-related accident, the accident does not need to be the sole cause of the disability. [26] Thus, "an employer is liable for all natural and unavoidable consequences of a work-related injury."[27]

Presumption of Compensability

To establish a causal relationship between a disability and a work-related accident, in recognition of the humanitarian purpose of the Act and the "strong legislative policy favoring awards in arguable cases"[28] a claimant is entitled to a presumption of compensability ("Presumption"):

> When our cases speak of the "humanitarian purpose" of the statute, they refer specifically to the presumption of compensability, D.C. Code §[32-1521(1)][29] (1988), which enables a claimant more easily to establish his or her entitlement to benefits and is intended to favor awards in arguable cases. *See Ferreira v. District of Columbia Department of Employment Services,* 531 A.2d 651, 655 (D.C. 1987). The reason for this presumption is simply that a worker's sole remedy for a work-related injury is the remedy provided by the statute; consequently, if the statutory benefits are unavailable for any reason, the worker will not be compensated at all for the injury. However, when it is undisputed that a claimant's injury arose out of his or her employment and is therefore compensable, "the presumption is no longer part of the case" because it is no longer necessary to effectuate the humanitarian purpose of the law. *Dunston v. District of Columbia Department of Employment Services,* 509 A.2d 109, 111 (D.C. (1986).[30]

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[26] *Ferreira*, 531 A.2d 651.

[27] *Young v. Washington Ctr. for Aging Servs.*, Dir. Dkt. No. 88-12, H&AS No. 87-444, OWC No. 0112795 and 0094511 (April 19, 1990).

[28] *Dunston v. Dep't of Employment Servs.*, 509 A.2d 109, 111 (D.C. 1986). *Dunston* is the first District of Columbia Court of Appeals workers' compensation case to mention the humanitarian purpose of the Act.

[29] In 2001 the Act was recodified from §36-301 *et seq.* to §32-1501 *et seq*; the substance of the provisions did not change. Throughout this dissertation citations will be to the recodified sections.

[30] *4934, Inc. v. Dep't of Employment Servs.*, 605 A.2d 50, 57 (D.C. 1992).

Specifically,

> [i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary:
>
> > (1) That the claim comes within the provisions of this chapter;
> >
> > (2) That sufficient notice of such claim has been given;
> >
> > (3) That the injury was not occasioned solely by the intoxication of the injured employee; and
> >
> > (4) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.[31]

The seminal case applying the Presumption is *Ferreira v. D.C. Department of Employment Services*.[32]

Ms. Maria Ferreira testified at a workers' compensation hearing that on October 28, 1982 she injured her neck when she tried to lift a silver chafing dish that was in a box above her head, or maybe it was below shoulder level. She pulled the dish or maybe she lifted it. She began feeling pain in the end of October 1982 or maybe it was early October 1982 or maybe there was no specific date or maybe it was November 1982 or December 1983. The administrative law judge[33] concluded Ms. Ferreira did not suffer a specific traumatic injury because Ms. Ferreira's testimony was too inconsistent to be afforded any weight:

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[31] Section 32-1521 of the Act.

[32] *Ferreira*, 531 A.2d 651.

[33] Prior to April 3, 2001, workers' compensation adjudicators in the District of Columbia were not classified as administrative law judges. §32-1543(b) of the Act. Throughout this dissertation these adjudicators uniformly are referred to as administrative law judges.

> Claimant's multiple statements regarding previous symptoms, the actual incident, whom she advised of the incident and how she felt afterwards are all inconsistent. Further, claimant's testimony regarding the alleged incident is contradicted by the credible testimony of Vincent Hilliard, Jonas Finch, Don Wilson and Dr. Feffer and the report of Dr. Rochester. Contrary to claimant's testimony, all of these witnesses stated that claimant did not indicate to them that she had suffered a specific work injury. Therefore, I conclude that there is no credible evidence of record upon which I can conclude that claimant suffered a specific traumatic injury. Since claimant's only argument is that she is entitled to benefits based upon a specific traumatic incident, I conclude that this claim should be denied.[34]

Because Ms. Ferreira had not established a specific traumatic event by credible evidence, her claim was denied, but Ms. Ferreira had not been afforded the benefit of the Presumption:

> The first flaw in the decision on review is its failure to provide petitioner with the benefit of the statutory presumption of compensability. In this jurisdiction, there is a presumption that a "claim comes within the provisions of this [the Workers' Compensation] chapter." D.C. Code §[32-1521(1)]; *Dunston v. District of Columbia Dep't of Employment Services*, 509 A.2d 109, 111 (D.C. 1986). This sound presumption, designed to effectuate the humanitarian purposes of the statute, reflects a "strong legislative policy favoring awards in arguable cases." *Wheatley v. Adler*, 132 U.S. App. D.C. 177, 183, 407 F.2d 307, 313 (1968) (en banc), *cited in Dunston, supra*, 509 A.2d at 111; *see Hensley v. Washington Metropolitan Area Transit Authority*, 210 U.S. App. D.C. 151, 154, 655 F.2d 264, 267 (1981) (the presumption is "but one indication of the 'humanitarian nature' of the Act generally"), *cert. denied*, 456 U.S. 904, 72 L. Ed. 2d 160, 102 S. Ct. 1749 (1982). The Act "is to be construed liberally for the benefit of employees and their dependents." *J. V. Vozzolo, Inc. v. Britton*, 126 U.S. App. D.C. 259, 262, 377 F.2d 144, 147 (1967); *see Champion v. S&M Traylor Bros.*, 223 U.S. App. D.C. 172, 174, 690 F.2d 285, 287 (1982) (Act is to be liberally construed in accordance with its purpose).
>
> While the purpose and origin of the presumption make its scope somewhat obscure, some points are generally accepted. In order to benefit from the presumption, a claimant needs to make some "initial demonstration" of the employment-connection of the disability. 1 A. LARSON, WORKMEN'S COMPENSATION LAW § 10.33 at 3-138

[34] *Ferreira v. B&B Caterers*, H&AS No. 83-227, OWC No. 0014472 (October 25, 1985) *rev'd Ferreira*, 531 A.2d 651.

(1986) (hereinafter "LARSON"). The initial demonstration consists in providing some evidence of the existence of two "basic facts": a death or disability and a work-related event, activity, or requirement which has the *potential* of resulting in or contributing to the death or disability. *See Naylor v. Grove Construction Company*, H&AS No. 83-163, [Department of Employment Services] Final Order at 8 ([Department of Employment Services], August 1, 1984). The presumption then operates to establish a causal connection between the disability and the work-related event, activity, or requirement. [footnote omitted] *Swinton v. J. Frank Kelly, Inc.*, 180 U.S. App. D.C. 216, 223, 554 F.2d 1075, 1082 (the "presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim"), *cert. denied*, 429 U.S. 820, 50 L. Ed. 2d 81, 97 S. Ct. 67 (1976).

Once the presumption is triggered, the burden is upon the employer to bring forth "substantial evidence" showing that death or disability did not arise out of and in the course of employment. *Hensley, supra*, 210 U.S. App. D.C. at 154, 655 F.2d at 267; *Swinton, supra*, 180 U.S. App. D.C. at 222, 554 F.2d at 1081; *Wheatley, supra*, 132 U.S. App. D.C. at 182, 407 F.2d at 312; *Butler v. District Parking Management Co.*, 124 U.S. App. D.C. 195, 197, 363 F.2d 682, 684 (1966); *see Dunston, supra*, 509 A.2d at 111 (the "presumption requires the employer to take the initial steps to disprove liability"). "Stated otherwise, the statutory presumption may be dispelled by circumstantial evidence specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event." *Swinton, supra*, 180 U.S. App. D.C. at 224, 554 F.2d at 1983, *quoted in Hensley, supra*, 210 U.S. App. D.C. at 155, 655 F.2d at 268.

In this case, petitioner provided more than enough evidence of the existence of the two basic facts necessary to trigger the presumption. First, petitioner indisputably suffered a severe disability. Second, the manifestation of petitioner's disability occurred in the course of her employment at B&B, and petitioner presented sufficient testimonial evidence of the lifting requirements of her work to generate a potential connection between the work-related activity and the disability. Thus, the burden shifted to B&B to disprove the employment connection.

In the decision on review, [the Department of Employment Services] neglected to apply or inadvertently misapplied the law on presumptions. In any event, it neither addressed nor considered the employer's responsibility for disproving employment causality.[35]

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[35] *Ferreira*, 531 A.2d at 655-656.

The administrative law judge's second flaw was applying the wrong test for determining if Ms. Ferreira had sustained a compensable disability. Specifically, the administrative law judge denied Ms. Ferreira's claim because she had not proved a specific traumatic injury, but the Act does not require a specific traumatic injury or an unusual incident; the requirement of an accidental injury is satisfied when "something unexpectedly goes wrong within the human frame."[36] Furthermore, the accidental injury need not be the result of a discrete event; "a work condition or activity which is gradual or progressive in nature"[37] is sufficient. Thus, the administrative law judge had erred as a matter of law on this point as well.

Finally, the administrative law judge also erred by failing to consider alternate, work-related causes of Ms. Ferreira's disability.[38] Even if no specific lifting incident had occurred on October 28, 1982, that deficiency alone was not enough to discredit that Ms. Ferreira's disability was work-related:

> Given the flexibility and informality built into the pre-hearing, hearing, and post-hearing procedures, and the agency's active role in the adjudication of these claims, confining a claimant to one particular "theory of employment causation," or failing to consider other possible employment-related causes of a disability is antithetical to the statutory and regulatory scheme. Moreover, the beneficent purposes of the Act and its replacement of common law remedies constrain [the Department of

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[36] *Washington Metro. Area Transit Auth.*, 506 A.2d at 1127, 1130.

[37] *Ferreira*, 531 A.2d at 657.

[38] Under our Act, a "claim" means nothing more than a simple request for compensation which triggers the process of claim adjudication. [footnote omitted] A "claim" is not a specific theory of employment causation, and indeed, claimants are permitted to argue alternative theories of employment causation in making their "claim" for compensation. Under our Act, if one theory of employment causation has the potential to result in or contribute to the disability suffered, the presumption is triggered.

Ferreira, 531 A.2d at 659-660.

> Employment Services] to resolve, for every claim, the fundamental questions of whether there is a disability and whether it is employment-related.
>
> In this case, there was a departure from attention to the basic issue: was petitioner's cervical spine disability caused or aggravated by her employment with B&B? *See U.S. Industries, supra*, 455 U.S. at 620 (Brennan, J., dissenting). Therefore, even if the [administrative law judge] discredited petitioner's claim that a specific lifting episode occurred on October 28, 1982, which caused or aggravated the disability, the [administrative law judge] was obligated to resolve the broader question of whether the disability was nonetheless employment-bred. If the issue was improperly narrowed pre-hearing, and if, as a result, the evidence at the hearing was insufficient to adjudicate the fundamental factual inquiry, the post-hearing procedures of 7 DCMR § 223.4 was available as relief.
>
> The misfocus of the decision in this case can be appreciated by a summary of the strength of petitioner's prima facie showing of an employment-related injury. Thus, regardless of the exact date of the injury, petitioner was consistent in maintaining that the physical manifestations of her disability started in late October or early November while petitioner was in the sole employment of B&B. The lifting requirements of petitioner's job were severe enough that her supervisor promoted her in order to help alleviate some of the strain. After the severity of the injury became apparent, petitioner's supervisor recommended that she file a workers' compensation claim, and, in deposition testimony, he admitted that her disability may have been work-related. Finally, the four physicians who were primarily responsible for petitioner's treatment and one of the insurer's physicians indicated that lifting requirements on the B&B job at least potentially aggravated petitioner's disability.
>
> With even less compelling evidence, the hearing examiner would have been required to apply the statutory presumption of compensability to this claim. Indeed, the inquiry in this case should have been focused on whether the employer provided "substantial evidence" of a non-employment related basis to sever the potential employment connection petitioner manifestly proved.[39]

Thus, Ms. Ferreira's case was remanded for the employer to rebut the Presumption.[40]

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[39] *Ferreira*, 531 A.2d at 659.

[40] The Presumption is not a guarantee of compensability. On remand, an administrative law judge ruled Ms. Ferreira's lower back, neck, and shoulder discomfort was a result of the natural progression of

Frequently, the Presumption is the starting point in the analysis of litigated private sector workers' compensation cases. By establishing a causal connection between a disability and a work-related event, the Presumption enables a claimant to establish entitlement to workers' compensation benefits more easily because it also establishes the employer's burden to "take the initial steps to disprove liability."[41]

Invoking the Presumption

In order to invoke the Presumption, the claimant must show an employment connection through some evidence of 1. a disability and 2. a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.[42] "Disability" is defined in the Act as "physical or mental incapacity because of injury which results in the loss of wages."[43] To satisfy the first requirement, an injury alone is not sufficient to invoke the Presumption; the claimant must present some evidence of a work-related injury that causes wage loss:

> Although the Act displaces the tort system for most work-related injuries, the benefits available under the Act are not conceptually equivalent to tort damages. Unlike the tort system, awards under the Act are not made to compensate for the physical injury itself, but rather to compensate for the disability which results from the injury, and thereby presumably affects earning capacity. 1 LARSON § 2.40, at 10-11 (1985). This is apparent from the Act's definition of disability, which is "physical or mental incapacity because of injury *which results in the loss of wages*." D.C. Code §[32-1501(8)] (emphasis added). Thus, injuries that might result in large damage verdicts in tort actions result in small or even no awards at all under the Act.

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degenerative conditions and was not work related in any way. Ms. Ferreira still lost. *Ferreira v. Dep't of Employment Servs.*, 667 A.2d 310 (D.C. 1995).

[41] *Dunston* at 111.

[42] *Ferreira*, 531 A.2d 651.

[43] Section 32-1501(8) of the Act.

> [footnote omitted] Similarly, the Act does not provide any compensation for pain and suffering regardless of how consequential such damages may be. 1 LARSON § 2.40, at 11; *cf. Tredway v. District of Columbia*, 403 A.2d 732, 735 (D.C.) (no separate recovery for pain and suffering under the Federal Employees' Compensation Act), *cert. denied*, 444 U.S. 867, 62 L. Ed. 2d 92, 100 S. Ct. 141 (1979). In other words, compensation under the Act is predicated upon the loss of wage earning capacity, or economic impairment, and not upon functional disability or physical impairment. [footnote omitted] *See, e.g., Cook v. Paducah Recapping Serv.*, 694 S.W. 2d 684, 687 (Ky. 1985); *Ladner v. Mason Mitchell Trucking Co.*, 434 A.2d 37, 40 (Me. 1981), *cert. denied*, 464 U.S. 850, 104 S. Ct. 158, 78 L. Ed. 2d 145 (1983); *Marshall Durbin, Inc. v. Hall*, 490 So. 2d 877, 880 (Miss. 1986); *Mullaney v. Gilbane Bldg. Co.*, 520 A.2d 141, 143 (R.I. 1987); *see also* 2 LARSON §§ 57.11, at 10-2, 57.14 (a), at 10-46. [footnote omitted][44]

This threshold is not high. A reasonable inference that job duties had the potential to contribute to the disability is sufficient.[45] Testimony of a work-related event coupled with medical evidence that the employment had the potential of resulting in the injury is sufficient.[46] In fact, testimony alone may suffice to invoke the Presumption:

> The claimant argues that the [administrative law judge] was in error when she denied him the statutory presumption of compensability. The Director [of the Department of Employment Services ("Director")] finds merit in claimant's argument. The claimant testified that he was injured while pulling some plywood out of the trench. In order for claimant to benefit from the statutory presumption of compensability he must make an initial demonstration of two basic facts: a disability and a work related event, activity, or requirement which has the potential of resulting in or contributing to his disability. *Ferreira v. Department of Employment Services*, 531 A.2d 651, 655 (D.C. 1987). The Director finds that claimant's

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[44] *Smith v. Dep't of Employment Servs.*, 548 A.2d 95, 100-101 (D.C. 1988). To avoid an injured worker becoming a drain on society, workers' compensation benefits are intended to reimburse for lost wages without assigning blame or responsibility by distributing the cost of reimbursement to society through the cost of production. Workers' compensation benefits are not tort damages intended to make an injured worker whole.

[45] *Raeon v. Braude & Margulies*, Dir. Dkt. No. 93-28, H&AS No. 91-782, OWC No. 151329 (February 20, 1998).

[46] *Parodi v. Dep't of Employment Servs.*, 560 A.2d 524 (D.C. 1989).

> job had the potential to cause his disability. Therefore, claimant is entitled to the statutory presumption of compensability.[47]

Nonetheless, the claimant must present evidence of more than just employment:

> Ms. Portee-White's argument fails because she only proved one of the two required triggers. The triggers to the Presumption analysis are (1) some evidence of a disability and (2) the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability. Inasmuch as the parties do not dispute Ms. Portee-White injured herself on December 14, 2014 and was unable to work as a result of her injuries, there is no dispute regarding the first element; however, in order to invoke the Presumption, Ms. Portee-White also was required to present some evidence of a work-related event, not merely some evidence of employment [with the employer]. The [administrative law judge] ruled Ms. Portee-White did not make that showing, and because the [Compensation Review Board] affirms that ruling, there is no error in not invoking the Presumption.[48]

To satisfy the second requirement, the claimant must demonstrate correlation or general causation as opposed to specific causation:

> The law does not require a claimant to prove a causal relationship by introducing evidence that specifically links the disability to the work-related injury, as suggested by petitioner. Rather, the law in the District of Columbia creates a presumption that once a claimant demonstrates a work-related injury and a subsequent disability, the claim comes within the provisions of the Act.[49]

In other words, the claimant must present some evidence of an event that has the potential to cause or to contribute to the injury as opposed to proving the event actually caused or

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[47] *Campbell v. Design Props., Inc.*, Dir. Dkt. No. 93-58, H&AS No. 91-106, OWC No. 0178606 (April 11, 1997).

[48] *Portee-White v. Washington Metro. Area Transit Auth.*, CRB No. 14-101, AHD No. 13-221, OWC No. 699614 (December 15, 2014).

[49] *Georgetown Univ. Hosp. v. Dep't of Employment Servs.*, 929 A.2d 865, 870 (DC 2007).

contributed to the particular injury suffered by this claimant. Furthermore, doubts as to whether the injury arose out of the employment are resolved in the claimant's favor.[50]

Invoking the Presumption only requires a claimant produce "some evidence" of a disability and a work-related event, activity, or requirement. "Some evidence" is not a preponderance;[51] it is not expert testimony;[52] and it is not "credible evidence." At the initial stage of a case, invoking the Presumption, it is premature to consider the credibility of evidence:

> Based on our case law and the "humanitarian purposes" of the Act, we hold that an [administrative law judge] cannot refuse to accord an employee seeking benefits the statutory presumption on the basis that the claimant's evidence, which on its face is sufficient to show both an injury and a work-related event that has the potential of causing the injury, was simply not credible. To hold otherwise would contravene our decision in *Ferreira* and its progeny, in which we have repeatedly said that all that is required of the claimant for the presumption to apply is an "initial demonstration" consisting of "*some evidence*" of a work-related injury. 531 A.2d at 655 (emphasis added).
>
> Accordingly, the [administrative law judge] must afford the statutory presumption of compensability to an employee seeking workers' compensation for a physical injury, so long as the employee establishes a *prima facie* "'initial demonstration' of (1) an injury; and (2) a work related event, activity, or requirement which has the potential of resulting in or contributing to the injury." *Georgetown Univ. I,* … 830 A.2d at 870.

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[50] *Baker v. Dep't of Employment Servs.*, 611 A.2d 548 (D.C. 1992).

[51] *Baker v. First Transit*, CRB No. 12-105, AHD 11-258A, OWC No. 672618 (August 9, 2012).

[52] To ask a claimant, who already has produced substantial medical reports from the treating physician, and other relevant documentary evidence of causally related injury arising out of and in the course of employment, to provide sworn testimony to rebut an employer's medical expert, no matter how insufficient that testimony may be with respect to the presumption of compensability, would impose too high a burden and one which is inconsistent with the purposes of the Workers' Compensation Act. We decline to do so.

Washington Metro. Area Transit Auth. v. Dep't of Employment Servs., 827 A.2d 35, 45 (D.C. 2003).

> Credibility determinations are not an appropriate consideration at this initial stage.[53]

It cannot be emphasized enough – the threshold for invoking the Presumption is not high.

Rebutting the Presumption

Once the claimant has invoked the Presumption, to rebut the Presumption the employer must show that the claimant's disability did not arise out of and in the course of employment; it is the employer's burden to come forth with substantial evidence of "a nonemployment related basis"[54] "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[55] "Some isolated evidence" is not sufficient to overcome the Presumption;[56] neither is a vague and nebulous opinion that many things can cause an injury[57] nor speculation and conjecture.[58] However, the employer is not required to prove the disability could not have been caused by a work-related event or activity; that is too high a burden to impose.[59]

> Beyond stating that substantial evidence means "more than a mere scintilla," we have declined to establish a precise quantum of proof needed to meet the substantial evidence threshold. In requiring proof that [the

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[53] *Storey v. Dep't of Employment Servs.*, 162 A.3d 793, 807 (D.C. 2017).

[54] *Young v. Dep't of Employment Servs.*, 918 A.2d 427, 434 (D.C. 2007).

[55] *Ferreira*, 531 A.2d at 655.

[56] *Whittaker v. Dep't of Employment Servs.*, 668 A.2d 844, 847 (D.C. 1995).

[57] *Holder v. Washington Metro. Area Transit Auth.*, Dir. Dkt. No. 99-90, H&AS No. 99-342, OWC No. 507781 (November 14, 2000) (Doctor's opinion that "many things can cause [a tear in the meniscus]" was not specific and comprehensive enough to rebut the Presumption.)

[58] *Brown v. Howard Univ. Hosp.*, CRB No. 12-061, AHD No. 11-060, OWC No. 675904 (June 27, 2011). (The employer offered "evidence of a pre-existing back condition, prior back injuries, a motive to lie, and prior inconsistent statements to rebut the Presumption.")

[59] *Washington Hosp. Ctr*., 744 A.2d 992.

> claimant's] disability "could not" have been caused by the lifting incident, the Director placed on the [employer] a burden that has no basis either in the workers' compensation statute itself or in prior decisions of this court. Our cases -- *Ferreira I*, for example -- require an employer only to offer "substantial evidence" to rebut the statutory presumption of compensability, not to disprove causality with absolute certainty. *See* 531 A.2d at 655. As the [employer] compellingly argues in its brief, medical opinion seldom reaches that degree of certainty because medicine itself "is not an absolute science." The record in this very case illustrates the [employer's] argument. Although Dr. Sewell was a difficult witness whose testimony was, at times, internally illogical, he held steadfastly to his opinion, which he offered with a reasonable degree of medical certainty, that the lifting incident was not the cause of [the claimant's] disability. Nevertheless, as we have concluded in part II of this opinion, the rest of his testimony contained substantial evidence to support a finding that indeed it was the cause, and the [administrative law judge] so found.
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> The statutory presumption makes it easy for an employee to establish that a disability is work-related and, as we have often said, favors awards in "arguable cases." *Id*. (citations omitted). That presumption, however, is not so strong as to require the employer to prove that causation is *impossible* in order to rebut it.[60]

The Presumption usually is rebutted when a doctor (even a doctor retained for purposes of litigation) examines the claimant, reviews the relevant medical records, and states "an unambiguous opinion that the work injury did not contribute to the disability."[61] The difference between invoking the Presumption and rebutting the Presumption is that in order to rebut the Presumption by this method, the doctor must render an opinion regarding specific causation- conditions at work did not cause this claimant to sustain this injury. Even so, the administrative law judge must determine whether or not the Presumption has been rebutted without assessing credibility:

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[60] *Id.* at 1000.

[61] *Washington Post v. Dep't of Employment Servs.*, 852 A.2d 909, 910 (D.C. 2004). However, an expert opinion is not required to rebut the Presumption. *McNeal v. Dep't of Employment Servs.*, 917 A.2d 652, 658 nt. 2 (D.C. 2007).

> an [administrative law judge] may not assess the credibility of a claimant's evidence at this initial stage. Instead, the claimant is entitled to the statutory presumption that the injury arose during the course of employment and therefore entitled to workers' compensation benefits, so long as he or she presents "some evidence" to establish a *prima facie* case of a work-related injury. *Wash. Post v. District of Columbia Dep't of Emp't Servs.*, 852 A.2d 909, 911 (D.C. 2004). The burden is then on the employer to rebut the presumption that an employee's injury was, in fact, not related to his or her employment. *Id.* The employer can rebut the presumption by proffering substantial evidence of non-causation, i.e., evidence that is "specific and comprehensive enough" that a "reasonable mind might accept it as adequate to contradict the presumed connection between the event at work and the employee's subsequent disability." *Id.* (footnote, citation, internal quotation marks and brackets omitted). This, again, is not a matter as to which the [administrative law judge] is to make credibility determinations. Only if the employer is able to rebut the presumption and the burden returns to the claimant is the [administrative law judge] entitled to make credibility determinations.[62]

If the employer fails to meet its burden, the claim falls within the Act; the injury is deemed work-related, and any resulting disability is compensable.[63] If the Presumption is rebutted, the burden shifts back to the claimant to prove by a preponderance of the evidence any injury or disability arose out of and in the course of employment.[64] Evidence is weighed only after the employer has rebutted the Presumption.

Once a causal relationship between a disability and a work-related event has been established,[65] the Presumption continues to apply when filing for additional benefits due to

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[62] *Storey* at 797.

[63] *Parodi*.

[64] *Upchurch v. Dep't of Employment Servs.*, 783 A.2d 623, 628 (D.C. 2001).

[65] There is no legal distinction between "'causation as it relates to a determination of whether an accidental injury arose out of and in the course of employment' and 'causation as it relates to whether a particular medical condition is a result of the compensable work injury.'" *Whittaker* at 846.

new symptoms flowing from the work-related injury.[66] For example, Mr. Charles Whittaker tore his medial and lateral menisci in his right knee when he fell at work in 1988; these tears were superimposed upon pre-existing, degenerative arthritis that had been asymptomatic prior to his work-related injury. Despite multiple surgeries, his arthritis grew worse, and he was unable to return to his usual employment.

Mr. Whittaker's temporary total disability benefits were terminated so he filed a claim seeking ongoing temporary total disability benefits. Because Mr. Whittaker purportedly had failed to "'show that his continuing loss of wages [was] the result of the *exacerbation* of his pre-existent condition rather than . . . a result of the natural progression of the [arthritic] condition,'"[67] the administrative law judge denied his claim. The denial was reversed on appeal because

> [a]t the evidentiary hearing, [the claimant] submitted the deposition testimony of his treating physician and medical expert, Dr. Michael Cassidy, to support a finding that the torn cartilage in his right knee, conceded to have been caused by the work-related fall, had aggravated a pre-existing arthritic condition in his knee. [footnote omitted] In considering this evidence, the [administrative law judge] acknowledged and applied the well-settled principle that "the aggravation of a pre-existing condition may justify compensation." *Baker, supra* note 1, 611 A.2d at 550; *accord, Wheatley v. Adler*, 132 U.S. App. D.C. 177, 182, 407 F.2d 307, 312 (1968) (en banc) (construing predecessor statute), *cert. denied,* 393 U.S. 1026 (1969). But, importantly, the [administrative law judge] declined to give petitioner the benefit of the statutory presumption of causation in answering the "dispositive" question of "the medical relationship, if any, between claimant's present symptomology [sic] and the conceded work-related injury of November 1, 1988." The [administrative law judge] did so for the sole reason that "the compensability of claimant's November 1, 1988 injury has been neither raised nor challenged." That is, apparently because the employer never disputed that the torn knee cartilage stemmed from the employment, the [administrative law judge] thought that this removed from

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[66] *Short v. Dep't of Employment Servs.*, 723 A.2d 845, 850 (D.C. 1998).

[67] *Whittaker* at 845.

> the analysis the presumption of a causal link between the disability -- arthritis aggravated by the injury -- and the accident. It did not.
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> * * *
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> The presumption, it was clear, applied to the causal relation not just between the original injury and the employment but between the current disabling condition and the employment.
>
> In defending the [administrative law judge's] refusal to apply the presumption here, [the employer and the insurer] contend that two types of causation must be distinguished: "causation as it relates to a determination of whether an accidental injury arose out of and in the course of employment" and "causation as it relates to whether a particular medical condition is a result of the compensable work injury." They argue that the statutory presumption applies only to the former. We find no meaning in that distinction. Under this jurisdiction's "aggravation rule," there is no question that "a particular medical condition [that] is a result of the compensable work injury" may itself be compensable and thus covered by the presumption. Where there is a dispute (as here) about whether the disabling aggravated condition -- the "medical condition" as [the employer and the insurer] put it -- is causally related to or "arose out of" the claimant's employment, the presumption applies and is triggered if the claimant produces "some evidence" of the two basic facts described in *Ferreira.*
>
> Our decisions thus require the [administrative law judge] to view the causal relation between a present disability and a job-related injury through the lens, as it were, of the statutory presumption, *unless* the employer has rebutted the presumption by "evidence 'specific and comprehensive enough to sever the potential connection'" between the two. [68]

That is not to say that every disputed issue is resolved in the claimant's favor.

Workers' compensation is a creature of statute; therefore, the Presumption is a creature of statute, and as such, there are times when it does not apply and times when it does. The Presumption does not apply to

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[68] *Id*. at 846-847.

- Determining if the tribunal has jurisdiction,[69]
- Assessing if a claimant's employment is principally located in the District of Columbia,[70]
- Calculating a claimant's average weekly wage,[71] or
- Evaluating the nature and extent of a claimant's disability.[72]

Notice

On the other hand, by the very language of the Act, a presumption does apply to establish "[t]hat sufficient notice of such claim has been given."[73] When an employee sustains

> any injury or death in respect of which compensation is payable under this chapter[, notice] shall be given within 30 days after the date of such injury or death, or 30 days after the employee or beneficiary is aware or in the exercise of reasonable diligence should have been aware of a relationship between the injury or death and the employment. Such notice shall be given to the Mayor and to the employer.[74]

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[69] *Furtick v. Dep't of Employment Servs.*, 921 A.2d 787, 790 (D.C. 2007) ("We do not get to the issue of whether the presumption of compensability should apply until we first determine that the agency has jurisdiction over the claim.")

[70] *Donohoe w. Metro. Fireproofing*, Dir. Dkt. No. 93-16, H&AS No. 91-739, OWC No. 103114 (October 5, 1995).

[71] *Jambaro v. Hosp. for Sick Children*, CRB No. 13-070, AHD No. 13-154, OWC No. 632891 (July 24, 2013).

[72] *Dunston* at 111.

[73] Section 32-1521(2) of the Act. The Presumption applies to both written notice and actual notice, *Dillon v. Dep't of Employment Servs.*, 912 A.2d 556, 560 nt. 6, and encompasses both the contents of the notice and its timeliness. *Dillon.*

[74] 32-1513(a). Importantly,

> [o]ur statute not only uses "injury" language, but also refers specifically to "injury . . . in respect of which compensation is payable" under the Act. D.C. Code § 32-1513 (a). This means that "the claim period runs from the time compensable injury becomes apparent." LARSON, *supra*, at § 126.06 [1]. To be "compensable," an injury must result in "disability," which we have often said is primarily an economic — not medical — concept that

The Act requires such written notice include

> the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or, in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.[75]

There are, however, exceptions to this requirement for written notice.

Oral notice is an exception, but even oral notice must include the same information required by §32-1513(b) of the Act. So long as oral notice satisfies that section's requirements, the purpose of the notice requirement is satisfied:

> The notice requirement of D.C. Code §[32-1513] serves two purposes: it enables an employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury; and

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encompasses "any incapacity arising from a work-related injury that results in lost wages." *Wash. Metro. Area Transit Auth.*, 926 A.2d at 149 n.12; see Stancil, 436 F.2d at 276 n.4 ("'Disability' . . . is a medico-economic term, meaning actual incapacity because of injury to earn the wages which the claimant was receiving."). Disability compensation is meant to address that partial or total loss, temporary or permanent, in earning capacity. *See Howard Univ. Hosp./Prop. & Cas. Guarantee Fund*, 952 A.2d at 176. Thus, an injury "in respect of which compensation is payable" under the Act, D.C. Code § 32-1513 (a), of which the claimant must give notice to the employer, is an injury that is (or at least is capable of becoming) disabling in the economic sense. [footnote omitted] The statutory language of the notice requirement therefore indicates that the 30-day notice period is triggered when the employee is or should have been aware that an impairment (physical or psychological) may be compensable because it is likely to result in loss of wages. *Cf. Stancil*, 436 F.2d at 279 (formulating the question as whether employee "reasonably believed" he had — or had not — "suffered a work-related harm which would probably diminish his capacity to earn his living"). This awareness will usually come about because of an actual inability or impaired ability to perform usual work duties, from the nature of the trauma sustained, or on advice from a physician. In many cases where there is a discrete incident in the workplace, the severity of the trauma might suffice to make the fact or likelihood of compensable injury apparent to the employee. The presence of momentary pain or discomfort, however, does not necessarily indicate the presence of an underlying disabling impairment and will not always trigger the requirement to give notice of injury that is compensable, particularly where the employee is able to continue to work as before. *See generally Munyan v. Daimler Chrysler Corp.*, 909 A.2d 133, 136-37 (Del. 2006) (discussing a conflict in medical evidence and noting that "evidence of pain without loss of use is not a compensable permanent impairment").

Poole at 467-468.

[75] Section 32-1513(b) of the Act.

> it facilitates the earliest possible investigation of the facts surrounding the injury. [76]

The key is that the employer must be given sufficient information "that would lead a reasonable man to conclude that liability is possible and an investigation should ensue."[77]

Actual notice is another exception to the requirement for written notice. Actual knowledge of an event and an injury (even if the severity of the injury is underestimated at the time notice is given) satisfies the statutory requirement.[78] There must be some indication that the claimant sustained a disabling work-related injury,[79] and the actual notice must be by an individual with supervisory responsibilities or agency capacity rather than just a co-worker.[80]

Regardless of the method of communicating notice, once the claimant establishes a work-related injury,

> the Act presumes adequate and timely notice has been given, making it an employer's burden to overcome the presumption by adducing substantial evidence in opposition to the presumed notice. Once the employer has done that, the presumption of notice falls from the case, and the evidence is weighed, with the claimant bearing the burden of demonstrating adequate notice by a preponderance of the evidence.[81]

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[76] *McIntyre v. Safeway Stores, Inc.*, Dir. Dkt. No. 01-41, OHA No. 00-309, OWC No. 550033 (April 23, 2002).

[77] *Id.*

[78] *Howrey & Simon v. Dep't of Employment Servs.*, 531 A.2d 254 (D.C. 1987).

[79] *Peterson v. Em-Kay Liquor Store*, CRB No. 09-038, AHD No. 08-224, OWC Nos. 636644 and 637719 (March 12, 2009).

[80] *Goggans v. Sibley Mem'l Hosp.*, CRB No. 13-166, AHD No. 12-556, OWC No. 691293 (April 22, 2014); §32-1513(d)(1) of the Act.

[81] *Henderson v. Finnegan, Henderson, Farabow, Garrett & Dunner, LLP*, CRB No. 12-018, AHD No. 11-263, OWC No. 678522 (March 27, 2012).

Thus, the same burden shifting that applies to compensability applies to notice.

Intoxication

There also is a presumption that an "injury was not occasioned solely by the intoxication of the injured employee."[82] Laboratory results showing the presence of intoxicating substances do not prove intoxication,[83] and demonstrating effects of intoxication such as impaired judgment or risk-taking is not sufficient to bar compensability.[84] By the plain language of the Act, to bar compensability, intoxication must be the only cause of the claimant's injuries, and being a primary cause of an accident is not the same as being the sole cause of an accident.[85] With such a high burden, an intoxication defense rarely succeeds; neither does a willful intention defense.

Willful Intention

Finally, there is a presumption that an "injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another."[86] Even if an injury does arise out of and in the course of employment, some jurisdictions bar recovery of

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[82] Section 32-1521(3) of the Act.

[83] See *Green v. Washington Metro. Area Transit Auth.,* H&AS No. 83-155, OWC No. 0010832 (February 28, 1984).

[84] *Peters v. Nat'l Org. for Marriage*, CRB No. 14-076, AHD No. 14-142, OWC No. 709020 (October 29, 2014).

[85] See *Roberts v. Corning Constr.*, H&AS No. 93-117B, OWC No. 184376 (October 1, 1996) (The claimant's intoxication was the primary cause of his fall but "work activities that the claimant was performing when he was injured also could have contributed to his falling from the ladder [so] intoxication was not the sole cause of his fall and resulting injuries.")

[86] Section 32-1521(4) of the Act.

workers' compensation benefits when a claimant engages in willful misconduct. In those jurisdictions, willful misconduct generally is defined as violating a rule or a statute in a way that takes the claimant outside the scope of employment. In the District of Columbia, however,

> [t]he Act does not excuse employer liability where the employee is injured while willfully violating an employer's rules, *nor* does it excuse employer liability for injuries where the employee is injured by gross neglect of his or her duties. While an employee not following the rules of an employer or committing willful misconduct may subject an employee to termination or other discipline, willful misconduct by itself is not a bar to workers' compensation benefits.[87]

Recovery is barred in the District of Columbia only when a claimant's misconduct is part of an intentional plan or attempt to injure oneself or another.[88]

While the Act specifically states that in the absence of evidence to the contrary it shall be presumed an injury is not occasioned by a claimant's willful intention to injure oneself or another, the Act does not define "willful intention." In the absence of a statutory definition,

> two factors have figured in the cases interpreting the "willful intent to injure" exception: "the factor of seriousness of the claimant's initial assault, and the factor of premeditation as against impulsiveness." 1 A. Larson, *The Law of Workmen's Compensation*, Section 11.15(d).[89]

Thus, the standard for proving willful intention to injure is high, especially in conjunction with the presumption against the applicability of this defense, and an intent to injure

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[87] *Abdlah v. Cong. Exxon Alina*, AHD No. 17-399, OWC No. 756975 (February 9, 2018).

[88] *Whitesides v. Sonnenschein, Nath & Rosenthal*, CRB No. 07-144, AHD No. 07-070, OWC No. 629021 (October 4, 2007).

[89] *Skeen v. 4934, Inc. d/b/a The Godfather*, H&AS No. 83-71, OWC No. 0007899 (August 30, 1983).

another requires premeditation or deliberation; it requires more than a reaction which leads to an injury, even a serious injury. As a result, the defense of willful intention does not often succeed in the District of Columbia and is not the equivalent of acting with hostility or aggression.

Summary

This detailed explanation of just some of the fundamental components of workers' compensation law in the District of Columbia is necessary to understanding that at each step in the workers' compensation process the claimant intentionally is presented with distinct advantages and that the purpose of the Act is circumvented when the Presumption (perhaps the biggest advantage) is misapplied. The broad scope of liability for injuries arising out of and in the course of employment without regard to fault stems from a common purpose of all workers' compensation systems, namely providing claimants with an expeditious and practical remedy for work-related accidents while simultaneously limiting the economic burden on employers, but if the Presumption is not applied properly, the process is neither expeditious nor practical for either party.

Chapter 2
Abrogating the Presumption in Physical Injury Cases – the Aggressor Defense

Introduction[90]

- Mr. Rodney Dickerson stepped aboard a pallet mounted on the front of a forklift and placed a case of vodka on his shoulder; as the pallet ascended to the second floor of a warehouse, it broke, and Mr. Dickerson fell to the ground. He sustained a concussion, multiple strains, and multiple contusions. Because his employer did not rebut the presumption of compensability, he was awarded benefits.[91]
- While operating a pipe-cutting grinder without using the safety shield, Mr. Edward F. Mooney severely injured his left hand. Because his employer did not rebut the presumption that Mr. Mooney's injury was not caused by a willful intention to injure himself, he was awarded benefits.[92]

Stupidity is compensable. When tort principles no longer apply, even actions ordinarily classified as foolhardy are entitled to the presumption of compensability ("Presumption").

In workers' compensation, compensability is determined by the relationship between an event causing an injury and employment, not the relationship between an event

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[90] This chapter is adapted from Melissa Lin Jones, *Injecting Fault into a No-Fault System: The Aggressor Defense in Work-Related Fight Cases*, 32 HOFSTRA LAB. & EMP. L.J. 91 (Fall 2014).

[91] *Dickerson v. Republic Nat'l Distrib. Co.*, AHD No. 11-132, OWC No. 673114 (July 27, 2011).

[92] *Mooney v. John J. Kirlin Co.*, H&AS No. 97-210, OWC No. 510389 (December 23, 1997).

causing an injury and a claimant's culpability, clumsiness, impulsiveness, incompetence, etc. If the accidental injury arises out of and in the course of employment, the claimant is entitled to application of the Presumption and to benefits without regard to foreseeability or responsibility-- unless the claimant sustains that injury during a work-related fight started by the claimant.

In 1985, the Director of the Department of Employment Services ("Director") conducted administrative appellate review of workers' compensation decisions.[93] In *Bird v. Advance Security*, the Director ruled that in order for injuries sustained in a fight to be compensable two elements must be satisfied:

1. The employment required the combatants work together often enough for their temperaments and emotions to interact under workplace strains tending to increase the likelihood of friction between them, and
2. The claimant was not the aggressor.[94]

In other words, even though the Presumption applies, if a claimant initiated a physical altercation and is injured as a result of that altercation, the claimant's injuries are not compensable pursuant to the aggressor defense.

Some states recognize the aggressor defense as a bar to eligibility for workers' compensation benefits; some states reject the aggressor defense as a bar to receiving workers' compensation benefits; some states that once recognized the aggressor defense as

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[93] In December 2004, the Compensation Review Board assumed administrative appellate review of Compensation Orders. §32-1521.01 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. ("Act"). Before the creation of the Compensation Review Board, the Director of the Department of Employment Services ruled on appeals of Compensation Orders.

[94] *Bird v. Advance Sec.*, H&AS No. 84-69, OWC No. 0015644 (June 7, 1985) ("*Bird II*").

a bar to eligibility for workers' compensation benefits have come to reject that defense in whole or in part. Despite the Presumption, the District of Columbia recognizes the aggressor defense.

The *Graber* Case

Graber v. Sequoia Restaurant[95] is an illustrative District of Columbia workers' compensation case applying the aggressor defense to injuries sustained in an on-the-job fight. On August 9, 2009, Mr. Todd Allen Graber worked as a food server at Sequoia Restaurant. On that day, he was drinking on the job. He also "was behaving aggressively towards his co-workers;"[96] inside the restaurant, Mr. Graber "engaged in a heated discussion with a co-worker, Mr. Mehdi Brewer[,] although the substance of those words [is] unclear."[97] Another co-worker separated Mr. Graber and Mr. Brewer.

Mr. Brewer began using a computer terminal in a work area. He then turned and began walking onto the dining floor. While Mr. Brewer was walking away, Mr. Graber struck Mr. Brewer in the back of the head. In response, Mr. Brewer pivoted and punched Mr. Graber in the face. Mr. Graber fell to the floor.[98]

At a local hospital, Mr. Graber underwent a right decompressive craniectomy. He remained hospitalized for approximately five weeks for "right temporal lobe

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[95] *Graber v. Sequoia Rest.*, AHD No. 10-063, OWC No. 662653 (April 13, 2011) ("*Graber I*").

[96] *Id.*

[97] *Id.*

[98] It is unclear whether the punch or the impact with the floor rendered Mr. Graber unconscious.

intraparenchymal and basal ganglia hemorrhage."[99] Even after discharge from the hospital, Mr. Graber continued to treat for uncontrolled seizures and migraines.

When determining Mr. Graber's entitlement to workers' compensation benefits an administrative law judge noted that "to be compensable an injury must both arise out of, and in the course of, the employment."[100] Then, without mentioning the Presumption, the administrative law judge analyzed whether Mr. Graber was the aggressor:

> [I]t is clear to the Undersigned that the Claimant was the aggressor on August 9, 2009. Under the *Bird* analysis, the Undersigned does find that the nature of the Claimant's employment does require regular contact with his co-workers, including Mr. Brewer which can cause a strain on emotions increasing workplace friction. However, the Claimant fails the second prong of the *Bird* test.
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> The surveillance footage the Undersigned reviewed (as well as the corroborating witness testimony) shows Mr. Brewer walking away from the Claimant when the altercation occurred. Indeed, in the instant before the Claimant pushed or struck the back of Mr. Brewer's head, Mr. Brewer was clearly walking away from the Claimant and had his back fully towards the Claimant. The Claimant chose to come from behind Mr. Brewer while he was walking away and physically attack Mr. Brewer. As such, the Claimant can clearly be labeled the aggressor.[101]

In the end, the administrative law judge ruled Mr. Graber's injury was not compensable because he had acted with a willful intention to injure Mr. Brewer and because he had been the aggressor:

> The Claimant argues several points in support of his contention that he is not the aggressor in the above altercation. First, the Claimant argues that the "aggressor defense" appears nowhere in the Act and as such is not a viable defense. The Claimant quotes §32-1503(b) which states that the "Employer shall be liable for compensation for injury or death without

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[99] *Graber I.*

[100] *Id*.

[101] *Id.*

> regard to fault as a cause of the injury or death." However, as outlined above, the Claimant fails in this argument as the Claimant fails to note that §32-1503(d) limits liability for compensation due to an injury to the employee, the Claimant, if the injury was occasioned solely by his *intoxication or by his willful intention* to injure himself or another. Thus, contrary to the Claimant's argument, the aggressor defense does find support in the statute in §32-1503(d).
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> The Claimant points out that many cases which have follow[ed] *Bird* involve disputes between coworkers that [were] either prolonged or cases where the Claimant had acted in a physically aggressive manner. First, the argument that the length of the altercation is determinative in whether the Claimant is the aggressor is rejected. Whether or not the altercation lasted a matter of a few minutes or a few hours does not negate the fact that the Claimant came from behind Mr. Brewer and initiated physical contact in an aggressive way. No injury would have occurred to the Claimant had he not pushed/hit Mr. Brewer aggressively in the head, regardless of whether or not this occurred a few seconds, a few minutes, or a few hours into the altercation. The end result, regardless of time, is that the Claimant was the aggressor on the date of injury.
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> * * *
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> Claimant's willful intention to injure another, Mr. Brewer, caused his injury to occur, and thus liability for compensation shall not apply. *See* D.C. Code §32-1503(d). As I find the Claimant to be the aggressor in the altercation of August 9, 2009, no further discussion is warranted, including the Claimant's intoxication on that day, which also defeats his claim. I find an accidental injury did not occur on that date within the scope of the [A]ct as the Claimant was the aggressor. With this finding, all other issues are rendered moot.[102]

The administrative law judge denied Mr. Graber's request for temporary total disability benefits and for medical benefits so Mr. Graber filed an appeal.

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[102] *Id.*

Mr. Graber's Arguments on Appeal to the Compensation Review Board

On appeal to the Compensation Review Board, Mr. Graber asserted the administrative law judge had erred in several ways. The arguments important to the aggressor defense are:

1. Was the presumption of compensability properly applied?

2. Were Mr. Graber's injuries occasioned solely by his intoxication or solely by a willful intent to injur[e] Mr. Brewer?

3. Does the aggressor defense impermissibly bar Mr. Graber's recovery under the [Act]?[103]

Initially, Mr. Graber attempted to convince the Compensation Review Board he was not the aggressor; however, the administrative law judge unequivocally had ruled Mr. Graber was the aggressor. The scope of review by the Compensation Review Board is limited to determining whether the factual findings in the appealed Compensation Order are supported by substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with the law.[104] The Compensation Review Board is constrained to uphold a Compensation Order that is supported by substantial evidence even if there also is contained in the record substantial evidence to support a contrary conclusion and even if the Compensation Review Board might have reached a contrary conclusion based upon an independent review of the record.[105] Because the administrative law judge's ruling was supported by substantial evidence, the Compensation Review Board

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[103] *Graber v. Sequoia Rest.*, CRB No. 11-045, AHD No. 10-063, OWC No. 662653 (July 25, 2011) ("*Graber II*").

[104] Section 32-1521.01(d) of the Act.

[105] Substantial evidence is relevant evidence a reasonable person might accept to support a conclusion. *Marriott Int'l v. Dep't of Employment Servs.*, 834 A.2d 882 (D.C. 2003).

accepted Mr. Graber's status as the aggressor and lacked authority to reweigh the evidence on that issue.

As for Mr. Graber's other arguments, the Compensation Review Board recognized the Act contains several presumptions:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of evidence to the contrary:
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> (1) That the claim comes within the provisions of this chapter;
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> (2) That sufficient notice of such claim has been given;
>
> (3) That the injury was not occasioned solely by the intoxication of the injured employee; and
>
> (4) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.[106]

However, the Compensation Review Board directed those presumptions be read in conjunction with §32-1503(d) of the Act:[107]

> [I]t is presumed that a work-related injury is compensable unless intoxication or a willful intention to injure or kill oneself or another is the sole cause of the injury. If either exception applies, the injury does not arise out of the employment and is not compensable.[108]

Mr. Graber's injuries were not caused solely by his intoxication, but it was unclear if his injury was the result of a willful intention to injure Mr. Brewer. If this issue had been dispositive, it would have required a remand for additional fact-finding, but ultimately,

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[106] Section 32-1521 of the Act.

[107] "Liability for compensation shall not apply where injury to the employee was occasioned solely by his intoxication or by his willful intention to injure or kill himself or another."

[108] *Graber II*.

Mr. Graber's status as the aggressor and his pursuit of a private animosity with no connection to his employment barred his eligibility for workers' compensation benefits regardless of any willful intention to injure Mr. Brewer:

> There is substantial evidence in the record to support the finding that the work-related altercation was over: Mr. Graber and Mr. Brewer walked in different directions, physically had separated, and had resumed their respective duties when Mr. Graber struck Mr. Brewer in the back of his head from behind. . . .Because the ruling that Mr. Graber was the aggressor is supported by substantial evidence, this tribunal simply cannot review and reweigh evidence anew as Mr. Graber would prefer. [footnote omitted]
>
> In addition, Mr. Graber argues that the aggressor defense inserts into the Act an impermissible element of fault. We disagree.
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> Although workers' compensation generally is a no-fault system, in specific instances such as intoxication, willful misconduct, and the aggressor defense, there is an element of fault that takes the activity and its consequences beyond the employment situation. Mr. Graber's argument may have been more persuasive if the altercation had been an uninterrupted one; however, because "Mr. Brewer was clearly walking away from the Claimant and had his back fully towards the Claimant [and because Mr. Graber] chose to come from behind Mr. Brewer while he was walking away and physically attack Mr. Brewer," [footnote omitted] the situation was a willful intent to injure another that degenerated into an altercation of private animosity and vengeance with no work connection.[109]

Often in fight cases, as in *Graber*, several concepts are intertwined to reach the result. Consequently, understanding the facts of the *Bird* case and the justification for the *Bird* test is instrumental in assessing whether the *Bird* test impermissibly circumvents the Presumption.

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[109] *Id.*

The *Bird* Test

On October 5, 1983, Officer David R. Bird received a telephone call at his post in the lobby of the World Bank where he worked as a security officer. Officer Bird could not leave his post to deliver an emergency message to fellow officer Percy Tappin so he tried to reach Officer Tappin by calling a telephone in the parking garage used by World Bank employees.

Officer Tappin was stationed in a booth at the garage entrance, and parking attendants employed by Diplomat Parking frequently answered this telephone. In fact, Mr. Sharif Mohamed, a Diplomat Parking employee, answered the telephone.

Officer Bird told Mr. Mohamed there was an emergency call for Officer Tappin, but Mr. Mohamed hung up the phone. Mr. Mohamed hung up on Officer Bird two more times when Officer Bird called back.

While Officer Bird was on break, he accused Mr. Mohamed of being impolite. Mr. Mohamed challenged Officer Bird to a fight, and Officer Bird said he would take it up with Mr. Mohamed's supervisor, Mr. Abraham Ankele.

The next day, Officer Bird arrived at the World Bank approximately 30 minutes before his shift; he regularly did so in order to change into his uniform, punch-in, and report to his post. He went to the locker room, and Mr. Mohamed and Mr. Ankele were there.

Mr. Ankele asked Officer Bird about the telephone incident. During this discussion, Mr. Mohamed approached Officer Bird, made obscene gestures, and used profanities.

The verbal exchange continued outside the locker room, and Mr. Mohamed hit Officer Bird on the head. As Officer Bird tried to defend himself, he and Mr. Mohamed fell to the ground.

This account is Officer Bird's version of the events. Mr. Mohamed, Mr. Ankele, and Officer Shadee Ansari offered different versions of the events.

According to Mr. Mohamed, the telephone calls on October 5, 1983 were from a female who wanted to speak to Officer Bird. Mr. Mohamed did not relay the call to Officer Bird; instead, Mr. Mohamed told the female to call the security office.

Shortly thereafter, Officer Bird called Mr. Mohamed to ask why Mr. Mohamed had told the female to call the security office. Officer Bird called Mr. Mohamed an obscene name, and he challenged Mr. Mohamed to a fight at the end of the day.

The next day, Mr. Mohamed and Mr. Ankele were in the locker room when Officer Bird arrived. Officer Bird began talking in an aggressive tone and asked why Mr. Mohamed had not waited for him after work the day before. Then, as Mr. Mohamed was leaving the locker room, Mr. Ankele left to call security, and Officer Bird began hitting Mr. Mohamed on the head. Both men fell to the ground.

Mr. Ankele provided a third version of the events. According to him, Mr. Mohamed told him that a female had called for Officer Bird and that Mr. Mohamed did not transfer the call or deliver a message to Officer Bird. Mr. Mohamed also told Mr. Ankele that Officer Bird came to the parking-attendant booth and yelled at Mr. Mohamed.

The next day, Mr. Ankele and Officer Bird were in the locker room when Mr. Mohamed entered. Officer Bird brought up the telephone calls, and the two men began arguing and name-calling; Officer Bird challenged Mr. Mohamed to a fight, but Mr. Ankele did not see who threw the first punch.

Officer Ansari saw Officer Bird and Mr. Mohamed in a heated argument outside the parking-attendant booth. Each was holding the other by the collar, and when Mr. Ankele tried to separate them, he was pushed away.

Officer Bird injured his right thumb during the fight so he filed a claim for permanent partial disability benefits. At the formal hearing, Officer Bird's employer argued that because the fight had taken place before the start of Officer Bird's tour of duty, it did not arise out of and in the course of employment. The administrative law judge rejected this argument.

Officer Bird's employer also argued that Officer Bird was not injured while acting in furtherance of his employment because the telephone call that had precipitated the animosity was not work-related. Without making any specific findings as to the content of the telephone call, the administrative law judge rejected this argument as well because even assuming the call was personal, an on-the-job assault is compensable if "the work of the participants brought them together and created the relations and conditions which resulted in the clash."[110] Because the fight had taken place in a locker room shared by the participants, because Officer Bird had passed by Mr. Mohamed's duty post in order to report to his own post, and because Officer Bird's patrol of the premises had brought him in contact with Mr. Mohamed, the conditions of employment had created the environment for the fight.

Finally, Officer Bird's employer argued the claim was barred by Officer Bird's willful intention to injure another. In response, the administrative law judge specifically

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[110] *Bird v. Advance Sec.*, H&AS No. 84-69, OWC No. 0015644 (November 6, 1984) ("*Bird I*") quoting *Hartford Accident & Indem. Co. v. Cardillo*, 112 F.2d 11, 18 (D.C. Cir. 1940).

ruled, "[b]ased on the testimony of Ankele, whom I find to be a credible and a candid witness, I find that the evidence does not establish who struck the first blow."[111] Although Officer Bird had shown aggressive behavior, the administrative law judge could not conclude he had willfully intended to injure Mr. Mohamed.

Without applying the Presumption, the administrative law judge found Officer Bird's injury arose out of and in the course of his employment and recommended awarding Officer Bird 5% permanent partial disability of his right thumb, but on appeal, the Director rejected that recommendation and denied Officer Bird's request for benefits. Although the Director found no error in the administrative law judge's conclusion on the issue of "in the course of employment" so far as it related to Officer Bird's pre-tour activities, the Director disagreed with the administrative law judge's broad reading of *Hartford Accident* and disagreed that the assault arose out of Officer Bird's employment:

> For the work to "create the relations and conditions which resulted in the clash", I think that *Hartford Accident* at a minimum requires: 1) a showing that the employment required the combatants to work in an environment which brings them together often enough for their temperaments and emotions to interact under strains of the workplace and which tends to increase the likelihood of friction between them; and 2) a finding that the injured employee was not the aggressor.[112]

The Director explained why Officer Bird was not entitled to benefits pursuant to this test:

> In *Hartford Accident* there were two environmental factors which tended to increase the likelihood of friction between the fight participants. First, there existed a supervisor-supervisee relationship between the fight participants. Disputes will often develop within such relationships based on the different notions of how, how fast, how well or how carefully a particular task should have been, was, or should be performed. In many instances, a supervisor's performance rating depends upon the

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[111] *Bird I*.

[112] *Bird II*.

performances of his supervisees. Pressures on the supervisees from supervisors sometimes erupt into violence or heated verbal exchanges.

Second, the nature of the duties of the claimant, a grocery helper, and the supervisor, a checker, assured that they would come into contact regularly. Thus, the more opportunities which arose for their temperaments and emotions to cross paths, the greater the likelihood of friction.

In this proceeding Claimant was a security guard principally stationed near the main receptionist area inside of a World Bank building. The parking garage attendant worked outside and under that building. Claimant and the parking [attendant would have occasion to see each other on] the parking area when Claimant arrived at work or when he was on patrol and sometimes in the locker room when Claimant changed clothes.

Although Claimant's occasional visits to the garage area to park or remove his car or to perform a security function and his use of the locker rooms might have brought him into contact with the parking attendant, it cannot reasonably be concluded that the nature of their respective duties or their employment relationship was likely to increase friction. Moreover, there is no evidence in the record that Claimant was required to drive to work or to come to work in his street clothes. While the World Bank may have permitted Claimant's use of the locker rooms, that fact is insufficient to justify a conclusion that the employment created the relations and conditions which resulted in the clash. Indeed, if that were the case, any two employees who have occasion to ride an employer's elevators together, to use the same bathroom facilities or to see one another in the company cafeteria and who engage in a personal fight, would sustain compensable injuries. *Hartford Accident*, however, does not go so far.

At the end [o]f *Hartford Accident* Judge Rutledge attempted to reconcile his view with those expressed in *Fazio* [*v. Cardillo*, 109 F.2d 835 (D.C. Cir. 1940)] by pointing out that "claimant there was the aggressor in the physical assault." *Id.* at 18. In *Ackerman* [*v. Cardillo*, 140 F.2d 348 (D.C. Cir. 1944)], moreover, the Court once again noted that *Hartford Accident* was limited to circumstances where the claimant was [not the aggressor. In light of those remarks, I must conclude that injuries resulting from a fight with a co-worker are] not compensable under *Hartford Accident* unless the claimant is not the aggressor.

In this proceeding, the evidence tends to support the view that Claimant was the aggressor. Regardless of who struck the first blow, it was Claimant who first approached the parking attendant and who seemed bent on settling a score. I accept, moreover, the [administrative law judge's] finding that claimant "challenged Mohamed to go outside to fight."

> [Recommended Compensation Order] at 8. Based on these facts, I find Claimant to have been the aggressor and that under *Hartford Accident* his injuries did not arise out of his employment.
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> Because I find that Claimant's claim for benefits must be denied on the grounds that his injuries did not arise out of his employment, I need not reach the second issue of whether Claimant's intent to fight constitutes a willful intent to injure another.[113]

In *Hartford Accident*, the claimant's injuries from a work-related assault were compensable:

> Nor is it necessary, as these cases show, that the particular act or event which is the immediate cause of the injury be itself part of any work done for the employer by the claimant or others. Otherwise no award could be given for many injuries now compensated, such as those caused by stray bullets, unexplained falls, objects falling from outside the employer's premises and work, many street risks, horseplay, most assaults and many other causes. "The risks of injury incurred in the crowded contacts of the factory through the acts of fellow workmen are not measured by the tendency of such acts to serve the master's business." Not that the act is in the line of duty, or forwards the work, or creates special risk, but that the work brings the employee within its peril makes it, for purposes of compensation, "part of the work."
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> Recognition that this is so came more easily as to physical than as to human forces. As with street risks, the early disposition in cases of human action was to emphasize the particular act and its nature, except anomalously when it involved merely negligence of the claimant or fellow employees. The statutory abolition of common law defenses made easy recognition of the accidental character of negligent acts by the claimant and fellow servants. The extension to their accidental (*i.e.*, nonculpable, but injurious) behavior was not difficult. So with that of strangers, including [assault] by deranged persons, and their negligence intruding into the [working] environment. But these extensions required a shift in the emphasis from the particular act and its tendency to forward the work to its part as a factor in the general working environment. The shift involved recognition that the environment includes associations as well as conditions, and that associations include the faults and derelictions of human beings as well as their virtues and obediences. Men do not discard their personal qualities when they go to work. Into the job they carry their

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[113] *Id*.

intelligence, skill, habits of care and rectitude. Just as inevitably they take along also their tendencies to carelessness and camaraderie, as well as emotional make-up. In bringing men together, work [brings] these qualities together, causes frictions between them, creates occasions for lapses into carelessness, and for fun-making and emotional flare-up. Work could not go on if men became automatons repressed in every natural expression. "Old Man River" is a part of loading steamboats. These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.

But resistance to application of the broad and basic principle has been most obstinate perhaps where the particular act immediately causing injury involves responsible volition by the claimant or others. The extreme instances are those containing an element of illegality or criminality. The horseplay and assault cases are illustrative. Confusion and conflict still reign in these realms.

Several factors have sustained the resistance. One is the hangover from common law conceptions of profiting by one's own wrong. But this applies as well, in logic, to contributory or one's own exclusive negligence. Another was the now thoroughly dissipated notion that voluntary responsible action cannot be accidental. The volitional character of the act also raised a supposed analogy to "independent, intervening agency" in tort causation. There was, further, an assumed essential opposition between "personal" acts and those of an "official" (*i.e.*, related to the work) character. An assault necessarily involves emotional make-up and disturbance. In a broad sense nothing is more personal. Quarreling is always so. This accounts for the early disposition to regard all injuries from wilful [sic] assault as not compensable, a view also necessarily dictated, except rarely when duty requires fighting, if tendency of the particular act to forward the work or direct connection with line of duty are the tests of liability. But that view now is repudiated universally in recognition that work causes quarrels and fights. That they involve volition and fault, have no tendency to forward the work, and are permeated with the personal element of anger no longer suffices to break the causal connection between work and injury. Emotional disturbance is not of itself an "independent, intervening cause" or a "departure from the work."

But differences remain as to when work causes quarrels. So long as the claimant is merely the victim, not a participant, it makes little difference whether the fighting is by fellow employees or strangers to the work or what is the immediate occasion for the dispute. The same is true in horseplay. It is sufficient that the work brings the claimant within the range of peril by requiring his presence there when it strikes. But conflict becomes acute

when the claimant participates. There are two lines of division, which partially overlap. One is concerned with whether the claimant is the aggressor. Another turns on whether the dispute arises immediately over the work or about something else. One view limits compensable causation to quarrels relating directly to the work. It disconnects the precipitating incident from the working environment, though that alone may have produced it. So isolated, its immediate relevance to the work becomes the [determining] consideration. Momentary lapses from duty, as in horseplay, kidding and teasing, which often explode into bursts of temper and fighting become "departures from the work," "independent, intervening causes" or "purely personal matters." Their immediate [irrelevance] overcomes and nullifies the part played by the work in bringing the men together and creating the occasion for the lapse or outburst. The other view rejects the test of immediate relevancy of the culminating incident. That is regarded, not as an isolated event, but as part and parcel of the working environment, whether related directly to the job or to something which is a by-product of the association. This view recognizes that work places men under strains and fatigue from human and mechanical impacts, creating frictions which explode in myriads of ways, only some of which are immediately relevant to their tasks. Personal animosities are created by working together on the assembly line or in traffic. Others initiated outside the job are magnified to the breaking point by its compelled contacts. No worker is immune to these pressures and impacts upon temperament. They accumulate and explode over incidents trivial and important, personal and official. But the explosion point is merely the culmination of the antecedent pressures. That it is not relevant to the immediate task, involves a lapse from duty, or contains an element of volition or illegality does not disconnect it from them nor nullify their causal effect in producing its injurious consequences. Any other view would reintroduce the conceptions of contributory fault, action in the line of duty, nonaccidental character of voluntary conduct, and independent, [intervening] cause as applied in tort law, which it was the purpose of the statute to discard. It would require the application of different basic tests of liability for injuries caused by volitional conduct of the claimant and those resulting from negligent action, mechanical causes and the volitional activities of others.

The limitation, of course, is that the accumulated pressures must be attributable in substantial part to the working environment. This implies that their causal effect shall not be overpowered and nullified by influences originating entirely outside the working relation and not substantially magnified by it. Whether such influences have annulling effect upon those of the environment ordinarily is the crucial issue. The difference generally is as to the applicable standard. It is not, as is frequently assumed, the law of "independent, intervening agency" applied in tort cases. It cannot be prescribed in meticulous detail, but is set forth in the statute, not only in the

> broad presumptions created in favor of compensability, but more explicitly in the provision by which Congress has expressed clearly its intention concerning the kinds of acts which bar recovery when done by the claimant. The provision is: "No compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee or by the *willful intention of the employee to injure or kill himself or another*."
>
> This provision, reinforced by the statutory presumptions and the Act's fundamental policy in departing from fault as the basis of liability and of defense, except as specified, is inconsistent with any notion that recovery is barred by misconduct which amounts to no more than temporary lapse from duty, conduct immediately irrelevant to the job, contributory negligence, fault, illegality, etc., unless it amounts to the kind and degree of misconduct prescribed in definite terms by the Act. It is entirely inconsistent with reading into the statute the law of tort causation and defense, where liability is predicated on fault and nullified by contributory fault. We are committed by the statutes and our previous decisions against the test of immediate relevancy of the precipitating act to the task in hand.[114]

The statutory language from the Longshoremen's and Harbor Workers' Compensation Act that Justice Rutledge interpreted in *Hartford Accident* is almost identical to the language in the Act,[115] and both acts contain the same presumption that a claim comes within the provisions of the act.[116] Regretfully, Justice Rutledge went on to note, "Claimant may have been at fault, but he was the aggressor neither in the banter nor in the physical

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[114] *Hartford Accident* at 14-17 (internal footnotes omitted).

[115] "No compensation shall be payable if the injury was occasioned *solely* by the intoxication of the employee or by the *willful intention of the employee to injure or kill himself or another*." *Hartford Accident* at 17 quoting the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, c. 509, §3(b), 44 Stat. 1426, 33 U.S.C. c. 18, §903(b), 33 U.S.C.A. §903(b). *Cf.* §32-1503(d) of the Act: "Liability for compensation shall not apply where injury to the employee was occasioned solely by his intoxication or by his willful intention to injure or kill himself or another."

[116] Both acts create a presumption that a "claim comes within the provisions of this chapter." 33 U.S.C. §920(a) and §32-1521(1) of the Act.

encounter,"[117] and he distinguished *Fazio* on the grounds that "claimant there was the aggressor in the physical assault."[118]

Without even mentioning the Presumption, the Director adopted the two-prong *Bird* test to determine the compensability of injuries sustained in a fight at work. Regardless of a connection between employment conditions and the fight and regardless of the Presumption, so long as the claimant was the aggressor, the claimant's injuries are beyond the scope of employment and are not compensable. This test goes against the Act and the basic principles of workers' compensation law in the District of Columbia and elsewhere.

Application of the Aggressor Defense - Aggressor vs. Provocateur

Given that there is no statutory aggressor defense in the District of Columbia, it should come as no surprise that there is no statutory or regulatory definition of an aggressor in this context. One administrative law judge defined "aggressor" by stating "overbearing physical retaliation, which may not be warranted by the initial assault, does not equate to aggression. The aggressor is the individual who instigates the physical confrontation, not necessarily the one most damaged in its aftermath,"[119] but the application of the *Bird* test has gone beyond denying benefits only to the worker who threw the first punch.[120]

Mr. Sulaiman Mansaray was a dishwasher at the Grand Hyatt Hotel Washington. He regularly worked with other dishwashers supplied to the hotel by a temporary

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[117] *Hartford Accident* at 18.

[118] *Id.*

[119] *Sims v. Educ. Transition Serv.*, OHA No. 03-332, OWC No. 584796 (September 24, 2003).

[120] *Mansaray v. Grand Hyatt Hotel Washington*, OHA No. 01-411A, OWC No. 563199 (January 25, 2002).

employment agency. Mr. Mansaray had a habit of treating the temporary workers with rudeness and contempt.

On December 29, 2000, Mr. Mansaray directed numerous disparaging comments toward Mr. Ramon Adams. Mr. Mansaray was admonished to stop treating his co-workers with disrespect, but he persisted. In response to Mr. Mansaray's comments, Mr. Adams twice approached Mr. Mansaray in a manner that gave the appearance he was going to strike Mr. Mansaray. Both times, Mr. Adams was restrained and was removed from the situation.

Late in the evening, Mr. Adams was sorting glassware when Mr. Mansaray interrupted Mr. Adams' work by stacking a rack of coffee cups on top of the glassware Mr. Adams was sorting. Mr. Adams demanded Mr. Mansaray remove the coffee cups; Mr. Mansaray refused, and Mr. Adams threw the rack to the floor. At this point, for the third time that night, Mr. Mansaray made disparaging comments about Mr. Adams. Mr. Adams approached Mr. Mansaray quickly, but Mr. Mansaray retreated to an adjacent hallway. When Mr. Adams caught up to Mr. Mansaray, he beat him about the head and face.

An administrative law judge found Mr. Mansaray

> instigated the fight by provoking Mr. Adams with insults and taunts which had previously caused Mr. Adams to respond in a fashion that was potentially violent and which could reasonably have been expected to cause a normal person of average sensibilities to react with violence.[121]

[121] *Id.*

There was no dispute that Mr. Mansaray had not struck the first blow. His pattern of conduct,[122] however, had "the potential to provoke a person of average sensibilities to respond with violence, a variant of the 'fighting words' concept,"[123] and his continued taunting even after Mr. Adams twice had been on the verge of violence "put him on notice that his conduct was capable of and perhaps even likely to lead to an altercation in which he might sustain injury."[124] After applying the Presumption, the administrative law judge weighed the evidence and concluded Mr. Mansaray's injuries were not compensable:

> [C]laimant engaged in a course and pattern of abusive, insulting, and intentionally offensive and knowingly provocative behavior, repeatedly and in the face of employer workplace rules prohibiting such conduct and a specific admonition from his direct supervisor on the night in question to desist therefrom, and was therefore an "aggressor" whose claim for compensation is barred. Where the misconduct of the claimant reaches the point where an average person of normal sensibilities could be expected to respond with violence, and where that misconduct has been shown through the relationship and behavioral response of a particular individual to pose a significant likelihood that continuing in that course of misconduct will lead to a violent response, and where that misconduct is not significantly useful or necessary to the employer, and is in fact prohibited by the employer, the misconduct can be considered to establish that the claimant is an "aggressor" whose injuries resulting from the response to the misconduct are not compensable under the Act.[125]

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[122] Mr. Mansaray's offensive behavior was not limited to this shift:

> [P]rior to the night in question, [Mr. Mansaray's supervisor] had received complaints from at least 2 other workers about [Mr. Mansaray's] manner of talking to others at work, and that this caused him to discuss the claimant's disrespectful attitude with Ms. Taylor, [one of the employer's human resources specialists,] leading to adding the subject to the agenda of the next employee meeting.

Id.

[123] *Id.*

[124] *Id.*

[125] *Id. Cf. Maria v. D.C. Dep't of Corr.*, H&AS No. XX-737, DDCC No. 334001 (July 12, 1990) (The administrative law judge presiding over this public sector workers' compensation case did not apply the *Bird* test by name, but he found the claimant was not the aggressor because although she had provoked the

Thus, a claimant who did not throw the first punch still qualifies as the aggressor if his actions provoke an average person of normal sensibilities to strike.[126]

No Fault Liability and the *Bird* Test

So long as the claimant, even an aggressive claimant, was injured "while acting within the scope of his employment,"[127] the analysis is not supposed to include fault; "[e]very employer subject to this chapter shall be liable for compensation for injury or death without regard to fault as a cause of the injury or death."[128] Consistent with this concept, the first prong of the *Bird* test requires the claimant prove

> the employment required the combatants to work in an environment which brings them together often enough for their temperaments and emotions to interact under strains of the workplace and which tends to increase the likelihood of friction between them.[129]

Satisfying this portion of the test brings the claimant's aggressive activity within the scope of employment because employment conditions created the frictions culminating in a fight;

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coworker, her "verbal provocation did not warrant a physical attack.") *Cf. also Sutherland v. Fed. Express Corp.*, AHD No. 16-327, OWC No. 727789 (November 18, 2016) (The administrative law judge individually analyzed three separate but related events occurring in the same day to assess if the claimant was the aggressor in any of the events rather than analyzing the totality of the series of events as a whole.)

[126] Relying on the purportedly expanded definition of injury in *McCamey* and *Ramey* (see Chapter 3 "Abrogating the Presumption in Psychological Injury Cases – the *McCamey/Ramey* Test"), willful intent to injure another now includes "a claimant's willful intent to cause harmful stress to another." *Price-Richardson v. Washington Metro. Area Transit Auth.*, CRB No. 16-015, AHD No. 13-431, OWC No. 703466 (July 8, 2016).

[127] Section 32-1504(b) of the Act.

[128] Section 32-1503(b) of the Act.

[129] *Bird II*.

personal animosities brought into the workplace are not compensable.[130] Thus far, the *Bird* test merely restates the foundation for any compensable workers' compensation claim.

The second prong of the *Bird* test, however, ignores the Presumption and injects fault into a no-fault system: "[T]he injured employee was not the aggressor."[131] Regardless of the work-related origin of the altercation so long as "he started it," the claimant's injuries are not compensable, but the claimant's role as the aggressor does not change that accidental injuries are presumed to be work-related. The issues do not stop here.

The Presumption of Compensability and the *Bird* Test

Because the first prong of the *Bird* test requires an analysis of whether the claimant's actions arise out of and in the course of employment, the Presumption is implicated, but the Presumption has been applied inconsistently in cases involving an alleged claimant-aggressor. Sometimes the aggressor defense has been applied when invoking the Presumption:

> Based on the record testimony, and reports submitted herein, claimant has presented evidence of the two basic facts required to invoke the presumption: an injury and a work related activity that she did not instigate, which potentially contributed to the injury.[132]

Sometimes the aggressor defense has been applied when rebutting the Presumption:

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[130] See *Pinto v. Marriott, Inc.*, H&AS No. 98-557, OWC No. 528511 (June 29, 2000):

> I find that the claimant's injuries arose out of and in the course of her employment with the employer as a banquet waitress. I further find that the evidence reflects claimant's injuries arose from a work related incident and not from a personal dispute between the combatants that was imported into the workplace and the claim is therefore not barred and is compensable under the Act.

[131] *Bird II.*

[132] *Smith v. Heritage Sec., Inc.*, OHA No. 03-147, OWC No. 583401 (December 23, 2003) (Emphasis added.)

> Employer attempts to use the aggressor defense to defeat the compensability of this claim. In order to rebut the statutory presumption of compensability, the evidence adduced by employer has to meet the standard of being specific, credible and comprehensive. *Washington Metropolitan Area Transit Authority v. Department of Employment Services* (Harold Spencer), 827 A.2d 35 (D.C. 2003); *Parodi v. Department of Employment Services*, 560 A.2d 524 (D.C. 1989).
>
> There is not substantial record evidence to support employer's contention that claimant was the aggressor on October 24, 2002. Therefore, employer fails to rebut the presumption of compensability; the October 24, 2002 incident, in which claimant sustained several injuries, arose out of and in the course of her employment.[133]

Sometimes the Presumption has not been applied at all:

> The evidence in this case consists of the testimony of the claimant and the testimony of Mr. Cooper. Claimant testified that he arrived at the employer's offices, went directly to the administrative area, and advised Mr. Cooper of the pay dispute involving Flippo. He testified initially that Mr. Cooper advised him that he would have to wait until Mr. Cooper was not busy to deal with the issue; later he changed that testimony, and said that no such instruction was given. He testified that the date of the incident was June 6, but after prodding by his attorney, he changed the date to June 13. He testified initially that Mr. Cooper did ask him to leave the office prior to the physical contact between them, but he later denied any such request or order to leave was given. While the claimant's testimony was in these and other respects inconsistent, lacking in detail, confused, non-responsive and vague, Mr. Cooper's was detailed, straightforward, consistent and responsive. Mr. Cooper testified as is set forth in the Findings of Fact, *supra.* Further, while Mr. Cooper's version of events appears to make a certain amount of sense, e.g., an angry and disgruntled worker accosted his supervisor over an alleged pay dispute, the claimant's version doesn't, e.g., a busy supervisor engaged in dispatching workers to various sites makes an unprovoked assault on the claimant, who was merely requesting assistance in a pay dispute.

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[133] *Sims*. See also *Mansaray*:

> [E]mployer's evidence [that Mr. Mansaray was the aggressor] is sufficient to overcome the presumption invoked by claimant's evidence. [citation omitted] The evidence will therefore be considered without reference to the presumption, and with claimant having the burden of establishing entitlement to compensation under the Act, by a preponderance of the evidence.

> Taking these matters into account, and further considering that claimant's testimonial demeanor was hurried and at times unconvincing, I accept employer's version of the event in preference to claimant's. As such, claimant has failed to demonstrate that he was not the aggressor, as he must do in order to prevail under the *Bird* test, and the claim therefore must be denied.[134]

If the aggressor defense continues to apply, it must apply uniformly. An altercation at work that satisfies the first prong of the *Bird* test suffices to invoke the Presumption because satisfying that portion of the test requires the same proof that is required to invoke the Presumption. If the aggressor defense is to act as a bar to recovery at all, it should not apply until the rebuttal stage of the Presumption analysis, and then, the burden should rest with the employer. Until this affirmative defense is proven, the claimant is entitled to the benefit of the presumption that the injury arises out of and in the course of employment. Failure to apply the Presumption when the first prong of the *Bird* test has been satisfied circumvents the humanitarian purpose of the Act by minimizing (if not eliminating) the employer's burden to present substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[135] In fact, after a version of this chapter was published in 2014, the Compensation Review Board applied a burden-shifting analysis to the *Bird* test:

> On remand, the [administrative law judge] should analyze whether Employer has met its burden to adduce substantial evidence that the injuries and disabilities claimed were the sole result of either Claimant's intoxication or his willful intent to injure himself or another. If Employer makes that showing, then the burden shifts to Claimant to establish, by a preponderance of the evidence, that the injuries and disabilities were not solely caused by his intoxication or his willful intent to injure himself or someone else. While Claimant's argument correctly posits that Employer's

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[134] *Coates v. Allstar Labor, Inc.*, OHA No. 01-044, OWC 556595 (January 25, 2001).

[135] *Ferreira v. Dep't of Employment Servs.*, 531 A.2d 651, 655 (D.C. 1987).

> burden in using the aggressor defense to overcome the presumption is by "substantial evidence" as to element one of *Bird*, Claimant implies a higher standard on the aggressor prong, citing *Hensley* [*v. Washington Metro. Area Transit Auth.*, 655 F.2d 264 (D.C. Cir. 1981)]. We disagree. The same evidentiary burdens apply to both parts of *Bird*, and by implication, if there is substantial evidence that Claimant was the aggressor, the ultimate burden in connection with the "aggressor" element is with the claimant, by a preponderance of the evidence.
>
> At this point, the first issue that needs to be resolved is whether Claimant was the aggressor, and this is to be done using the standard presumption analysis. If so, the claim fails. If not, the claim is compensable, and the remaining unresolved issues must be addressed.
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> * * *
>
> The matter is REMANDED to the Administrative Hearings Division for further consideration of the claim. On remand, the Administrative Law Judge is to afford Claimant the benefit of the presumption that he was not the aggressor and is to consider whether the record evidence is sufficient to overcome that presumption. If not the claim is to be granted, and the issues not reached in the Compensation Order must be addressed. If the presumption is overcome, then the evidence is to be reweighed without regard to the presumption with Claimant bearing the burden of proof by a preponderance of the evidence, and if it is found that Claimant was the aggressor, the claim is to be denied.[136]

Because the claimant still must invoke this new aggressor presumption before the employer must rebut it, it remains unclear what effect the first prong of the *Bird* test has on the analysis.

Arising Out Of and In the Course of Employment and The *Bird* Test

In *Bird*, despite the first prong of the test adopted in that case, without applying the Presumption the Director concluded the claimant's injury did not arise out of his

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[136] *Cyr v. Captain White's Seafood*, CRB No. 19-096, AHD No. 19-202, OWC No. 781540 (October 29, 2019). *Cyr* is the only published case since October 2019 to apply a Presumption analysis to the aggressor defense.

employment. Since *Bird*, administrative law judges have utilized "arising out of" or "in the course of" or both to deny benefits when the claimant is the aggressor. In *Williams v. Upperman Plumbing Corporation*, without applying the Presumption the administrative law judge relied upon "arising out of" to deny benefits:

> Injuries resulting from a fight with a co-worker [are] not compensable unless the claimant is not an aggressor. Moreover, to be compensable, the injury must arise both out of and in the course of employment. Since claimant was the aggressor, his injuries cannot be said to have arisen out of his employment. *Bird v. Advance Security*, H&AS No. 84-69, OWC No. 0015644 (June 7, 1985). Therefore, claimant's claim is not compensable.[137]

Without applying the Presumption, the administrative law judge in *Coates v. Allstar Labor, Inc.* relied upon "in the course of" to deny benefits; "I find and conclude [the claimant-aggressor] did not sustain an accidental injury in the course of his employment."[138] The same administrative law judge who decided *Coates* decided *Wolford v. District of Columbia Water and Sewer Authority*, and in *Wolford*, that administrative law judge applied the Presumption and then relied upon both "arising out of" and "in the course

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[137] *Williams v. Upperman Plumbing Corp.*, H&AS No. 86-716, OWC No. 0103221 (December 10, 1987).

[138] *Coates*. As recently as 2016, the Compensation Review Board attempted to refute that the aggressor defense injects fault into the workers' compensation system with an "in the course of" rationale:

> We are cognizant of the fact that consideration of factors such as "fault" or "negligence" has no place when considering entitlement to workers' compensation benefits. But this "no-fault" concept is concerned with fault in the sense of tort analysis, i.e., negligence or contributory negligence as they affect liability.
>
> We do not consider this a question of "fault" in that sense, any more than we consider the aggressor defense rule in physical injury cases to be "fault-based". It is more properly viewed as being part of the "course of employment" consideration, with such behavior not being part of the employee's job; rather, it constitutes a deviation therefrom.

Price-Richardson.

of" to deny benefits when weighing the evidence; "I find and conclude [the claimant-aggressor] did not sustain an accidental injury arising out of and in the course of his employment"[139] because the claimant was the aggressor.

By its very terms, the first prong of the *Bird* test requires the employment bring the combatants "together often enough for their temperaments and emotions to interact under strains of the workplace and which tends to increase the likelihood of friction between them."[140] Such a showing encompasses only a fight that arises out of and in the course of employment even though there may be little, if any, connection to the furtherance of the employer's business or the performance of actual job duties. It is more than coincidence that the fight started at work; it started at work because of strains and frictions caused by the conditions of employment.

In the end, who started the fight does not affect whether the conditions of employment have the potential to cause or contribute to the disability. If a fight arises out of and in the course of employment, it does so for both the aggressor and the victim:

> As stated in 4 NACCA Law Journal 53: "Where the assault is directly connected with the work, and arises out of work-quarrels, as distinguished from personal quarrels, the assault is compensable without determining questions of aggressors or innocent parties. Courts are not justified in making exceptions for 'aggressors' where the legislature has not done so by express provisions. An assault that arises out of work-arguments as distinguished from personal grudges, is clearly causally related to the employment, regardless of who strikes the first blow, and hence 'arises out of' the employment. Furthermore, to make a distinction between aggressors and innocent victims adds further complications as to what constitutes an aggressor, and is judicial legislation in a remedial act intended to widen, not narrow, the rights of workers. In tort law, who strikes the first blow may be material on assumption of risk, contributory negligence, intervening cause,

[139] *Wolford v. D.C. Water and Sewer Auth.*, OHA No. 01-322, OWC No. 558245 (November 21, 2001).

[140] *Bird II*.

> and on other questions. But in compensation law, the question of 'arising out of' depends simply on the causal relation to the work, in which the question of 'aggressors' is a court made, not legislative, exception."[141]

Any such distinction is a thinly veiled excuse for abrogating the Presumption and blaming the aggressor for bad behavior.

Willful Misconduct and Willful Intention to Injure and the *Bird* Test

The statutory defense that is the most difficult to exclude as justification for the aggressor defense is willful intention to injure because there is a natural aversion toward rewarding bad behavior. Nevertheless, despite a statutory exclusion of a claimant's willfully, intentionally inflicted injuries, close scrutiny of the Act establishes compensability even if the claimant was the aggressor in a work-related fight.

The statutory language of §32-1503(d) of the Act is clear:

> Liability for compensation shall not apply where injury to the employee was occasioned solely by his intoxication or by his willful intention to injure or kill himself or another.

The plain language of §32-1503(d) of the Act does not create an aggressor defense *per se* nor does it abolish the Presumption. In fact, the same section of the Act that creates the presumption that the claim falls under the provisions of the Act creates a presumption that an injury is not occasioned "by the willful intention of the injured employee to injure or kill himself or another."[142]

In *Bird*, the Director actually did not reach the issue of whether an intention to fight constitutes a willful intention to injure:

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[141] *Myszkowski v. Wilson & Co.*, 53 N.W.2d 203, 208 (Neb. 1952).

[142] Section 32-1521(4) of the Act.

> Because I find that Claimant's claim for benefits must be denied on the grounds that his injuries did not arise out of his employment, I need not reach the second issue of whether Claimant's intent to fight constitutes a willful intent to injure another.[143]

Since *Bird*, however, the willful intention language in §32-1503(d) of the Act has been used to afford "additional statutory support"[144] for the *Bird* test.

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[143] *Bird II*.

[144] *Coates*; *Wolford*; *Mansaray*; *Smith*; *Johnson v. Rose Indus. Servs.*, AHD No. 09-120, OWC/ODC No. 642223 (September 28, 2009); *Beasley v. Enter. RAC*, AHD No. 17-324, OWC No. 754957 (November 20, 2017); *Williams v. Upperman Plumbing Corp.*, Dir. Dkt. No. 88-7, H&AS No. 86-716, OWC No. 0103221 (November 23, 1988) (Because Mr. Ethelbert Williams' aggressive behavior precipitated the altercation leading to his injury he was not entitled to benefits under the *Bird* test, and "as additional statutory support for the *Bird* test, the Director notes that D.C. Code, [§32-1503(d)] provides that liability for compensation shall not apply where injury to the employee was occasioned solely by his willful intention to injure himself or another." The Director gave no explanation of how the willful intention provision in the Act provides that support.)

In fact, the willful intention language was thoroughly yet unconvincingly analyzed in *Jones v. D.C. General Hospital*, H&AS No. XX-884, DDCC No. 335094 (February 28, 1991), a public sector workers' compensation case decided six years after *Bird*. For an assessment of how the analysis in *Jones* does not support an aggressor defense fashioned out of §32-1502(d) of the Act see *Injecting Fault*. Nonetheless, the *Jones* reasoning has been summarized and applied as follows:

> This agency followed the trend of the majority of jurisdictions that have considered the issue. *See* generally A. Larson, 2 LARSON'S WORKERS' COMPENSATION LAW §34.02 (2011). In *Harris v. Dobson & Company*, 132 A. 374 (Md. 1926) the Maryland Court of Appeals held that "willful misconduct may consist of a disregard of rules or orders but there must be something more than thoughtlessness, heedlessness or inadvertence." *Jones*, n. 7 (*citing Harris*, *supra*). The mere fact that a claimant neglected to have proper regard for his own safety is not sufficient to bar him. *Karns v. Liquid Carbonic Corp.*, 338 A.2d 251, 275 Md. 1, 18 (1975). Similarly, the Virginia Court of Appeals held that willful misconduct imports something more than mere exercise of will in doing the act, that is, a wrongful intention to do an act that one knows or ought to know is wrongful or forbidden by law and involves premeditation and determination to do the act, though known to be forbidden. *Jones, n. 7 (citing King v. Empire Collieries Company*, 139 S.E. 478,479 (Va. 1927)). Virginia also considers the reasonableness of the rule prohibiting conduct, whether the rule was known to an employee, whether the rule was for the employee's benefit, and whether the employee intentionally undertook the forbidden act. *Buzzo v. Woolridge Trucking, Inc.*, 17 Va.App. 327, 332, 437 S.E.2d 205, 208 (1993) (citing *Spruill v. C. W. Wright Constr. Co.*, 8 Va.App. 330, 334, 381 S.E.2d 359, 360-61 (1989)). An employee may rebut the affirmative defense by showing some plausible purpose to explain a violation of a rule. See A. Larson, 2 LARSON'S WORKERS' COMPENSATION LAW §35.04.

Hill v. Dep't of Mental Health, OHA/AHD No. PBL 15-007, ORM No. 0468-WC-14-0000960 (July 14, 2015).

Even if an injury does arise out of and in the course of employment, some jurisdictions bar recovery of workers' compensation benefits when a claimant engages in willful misconduct. In those jurisdictions, willful misconduct may be defined as violating a rule or a statute in a way that takes the claimant outside the scope of employment, but the District of Columbia, does not follow that definition:

> The Act does not excuse employer liability where the employee is injured while willfully violating an employer's rules, *nor* does it excuse employer liability for injuries where the employee is injured by gross neglect of his or her duties. While an employee not following the rules of an employer or committing willful misconduct may subject an employee to termination or other discipline, willful misconduct by itself is not a bar to workers' compensation benefits.[145]

Recovery is barred only when a claimant's "misconduct is part of an intentional plan or attempt to injure oneself" or another.[146] Something more than careless instinct is necessary to qualify as willful misconduct. New Jersey best explains why a statutory defense of willful misconduct does not conclusively prevent an aggressor from recovering workers' compensation benefits:

> We do not consider that the Legislature meant to punish a workman for a playful shove, an angry curse, or even an impulsive slap or punch, by depriving him of compensation. Where the act does not arise out of a privately motivated, purely personal feud, where it does not amount to willful misconduct or a willful intention to injure another (thereby importing premeditated and deliberate action), it is not for the court to read a new exception, covering aggressors, into the clear and unequivocal text of the Workmen's Compensation Act, *R.S.* 34:15-7. To do so would be to rule out negligence, contributory negligence, assumption of risk and other

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[145] *Abdlah v. Cong. Exxon Alina*, AHD No. 17-399, OWC 756975 (February 9, 2018).

[146] *Whitesides v. Sonnenschein, Nath & Rosenthal*, CRB No. 07-144, AHD No. 07-070, OWC No. 629021 (October 4, 2007).

> common law defenses pre-dating the act, in all types of compensation cases except those involving assaults.[147]

For the most part, on-the-job fights fall outside the definition of willful misconduct in that they are unintentional, impulsive acts in response to impassioned employment-related events or conditions. Even in the case of horseplay, several factors must be considered when determining compensability:

> (1) the extent and seriousness of the deviation, (2) the completeness of the deviation (i.e., whether it was commingled with the performance of duty or involved an abandonment of duty), (3) the extent to which the practice of horseplay had become an accepted part of the employment, and (4) the extent to which the nature of the employment may be expected to include some such horseplay.[148]

These factors establish whether or not the activity is in the course of employment which it already has been explained the first prong of the *Bird* test requires. Thus, unless there is a specific statutory provision barring recovery by an aggressor, the general defense of willful misconduct is not sufficient to deny an aggressor workers' compensation benefits; it merely ignores the Presumption by reinstituting the tort defenses of contributory negligence and assumption of risk based on the aggressor's culpability.

Summary

"Prior to 1947, the aggressor defense was accepted by nearly every jurisdiction in the country[.]"[149] The justifications were varied-- an aggressor cannot profit from

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[147] *Martin v. Snuffy's Steak House*, 134 A.2d 789, 798-799 (N.J. Super. Ct. App. Div. 1957).

[148] 2 LARSON'S WORKERS' COMPENSATION LAW §23.01 (2019).

[149] Gail Boreman Bird, *Workmen's Compensation: The Aggressor Defense Resurrected* 24 HASTINGS L. J. 567, 573 (1973). The aggressor defense still is accepted by a majority of jurisdictions in the country. See *Injecting Fault.*

misconduct; an aggressor is not performing employment duties; an aggressor is not furthering the employer's business. None of these justifications appreciates the fundamental tenets of workers' compensation law in the District of Columbia or the plain language of the *Bird* test itself. The workers' compensation system is designed to provide swift relief for injuries caused by an event related to employment (including the conditions of employment and the reactions to those conditions), and without explicit statutory authority, the *Bird* case inappropriately adopted the aggressor defense.

The administrative law judge who decided *Jones v. District of Columbia General Hospital* relegated to a footnote an important consideration that virtually was ignored in later District of Columbia work-related fight cases:

> I have not addressed the so-called aggressor defense in concluding as I have. A majority of jurisdictions reject the view that the initiation or renewal of a fight by claimant deprives the claim of the arising out of the employment quality. The aggressor defense has also been roundly criticized as an attempt to insert a fault-based concept into workers' compensation law. Furthermore, the aggressor defense does not appear in [the Act] and the fact that a claimant struck the first blow does not necessarily break the chain of causation when the incident originates in the employment.[150]

That "chain of causation" implicates the Presumption, and by its very nature the *Bird* test includes only assaults borne out of an employment environment that acts as a catalyst by bringing the combatants together in a way that results in a fight. Barring compensability because the claimant initiated that work-related event ignores the fundamentals of the District of Columbia's workers' compensation law including the Presumption.

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[150] *Jones* at nt. 9.

Chapter 3
Abrogating the Presumption in Psychological Injury Cases

The *McCamey* and *Ramey* Tests

An amputation is obvious to the naked eye. A broken bone shows on an x-ray film. A herniated disk appears on an MRI scan. How do you prove a psychological injury? It is supposed to be with the benefit of the presumption of compensability ("Presumption"), but invoking the Presumption in psychological injury cases is subject to unnecessary hurdles not imposed in physical injury cases.

In a tort case brought in the District of Columbia, in order to recover for intentional infliction of emotional distress, "a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress."[151] Furthermore,

> [t]he conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."[152]

This high burden of proof satisfies society's concern that an inherently invisible claim has not been fabricated for secondary gain.

The burden of proof is even higher when attempting to recover for negligent infliction of emotional distress. In the District of Columbia, there is no general duty of care to avoid causing mental distress at least in part because:

> We know that, from repeated scares or frights, persons are liable to have their sensibilities easily, and in some cases morbidly excited, [b]ut the law furnishes no remedy for such sensitive condition. To attempt to furnish a

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[151] *Armstrong v. Thompson*, 80 A.3d 177, 189 (D.C. 2013).

[152] *Drejza v. Vaccaro*, 650 A.2d 1308, 1312 nt. 10 (D.C. 1994) quoting Restatement (Second) of Torts §46 cmt. d (1965).

> legal remedy in such case, would open the door to the wildest speculation. Without for a moment intimating that simulation existed in this case, yet the nature of such claim would render it easy of simulation; and if not simulated, the temptation would be strong to exaggeration, and the assigning of one cause for another in the production of the morbid state of the nervous sensibilities; and all this, though it might be without real foundation, would be most difficult to disprove by the party sought to be charged. Such claims for compensation are subject to all the objections to remote and speculative damages.[153]

Consequently, to mitigate the concern about spurious claims that are difficult to disprove, additional factors have been imposed; the defendant's conduct must have placed the plaintiff in a "zone of physical danger" or

> the plaintiff can show that (1) the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff's emotional well-being, (2) there is an especially likely risk that the defendant's negligence would cause serious emotional distress to the plaintiff, and (3) negligent actions or omissions of the defendant in breach of that obligation have, in fact, caused serious emotional distress to the plaintiff. Whether the defendant breached her obligations is to be determined by reference to the specific terms of the undertaking agreed upon by the parties or, otherwise, by an objective standard of reasonableness applicable to the underlying relationship or undertaking, *e.g.*, in medical malpractice cases, the national standard of care. [footnote omitted] The likelihood that the plaintiff would suffer serious emotional distress is measured against an objective standard: what a "reasonable person" in the defendant's position would have foreseen under the circumstances in light of the nature of the relationship or undertaking. In addition, the plaintiff must establish that she actually suffered "serious and verifiable" emotional distress.[154]

Unlike the high burdens in tort cases, in a District of Columbia private sector, workers' compensation case for a psychological injury there is a presumption of

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[153] *Washington & Georgetown R.R. Co. v. Dashiell*, 7 App. D.C. 507, 515 (1895).

[154] *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 810-811 (D.C. 2011) (citation omitted).

compensability. In a physical-mental claim,[155] in order to invoke the Presumption, the claimant must prove "the physical accident had the potential of resulting in or contributing to the psychological injury."[156] If the Presumption is not rebutted, the injury is compensable; if the Presumption is rebutted, the claimant must prove "the physical accident caused or contributed to the psychological injury."[157] In a mental-mental case,

> an injured worker. . . invokes the statutory presumption of compensability by [offering credible evidence of] a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury supported by competent medical evidence.[158]

If the Presumption is not rebutted, the injury is compensable; if the Presumption is rebutted, the claimant must "prove by a preponderance of the evidence that the workplace conditions or events caused or aggravated the psychological injury."[159]

Psychological injuries arising out of and in the course of employment are no less real than physical injuries arising out of and in the course of employment, but proving psychological injuries stresses out everyone involved in District of Columbia workers' compensation cases because the Presumption is misapplied. The problem started with the *Dailey* test.

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[155] In a physical-mental claim, the claimant alleges a physical injury caused a mental injury. In a mental-mental claim, the claimant alleges an emotionally traumatic event or stressor caused a mental injury. In a mental-physical claim, the claimant alleges an emotionally traumatic event or stressor caused a physical injury.

[156] *McCamey v. D.C. Dep't of Employment Servs.*, 947 A.2d 1191, 1213 (D.C. 2008) ("*McCamey II*"). (Emphasis removed.)

[157] *Id.* at 1214.

[158] *Ramey v. Potomac Elec. Power Co.*, CRB No. 06-38(R), AHD No. 05-318, OWC No. 576531 (July 24, 2008) ("*Ramey on Remand*").

[159] *Id*.

The Third-Party Standard- *Dailey v. 3M Company*

Ms. Dorothy Dailey is not the first claimant to allege a psychological injury arising out of and in the course of her employment. Her appeal to the Director of the District of Columbia Department of Employment Services ("Director"), however, set the standard by which psychological injury claims would be adjudicated for decades to come.[160]

In the early 1980's, Ms. Dailey was employed by 3M Company as a secretary. She worked at her employer's Indianapolis, Indiana office until 1983 when she was given the choice to either relocate to 3M Company's Washington, D.C. office or to separate from her employment.

Ms. Dailey relocated, and while working in 3M Company's D.C. offices, she began to suffer from depression and an ulcer. By January 1985, she stopped working and returned to Indiana.

Sometime thereafter, Ms. Dailey requested a formal hearing to adjudicate her claim for ongoing temporary total disability benefits. At the formal hearing, Ms. Dailey argued that her disabling depression was causally related to "the disruption of her job and life situation" and that "the disorganization and pressure at [3M Company's] District [of Columbia] office contributed to her condition."[161] In its defense, 3M Company contended

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[160] Ms. Dailey was a private sector employee. As such, her claim for workers' compensation benefits was governed by the Private Sector Workers' Compensation Act, D.C. Code §32-1501 *et seq.* ("Private Sector Workers' Compensation Act" or "Act"). In the District of Columbia, public-sector-employee claims for workers' compensation disability benefits are governed by a separate act, the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.01 *et seq.* ("Public Sector Workers' Compensation Act"). Although this chapter focuses on private sector claims, with the District of Columbia Court of Appeals' resolution of *McCamey II* and *Ramey v. D.C. Dep't of Employment Servs.*, 997 A.2d 694 (D.C. 2010) ("*Ramey II*"), the tests for proving a psychological injury under either act are the same. See "The Subjective *McCamey* Standard," *infra*.

[161] *Dailey v. 3M Co.*, H&AS No. 85-259, OWC No. 0066512 (May 19, 1988) *abrogated by Ramey II.*

Ms. Dailey's condition did not constitute an accidental injury arising out of her employment. An administrative law judge ruled in favor of 3M Company and denied Ms. Dailey's claim for relief because her psychological injury did not arise out of her employment.

Ms. Dailey appealed the denial of her claim to the Director. She argued she was entitled to workers' compensation benefits for two reasons: 1. "[H]er predisposition to a depressive condition should not bar her eligibility for benefits when work-related events aggravated her pre-existing condition"[162] and 2. 3M Company had not rebutted the Presumption that her injury arose out of and in the course of her employment.

Affirming the denial of temporary total disability benefits, the Director specifically held that

> in order for a claimant to establish that an emotional injury arises out of the mental stress or mental stimulus of employment, the claimant must show that actual conditions of employment, as determined by an objective standard and not merely the claimant's subjective perception of his working conditions, were the cause of his emotional injury. [footnote omitted] The objective standard is satisfied where the claimant shows that the actual working conditions could have caused similar emotional injury in a person who was not significantly predisposed to such injury.[163]

In reaching this conclusion, the Director surveyed prior workers' compensation cases alleging psychological injuries including *McEvily v. Washington Metropolitan Area Transit Authority*[164] and *Wenzel v. British Airways*.[165]

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[162] *Id*.

[163] *Id*.

[164] *McEvily v. Washington Metro. Area Transit Auth.*, H&AS No. 83-172, OWC No. 0009410 (February 13, 1984).

[165] *Wenzel v. British Airways*, H&AS No. 84-308, OWC No. 0037916 (October 4, 1986).

In *McEvily*, Mr. Robert E. McEvily claimed he had suffered a psychological injury as a result of a manager's failure to respond promptly to his work products and his professional needs. An administrative law judge denied Mr. McEvily's request for workers' compensation benefits because he had not experienced an incident at work which "would"[166] have effected anyone who was not otherwise predisposed to psychiatric disturbance. The Court affirmed the denial of benefits.

Similarly, in *Wenzel*, the Director had elaborated on the standard for determining when a psychological injury arises out of employment:

> The *Chaney* decision held that, at the very least, the concept of "arising out of the employment" requires a showing that there were obligations placed on the employee or conditions under which the employee performed which exposed him to risks or dangers which could have [led] to the kind of psychological injury actually suffered. A claimant could meet this burden by offering evidence of a specific, articulable source of the stress injury within the conditions of the [workplace] and medical evidence that that source could produce the kind of stress injury which the claimant suffered. Thus, to support the ultimate finding that a psychological injury arises out of the employment there must be a finding, supported by the evidence, that within the obligations or conditions of the workplace there was a specific, articulable source of injury in the workplace and a finding, supported by medical evidence, that the alleged source of the injury could have produced the kind of injury the employee suffered.
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> The *Chaney* requirement grew out of a concern that in psychological injury cases the legal concept of arising out of the employment would become indistinguishable from medical causation. I noted in *Chaney* that often the factfinders in stress injury cases simply based their decisions solely on the testimonies or reports of psychiatrists or psychologists. Where the legal test for an injury arising out of the employment depends solely on the persuasiveness of medical experts and not on any independent findings on the conditions in the workplace or on the legal significance of any such conditions, the term "arises out of" becomes synonymous with "medically

[166] For almost twenty years, administrative law judges interchangeably substituted "would" and "could" in the *Dailey* test; the Compensation Review Board ruled that doing so has little impact on the outcome of a case. *Ward v. D.C. Water & Sewer Auth.*, CRB No. 24-03, AHD No. 03-355, OWC No. 563614 (April 14, 2006).

> induced, caused or aggravated by." Thus, once medical causation is established, the inquiry for these factfinders ends.
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> * * *
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> In requiring more than a showing that an employee had a medically harmful, psychologically adverse reaction to the work environment, *Chaney* emphasized that it is the employment, and not the make-up of the employee, which must account for the source of the employee's stress. If there is nothing discernible in the employment which for articulable reasons would ordinarily account for the employee's severe reaction, then the employee's injury does not arise out of the employment. Thus, inasmuch as *Chaney* directs attention to the work environment, and not to the employee's perception of his work environment, a factfinder has an objective basis on which to make his findings.[167]

In a footnote in *Dailey*, the Director acknowledged that the test applied in that case was a departure from the purely objective *Chaney* test. Pursuant to *Chaney*, if the claimant proved an actual and specific source of stress and if the medical evidence established a causal connection between that source and the psychological injury, the injury was compensable as arising out of employment regardless of whether the source of stress would have effected a person not otherwise predisposed to the psychological injury;[168] however, even under the *Chaney* test if the claimant had a personal predisposition to the alleged psychological injury, an additional "accidental injury" test was imposed. The

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[167] *Wenzel*.

[168] *Dailey* at nt. 1. See also *Young v. D.C. Dep't of Employment Servs.*, 918 A.2d 427 (D.C. 2007) (mold exposure):

> [O]ur workers' compensation case law relating to workplace allergens dictates against any assumption that, because a substance present in the Hospital may not have been at dangerous or unhealthful levels for the general public, the substance could not cause an adverse reaction in a particular claimant. See *Howard Univ. Hosp. v. District of Columbia Dep't of Employment Servs.*, 881 A.2d 567 (D.C. 2005) (latex allergy); *Wash. Post v. District of Columbia Dep't of Employment Servs.*, 853 A.2d 704 (D.C. 2004) (allergy to a newspaper printing chemical).

Young at 431 nt. 5.

psychological injury "would not be considered 'accidental' if the resulting injury was in essence the inevitable or unavoidable consequences of the worker's [personal] psychological make up, and the injury's connection to the employment was more coincidence than causally connected."[169]

Returning to the Director's analysis of the denial of benefits to Ms. Dailey, the Director accepted that prior to her employment Ms. Dailey had had an obsessive-compulsive character pattern and that she had not been exposed to an unusually intense mental stimulus at work for 3M Company which would have caused a psychological injury in another person not so predisposed,[170] but the Director was not persuaded by Ms. Dailey's arguments that her predisposition was immaterial or that the aggravation of her pre-existing condition was compensable. First, although the Director acknowledged an aggravation of a pre-existing condition may be compensable, because Ms. Dailey's injury did not arise out of and in the course of her employment, there was no aggravation:

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[169] *Dailey* at nt. 1.

[170] The *Dailey* test was interpreted to require more than "common" stressors for a psychological injury to be compensable:

> [W]hile the *Dailey* test does not by its terms have an explicit requirement of "unusualness", it does by implication assume that there is something out of the ordinary, either intrinsically, or in the frequency, persistence, severity, or intensity, about the claimed stressors, at least in connection with their capacity to produce incapacitating anxiety or emotional harm. There would be no point to such a test in the first instance if normal, common stressors inherent in any or most employment were sufficient for compensability purposes. All that would be required in the absence of such characteristics would be straightforward cause and effect, the rejection of which as the standard in this special class of cases is the basis of the *Dailey* test.

Brown v. Bloomberg, L.P., CRB No. 05-45, OHA/AHD No. 02-392, OWC No. 568405 (January 10, 2006). Proving a psychological injury no longer requires unusual stressors. *Johnson v. Fed. Express Corp.*, CRB No. 13-077, AHD No. 12-359, OWC No. 688463 (February 5, 2014).

> [T]o say that one's working conditions have aggravated a pre-existing condition, presupposes that legal causation has already been established between the pre-existing condition and the injury which is attributed to the employment conditions; but in this case, legal causation was never established. The thrust of the [administrative law judge's] finding was that whatever emotional problems claimant experienced were caused by her own personal make up and non-work related factors, as opposed to being caused by events or conditions of her employment.[171]

As for Ms. Dailey's argument that 3M Company had not rebutted the Presumption, Ms. Dailey had not introduced persuasive evidence of an injury sustained during the scope of her employment;[172] therefore, she had not invoked the Presumption,[173] and 3M Company had no duty to rebut it. Thereafter, satisfying the *Dailey* test by a preponderance of the evidence became a prerequisite for invoking the Presumption:

> Lastly, after determining, properly in our view, that Petitioner had failed to meet the Dailey test, [the administrative law judge] went on to weigh the evidence again, without reference to the presumption. This step was unnecessary, because, if the Dailey test is not met, the inquiry ends, and the claim is non-compensable. In that the [administrative law judge's] conclusion remained the same, i.e, the claim was not compensable, we do

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[171] *Dailey*. This circular argument overlooks that in order for an aggravation to be compensable the pre-existing condition need not be work-related. *Jackson v. D.C. Dep't of Employment Servs.*, 955 A.2d 728, 734 nt. 7 (D.C. 2008).

[172] The requirement for "persuasive" evidence is significant for two reasons: 1. The *Dailey* test must be satisfied by a preponderance of the evidence, *Brown*, and 2. Persuasive evidence requires weighing evidence when invoking the Presumption. In a physical injury case, all that is required to invoke the Presumption is "some" evidence, and a credibility determination at this stage is premature. See "Breaking Down the Test – Invoking the Presumption of Compensability: Credible Evidence that the Work-Related Conditions or Events Existed or Occurred," *infra*.

[173] The Director actually replaced the test for invoking the Presumption with the result of the Presumption:

> [I]n order for the presumption of compensability to arise, claimant must establish by reliable, credible and probative evidence, the existence of an injury and the fact that it occurred during the course of employment. Once these two basic facts are established, the statutory presumption arises that the injury arose out of the employment. In this case, claimant did not establish by reliable, credible and probative evidence that her injury occurred during the course of her employment; and therefore, the presumption of compensability did not arise.

Dailey.

point out that it would have been error to grant the claim following this exercise. If the actual conditions as found by the [administrative law judge] based upon substantial evidence in the record are not such that an average worker of normal sensitivities, not predisposed to emotional or psychological injury, could be expected to suffer the same or similar psychological injury as that claimed by a claimant, then, under the Act, the claim must be denied. Consistent with that, the place to "weigh" the medical evidence on this potentiality question, at least initially, is in the presumption stage. As was recently explained by the [Compensation Review Board]:

> [T]he Dailey test is part of [the] "presumption" analysis. That is, it must be satisfied in order to invoke the presumption of compensability. It is, as has been noted, a special test which is appropriate to this special class of cases, and which is resolved as the first step in the presumption part of the overall causal relationship issue. As such, it replaces the normal "some evidence of potential causation" as the trigger for the presumption, with a test that requires the [administrative law judge] to make a factual conclusion as to the issue of potential causation. While we are not aware of any existing case authority addressing the specific quantum of evidence required at this stage, we must posit the existence of the test to be a limiting factor, the application of which will reduce the number of claims that would otherwise, in the absence of the test, be compensable, rather than an expansive one whose purpose would be to include cases that might otherwise be excluded from compensability. Because of this, we conclude that this initial stage of the analysis places a burden, by the preponderance of the evidence, upon claimants to establish both the nature of the actual conditions or stressors to which a claimant has been subjected, and whether those stressors have the requisite potential to cause the same or similar condition in an average worker of normal sensitivities, not otherwise predisposed to emotional or psychiatric injury.

Brown v. Bloomberg, [CRB No. 05-45, OHA/AHD No. 02-329, OWC No. 568405 (January 10, 2006)], page 6 - 7. Although we recognize the complexity to the proceedings that this might add, requiring as it does findings of fact based upon the record as a whole as part of the initial presumption analysis, we can see no better way to proceed in this special class of cases in which there is a test requiring those factual findings before proceeding to whether in a specific given case there is an actual causal relationship between the employment and the claimed injury. Thus, while there is no possibility on this record of conflicting outcomes between the

> pre-presumption analysis and the outcome following weighing the evidence as a whole, the proper place for the [administrative law judge] to have considered all the record evidence of relevance to the Dailey test must be at this initial stage.[174]

As early as September 1990, the *Dailey* test was being examined critically:

> Although recovery for aggravation of a preexisting condition may seem incompatible with the *Dailey* test's focus on a hypothetical employee who is not "predisposed" to injury, we do not read *Dailey* to preclude recovery where a claimant comes to the job with a preexisting psychological condition. Under *Dailey*, an employee predisposed to psychic injury could recover if he is exposed to work conditions so stressful that a normal employee might have suffered similar injury. Thus, an employee with a predisposition to mental illness is not precluded from recovering under *Dailey*. Only when so interpreted is the *Dailey* standard compatible with the [Private Sector] Workers' Compensation Act.[175]

Whether or not a claimant is predisposed to a psychological injury, the struggle to strike the balance between compensating for psychological injuries and imposing an objective test to confirm a work-related psychological injury began shortly after *Dailey* issued (if not in *Dailey* itself).[176]

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[174] *Rawlings v. Washington Metro. Area Transit Auth.*, CRB No. 04-65, AHD No. 04-123, OWC No. 590774 (January 19, 2006) *abrogated by Ramey II*. When originally adjudicated pursuant to the *Dailey* test, Mr. Rawlings' claim was denied; however, during the pendency of his case, the standard changed to the *Ramey* test, and benefits were awarded. See *Rawlings v. Washington Metro. Area Transit Auth.*, CRB No. 10-038, AHD 04-123, OWC No. 590774 (September 8, 2011).

[175] *Spartin v. D.C. Dep't of Employment Servs.*, 584 A.2d 564, 570 (D.C. 1990) *abrogated by Ramey II*.

[176] In several cases decided throughout the next seventeen years, the District of Columbia Court of Appeals specifically endorsed the requirement that in order to be compensable, a psychological injury claim filed by a person with a significant predisposition to a particular psychological injury must involve an event at work which could have effected someone else who was not significantly predisposed to that type of injury. *McCamey v. D.C. Dep't of Employment Servs.*, 886 A.2d 543 (D.C. 2005) ("*McCamey I*") *vacated, McCamey v. D.C. Dep't of Employment Servs.*, 896 A.2d 191 (D.C. 2006); *Landesberg v. D.C. Dep't of Employment Servs.*, 794 A.2d 607 (D.C. 2002); *Gary v. D.C. Dep't of Employment Servs.*, 723 A.2d 1205 (D.C. 1998); *McKinley v. D.C. Dep't of Employment Servs.*, 696 A.2d 1377 (D.C. 1997); *Charles P. Young Co. v. D.C. Dep't of Employment Servs.*, 681 A.2d 451 (D.C. 1996); *Sturgis v. D.C. Dep't of Employment Servs.*, 629 A.2d 547 (D.C. 1993); *Porter v. D.C. Dep't of Employment Servs.*, 625 A.2d 886 (D.C. 1993). The Court even relied on the *Dailey* test when ruling on an appeal of a D.C. Police and Firefighters Retirement and Disability Act claim for administrative sick leave necessitated by an on-duty, psychological injury. *Franchak*

The Beginning of the End - *McCamey I*

In an attempt to reconcile the skepticism surrounding psychological injuries with the liberal purpose of the Act, in 2008 the District of Columbia Court of Appeals ("Court") required the Compensation Review Board revise the test for the compensability of physical-mental injury claims. The objective *Dailey* test was replaced with the subjective *McCamey* test, but the transition was not a smooth one.

In the mid-1990's, Ms. Charlene McCamey experienced a serious psychological illness due in substantial part to her parents' deaths. After treating with Dr. Maria C. Hammill, Ms. McCamey resumed her regular employment duties without limitation.

On September 29, 2000, Ms. McCamey suffered injuries to her forehead, lower back, and neck when she fell while working for the District of Columbia Department of Public Schools. As a result of this work-related accident causing physical injuries, Ms. McCamey also suffered from headaches, "depression, panic attacks, confusion, auditory hallucinations, and memory loss."[177]

Ms. McCamey returned to Dr. Hammill for treatment; at that time, Dr. Hammill opined the work-related accident had exacerbated Ms. McCamey's pre-existing, psychological disorder. An independent medical examiner, psychiatrist Bruce Smoller, disagreed with Dr. Hammill; Dr. Smoller asserted the source of Ms. McCamey's psychological injury was her pre-existing psychosis, not her work-related accident.

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v. D.C. Metro. Police Dep't, 932 A.2d 1086 (D.C. 2007). All of these cases at least have been abrogated in part or overruled in part by *McCamey II* or *Ramey II*.

[177] *McCamey I* at 544.

Following a formal hearing, an administrative law judge denied Ms. McCamey's psychological injury claim for workers' compensation disability benefits. The administrative law judge's decision, appropriately was based upon an application of the *Dailey* test; Ms. McCamey had failed to prove "a person of normal sensibilities with no history of mental illness would have suffered a similar psychological injury."[178]

On appeal, the Director affirmed the administrative law judge's decision. His rationale was that "the evidence did not show[] that an individual who did not have a pre-existing anxiety disorder would have suffered a psychological injury as a result of trauma to the head."[179]

On judicial review, the Court rejected Ms. McCamey's argument that the *Dailey* test is not applicable if the aggravation of a claimant's pre-existing, psychological condition is caused by a physical injury rather than by job stress:

> Nor is it decisive that [a claimant] cites a specific job-related accident as the cause of her disorder rather than less easily identified conditions of stress in the employment. Whatever the triggering event or condition, the Director may properly apply a rule for causation in this difficult area of emotional injury that discourages spurious claims -- one focusing on the objective conditions of the job and their effect on the "normal employee" not predisposed to the injury by a mental disorder.[180]

Furthermore, the Court acknowledged that Ms. McCamey's aggravation argument was not "implausible in principle,"[181] but because the Court "previously [had] approved the

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[178] *McCamey I* at 545.

[179] *McCamey v. D.C. Pub. Sch.*, Dir. Dkt. No. 10-03, OHA No. PBL 02-031, OBA No. LT2-DDT002160 (February 10, 2004) *rev'd, McCamey II*.

[180] *McCamey I* at 547 quoting *Porter* at 889. (Emphasis removed.)

[181] *McCamey I* at 548.

Director's analysis in *Dailey* and [had] applied it to the very kind of situation [in Ms. McCamey's case,]" it was "compelled" to affirm the denial of benefits.[182]

To this point, it was business as usual. The Court, however, foreshadowed the next step:

> Ms. McCamey's position, though ably and conscientiously presented, founders upon our precedents, and it cannot prevail unless those precedents [including *Porter*, *McEvily*, and others] are overruled by the court sitting en banc.[183]

On March 15, 2006, the Court granted Ms. McCamey's petition for *en banc* review. *McCamey I* was vacated,[184] and the *Dailey* test was on the brink of being abrogated.

The Subjective *McCamey* Standard

More than two years after issuing *McCamey I*, the District of Columbia Court of Appeals reconsidered Ms. McCamey's case *en banc*. Even though Ms. McCamey was a public sector employee, the Court began its analysis of the compensability of physical-mental injuries by explaining that pursuant to the Private Sector Workers' Compensation Act an aggravation of a pre-existing condition is compensable even if non-employment related factors contribute to or aggravate that condition. Because an employer must accept its employees with the frailties that predispose them to injury, if a disability arises even in part out of employment, the disability is compensable.[185]

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[182] *Id.* at 546.

[183] *Id.* at 548.

[184] *McCamey*, 896 A.2d 191.

[185] See "Chapter 1 Compensable Injuries."

Unlike in the Private Sector Workers' Compensation Act,[186] the aggravation rule is not codified in the Public Sector Workers' Compensation Act, but the Employees' Compensation Appeals Board[187] previously had ruled that an aggravation of a pre-existing injury (physical or psychological) is compensable under the Federal Employees' Compensation Act. Despite the differences among the Private Sector Workers' Compensation Act, the Public Sector Workers' Compensation Act, and the Federal Employees' Compensation Act, those differences did not materially alter the Court's analysis of Ms. McCamey's physical-mental claim when considering the humanitarian purpose of workers' compensation law in general; the application of the well-settled principle that employers take their employees as they find them applies to both private sector employees and public sector employees, and

> [t]he expansion of the objective test from mental-mental cases to physical-mental cases is inconsistent with the language, legislative history, and purpose of the [Private Sector] Workers' Compensation Act and the [Public Sector Workers' Compensation Act]. Its application deprives an entire class of employees (including claimants with pre-existing psychological conditions) of compensation for injuries *that they can prove* are connected to workplace accidents. Because the workers' compensation statutes exist for the purpose of compensating employees for work-related injuries, the objective test (at least as applied to physical-mental claims) is inconsistent with the statute and must be overturned.[188]

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[186] Section 32-1508(6)(A) of the Act states: "If an employee receives an injury, which combined with a previous occupational or nonoccupational disability or physical impairment causes substantially greater disability or death, the liability of the employer shall be as if the subsequent injury alone caused the subsequent amount of disability."

[187] The Employees' Compensation Appeals Board is the administrative, appellate body charged with reviewing claims based upon the Federal Employees' Compensation Act, 5 U.S.C. §8101 *et seq*. (the predecessor of the Public Sector Workers' Compensation Act).

[188] *McCamey II* at 1202.

Based on caselaw that progressively had foreclosed workers' compensation benefits for claimants predisposed to psychological injury unless a normal or average employee would have experienced a similar injury, the *Dailey* test shifted the focus from an examination of the work environment to an examination of a hypothetical third person and created a heightened standard for claimants with pre-existing psychological conditions. As such, the *Dailey* test circumvented the aggravation rule, and claimants with pre-existing conditions were prevented from recovering for work-related injuries:

> In the context of physical-mental disabilities, the physical accident is the unexpected occurrence supplying the necessary (and objective) workplace connection. Thus, in cases of physical injury, so long as the claimant proffers competent medical evidence connecting the mental disability to the physical accident (legal causation), the claimant has either established a prima facie case of aggravation or a new injury. That being the case, the objective test is simply unnecessary. Put another way, the pure objective test is always met in physical-mental cases, provided that the claimant proves the connection between the mental condition and the physical accident.[189]

Pursuant to *McCamey II*, as in physical injury cases, in private sector cases where the Presumption applies, in order to invoke that presumption in physical-mental cases, the claimant now must prove "the physical accident had the potential of *resulting in or contributing to* the psychological injury."[190] In private sector physical-mental cases where the Presumption has been rebutted and in public sector physical-mental cases where there is no Presumption, the claimant must prove "the physical accident caused or contributed to

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[189] *McCamey II* at 1208-1209.

[190] *Id.* at 1213.

the psychological injury."[191] On remand from the Court, the Compensation Review Board summarized the new rule in physical-mental cases as follows:

> [W]here a claimant in a physical-mental claim presents competent medical evidence connecting a work related physical injury to a claimed psychiatric injury the claimant has established a *prima facie* case of either a new injury or an aggravation of a pre-existing condition. Although this case is a claim under the public sector act, the [C]ourt did not limit its ruling or rationale to that act, but explicitly indicated that the ruling applies to the public and private sector acts.
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> Thus, under the new rule, unlike in *Dailey*, the injured worker, having established a causal link between the physical injury and the employment, bears the burden of proving by a preponderance of the evidence that the physical injury caused or contributed to the claimed psychological injury. The injured worker satisfies this burden by presenting evidence not only of the occurrence of the physical injury, but also competent medical evidence showing the physical injury caused or contributed to the psychological injury. The [Court] wrote that "Where the presumption is either inapplicable or has been rebutted, the burden falls on the claimant to prove by a preponderance of the evidence that the physical accident caused or contributed to the psychological injury". [*McCamey II* at 1214.] The [Court] went on to state that "In determining whether a claimant has met his or her burden, [an administrative law judge] must weigh and consider the evidence as well as make credibility determinations [and may] of course consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence." [*Id.*]
>
> This being a public sector case in which the presumption is "inapplicable", the quoted language suffices to explain the standard. That is, the physical injury satisfies the causal link to employment, and what remains is a consideration as to whether there is competent medical evidence connecting the physical injury to the claimed psychological injury, thereby establishing a *prima facie* case of compensability of the psychological injury, which can then only be defeated by employer presenting a preponderance of countervailing evidence. The [C]ourt stressed that compensability may be shown where the claimant has a pre-

[191] *Id.* at 1214.

> existing psychological condition that is aggravated by the physical injury, if the aggravation is a direct and natural result of the physical injury.[192]

The objective standard examining a claimant's particular susceptibilities was rejected, and the *Dailey* test was abolished.

The Mental-Mental Test – The *Ramey* Test

In *McCamey II* the District of Columbia Court of Appeals specifically refrained from crafting a test to establish the necessary connection between employment and injury in mental-mental claims. Nonetheless, the Court emphasized that

> any test that prevents persons predisposed to psychological injury from recovering in all cases is inconsistent with the legislative history and humanitarian purpose of the [Private Sector Workers' Compensation Act and the Public Sector Workers' Compensation Act]. Accordingly, if the [Compensation Review] Board decides that a special test for mental-mental claims remains desirable, it must be one focused purely on verifying the factual reality of stressors in the work-place environment, rather than one requiring the claimant to prove that he or she was not predisposed to psychological injury or illness, or that a hypothetical average or healthy person would have suffered a similar psychological injury, before recovery is authorized.[193]

Less than a month after *McCamey II* issued, the Court remanded a private sector, post-traumatic stress disorder case for reconsideration in light of its decision in *McCamey II.*

Just before midnight on August 29, 2003, Mr. Benjamin Ramey reported to work as a conduit installer for Potomac Electric Power Company. Mr. Ramey reported to a

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[192] *McCamey v. D.C. Pub. Sch.*, CRB No. 10-03(R), AHD No. PBL 02-031, DCP No. LT2-DDT002160 (June 17, 2008).

[193] *McCamey II* at 1214. The Court's warning here is similar to the caution issued in *Young.* See note 168.

supervisor's office for a job assignment, but based upon several observable signs, the supervisor accused Mr. Ramey of drinking.

Mr. Ramey was transported to the employer's downtown location; his requests to use a restroom and to smoke were denied. For two hours, another supervisor attempted to arrange a breathalyzer test for Mr. Ramey.

Mr. Ramey, Mr. Ramey's supervisor, a union representative, and a senior labor relations specialist eventually loaded into an automobile and drove to a medical facility about an hour south of the employer's downtown location; Mr. Ramey's requests to use a restroom, eat, or drink were denied. A breathalyzer test could not be performed at that facility so the group traveled to another facility; a breathalyzer test could not be performed at this facility either so the group returned to the employer's downtown location.

Almost twelve hours after he had reported to work, Mr. Ramey was given two successive breathalyzer tests. The first reading was 0.070. The second reading was 0.065. After his car was inspected, Mr. Ramey drove home and went to bed.

Mr. Ramey was suspended. After resuming his usual duties, he was placed on decision-making leave which required participation in an alcohol rehabilitation program, probation for three years, and random drug and alcohol testing during the first two years of probation.

Mr. Ramey participated in the alcohol rehabilitation program for two weeks. Because he continued to drink, he was discharged from the program.

The next day, Mr. Ramey went to the Howard University Hospital emergency room for arm numbness and tingling. Shortly thereafter, he sought psychiatric treatment, and he

filed a claim for workers' compensation benefits as a result of post-traumatic stress disorder induced by his treatment on and about August 30, 2003.

Applying the *Dailey* test, an administrative law judge denied Mr. Ramey's claim for relief:

> The credible version of the events surrounding claimant's activities on August 30, 2003 does not reflect the presence of stressors which would cause emotional injury to a person not predisposed to such injury. In that the evidence adduced by claimant has not invoked the presumption of compensability, his claim for relief, pursuant to the District of Columbia Workers' Compensation Act, must fail.
>
> Claimant testified, at hearing and at his deposition, that he was forcibly detained with implied threats of physical harm; that he was driven around in the dark for hours with intimidating companions who did not respond to his questions about where and why they were traveling; that he urinated on himself because he was not allowed to use a restroom; that it was obvious to his companions that he wet himself; that they laughed at him for urinating on himself and that they later told co-workers, who ridiculed him when he returned to work. Claimant believes he was treated like a dog or an animal, and remembers that the way he was treated made him feel "like dirt".
>
> Claimant was wearing pale grey coveralls the morning of August 30, 2003; he believes that the front of his pants all the way down to his shins, was wet with dark stains after he urinated on himself. He says that he felt humiliated and embarrassed when, according to him, Mr. Johnson and Mr. Negussie looked at his soiled pants and snickered. According to claimant's testimony, when he returned to work after the five day suspension he was embarrassed because he believed co-workers were talking about him urinating on himself. However, these perceptions were not corroborated by evidence from any other source.
>
> Rather, the credible record evidence indicates that claimant was visibly inebriated, unsteady on his feet, and incoherent; that he was not forcibly restrained or coerced into going; that he understood that he was being driven to find a facility which would administer a Breathalyzer test; that it was not dark when he and the other PEPCO employees (including a union representative who had identified himself to claimant and was there to look out for claimant's interests) left the downtown office; that they were driving around trying to find a facility for no longer than five hours; that the atmosphere in the car was friendly and relaxed rather than oppressive, and

> that no one in the car or at the office (again, including the union representative who was present to look out for claimant), was aware of claimant's urinating on himself. [footnote omitted]
>
> Clearly, it is claimant's *perception* of the events of August 30, 2003, rather than the actual incident, which impacted his emotional state. Said perception, which does not reflect the reality which would have been experienced by the "normal employee", cannot invoke the presumption that the actual incidences had the potential to cause emotional injury.[194]

The Compensation Review Board affirmed the administrative law judge's ruling,[195] but because *McCamey II* had been decided during the pendency of the judicial review of this case, the Court vacated the Compensation Review Board's Decision and Order affirming the Compensation Order.[196]

In *McCamey II*, the Court had been unwilling to create a "carefully crafted test to establish the necessary connection between mental injury and work" that was appropriate for cases involving mental-mental claims where the objectively verifiable work connection may be less than apparent.[197] That responsibility fell to the Compensation Review Board so it developed the *Ramey* test for mental-mental injuries:

> [A]n injured worker alleging a mental-mental claim invokes the statutory presumption of compensability by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury. The injured worker's showing must be supported by competent medical evidence. The [administrative law judge], in determining whether the injured worker invoked the presumption, must

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[194] *Ramey v. Potomac Elec. Power Co.*, OHA No. 05-318, OWC No. 608087 (March 17, 2006).

[195] *Ramey v. Potomac Elec. Power Co.*, CRB No. 06-38, AHD No. 05-318, OWC No. 608087 (June 14, 2006).

[196] *Ramey v. D.C. Dep't of Employment Servs.*, 950 A.2d 33 (D.C. 2008) ("*Ramey I*"). On remand, Mr. Ramey's claim for benefits, again, was denied. *Ramey v. Potomac Elec. Power Co.*, OHA No. 05-318, OWC No. 608087 (August 25, 2008) *aff'd*, *Ramey v. Potomac Elec. Power Co.*, CRB No. 08-217, AHD No. 05-318, OWC No. 608087 (October 29, 2008) *aff'd*, *Ramey II.*

[197] *Ramey I* at 35 quoting *McCamey II* at 1214.

> make findings that the workplace conditions or events existed or occurred, and must make findings on credibility. If the presumption is invoked, the burden shifts to the employer to show, through substantial evidence, the psychological injury was not caused or aggravated by workplace conditions or events. If the employer succeeds, the statutory presumption drops out of the case entirely and the burden reverts to the injured worker to prove by a preponderance of the evidence that the workplace conditions or events caused or aggravated the psychological injury.[198]

In *Ramey II*, the Court commented "the [Compensation Review] Board essentially adopted the test announced by this [Court] in *McCamey [II]* for use in physical-mental cases[] for application in mental-mental cases."[199] The *McCamey* and *Ramey* tests now apply in all work-related psychological injury cases in the District of Columbia.

Breaking Down the Test – Invoking the Presumption of Compensability

In *McCamey II* the District of Columbia Court of Appeals created the current test for invoking the Presumption in a physical-mental claim: In a private sector case, the claimant must show "the physical accident had the potential of *resulting in or contributing to* the psychological injury."[200] In other words, the Presumption is invoked by demonstrating correlation or general causation (the physical accident has the potential to cause or to contribute to a psychological injury), not specific causation (the physical accident actually caused or contributed to a psychological injury in this claimant).

In a case involving a mental-mental injury, there is no physical accident to supply an obvious, yet necessary, workplace connection. Instead, pursuant to *Ramey* the claimant

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[198] *Ramey on Remand.*

[199] *Ramey II* at 700.

[200] *McCamey II* at 1213.

"invokes the statutory presumption of compensability by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury,"[201] again, an issue of general causation; however, the Compensation Review Board replaced the missing physical accident with 1. a credibility determination: "in determining whether the injured worker invoked the presumption, [the administrative law judge] must make findings that the workplace conditions or events existed or occurred, and must make findings on credibility"[202] and 2. competent medical evidence connecting the mental disability to the physical accident.

Whether the injury is physical or psychological, the issue at this stage of a workers' compensation claim is not one of specific causation only potential causation, a distinct difference between workers' compensation litigation and tort litigation. From the outset in a civil lawsuit, the plaintiff has the burden of proving actual causation between an act and an injury. In a tort case for intentional infliction of emotional distress, the defendant's outrageous conduct actually must cause the plaintiff's severe emotional distress; proving the defendant's outrageous conduct has the potential to cause severe emotional distress is not enough to prevail. In a tort case for negligent infliction of emotional distress, the defendant's actions must have, "in fact, caused serious emotional distress to the plaintiff;"[203] proving the defendant's actions could have caused serious emotional distress is not enough to prevail.

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[201] *Ramey on Remand.*

[202] *Id*.

[203] *Hedgepeth* at 811.

There also is a distinct difference between the proof necessary to invoke the Presumption in a workers' compensation claim for a physical injury and the proof necessary to invoke the Presumption a workers' compensation claim for a psychological injury. For example, Mr. Walter McNeal, Jr. invoked the Presumption in his workers' compensation claim for a physical injury through testimony deemed not credible:

> On December 3, 2002, Claimant was standing in the lower level of the bus garage, talking to a co-worker, Felton Lowery, when a bus rounded the corner behind where Claimant was standing. As the bus passed Claimant, it made a minor brush with Claimant's upper back and shoulder area, but the contact was insufficient to cause Claimant to experience any significant force or trauma.
>
> * * *
>
> Claimant was not injured as a result of this incident, and none of the medical care which Claimant subsequently received, and none of the disability experienced following the surgery, was causally related to a work injury, there being no such injury.[204]

Although the administrative law judge did not believe the incident described by Mr. McNeal had occurred and although the history Mr. McNeal had recounted to his treating and evaluating physicians included an incident "far more serious and traumatic"[205] than the one the administrative law judge found actually had occurred, Mr. McNeal's discounted testimony and the medical evidence premised upon Mr. McNeal's reported history consistent with his discounted testimony sufficed to invoke the Presumption.[206]

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[204] *McNeal v. Washington Metro. Area Transit Auth.*, OHA No. 03-353, OWC No. 585468 (September 30, 2003).

[205] *Id.*

[206] This issue was beyond challenge before the Court of Appeals:

> [The employer] does not challenge the [administrative law judge's] determination that McNeal triggered the presumption of a "medical causal relationship between [the]

On the other hand, because of the *Ramey* criteria Ms. Lakeisha Lewis failed to invoke the Presumption in her mental-mental case when the administrative law judge did not find credible her testimony regarding workplace events and conditions:

> Claimant's testimony and Claimant[']s reciting of events as listed in the records of Dr. Bartlett and Dr. Major Lewis cannot be found to be credible. Both the work place event or condition did not exist as described by Claimant that would lead to a determination that Claimant invoked the presumption under *Ramey* that her injury arose out of and in the course of her employment.[207]

The Presumption is the starting point of the causation analysis, and there is no distinction in the Act between physical injuries and psychological injuries. The threshold for invoking the Presumption is higher for psychological injuries than it is for physical injuries; however, when invoking the Presumption, any suspicion of deception should apply equally, and the proof needed to invoke the Presumption in a case for a physical injury or in a case for a psychological injury should be the same.

Breaking Down the Test – Invoking the Presumption of Compensability: Credible Evidence that the Workplace Conditions or Events Existed or Occurred

A claimant alleging a physical injury invokes the Presumption by presenting "some evidence" of a disability and of a work-related event, activity, or requirement that has the

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> alleged disability and the accidental injury," and it could not fairly do so. McNeal's testimony and various medical records reported that he was at work when a bus struck his back and neck and that shortly thereafter he was diagnosed with neck injuries. As the [Compensation Review Board] recognized, the [administrative law judge] "properly shifted the burden to [the employer] to produce evidence that is substantial, specific and comprehensive enough to sever the potential employment connection."

McNeal v. D.C. Dep't of Employment Servs., 917 A.2d 652, 656 (D.C. 2007).

[207] *Lewis v. Washington Metro. Transit Auth.*, AHD No. 19-387, OWC No. 779868 (December 4, 2019).

potential to cause or to contribute to the disability.[208] A claimant usually invokes the Presumption through direct testimony, and at this stage of a workers' compensation case involving a physical injury, even if the claimant's testimony is not credible the Presumption can be invoked by that testimony.[209] Based upon these fundamental tenets of District of Columbia workers' compensation law, the Compensation Review Board inaccurately summarized the *McCamey* test.

In *McCamey*, the Court wrote:

> Thus, we hold that it is appropriate to apply the causal standards seen throughout D.C. workers' compensation cases. In cases where the statutory presumption is applicable, the claimant must show that the physical accident had the potential of *resulting in or contributing to* the psychological injury. See *Smith, supra,* 934 A.2d at 435 (quoting *Mexicano v. District of Columbia Dep't of [Employment Servs.*,] 806 A.2d 198, 204 (D.C. 2002)) ("'To benefit from the statutory presumption, the employee

[208] *Ferreira v. D.C. Dep't of Employment Servs.*, 531 A.2d 651 (D.C. 1987).

[209] *Storey v. D.C. Dep't of Employment Servs.*, 162 A.3d 793 (D.C. 2017). Agreeing with a lengthy dissent written by the author of this dissertation, the Court specifically ruled that an administrative law judge is not to make credibility determinations when assessing whether a claimant's testimony invokes the Presumption in a physical injury case:

> This appeal asks us to consider whether an Administrative Law Judge ("ALJ") is authorized to make credibility determinations and weigh a claimant's evidence in determining whether the claimant has met his or her "threshold requirement," to be entitled to the statutory presumption of compensability. For the reasons that follow, we hold that an ALJ may not assess the credibility of a claimant's evidence at this initial stage. Instead, the claimant is entitled to the statutory presumption that the injury arose during the course of employment and therefore entitled to workers' compensation benefits, so long as he or she presents "some evidence" to establish a *prima facie* case of a work-related injury. *Wash. Post v. District of Columbia Dep't of Emp't Servs*., 852 A.2d 909, 911 (D.C. 2004). The burden is then on the employer to rebut the presumption that an employee's injury was, in fact, not related to his or her employment. *Id*. The employer can rebut the presumption by proffering substantial evidence of non-causation, i.e., evidence that is "specific and comprehensive enough" that a "reasonable mind might accept it as adequate to contradict the presumed connection between the event at work and the employee's subsequent disability." *Id*. (footnote, citation, internal quotation marks and brackets omitted). This, again, is not a matter as to which the ALJ is to make credibility determinations. Only if the employer is able to rebut the presumption and the burden returns to the claimant is the ALJ entitled to make credibility determinations.

Id. at 797.

> need only show some evidence of a disability and a work-related event or activity which has the potential of resulting in or contributing to the disability.'"). Where the presumption is either inapplicable or has been rebutted, the burden falls on the claimant to prove by a preponderance of the evidence that the physical accident caused or contributed to the psychological injury. See *Washington Post v. District of Columbia Dep't of Employment Servs.*, 852 A.2d 909, 911 (D.C. 2004). In determining whether a claimant has met his or her burden, [an administrative law judge] must weigh and consider the evidence as well as make credibility determinations. In this regard, the [administrative law judge] may of course consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence.[210]

In other words, the Court ruled the weighing and credibility considerations should take place after the Presumption has been rebutted, but the Compensation Review Board requires a credibility determination to invoke the Presumption in psychological injury cases.

In mental-mental cases, in order to invoke the Presumption the claimant must offer credible evidence of a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury supported by competent medical evidence.[211] The added credibility requirement is an obvious attempt to ensure the work-related condition or event as reported by the claimant actually existed or occurred; however, whether the claimant's injury is physical or psychological in order to arise out of and in the course of employment the work-related condition or event as reported by the claimant must actually exist or occur. Thus, if assessing the credibility of a claimant's testimony at this stage of a physical injury case is an inappropriate weighing of the evidence, assessing the credibility of a claimant's testimony at this stage of a psychological

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[210] *McCamey II* at 1213-1214. (Underlining added.)

[211] *Ramey on Remand.*

injury case also is premature.[212] Nonetheless, because the Compensation Review Board adopted this added requirement for mental-mental cases, the objectivity of the credibility determination must remain focused on the work environment; it cannot focus on the claimant's perception or characterization of the work environment.[213]

Mr. Phillip A. Taylor, a mechanic, checked a vehicle that had been brought into his employer's shop and determined the tires were worn out, the struts were installed improperly, and the alignment was off. He reported this information to the shop manager and was instructed to replace the tires, ignore the remaining problems, and sign a ticket indicating he had performed all the work. Mr. Taylor was concerned that not addressing all of the problems could result in an accident and serious injuries, but the shop manager told Mr. Taylor to "sign the ticket and let it go."[214] That night, Mr. Taylor began crying, had difficulty driving, and could not sleep.

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[212] *Storey* at 804:

> If, as the majority of the [Compensation Review Board] and [the employer] claim, an [administrative law judge] is allowed to discredit an employee's evidence at the presumption stage, without even needing to consider the employer's rebuttal evidence, then the statutory purpose of the presumption would be contravened. Essentially, the burden of proof would be on the *employee* to demonstrate that he or she suffered a work-related injury, rather than on the *employer* to show that the claimant did not suffer such an injury. That formulation of the burden of proof is in tension with what the Council intended when it enacted the statutory presumption. *See* D.C. Council, Report on Bill 3-106, *supra*, at 15 (burden is on the employer to demonstrate that employee did not suffer a compensable injury); *see, e.g.*, *McNeal*, *supra*, 917 A.2d at 658 (a claimant only has the burden when employer presents evidence that "rebut[s] the presumed causal connection"); *see also Clark Constr. Grp., Inc. v. District of Columbia Dep't of Emp't Servs.*, 123 A.3d 199, 203 (D.C. 2015) (court will look to the legislative history where there are persuasive reasons to do so).

[213] *Price-Richardson v. Washington Metro. Area Transit Auth.*, CRB No. 16-015, AHD No. 13-431, OWC No. 703466 (July 8, 2016).

[214] *Taylor v. Sears, Roebuck & Co.*, Dir. Dkt. No. 96-96, H&AS No. 93-285, OWC No. 236937 (February 24, 1997).

The next day, a customer specifically requested an oil change using 5W30 weight oil. The shop was out of that grade, and Mr. Taylor was told to use 10W30 weight oil. When Mr. Taylor was on his way to inform the customer about the change in the grade of oil, he was instructed to use the 10W30 weight oil without telling the customer. Shortly thereafter, Mr. Taylor left work because of stomach problems and an inability to stand; he did not return to work and was treated for depression.

An administrative law judge ruled that although Mr. Taylor's psychological injury occurred in the course of employment, it did not arise out of employment. The Director reversed the Compensation Order and awarded benefits because the administrative law judge had disregarded the fact that the actual work conditions Mr. Taylor asserted had caused his psychological injury existed:

> On the one hand, the [administrative law judge] appears to have accepted claimant's testimony that the events on December 30th and 31st did in fact occur, and that claimant suffers from depression. On the other hand, however, the [administrative law judge] made the finding that claimant's depression resulted from his perception of events (that the new management was unethical) in the work place. Thus, the [administrative law judge's] finding that claimant's depression resulted from claimant's perception of events in the work place is not in accordance with the evidence, and said finding does not rationally flow from the evidence. Therefore, the [administrative law judge's] finding must be reversed as a matter of law. See *Freeman v. District of Columbia Department of Employment Services*, 568 A.2d 1091 (D.C. 1990) (findings of fact must rationally flow from the evidence). Furthermore, the [administrative law judge's] finding is not based on substantial evidence of record. See [*George Hyman Construction Co. v. Dep't of Employment Servs.,* 498 A.2d 563 (D.C. 1985)].
>
> As to claimant's disability, the parties do not dispute that claimant suffers from a psychological impairment that could have been caused from the work. (HT 134, 137).
>
> The question is whether claimant made a showing that the stressors complained of were actual conditions of the employment and not merely a

> subjective perception of the working conditions. Claimant provided uncontradicted testimony that management instructed him not to inform a customer that the services provided were not what the customer had requested. Specifically, the customer requested 5W30 weight oil, and since the employer did not have 5W30 in stock it substituted with 10W30 weight oil and refused to permit the claimant to inform the customer. Claimant also testified regarding the potential damage a different oil weight could cause to an engine. Claimant provided further uncontradicted testimony regarding management's refusal to permit him to inform a customer that replacement of tires on her vehicle would not completely resolve the whole problem with the vehicle. Claimant also testified that to leave the vehicle in the condition as directed by the employer could result in a failure of the vehicle's steering mechanism and result in serious injuries.
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> As to uncontradicted testimony on an issue, it has long been established that uncontradicted evidence is acceptable as substantial evidence to support a finding. See generally *Wallace v. District Unemployment Compensation Board*, 294 A.2d 177 (D.C. 1972). Consequently, based on this record, the claimant has adduced substantial evidence that his reaction was from actual events that did in fact occur in the work place.
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> Generally, causation under the Workers' Compensation Act is construed liberally. *Ferreira v. District of Columbia Department of Employment Services.*, 531 A.2d 651, 655 (D.C. 1987). In the instant case, although the claimant has made a prima facie showing (sufficient to invoke the presumption of compensability) that his actual working conditions could have caused his psychological injury, pursuant to *Ferreira, supra*. A special standard has been carved out for non[-]traumatically caused mental injuries. Thus, the focus in such case is whether the stressors of the job [were] so great that they would have caused harm to an average person. See *Dail[e]y v. 3M Company and Northwest National Insurance Co.*, H&AS No. 85-259 (Final Compensation Order May 19, 1988). In the present case, based on the evidence that claimant was instructed to participate in employer's deceptive practices as a condition of employment, claimant has established that the conditions on his job were such that they could have caused harm to an average person. *Id.*[215]

One of the problems demonstrated by *Taylor* is that the *Dailey* test had implemented an additional requirement for invoking the Presumption beyond a

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[215] *Id.*

determination of whether or not the work-related conditions and events as reported by the claimant actually existed or occurred. Mr. Taylor made a showing that "his actual working conditions could have caused his psychological injury."[216] At that point, the Presumption was invoked, and rather than shift the focus to "an average person," the burden should have shifted to the employer to rebut the Presumption. Instead, Mr. Taylor's claim for a psychological injury he proved could have been caused by work-related events would have been barred by *Dailey's* version of objective verifiability if a third person would not have sustained a psychological injury as a result of the work-related events Mr. Taylor actually experienced.

The *Dailey* test attempted to create objective verification of a psychological injury by imposing a hypothetical third-party requirement that an "average person not predisposed to such injury would have suffered a similar injury."[217] *Dailey's* inappropriate standard did not prove or disprove causation, and that condition has been replaced by a requirement that credible evidence objectively verifies the existence of the workplace conditions or events that allegedly caused the mental-mental injury. This new credibility condition precedent is unique to invoking the Presumption in mental-mental cases, and although it arguably satisfies the underlying policy requirement that only injuries arising out of and in the course of employment are compensable as workers' compensation claims, it imposes an additional requirement for invoking the Presumption in cases for psychological injuries that is not required in other cases.

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[216] *Id*.

[217] *McCamey II* at 1201.

Breaking Down the Test – Invoking the Presumption of Compensability:
Competent Medical Evidence That
The Workplace Could Have Caused the Mental-Mental Injury

In addition to showing credible evidence of a psychological injury and actual workplace conditions or events which could have caused or aggravated that psychological injury, in order to invoke the Presumption in a mental-mental case the claimant's showing must be supported by competent medical evidence;[218] however, there is no regulation governing what constitutes competent medical evidence.[219]

In *Ramey*, on remand the administrative law judge summarized the medical evidence sufficient to invoke the Presumption as follows:

> In the instant case, the claim for benefits is premised upon an alleged psychological injury caused or aggravated by workplace stress ("mental-mental" claim). Claimant herein invokes the statutory presumption of compensability by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury. Documentary evidence of a psychological injury includes the reports of Dr. Carl Douthitt and clinical social worker Radhika Joglekar. Claimant has adduced competent medical evidence to support his contention that the record events which occurred between August 30, 2003 and November 3, 2003 could have caused or aggravated a psychological injury.[220]

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[218] *Ramey on Remand.*

[219] The opinion of a licensed clinical social worker qualifies as competent medical evidence sufficient to invoke the Presumption. *Howard v. Washington Metro. Area Transit Auth.*, CRB No. 12-147(1), AHD No. 12-109, OWC No. 683290 (October 30, 2013). The medical records relied on to invoke the Presumption do not have to have been based upon a contemporaneous medical examination. *Thomas v. Washington Metro. Area Transit Auth.*, CRB No. 08-226, AHD No. 08-037, OWC No. 635214 (March 22, 2010).

[220] *Ramey v. Potomac Elec. Power Co.*, OHA No. 05-318, OWC No. 608087 (August 25, 2008) *aff'd*, *Ramey v. Potomac Elec. Power Co.*, CRB No. 08-217, AHD No. 05-318, OWC No. 608087 (October 29, 2008) *aff'd*, *Ramey II.*

Not a single medical opinion is quoted as a basis for general causation; the administrative law judge relied upon just the existence of unexplained medical records as competent medical evidence to invoke the Presumption.

Certainly no medical evidence should not qualify as competent medical evidence, and at least arguably, even though methodology and conclusion are closely related when mental health experts assess diagnosis and causation, a doctor's reliance solely upon a claimant's subjective history to form an opinion regarding causation also should not qualify because the history of a work-related event alone does not answer the question of whether that event had the potential to cause or aggravate a psychological injury.[221] The mere manifestation of symptoms while at work is not compensable:

> [T]here are some injuries so thoroughly disconnected from the workplace that they cannot be said to "aris[e] out of or in the course of employment." *See* 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 4.02 (2011) (Some risks have "origins of harm so clearly personal that, even if they take effect while the employee is on the job, they could not possibly be attributed to the employment.").[222]

Regardless of what evidence qualifies as competent medical evidence, the requirement of offering competent medical evidence that supports the claimant's showing of a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury in order to invoke the Presumption is another

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[221] A claimant's history of symptom development and positive response to removal from the work environment may permit a doctor to make an appropriate diagnosis or treatment recommendations, but neither a diagnosis nor treatment is the same as an opinion regarding causation.

[222] *Muhammad D.C. Dep't of Employment Servs.*, 34 A.3d 488, 496 (D.C. 2012) (footnote omitted).

requirement unique to work-related psychological injury claims.[223] There is no such requirement in work-related physical injury claims:

> "The statutory presumption applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." *Swinton v. Kelly*, 180 U.S. App. D.C. at 223, 554 F.2d at 1082 (construing the Longshoremen's and Harbor Workers' Compensation Act[, the predecessor of the Act.) The claimant] was not obliged to present expert opinion of causation in order to enjoy the benefit of the presumption. "It was not [his] burden to do that unless and until the employer presented sufficient evidence to rebut the presumed causal connection." *Id*. at 223 n.35, 554 F.2d at 1082 n.35. Because [the employer] did not present such evidence, the presumption controls.[224]

Again, the threshold for invoking the Presumption is higher in psychological injury claims than it is in physical injury claims. In order to maintain fidelity to workers' compensation policies and principles, it shouldn't be, but even under the *Ramey* test it must be invoked properly and reasonably.

Breaking Down the Test – Rebutting the Presumption of Compensability

After a claimant has invoked the Presumption in a mental-mental case, in order to rebut the Presumption an employer must "show, through substantial evidence,[225] the psychological injury was not caused or aggravated by workplace conditions or events."[226] This obligation is the same in a physical injury case:

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[223] *Storey* at 803 ("Physical injury cases differ from 'mental-mental' cases because they do not require the claimant 'to present expert opinion of causation in order to enjoy the benefit of the presumption.'")

[224] *McNeal*, 917 A.2d at 658.

[225] "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Children's Def. Fund v. D.C. Dep't of Employment Servs.*, 726 A.2d 1242, 1247 (D.C. 1999).

[226] *Ramey on Remand.*

> This presumption operates, though, only "in the absence of evidence to the contrary." D.C. Code §32-1521. "Once the presumption is triggered, the burden is upon the employer to bring forth 'substantial evidence' showing that death or disability did not arise out of and in the course of employment." *Ferreira*, 531 A.2d at 655 (citation omitted). The employer's evidence simply needs to be "specific and comprehensive enough," *id*. (citation omitted), that "a reasonable mind might accept [it] as adequate" [footnote omitted] to contradict the presumed causal connection between the event at work and the employee's subsequent disability. *See, e.g.*, *Safeway Stores, Inc. v. District of Columbia Dep't of Employment Servs.*, 806 A.2d 1214, 1219-20 (D.C. 2002). Accordingly, while we have said that "the presumption of compensability cannot be overcome merely 'by some isolated evidence,'" *Whittaker v. District of Columbia Dep't of Employment Servs.*, 668 A.2d 844, 847 (D.C. 1995) (citation omitted), neither is the presumption "so strong as to require the employer to prove that causation is *impossible* in order to rebut it." *Washington Hosp. Ctr. v. District of Columbia Dep't of Employment Servs.*, 744 A.2d 992, 1000 (D.C. 2000) (emphasis in the original).[227]

To meet its burden, an employer usually offers an opinion from an independent medical examiner:

> [A]n employer has met its burden to rebut the presumption of causation when it has proffered a qualified independent medical expert who, having examined the employee and reviewed the employee's medical records, renders an unambiguous opinion that the work injury did not contribute to the disability.[228]

Moreover, an employer's burden is not satisfied if a doctor espouses anything but a clear and unambiguous opinion that employment conditions and the claimant's disability are not related in any way because if the claimant's employment contributes to an injury even in part, that injury is compensable. The difference between invoking the Presumption and rebutting the Presumption is that to invoke the Presumption, the claimant's medical

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[227] *Washington Post v. D.C. Dep't of Employment Servs.*, 852 A.2d 909, 911 (D.C. 2004).

[228] *Id.* at 910.

evidence must support general causation, but in order to rebut the Presumption, the employer's medical evidence must include a negative opinion regarding specific causation.

On the other hand, a similarity between invoking the Presumption and rebutting the Presumption is that both causation opinions are equally subjective, but arguably, the worker an independent medical examiner observes is different from the worker the treating physician observes. The treating physician examines a patient seeking help, but the independent medical examiner scrutinizes a claimant seeking benefits mired in litigation. These differences may effect multiple aspects of the examination, the resulting opinions, and the weighing of the evidence.

Breaking Down the Test- Weighing the Evidence

If and only if an employer presents substantial evidence that the claimant's psychological injury is not caused or aggravated by workplace conditions or events, the administrative law judge weighs the evidence with the burden returning to the claimant to prove by a preponderance of the evidence that the psychological injury arose out of and in the course of employment.[229] At this point in the analysis, the claimant does not receive the benefit of the Presumption, and even though causation may be difficult to prove, there is no provision for relaxing that burden.

A psychological injury, be it depression or anxiety or post-traumatic stress disorder, is not a signature disease specifically linked to conditions of employment, and when a claimant reports to a doctor for treatment, the doctor assesses the situation for therapeutic

[229] *McCamey II* at 1214.

purposes, not for liability purposes. Importantly, neither a claimant's subjective history nor a diagnosis is a cause, and little effort, if any, may be given to ruling in or ruling out non-employment-related causes or even objective reality. Undoubtedly, the complex interaction of multiple conditions and circumstances is difficult to untangle, but when arriving at an opinion of causation for purposes of liability, some effort is necessary. If that opinion is based upon the claimant's subjective complaints without some forensic effort, it is conjecture, and all it does is bolster the claimant's credibility regarding whether a particular event actually occurred and the claimant's opinion whether a particular event caused or contributed to the claimant's psychological injury.[230]

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[230] For example, Ms. Galina Hamlett alleged her psychological injury was caused by stress at work from verbal attacks and a non-supportive work environment. Based upon this history, Ms. Hamlett's treating psychiatrist diagnosed her with psychosis not otherwise specified. An administrative law judge did not accept the doctor's testimony as competent medical evidence because that opinion just adopted Ms. Hamlett's reported history:

> The treating physician testimony is rejected since it is not based on objective evidence such as prior medical records, knowledge of workplace stressors, or knowledge of Claimant's previous mental history.
>
> Based upon Claimant's failure to invoke the presumption of compensability because the distinct injury that she suffered did not have the potential of resulting in or contributing to her disability, Claimant is not entitled to the presumption of compensability for mental-mental injury established under *Ramey [I]*. Claimant did not present objective medical evidence since her treating physician relied solely upon Claimant's history for the cause of her psychotic condition.

Hamlett v. Telesec Corestaff, AHD No. 08-020, OWC No. 635852 (April 21, 2009). The Director recognized this problem more than thirty years ago:

> This proceeding also demonstrates the undesirability of relying solely on psychiatric evidence; for often physicians who find a work-connection in the occurrence of an injury are not necessarily concerned about whether the conditions in the workplace of which a patient complains actually existed. What seems to be important to the physician is the perception the patient has of the work-place.

Wenzel.

Admittedly, because "[m]ental disorders result from an extraordinarily complex interrelation between an individual's internal or subjective reality and his external or environmental reality,"[231] a precise causation determination may be impossible. Precision, however, is not necessary in a District of Columbia workers' compensation case; so long as employment conditions contribute to the existence or aggravation of an injury, that injury is compensable.[232] Thus, even though there is no provision for relaxing the burden of proof, for a psychological injury to be compensable, employment only needs to have a contributory relationship to the psychological injury.

Summary

The issue isn't whether or not work-related psychological injuries should be compensable. The issue is how to prove compensability in a way that avoids stressing out the entire workers' compensation community.

The three main arguments for a heightened standard of proof in psychological injury cases focus on the prejudices against psychological injuries:

1. Mental injuries are subjective.
2. It is difficult, if not impossible, to apportion personal stressors and industrial stressors.
3. A psychological injury is difficult to disprove.

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[231] Lawrence Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 VAND. L. REV. 263, 271 (1983).

[232] *Ferreira*.

Feeding off these arguments, the error in the *Dailey* test was that it didn't focus on employment conditions; it focused on whether another person would have suffered a psychological injury, not whether the work condition caused an injury to the claimant. The *McCamey* and *Ramey* tests still buy into these arguments and make the same mistake of not focusing on employment conditions.

Until employers, insurers, adjudicators, and legislators overcome the bias against psychological injuries, they will never be treated the same as physical injuries. Just follow the law as written. In other words, apply the Presumption to psychological injuries the same way it is applied to headaches, physical injuries that cannot be causally linked to employment through objective diagnostic testing, and all other physical injuries. Admittedly, the precise cause of a psychological injury is multifaceted, but under the Act, the definition of a compensable injury is liberal – no unusual incident is needed, the employer takes the claimant as it finds him, and if conditions of employment contribute to or aggravate an injury, the claimant is entitled to compensation. On the other hand, if conditions of employment do not cause or contribute to an injury, the injury does not arise out of and in the course of employment; whether physical or mental, non-work-related injuries are not compensable. When the Presumption and the rest of the Act is applied properly there simply is no need for a separate test for psychological injuries because the parties still must meet their assigned burdens.

Chapter 4
One-Shotters or Have-Not's Should Come Out Ahead In the District of Columbia's Private Sector Workers' Compensation System But Do They?

In 1974, Marc Galanter wrote "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change."[233] Galanter's article posits that the basic structure of the American legal system restricts the opportunity for using that system as a means of redistributive change; however, in District of Columbia private sector workers' compensation cases, claimants have distinct advantages built into the architecture of the system, not the least of which is the presumption of compensability at §32-1521 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. Conceptually, it would seem that this presumption-advantage should allow the Have-Nots to come out ahead, but analysis of published administrative appellate decisions reveals that not only is the presumption of compensability recurrently misapplied, its application on remand does not translate into a claimant-favorable change in the result of a case.

Galanter analyzes the American legal system as a series of contests between One-Shotters ("those claimants[, usually individuals] who have only occasional recourse to the courts"[234]) and Repeat Players (litigants, usually organizations, engaged in multiple,

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[233] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

[234] *Id*. at 97.

similar cases over time[235]). These two classes of parties play the litigation game differently, and according to Galanter, Repeat Players are in a position of advantage over One-Shotters.

These classifications are not dichotomous, but generally, a Repeat Player anticipates recurrent litigation, has low stakes in the outcome of any particular case, and has sufficient resources to pursue long-term interests such as making rules and creating precedent.[236] Being a Repeat Player does not guarantee success in litigation, but based upon experience and expertise in litigating the same issues, Repeat Players engage in litigation differently; they develop advantages in the litigation process that increase the odds of a win by selectively adjudicating the cases most likely to produce favorable rules for future application as opposed to favorable outcomes for present cases.[237] "Thus, we would expect the body of 'precedent' cases – that is, cases capable of influencing the outcome of future cases - to be relatively skewed toward those favorable to [Repeat Players]."[238]

On the other hand, by definition, One-Shotters lack the intelligence gained from prior litigation experience and focus on a particular outcome. They fight for the benefits to which they think they are entitled, not for future benefits through "(1) rule-change (2) improvement in institutional facilities (3) improvement of legal services in quantity and quality [and] (4) improvement of strategic position of have-not parties."[239]

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[235] *Id.*

[236] *Id.* at 98.

[237] *Id.* at 99-100.

[238] *Id.* at 102.

[239] *Id.* at 135.

In the District of Columbia private sectors workers' compensation system, the definition of a One-Shotter can be blurred by the nature of the administrative process. Unlike a tort plaintiff who litigates once-and-for-all for comprehensive damages (prior medical expenses, future medical expenses, prior lost wages, future lost wages, pain and suffering, etc.) in the course of a single trial, a workers' compensation claimant litigates for medical expenses and wage loss benefits before returning to work at the end of a healing period; when the claimant returns to work at less than the preinjury wage, the claimant litigates for temporary partial disability benefits; once reaching maximum medical improvement, the claimant litigates for permanent partial disability benefits; years later, the claimant litigates for worsening of condition. Nonetheless, even if a claimant engages in multiple proceedings, the claim for relief usually is for a different type of benefit each time, and the claimant still is not likely to be familiar with the specific issues for resolution or to have "advance intelligence"[240] of the foundation which could be laid in order to increase the likelihood of success.

Galanter posits the American legal system lacks opportunities for systemic equalizing. Contrary to Galanter's hypothesis, in the District of Columbia private sector workers' compensation system, One-Shotters have distinct advantages built into the architecture of that system specifically designed to allow One-Shotters to come out ahead at each step in the litigation process. Despite these advantages, starting at the informal conference, the Repeat Players still come out ahead.

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[240] *Id.* at 98.

The Informal Conference

When a private-sector worker is injured on the job, a claim is filed with the Office of Workers' Compensation. The District of Columbia is a voluntary-payment jurisdiction so if the employer accepts the claim, there may be no further intervention by the Office of Workers' Compensation or by any other governmental entity. If, however, the employer denies the claim or terminates benefits, either party can request an informal conference.

An informal conference is a non-adjudicatory meeting.[241] This proceeding is designed "to narrow issues, encourage voluntary payments of claims, and encourage agreement between interested parties."[242] A claims examiner employed by the Office of Workers' Compensation invites the claimant, the claimant's attorney (if represented), the employer, and the employer's attorney (if represented) to attend. Either party can submit written documents,[243] but there is no testimony under oath[244] and no official, transcribed record of the proceedings.[245]

In fact, only the claimant is permitted to explain the facts of the case to the claims examiner[246] but is not subject to cross-examination.[247] Specifically, at this initial stage of the process, the One-Shotter is the only party that can present an oral explanation of the

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[241] *Gooden v. Nat'l Children's Ctr.*, CRB No. 03-137, OWC No. 529469 (April 14, 2006).

[242] D.C. MUN. REGS. tit. 7, §211.2 (2020).

[243] D.C. MUN. REGS. tit. 7, §219.3 (2020).

[244] *Gooden*.

[245] D.C. MUN. REGS. tit. 7, §219.14 (2020).

[246] *Id.*

[247] *Gooden*.

facts of the case, and that explanation can elaborate on the written documentation or can explain inconsistencies in that documentation.

The Repeat Player is limited to relying on cold records and cannot call any witness to the informal conference to provide a different version of the facts. In addition, although the Repeat Player can ask the One-Shotter questions, the One-Shotter is not legally bound to give truthful answers because the One-Shotter is not under oath. Furthermore, because there is no record of the proceedings the One-Shotter's responses are not memorialized for impeachment during cross-examination in future proceedings.

Upon completion of the informal conference if the parties do not reach an agreement, the claims examiner issues a Memorandum of Informal Conference that includes recommendations for how the parties should handle the claim.[248] The claims examiner may recommend the employer pay benefits as requested in the claim for relief; the claims examiner may recommend the employer pay part of the claim for relief; or the claims examiner may recommend the employer pay nothing. Admittedly, regardless of the recommendation, the Memorandum of Informal Conference lacks any force if either party rejects it and timely files an Application for Formal Hearing.[249] Nonetheless, preventing the Repeat Player from offering any testimonial evidence while simultaneously allowing the One-Shotter to explain the facts without being placed under oath is an advantage to the One-Shotter.[250]

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[248] D.C. MUN. REGS. tit. 7, §219.18 (2020).

[249] *Gooden*.

[250] Memoranda of Informal Conferences are not published. If they were, it would be interesting to research the frequency with which claims examiners recommend employers accept claims as compensable. It is not

The Formal Hearing

Pursuant to §32-1521 of the District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. ("Act"), a claimant is entitled to a presumption of compensability ("Presumption"). Invoking the Presumption and rebutting the Presumption are detailed in "Chapter 1 District of Columbia Workers' Compensation Fundamentals;" this section focuses on the Presumption's burden-shifting requirements as advantages to One-Shotters.

Briefly, in order to benefit from the Presumption, the claimant initially must show some evidence of a disability and a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability;[251] the Presumption then establishes a causal connection between the employment and the claimant's disability.[252] In order to rebut the Presumption, the employer must present evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[253] If the employer fails to satisfy its burden, the claimant wins;[254] if the employer satisfies its burden, the Presumption falls from the case and the claimant must prove entitlement by a preponderance of the evidence.[255]

Throughout the Presumption's burden-shifting analysis, the One-Shotter is given

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unreasonable to surmise that more often than not claims examiners recommend employers accept claims as compensable. Regardless, the Repeat Players are more often in the position to decide what cases to pursue and thereby to create persuasive outcomes at the formal hearing level and precedent at the appellate level because they decide whether or not to pay the claims.

[251] *Ferreira v. Dep't of Employment Servs.*, 531 A.2d 651 (D.C. 1987).

[252] *Id.* at 655.

[254] *Mexicano v. Dep't of Employment Servs.*, 806 A.2d 198, 206 (D.C. 2002).

[255] *Washington Hosp. Ctr. v. Dep't of Employment Servs.*, 744 A.2d 992 (D.C. 2000).

clear advantages. First, a "claim" is not a specific theory of employment causation, and One-Shotters are permitted to argue alternate theories of causation when making a claim for compensation.[256] Then, if a theory of employment causation, even one not raised by the One-Shotter,[257] has the potential to result in or contribute to the disability suffered, the Presumption is triggered.[258]

The One-Shotter invokes the Presumption with some evidence of general causation; the "some evidence" necessary to invoke the Presumption does not even have to be credible.[259] Then, the Repeat Player must rebut the Presumption with evidence of specific causation; failure to do so means the One Shotter does not have to prove actual causation but instead can rely on the Presumption to win the case.

Finally, after the Presumption falls from the case, the opinions of the One Shotter's treating physician are afforded a preference over the opinions of the Repeat Player's independent medical examination physician.[260] When the administrative law judge relies on the opinion of the treating physician, there is no requirement to explain why the other medical opinions of record were rejected.[261] Although the administrative law judge may

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[256] *Ferreira* at 660.

[257] *Id*. at 657.

[258] *Id*. at 660.

[259] *Storey v. Dep't of Employment Servs.*, 162 A.3d 793 (D.C. 2017).

[260] *Short v. Dep't Employment Servs.*, 723 A.2d 845 (D.C. 1998).

[261] *Washington Hosp. Ctr. v. Dep't of Employment Servs.*, 821 A.2d 898, 904 (D.C. 2003). "Only with respect to *treating* physicians have we even held that the examiner must give reasons for rejecting medical testimony."

reject the testimony of a treating physician, explicit reasons for doing so must be given;[262] no reason need be given for rejecting the testimony of an independent medical examination physician.

A presumption in general is an advantage to One-Shotters. Specifically, in the Presumption's burden-shifting analysis, the One-Shotter can argue alternate theories to invoke the Presumption based on some evidence of potential causation and can prevail if the Repeat Player does not rebut the Presumption with evidence specific enough to sever the causal nexus between the claimant's employment and disability. Even if the Repeat Player successfully rebuts the Presumption, when weighing the evidence as a whole the opinions of the One-Shotter's treating physician are given a preference over the opinions of a physician selected by the Repeat Player. Thus, the Presumption is likely the One-Shotter's greatest advantage for securing benefits built into the architecture of the District of Columbia private sector workers' compensation system.

Modification of a Compensation Order

According to Galanter, decreasing delay lowers costs and takes away one of the Repeat Player's advantages.[263] Once an administrative law judge issues a Compensation Order in favor of the claimant, however, delay actually is an advantage to the One-Shotter.

Although *res judicata* and collateral estoppel apply to "administrative proceeding[s] when an agency is acting in a judicial capacity 'resolving disputed issues of

[262] *Canlas v. Dep't of Employment Servs.*, 723 A.2d 1210, 1212 (D.C. 1999).

[263] Galanter at 139.

fact properly before it which the parties have [had] an adequate opportunity to litigate,'"[264] given the ongoing nature of workers' compensation claims and consistent with the Act's humanitarian purpose, there are exceptions to these principles. Modification of an existing Compensation Order when a claimant's condition changes is one of those exceptions.[265]

"At any time prior to [one] year after the date of the last payment of compensation or at any time prior to [one] year after the rejection of a claim,"[266] either party may request modification of a Compensation Order if there is a change of condition which raises issues concerning "[t]he fact or the degree of disability or the amount of compensation payable pursuant thereto."[267] If the moving party fails to offer evidence warranting modification preliminarily, there is no entitlement to a hearing on the merits and the non-moving party prevails with the previous Compensation Order remaining in full force and effect.[268] If the moving party succeeds in offering preliminary evidence showing a reason to believe a change has occurred, the Presumption applies upon a showing of some evidence of a change in the degree of disability and a compensable injury that caused the previous disability.[269]

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[264] *Washington Metro. Area Transit Auth. v. Dep't of Employment Servs.*, 981 A.2d 1216, 1220 (D.C. 2009).

[265] *Short*.

[266] Section 32-1524(a) of the Act. For a claim for permanent partial disability benefits based upon wage loss filed pursuant to §32-1508(3)(V) of the Act, the time period for modification is three years after the date of the last payment of compensation or the rejection of the claim. §32-1524(a) of the Act.

[267] Section 32-1524(a)(1) of the Act. This initial determination is not limited to a change in medical condition. *Washington Metro. Area Transit Auth. v. Dep't of Employment Servs.*, 703 A.2d 1225 (D.C. 1997).

[268] *Snipes v. Dep't of Employment Servs.*, 542 A.2d 832 (D.C. 1988).

[269] The Presumption applies to the merits of a modification claim in the same way it applies to an initial claim, *Short*, but there is no presumption of a reason to believe there has been a change of conditions

The modification process is particularly important when the previous Compensation Order ordered an employer to pay ongoing benefits because once an employer has been ordered to pay ongoing benefits, until it receives another Compensation Order that modifies its obligation, it must continue paying the claimant or be subject to a penalty for not paying benefits timely.[270] The process of obtaining a new Compensation Order requires filing for a formal hearing, participating in that formal hearing, and waiting for the issuance of a new Compensation Order, all while still paying the claimant pursuant to the prior Compensation Order.

During the delay, if the employer overpays the claimant, it cannot recover those funds directly from the claimant. It only can request a credit against the payment of future benefits:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due. All payments prior to an award, to an employee who is injured in the course and scope of his employment, shall be considered advance payments of compensation.[271]

Initially delay may be an advantage to a Repeat Player, but once a Compensation Order awards a One-Shotter ongoing benefits, the One-Shotter profits from delay and from

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warranting a formal hearing on the merits of the claim for modification. *Taylor v. Verizon Communications, Inc.*, CRB No. 14-075, OHA/AHD No. 03216E, OWC No. 571165 (October 30, 2014).

[270] See §32-1515(f) of the Act; *Al-Nori v. Four Points Sheraton Hotel*, CRB No. 11-008, OWC No. 604611 (August 10, 2011).

[271] Section 32-1515(j) of the Act. See also *Brown v. Washington Metro. Area Transit Auth.*, CRB No. 16-020(R), AHD No. 14-466, OWC No. 692619 (September 5, 2018) (The advance payment must replace income lost because of a compensable accident, must have been paid during a period of disability after the date of injury but before the issuance of an award in the current case, and must not have been paid under a separate obligation.)

receiving benefits it might not be entitled to and that can only be recouped by way of a credit against a payment of future benefits that might never be awarded.

Penalties for Untimely Payment of an Award of Compensation

If benefits awarded in a Compensation Order are not paid within ten days after they become due, the claimant is entitled to a mandatory penalty in the sum of 20% of the unpaid amount.[272] The ten-day time period starts to run on the date the employer receives a copy of the Compensation Order from the Office of Workers' Compensation or the Hearings and Adjudication Section.[273] Furthermore, the dispositive date is not the date the check is issued or the date the check is mailed; the dispositive date is the date the claimant or the claimant's attorney actually receives the check.[274]

It is immaterial if the untimeliness is unintentional or is not the result of culpable negligence.[275] Absent a showing of conditions beyond the employer's control that prevented the claimant's timely receipt of payment, a penalty must be imposed:

> If any compensation, payable under the terms of an award, is not paid within 10 days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20% thereof, which shall be paid at the same time as, but in addition to, such compensation, unless review of the compensation order making such award is had as provided in § 32-1522 and an order staying payments has been issued by the Mayor or court. The Mayor may waive payment of the additional compensation after a showing by the employer that owing to conditions over which he had no control such

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[272] Section 32-1515(f) of the Act.

[273] *Daly v. Dep't of Employment Servs.*, 121 A.3d 1257 (D.C. 2015).

[274] *Orius v. Dep't of Employment Servs.*, 857 A.2d 1061 (D.C. 2004).

[275] *Brown v. Davis Memorial Goodwill Indus.*, CRB No. 07-161, OWC No. 568170 (October 10, 2007).

> installment could not be paid within the period prescribed for the payment.[276]

Because this language is clear, it is strictly interpreted to mean that when a penalty is requested, an administrative law judge has no discretion. "[E]ither the compensation is timely paid and there is no penalty, or the compensation is late and the penalty must be imposed if the claimant seeks it."[277]

Galanter notes, "Courts typically have no facilities for surveillance, monitoring, or securing systematic enforcement of their decrees. The task of monitoring is left to the parties."[278] Plaintiffs successful in civil litigation are lucky if they recover a fraction of a judgment, and even if they do, collection efforts can be costly. The Act encourages monitoring for systematic enforcement of Compensation Orders through penalty awards. If the claimant does not receive a check timely, the lack of discretion in imposing a penalty and the narrow interpretation of what qualifies as circumstances beyond the Repeat Player's control are both advantages to the One-Shotter.

The Appeal to the Compensation Review Board

Following a formal hearing, an administrative law judge issues a Compensation Order. That Compensation Order is appealable to the Compensation Review Board.

In order to initiate an appeal with the Compensation Review Board, there are strict filing deadlines. Section 32-1522(b)(2A)(A) of the Act provides a "party aggrieved by a

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[276] Section 32-1515(f) of the Act.

[277] *Dorsey v. ITT/Continental Baking*, Dir. Dkt. No 86-19, H&AS No. 85-353-A, OWC No. 0009588 (May 9, 1989).

[278] Galanter at 138.

compensation order may file an application for review with the [Compensation Review] Board within 30 days of the issuance of the compensation order." Also, an "Application for Review must be filed within thirty (30) calendar days from the date shown on the certificate of service of the compensation order or final decision from which appeal is taken."[279] A "day" is defined as "a calendar day, unless otherwise specified in the Act or this chapter;"[280] however pursuant to §256.3 of the applicable regulations:

> The Office of the Clerk of the Board shall be open from 8:30 a.m. to 5:00 p.m. on all days except Saturdays, Sundays, and legal holidays, for the purpose of receiving Applications for Review and such other pleadings, motions and papers as are pertinent to any matter before the Board.

Thus, when the thirtieth calendar day falls on a Saturday, Sunday, or legal holiday, the deadline is extended to the next business day.[281] Finally, "[f]ilings with the Board of any permitted pleading, including the Application for Review, shall be deemed effective upon actual receipt by the Office of the Clerk."[282]

If an Application for Review is not filed timely, the Compensation Review Board does not have authority to consider the merits of the appeal;[283] however, under some circumstances, One-Shotters have been permitted to break the filing rules. For example, Ms. Virginia Paniagua improperly filed her Application for Review with the associate director of the Department of Employment Services' Labor Standards Bureau; for purposes

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[279] D.C. MUN. REGS. tit. 7, §258.2 (2020).

[280] D.C. MUN. REGS. tit. 7, §299.1 (2020).

[281] *Unigwe v. Dominion Enterprises*, CRB No. 11-055, AHD No 10-387A, OWC No. 659883 (September 8, 2011).

[282] D.C. MUN. REGS. tit. 7, §257.1 (2020).

[283] *Unigwe*.

of determining the timeliness of her appeal, the Compensation Review Board considered the date she improperly filed her Application for Review with the associate director.[284]

In addition to the filing deadlines, in order to perfect an appeal §32-1522(b)(2A)(B) of the Act requires a "Memorandum of Points and Authorities, which sets forth the legal and factual basis for the review or the opposition thereto, shall be filed with an application for review and an opposition answer." Similarly, the implementing regulations require "an original and three (3) copies of a supporting memorandum of points and authorities setting forth the legal and factual basis for requesting review."[285] These provisions, however, have been interpreted to classify a Memorandum of Points and Authorities as analogous to a brief filed with the District of Columbia Court of Appeals,[286] and although the rules of appellate procedure require the parties file briefs,[287] failure to do so does not prohibit the Court from ruling on the merits of the appeal.[288] Thus, a Memorandum of Points and Authorities may assist the Compensation Review Board in reaching a decision, but it is not

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[284] *Paniagua v. Hilton Hotel Corp.*, CRB No 11-006, AHD 10-313, OWC 657301 (June 7, 2011) nt. 1.

[285] D.C. MUN. REGS. tit. 7, §258.3(b) (2020).

[286] *Short* at 849.

[287] D.C. Ct. App. R. 31(c) (2020) states:

> If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move to dismiss the appeal. A party who fails to file a brief will not be heard at oral argument unless the court grants permission.

[288] D.C. Ct. App. R. 3(a)(2) states:

> An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the Court of Appeals to act as it considers appropriate, including dismissal of the appeal.

the benchmark by which the sufficiency of the Application for Review is measured.[289] So long as a request is filed timely, is in writing, and states that an appeal is being taken, it qualifies. Literally, all it takes is a written statement asserting a right to appeal:

> While claimant was represented by counsel at the Hearings & Adjudication level, claimant files the instant appeal, *pro se*. In his appeal, claimant does not make any specific arguments, but simply states, "I wish to appeal the Compensation Order of Malcolm J. L. Harper dated April 22, 1991."
>
> Preliminarily, employer asserts that claimant's Application for Review should be dismissed because claimant did not file a Memorandum of Points and Authorities in support of the Application for Review. However, the Director [of the Department of Employment Services] concludes that the May 17, 1991 Application for Review filed by claimant sufficiently fulfills the requirements of D.C. Code, §[32-1522.] As for the sufficiency of a particular Application for Review, it is sufficient if it is timely, is in writing, and states that an appeal is being taken. Legal arguments would certainly strengthen an appeal and would assist the Director in making a decision, however, that is not how the sufficiency of an appeal is measured. *See, Armstrong v. Howard University*, H&AS No. 91-272 (Director's Order, April 16, 1992).[290]

Without a Memorandum of Points and Authorities asserting legal arguments, the Compensation Review Board must review the underlying Compensation Order to ascertain if it is supported by substantial evidence.[291] Specifically, the Compensation Review Board must perform an appellate review by determining whether the factual findings in the Compensation Order are based upon substantial evidence in the record and whether the legal conclusions drawn from those facts are in accordance with applicable law.

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[289] *Draughorn v. C.J. Coakley*, Dir. Dkt. No. 88-155, H&AS No. 87-486-A, OWC No. 0113733 (October 27, 1995).

[290] *Wilson v. Mergentine/Perini*, Dir. Dkt. No. 91-58, H&AS No. 91-24, OWC No. 145052 (January 4, 1994).

[291] See *Burwell v. Greater Southeast Cmty. Hosp.*, Dir. Dkt. No. 00-09, H&AS No. 99-390, OWC No. unknown (August 16, 2000).

Generally, it is assumed that the Repeat Player's "heightened level of familiarity with institutional actors allows [them] to occasionally disobey court rules or obtain information that is not readily accessible to the public (e.g., receive extensions on court filings or learn the unwritten rules of certain judges' court decorum);"[292] however, this advantage can require the Compensation Review Board analyze a Compensation Order for legal deficiencies One-Shotters may not even know to assert. In fact, the employer may not even be on notice of the specific issues being reviewed.

On the other hand, if an employer files an appeal of a Compensation Order awarding benefits, that appeal is not a stay of the underlying Compensation Order and the employer must pay benefits during the pendency of the appeal.[293] Only when payment of a Compensation Order imminently threatens irreparable injury,[294] specifically the continued solvency of the moving party,[295] is a stay warranted, and even though an employer may be unable to recover benefits paid to a claimant if the underlying Compensation Order ultimately is overturned on appeal,

> the prospect of an employer or insurance carrier being unable to collect payments made to a claimant pursuant to a compensation order that may later be reversed does not constitute an irreparable injury warranting a stay of a compensation order upon review. Teal v. Washington Gas Light Company, H&AS No. 86-403 (Director's Order of May 20, 1987). Or stated in other words, the insolvency or financial irresponsibility of a claimant to repay compensation paid to him or her pursuant to an order which is later reversed is not such an irreparable injury as would entitle the appealing

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[292] Bahaar Hamzehzadeh, *Repeat Player vs. One-Shotter: Is Victory All That Obvious*, 6 HASTINGS BUS. L.J. 239, 244 (Winter 2010).

[293] D.C. MUN. REGS. tit. 7, §260.1 (2020).

[294] D.C. MUN. REGS. tit. 7, §260.3 (2020).

[295] *Whitson v. The Washington Home/Hospice*, Dir. Dkt. No. 00-57, OHA No. 00-148, OWC No. 548138 (October 5, 2000).

> employer or insurance carrier to a stay. The only instance in which it appears that irreparable harm can be established in such cases so as to warrant the stay of a compensation order, is when payment of the compensation order imminently threatens the solvency of the moving party.[296]

Contrary to the imbalance of power Galanter describes, on appeal to the Compensation Review Board, the One-Shotter, not the Repeat Player, is in a position of advantage. The One-Shotter can violate filing requirements and force the Compensation Review Board to analyze the Compensation Order for legal sufficiency, but if the Repeat Player files an appeal, it must continue to pay benefits during the pendency of that appeal even though it ultimately may win on appeal and not be liable for benefits.

Attorney's Fees

In the District of Columbia, a claimant's attorney is paid a contingent fee if he successfully prosecutes the claim.[297] Unlike in most tort litigation, if the employer loses, it can be forced to pay those fees plus costs in certain circumstances designed to encourage them to pay compensable claims without resorting to litigation:

> (a) If the employer or carrier declines to pay any compensation on or before the 30th day after receiving written notice from the Mayor that a claim for compensation has been filed, on the grounds that there is no liability for compensation within the provisions of this chapter, and the person seeking benefits thereafter utilizes the services of an attorney-at-law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, in a compensation order, a reasonable attorney's fee against the employer or carrier in an amount approved by the Mayor, or court, as the case may be, which shall be paid

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[296] *Id*.

[297] Successful prosecution does not require success on the entire claim for relief; it only requires the administrative law judge grant an award because a claimant engages counsel to obtain an award after an employer declines to pay compensation. *Al-Robaie v. Ft. Myer Constr. Corp.*, CRB No. 12-102(A) (September 24, 2013).

> directly by the employer or carrier to the attorney for the claimant in a lump sum after the compensation order becomes final.
>
> (b) If the employer or carrier pays or tenders payment of compensation without an award pursuant to this chapter, and thereafter a controversy develops over the amount of additional compensation, if any, to which the employee may be entitled, the Mayor shall recommend in writing a disposition of the controversy. If the employer or carrier refuse to accept such written recommendation, within 14 days after its receipt by them, they shall pay or tender to the employee in writing the additional compensation, if any, to which they believe the employee is entitled. If the employee refuses to accept such payment or tender of compensation and thereafter utilizes the services of an attorney-at-law, and if the compensation thereafter awarded is greater than the amount paid or tendered by the employer or carrier, a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered or paid shall be awarded in addition to the amount of compensation. The foregoing sentence shall not apply if the controversy relates to degree or length of disability, and if the employer or carrier offers to submit the case for evaluation by physicians employed or selected by the Mayor, as authorized in § 32-1507(e), and offers to tender an amount of compensation based upon the degree or length of disability found by the independent medical report at such time as an evaluation of disability can be made. If the claimant is successful in review proceedings before the Mayor or court in any such case, an award may be made in favor of the claimant and against the employer or carrier for a reasonable attorney's fee for claimant's counsel in accordance with the above provisions. In all other cases any claim for legal services shall not be assessed against the employer or carrier.[298]

Not having to pay an hourly rate (or anything) for representation counterbalances the disincentive of the cost of litigation. In addition, the outcome of the initial formal hearing is not the most important consideration for the One-Shotter's litigation strategy; the claimant's attorney must act as a Repeat Player on the client's behalf because the focus is not on maximizing profit in this proceeding: The claimant's lawyer must consider the long-term impact of her actions on the attorney-client relationship in order to maintain the

[298] Section 32-1530 of the Act.

opportunity to pursue a lucrative permanent partial disability award after the claimant reaches maximum medical improvement.

Effects of the Presumptions of Compensability Advantage

When injured workers had to litigate on-the-job injuries as tort claims, the defenses of assumption of the risk, contributory negligence, and the fellow servant rule worked to the advantage of employers. In the Act, the District of Columbia made legislative efforts to level the playing field for One-Shotters and Repeat Players. From start to finish, claimants have advantages in the District of Columbia's private sector workers' compensation system. Do the advantages make a difference, or do the Haves still come out ahead?

Identification of the Parties

At the outset, it is helpful to classify the litigants by Galanter's standards. In District of Columbia private sector workers' compensation cases there are two parties – the injured worker (the claimant) and the employer. In general, employers are organizations, and in general, organizations are more powerful than individuals; in an employment contest of employer versus employee being an organization certainly means greater financial strength, especially when the employee is not working because of an injury. Moreover, in the sample of coded cases used throughout this research there are only 7 claimants with more than one decision on appeal, and in all but one of these pairs of repeat cases, the underlying claim is the same. Put another way, the coded sample of 101 cases includes 94 different claimants and just 66 different employers. Thus, while not universal, it is fair to classify the claimants as One-Shotters and the employers as Repeat Players.

Case Selection and Coding

The ultimate focus of this research is on whether or not the presumptions at §§32-1521(1), 32-1521(2), 32-1521(3), and 32-1521(4) of the Act (collectively "Presumptions of Compensability") were applied properly so it also is helpful to identify the cases included in the sample. A decision issued by the Compensation Review Board provides an objective assessment of whether or not the Presumptions of Compensability were applied properly at the formal hearing level. In addition, a decision issued by the Compensation Review Board is the first opportunity in the adjudication process to establish precedent. Finally, the District of Columbia Court of Appeals defers to the Compensation Review Board's interpretations of the Act; therefore, success before the Compensation Review Board increases the odds of success before the Court. For these reasons, decisions issued by the Compensation Review Board, not Compensation Orders issued by administrative law judges, were coded.[299]

To begin, a chronological cite list of all Compensation Review Board decisions issued from February 1, 2005[300] through December 31, 2019 published on Lexis Advance was created by searching for <compensation & presum!> with the date restriction 02/01/2005 – 12/31/2019 in the "DC Off. of Emp. Serv. Director's

[299] There are no Presumptions of Compensability in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, D.C. Code §1-623.1 *et seq*; therefore, public sector cases were rejected from the sample. In addition, decisions that do not include the Presumptions of Compensability (*e.g.* cases ruling on motions, attorney fee petitions, reasonableness and necessity of medical treatment, etc.) were rejected from the sample. Duplicates and Compensation Orders erroneously stored in the "DC Off. of Emp. Serv. Director's Decisions/Compensation Review Board from 1996" library also were rejected. Finally, even in cases that were coded, resolution of any issues not related to the Presumptions of Compensability was not examined.

[300] The Compensation Review Board began reviewing cases in February 2005. Charles J. Willoughby, Department of Employment Services Workers' Compensation Processes – Resolution of Disputed Claims Special Evaluation, OIC No. 07-0021CF, July 2007, p. 20.

Decisions/Compensation Review Board from 1996" library.[301] Then, the list of 1,008 results was sorted by date (oldest-newest).[302]

Using Microsoft Excel's =RANDBETWEEN(x,y) formula where x=1 and y=1,008, a list of 350 random numbers was created. The list of random numbers was generated in nine columns of twenty-five rows to accommodate duplicate numbers and rejected cases. Cases to be reviewed for coding were selected by matching the random numbers (progressing down each column from left to right) to the case numbers on the cite list. One Hundred Eighty-five cases were reviewed in order to code 10% of all published Compensation Review Board decisions issued during the selected time period.

Each Compensation Review Board decision was coded for the following elements:[303]

- Claimant
- Employer
- Compensation Review Board Decision Date
- Claimant's Self-Representation on Appeal (Yes/No)
- Compensation Order Date
- Identification of the First Presumption Issue
- Outcome of the First Presumption Issue

[301] Lexis Advance is the most comprehensive source for published opinions from the Office of Hearings and Adjudication, Compensation Review Board, and District of Columbia Court of Appeals; therefore, it represents the most reliable means of identifying, sampling, and reviewing those decisions.

[302] The list was generated on February 16, 2020.

[303] Elements used for identification or case tracking purposes are not detailed here.

- Proper Application of the Presumption Identified in the First Issue (Yes/No)
- Identification of the Second Presumption Issue
- Outcome of the Second Presumption Issue
- Proper Application of the Presumption Identified in the Second Issue (Yes/No)
- Identification of the Third Presumption Issue
- Outcome of the Third Presumption Issue
- Proper Application of the Presumption Identified in the Third Issue (Yes/No)
- Compensation Order on Remand Date
- Benefits Awarded in Compensation Order on Remand
- Date of Injury
- Average Weekly Wage
- Compensation Rate
- Number of Days Between Compensation Order Date and Compensation Order on Remand Date
- Number of Days Between Compensation Order Date and Compensation Review Board Decision Date
- Appeal to Court of Appeals (Yes/No)[304]
- Notes

When the data needed for any particular field was not available in the Compensation Review Board's decision, the underlying Compensation Order, the Compensation Order

[304] In Lexis Advance it is difficult and sometimes impossible to link a District of Columbia Court of Appeals opinion to the workers' compensation case on appeal.

on Remand, or any other published decision from the case was used to populate the database as completely as possible.

Data Analysis

By the plain language of the Act there is a presumption of compensability designed for the claimant to win even in arguable cases. If it is functioning as an advantage to claimants as intended, one could expect claimants to be more successful than employers at the formal hearing level. In fact, following a formal hearing, claimants were awarded benefits[305] in only 38 of the 101 coded cases.[306]

If the claimant loses after a formal hearing and files an appeal,[307] the claimant is designated the petitioner. If the employer loses after a formal hearing, it files the appeal,

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[305] A case was coded as awarding benefits so long as some relief was granted; the full claim for relief may not have been granted.

[306] Several factors other than the Presumptions of Compensability may account for this low success rate:

1. Not all Compensation Orders are appealed to the Compensation Review Board, and not all of the Compensation Review Board's decisions on appeal are published. See "Limitations and Results," *infra*.

2. Not all of the Compensation Review Board's decisions are affirmed by the Court of Appeals. See note 323.

3. Patently compensable claims should be paid without proceeding to a formal hearing or an appeal.

4. Because of the personal interest in the immediate outcome of a case, claimants are less likely than employers to be interested in molding the law for future use and may settle even on unfavorable terms rather than wait for an uncertain result after a formal hearing or an appeal.

5. The employer ultimately determines if a claim proceeds to a formal hearing or an appeal by paying the claim or denying it regardless of its merits.

6. When a case proceeds to a formal hearing, employers have more resources to devote to creating the record; when a case proceeds to an appeal, employers have more resources to devote to researching persuasive or innovative arguments.

[307] A claimant may be awarded benefits in a Compensation Order and still file an appeal. For example, a claimant may request an award of ongoing wage loss benefits but only be granted a closed period of wage loss benefits; the claimant could file an appeal to try to increase the benefits awarded.

and the claimant is designated the respondent. In 72 of the 101 coded cases the claimant is the petitioner. See Table 1.

Table 1 – Claimant's Party Status

Litigant	Petitioner (Loser at the Formal Hearing)	Respondent (Winner at the Formal Hearing)
Claimant	71.3%	28.7%

Of the 72 cases wherein the claimant is the petitioner, the claimant was denied benefits in the Compensation Order 63 times. In those 63 cases, benefits were awarded on remand[308] only 6 times.[309] See Table 2.

Table 2 - Claimant as Petitioner on Appeal

Litigant	Petitioner (Benefits Denied at the Formal Hearing)	Petitioner (Benefits Granted on Remand)
Claimant	87.5%	9.8%

The cost of the error in those 6 cases is not to be underestimated:

- In Case 43,[310] the claimant was an electrical repair mechanic who injured his back while working on a fan-coil-unit motor. An administrative law

[308] If a Compensation Order on Remand is not published and if no subsequent decision in that case indicates that benefits were awarded on remand, the case was coded as unknown regarding an award of benefits on remand because it is not possible to determine if benefits were awarded on remand.

[309] In 2 of these 63 cases, the outcome on remand is unknown.

[310] *Dillon v. D.C. Water & Sewer Auth*, CRB No. 05-032, OHA No. 05-032, OWC No. 603500 (October 6, 2005).

judge ruled the claimant had failed to give proper notice and denied him temporary total disability benefits for a closed period, temporary partial disability benefits for a different closed period, and medical benefits. On appeal, 87 days after the administrative law judge issued the Compensation Order, the Compensation Review Board amended the Compensation Order to award medical expenses.

- In Case 49,[311] a debt collector injured both of her knees while moving boxes and a computer to a different desk. An administrative law judge denied her claim for temporary total disability benefits for two closed periods and authorization for medical treatment including multiple surgeries. The Compensation Review Board ruled the employer had failed to rebut the Presumption and reversed the Compensation Order. Eight-hundred One days after the administrative law judge issued the Compensation Order, the claimant was granted medical benefits.
- In Case 555, a bus driver suffered multiple psychological disorders as a result of "dealing with a lot of misconduct, people, dope fiends, drunks, people who don't like to follow the rules."[312] An administrative law judge denied her claim for medical benefits and temporary total disability benefits for a closed period of 1,312 days on the grounds that the claimant had failed to invoke the Presumption. The claimant's average weekly wage was not

[311] *Davis v. NCO Fin.*, CRB No. 05-02 (November 30, 2005).

[312] *Horton v. Washington Metro. Area Transit Auth.*, CRB No. 13-039, AHD No. 12-380, OWC No. 635573 (July 1, 2013).

disclosed, but the statutory minimum compensation rate for 2006 when the claimant was injured was $288.96. Eight-hundred Twelve days after the administrative law judge issued the Compensation Order, the claimant was awarded temporary total disability benefits for a closed period of 913 days worth $37,688.64 at the statutory minimum compensation rate.[313]

- In Case 762,[314] a mechanic injured his low back when he bent forward and lifted a pump engine. Although the administrative law judge ruled that the claimant had invoked the Presumption and that the employer had not rebutted the Presumption, the administrative law judge still denied the claimant's request for temporary total disability benefits from the date the claimant stopped working to the date of the formal hearing and continuing. The claimant's average weekly wage was not disclosed, but the statutory minimum compensation rate for 2013 when the claimant was injured was $354.11.[315] One-Hundred Eighty-Three days after the administrative law judge issued the Compensation Order, the Compensation Review Board vacated the denial of benefits in the Compensation Order. During that time period alone, the claimant was entitled to $9,257.45 in wage loss benefits at

[313] The statutory minimum compensation rate does not apply to temporary total disability benefits, *Hiligh v. Dep't of Employment Servs.*, 935 A.2d 1070 (DC 2007), but has been applied here in the absence of the claimant's average weekly wage and resulting compensation rate.

[314] *Pettis v. Washington Metro. Area Transit Auth.*, CRB No. 15-172, AHD No. 14-086, OWC No. 585487 (April 1, 2016).

[315] See note 313.

the statutory minimum compensation rate.[316] By the time the administrative law judge issued a Compensation Order on Remand 238 days after issuance of the Compensation Order, the claimant was entitled to $12,039.74 at the statutory minimum compensation rate.

- In Case 962,[317] while rushing to fill a stat order for medication, a pharmacy technician stopped short and sustained a complex degenerative tear of the medial meniscus in his left knee. An administrative law judge ruled the claimant had not invoked the Presumption with his testimony or his medical records and denied his claim for temporary total disability benefits for a closed period of 62 days. The claimant's average weekly wage of $1,357.57 yields a compensation rate of $905.05. Thus, on remand after the administrative law judge properly applied the Presumption to determine the claimant had invoked it and the employer had not rebutted it, the claimant was entitled to $8,016.16. It took 71 days for that error to be exposed and 187 days for it to be corrected.
- In Case 1000,[318] a 73-year-old document management analyst suffered "a complex tear of the medial meniscus, a grade 1 sprain of the medial

[316] Ordinarily ongoing benefits are calculated from the date of injury, but in order to calculate the cost of the error rather than the cost of the claim, benefits here are calculated from the date of the Compensation Order (when the error was made) to the date of the Compensation Order on Remand (when the error was corrected). Furthermore, calculating the cost of a misapplication is not intended as an actual dollar amount assessment but as an indicator of the potential impact of such an error.

[317] *Burr v. Children's Nat'l Med. Ctr.*, CRB No. 19-018, AHD No. 18-470, OWC No. 771893 (April 4, 2019).

[318] *Grenadier v. Lockheed Martin Corp.*, CRB No. 19-082, AHD No. 18-428, OWC No. 754848 (October 15, 2019).

> collateral ligament, adjacent marrow edema, and a full-thickness delaminating fissure along the notch third of the lateral patellar facet, joint effusion, and tendinopathy"[319] of his left knee which were treated with medication, physical therapy, and surgery. Because of his knee injury he walked with an altered gait and developed lumbar radiculopathy which was treated with medication and chiropractic care. The administrative law judge rendered conflicting rulings on the issue of whether the claimant's medical expenses were causally related to his work-related injury and denied his request for medical benefits until issuing a Compensation Order on Remand 341 days after issuing the Compensation Order on appeal.

A wrong decision denying benefits jeopardizes a claimant's health and financial stability. It discourages an employer from fixing dangerous working conditions. It increases the Repeat Player's strength.[320]

In 29 of the 101 coded cases, the claimant is the respondent; in all of those cases, the claimant was awarded benefits after a formal hearing. On remand, benefits were retained in 24[321] of those cases.[322] See Table 3.

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[319] *Grenadier v. Lockheed Martin*, AHD No. 18-428, OWC No. 754848 (June 30, 2020).

[320] A wrong decision granting benefits also has negative effects. It increases costs to consumers paying the passed-through price of benefits. It forces an employer to pay benefits that it cannot recover from the claimant except as a credit against future benefits that may never be awarded.

[321] In 2 of these 29 cases, the outcome on remand is unknown.

[322] Having classified employers as Repeat Players, the data for the most prevalent employer in the sample, the Washington Metropolitan Area Transit Authority, was isolated. The Washington Metropolitan Area Transit Authority is a litigant in 21 cases. In 17 of those cases (81.0%), the claimant is the petitioner, and in only 3 of those 17 cases (17.6%) was the claimant successful in earning or retaining benefits on remand. In 4 of the 21 cases (19.0%), the claimant is the respondent, and in 2 of those cases (66.7%) the claimant retained benefits on remand; in 1 of these 4 cases the outcome on remand is unknown.

Table 3 - Claimant's Success Rate on Remand

Litigant	Success Rate as Petitioner	When Respondent, Opponent's Success Rate
Claimant	18.6%	11.1%

Thus far, the data suggests the Presumptions of Compensability do not actually function as an advantage to claimants.

These numbers are not global. They only apply to appealed cases involving a presumption, but 101 of 185 cases reviewed (54.6%) involve the Presumptions of Compensability. Although being a Repeat Player does not guarantee a win, despite the Presumptions of Compensability claimants already seems to be at a disadvantage. The situation does not improve when factoring in misapplication of the Presumptions of Compensability.

In 34 of the 101 coded cases, the Compensation Review Board ruled a presumption had been misapplied.[323] Breaking down those 34 cases, 24 of them involve misapplication of the Presumptions of Compensability at the first step of the inquiry (invoking). In those 24 cases, the claimant is the petitioner 20 times; the claimant was awarded benefits in 2 of those cases after a formal hearing. In both of those cases, benefits were denied on remand.

[323] Proper application of the Presumptions of Compensability is objectively assessed based on whether the presumption issue in a Compensation Order is affirmed, reversed, remanded, or vacated by the Compensation Review Board. Of course, the Compensation Review Board is not infallible. Any decision it issues affirming a Compensation Order can be affirmed, reversed, vacated, or remanded by the Court of Appeals, but so few judicial opinions ruling on workers' compensation appeals are published that a longitudinal analysis is not viable. (A search for "name (employment) & compensation" performed in the "District of Columbia, Court of Appeals Cases from 1925" library with the date restriction of 02/01/2005 – 12/31/2019 yielded 191 cases. The Department of Employment Services is a named party in every workers' compensation case appealed to the Court of Appeals, but this search may inflate the results by yielding public sector disability cases and other irrelevant cases such as unemployment benefits cases. Of these 191 cases, 59 included the search term <presum!>.)

Of the 18 cases wherein the claimant was the petitioner and was denied benefits after the formal hearing, benefits were awarded on remand in only 5 cases.[324] See Table 4.

On the other hand, the claimant is the respondent in only 4 cases wherein the Compensation Review Board ruled that the Presumptions of Compensability were misapplied when invoking. In all 4 of those cases, benefits had been awarded after a formal hearing, and in 2 of those cases benefits were awarded again on remand.[325] See Table 4.

Table 4 - Outcomes When Presumptions of Compensability Misapplied at Invoking

Petitioner	Misapplication at Invoking	Benefits Granted in Compensation Order after Misapplication at Invoking	Benefits Granted (Again) on Remand After Misapplication at Invoking	Benefits Denied in Compensation Order after Misapplication at Invoking	Benefits Denied (Again) on Remand After Misapplication at Invoking
Claimant	27.8%	10.0%	0%	90.0%	70.6%[326]
Employer	13.8%	100%	66.7%[327]	0%	n/a

When the claimant appeals and the Compensation Review Board rules that the Presumptions of Compensability have been misapplied at the first step in the analysis, benefits have been taken away or denied again on remand 73.7% of the time.

Still focusing on the 34 cases wherein the Compensation Review Board ruled that the Presumptions of Compensability had been misapplied, 27 of them involve misapplication of the Presumptions of Compensability at the second step of the inquiry

[324] In 1 of these 18 cases, the outcome on remand is unknown.

[325] In 1 of these 4 cases, the outcome on remand is unknown.

[326] In 1 of these 18 cases, the outcome on remand is unknown.

[327] In 1 of these 4 cases, the outcome on remand is unknown.

(rebuttal).[328] In those 27 cases, the claimant is the petitioner 18 times.[329] The claimant was awarded benefits in 3 of those cases after a formal hearing, and benefits were retained in 1 case on remand. Of the remaining 15 cases wherein the claimant was the petitioner and was denied benefits after the formal hearing, benefits were awarded on remand only 3 times.[330] See Table 5.

On the other hand, the claimant is the respondent in 9 cases wherein the Compensation Review Board ruled that the Presumptions of Compensability had been misapplied at rebuttal. In all 9 of those cases benefits had been awarded to the claimant after a formal hearing, and in 7 of those cases benefits were awarded again on remand.[331] See Table 5.

Table 5 - Outcomes When Presumptions of Compensability Misapplied at Rebuttal

Petitioner	Misapplication at Rebuttal	Benefits Granted in Compensation Order after Misapplication at Rebuttal	Benefits Granted (Again) on Remand after Misapplication at Rebuttal	Benefits Denied in Compensation Order after Misapplication at Rebuttal	Benefits Denied (Again) on Remand after Misapplication at Rebuttal
Claimant	37.5%	16.7%	33.3%	83.3%	78.6%
Employer	93.1%	100%	100%[332]	0%	n/a

[328] A case may include more than one presumption issue.

[329] The respondent also can raise issues on appeal.

[330] In 1 of these 15 cases, the outcome on remand is unknown.

[331] In 2 of these 9 cases, the outcome on remand is unknown.

[332] In 2 of these 8 cases, the outcome on remand is unknown.

Overall, in the 34 cases wherein the Compensation Review Board ruled that the Presumptions of Compensability had been misapplied, regardless of who filed the appeal in 13 of those cases the claimant was awarded benefits after a formal hearing; in 8 of those cases the claimant retained benefits after appeal.[333] Regardless of who filed the appeal, in 21 of the 34 cases wherein the Compensation Review Board ruled that the Presumptions of Compensability had been misapplied, benefits were denied after a formal hearing, and in only 5 of those cases were benefits granted on remand.[334] See Table 6.

Table 6 - Comparative Outcomes After Misapplication of Presumptions of Compensability

Benefits Granted after Formal Hearing	Benefits Granted (Again) on Remand	Benefits Denied after Formal Hearing	Benefits Denied (Again) on Remand
38.2%	72.7%	61.8%	73.7%

There was a change in the outcome in only 8 of the 34 (26.7%) cases wherein the Compensation Review Board ruled that the Presumptions of Compensability had been misapplied, regardless of who brought the appeal;[335] 5 times benefits were granted on remand when they had been denied after formal hearing,[336] and 3 times benefits were denied on remand when they had been granted after a formal hearing.[337] The net result is that the Presumptions of Compensability do not seem to act as an advantage to claimants.

[333] In 2 of these 13 cases, the outcome on remand is unknown.

[334] In 2 of these 21 cases the outcome on remand is unknown.

[335] In 4 of these 34 cases, the outcome on remand is unknown.

[336] In 2 of these 21 cases the outcome on remand is unknown.

[337] In 2 of these 13 cases the outcome on remand is unknown.

When injured workers had to litigate on-the-job injuries as tort claims, the defenses of assumption of the risk, contributory negligence, and the fellow servant rule worked to the advantage of employers. With implementation of the District of Columbia workers' compensation system, at every step in the process the Act counteracts the "unholy trinity" of defenses by providing claimants with advantages. Perhaps the most important advantages are the presumptions found at §§32-1521(1), 32-1521(2), 32-1521(3), and 32-1521(4) of the Act. The Presumptions of Compensability enable a claimant to establish entitlement to benefits more easily, but they were misapplied in more than 1/3 of the coded cases. When the Presumptions of Compensability are misapplied, it would seem that the very purpose of the Act is circumvented, but misapplication of the Presumptions of Compensability frequently do not result in a change in the award of benefits on remand.[338] The philosophy underlying the Presumptions of Compensability favors the claimant, but research suggests application of the Presumptions of Compensability does not.

Limitations and Results

There are limitations to this research. The sample cases may not be representative of all filed claims or even all litigated claims. Not all work-related injuries become workers' compensation claims. Workers may not know an injury is covered by workers' compensation, may believe that the process is too cumbersome or too intimidating to warrant use, or may not want to be hampered by compensation rates one-third less than one's average weekly wage (which is paid in full when using sick leave); employers may

[338] Future research should perform a similar analysis of Alaska workers' compensation cases and federal Longshore and Harbor Workers' Compensation Act cases for comparison purposes; both of these jurisdictions have the same presumptions analyzed in this research.

not know an injury is covered by workers' compensation or may want to maintain a safety record. In addition, not all claims proceed to a formal hearing, an administrative appeal, or a judicial appeal. Furthermore, not all decisions issued by the Office of Hearings and Adjudication, the Compensation Review Board, or the Court of Appeals are published or are available on Lexis Advance.[339] There are too many deficiencies in the data for this research to assert that the analyses are statistically significant. In the end, the results of this research are only suggestive of the actual application of the Presumptions of Compensability and of the consequences of misapplication, but the implications alone are sufficient to prompt further inquiry. After all, there is more at stake than winning or losing in any particular case. If claimants rarely succeed with or without the benefit of the Presumptions of Compensability or if decisions available to the public predominately report claimants' losses, injured workers may be reluctant to pursue their rights or attorneys may be reluctant to represent claimants.[340] Moreover, whether denying or granting benefits a misapplication of the law decreases the public's faith in the system.

[339] Published decisions may or may not differ from unpublished decisions.

[340] In 6 of the coded cases the claimant was self-represented on appeal. In all of those cases the claimant was the petitioner; in all of those cases benefits were denied after a formal hearing; and in all of those cases application of the Presumptions of Compensability was unchanged after appeal. Future research should be conducted to assess any effect of representation on the outcomes above.

Chapter 5
Conclusions

In recognition of the humanitarian purpose of District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*. ("Act") and the legislative policy favoring awards even in arguable cases, a claimant is entitled to a presumption of compensability ("Presumption").

In order to benefit from the Presumption, the claimant initially must present some evidence of a disability and the existence of a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.[341] The Presumption then establishes a causal connection between the claimant's disability and the work-related event. Specifically, it is the relationship between employment and an event causing an injury that determines compensability, not the relationship between an employee's culpability and an event causing that injury. Unless the work-related event was a fight and the claimant was the aggressor.

Mr. Todd Allen Graber was injured in a fight at work. Applying the *Bird* test, an administrative law judge denied Mr. Graber's claim for workers' compensation benefits, and the Compensation Review Board affirmed that denial on appeal.

In *Bird v. Advanced Security*, the Director of the Department of Employment Services adopted a two-prong test to determine the compensability of injuries sustained during a fight at work. Pursuant to *Bird*, in order for injuries sustained in a fight to be compensable:

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[341] *Ferreira v. Dep't of Employment Servs.*, 531 A.2d 651 (D.C. 1987).

1. The employment [must have] required the combatants work together often enough for their temperaments and emotions to interact under workplace strains tending to increase the likelihood of friction between them, and
2. The claimant was not the aggressor.[342]

The administrative law judge had ruled that Mr. Graber was the aggressor in the fight and for that reason, his request for benefits was denied.[343] Because the administrative law judge's factual findings on that issue were supported by substantial evidence in the record and the legal conclusions drawn from those facts were in accordance with applicable law, the Compensation Review Board affirmed the denial,[344] but the law is wrong.

In the case of a work-related fight, despite an employment connection between the work conditions and the clash, so long as the claimant was the aggressor the *Bird* test deems the claimant's injuries beyond the scope of employment thereby barring recovery. This bar to recovery is contrary to the Presumption as the *Bird* test specifically limits the definition of a work-related fight to one not caused by the fault of an instigator even though the conditions of employment served as a catalyst for the physical altercation. In other words, satisfying the first prong of the *Bird* test invokes the Presumption because it demonstrates a work-related event, activity, or requirement that has the potential to cause or contribute to a disability. Thus, failure to apply the Presumption when the first prong of the *Bird* test has been satisfied circumvents the humanitarian purpose of the Act by

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[342] *Bird v. Advance Sec.*, H&AS No. 84-69, OWC No. 0015644 (June 7, 1985).

[343] *Graber v. Sequoia Rest.*, AHD No. 10-063, OWC No. 662653 (April 13, 2011).

[344] *Graber v. Sequoia Rest.*, CRB No. 11-045, AHD No. 10-063, OWC No. 662653 (July 25, 2011).

minimizing (if not eliminating) the employer's burden to present substantial evidence "specific and comprehensive enough to sever the potential connection between a particular injury and a job-related event."[345]

Misapplication of the Presumption makes it more difficult for claimants to recover benefits for injuries sustained in work-related fights. Misapplication of the Presumption also makes it more difficult for claimants to prove work-related psychological injuries.

There is a distinct difference between the proof necessary to invoke the Presumption in a workers' compensation claim for a physical injury and the proof necessary to invoke the Presumption in a workers' compensation claim for a psychological injury. In a physical injury case, to invoke the Presumption, the claimant must show some evidence of a disability and a work-related event, activity, or requirement which has the potential to cause or to contribute to the disability.[346] In a physical-mental case, to invoke the Presumption the claimant must show "the physical accident had the potential of *resulting in or contributing to* the psychological injury;"[347] so far the tests are the same. In a claim involving a mental-mental injury, the claimant "invokes the statutory presumption of compensability by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury;"[348] the missing

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[345] *Ferreira* at 655.

[346] *Ferreira*.

[347] *McCamey v. D.C. Dep't of Employment Servs.*, 947 A.2d 1191, 1213 (D.C. 2008) ("*McCamey II*").

[348] *Ramey v. Potomac Elec. Power Co.*, CRB No. 06-38(R), AHD No. 05-318, OWC No. 576531 (July 24, 2008) ("*Ramey on Remand*").

physical accident is replaced with 1. a credibility determination and 2. competent medical evidence connecting the mental disability to workplace conditions.[349]

A close reading of *McCamey* reveals that the test implemented by the Compensation Review Board is based on its inaccurate summary of that case. In *McCamey II*, the District of Columbia Court of Appeals wrote:

> Thus, we hold that it is appropriate to apply the causal standards seen throughout D.C. workers' compensation cases. In cases where the statutory presumption is applicable, the claimant must show that the physical accident had the potential of *resulting in or contributing to* the psychological injury. See *Smith, supra,* 934 A.2d at 435 (quoting *Mexicano v. District of Columbia Dep't of [Employment Servs.,*] 806 A.2d 198, 204 (D.C. 2002)) ("'To benefit from the statutory presumption, the employee need only show some evidence of a disability and a work-related event or activity which has the potential of resulting in or contributing to the disability.'"). Where the presumption is either inapplicable or has been rebutted, the burden falls on the claimant to prove by a preponderance of the evidence that the physical accident caused or contributed to the psychological injury. See *Washington Post v. District of Columbia Dep't of Employment Servs.,* 852 A.2d 909, 911 (D.C. 2004). In determining whether a claimant has met his or her burden, [an administrative law judge] must weigh and consider the evidence as well as make credibility determinations. In this regard, the [administrative law judge] may of course consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence.[350]

However, the Compensation Review Board adopted a different test for proving psychological injuries:

> [A]n injured worker alleging a mental-mental claim invokes the statutory presumption of compensability by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury. The injured worker's showing must be supported by competent medical evidence. The [administrative law judge], in determining whether the injured worker invoked the presumption, must make findings that the workplace conditions or events existed or occurred,

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[349] *Id*.

[350] *McCamey II* at 1213-1214. (Underlining added.)

> and must make findings on credibility. If the presumption is invoked, the burden shifts to the employer to show, through substantial evidence, the psychological injury was not caused or aggravated by workplace conditions or events. If the employer succeeds, the statutory presumption drops out of the case entirely and the burden reverts to the injured worker to prove by a preponderance of the evidence that the workplace conditions or events caused or aggravated the psychological injury.[351]

The Court ruled the weighing and credibility considerations should take place after the Presumption has been rebutted, but the Compensation Review Board requires a credibility determination to invoke the Presumption in mental-mental cases.

A claimant alleging a physical injury usually invokes the Presumption through direct testimony; even if the claimant's testimony is not credible the Presumption can be invoked by that testimony.[352] In mental-mental claims, in order to invoke the Presumption the added credibility requirement is an obvious attempt to ensure the work-related condition or event as reported by the claimant actually existed or occurred; however, whether the claimant's injury is physical or psychological in order to arise out of and in the course of employment the work-related condition or event as reported by the claimant must actually exist or occur. Thus, if assessing the credibility of a claimant's testimony at this stage of a physical injury claim is considered weighing the evidence, assessing the credibility of a claimant's testimony at this stage of a psychological injury claim also is premature. When invoking the Presumption, any suspicion of deception should apply equally, and the proof needed to invoke the Presumption either in a claim for a physical injury or in a claim for a psychological injury should be the same.

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[351] *Ramey on Remand*. (Underlining added.)

[352] *Storey v. Dep't of Employment Servs.*, 162 A.3d 793, 807 (D.C. 2017).

In addition to showing credible evidence of a psychological injury and actual workplace conditions or events which could have caused or aggravated that psychological injury, in order to invoke the Presumption the claimant's proof in a psychological injury claim also must be supported by competent medical evidence.[353] There is no regulation governing what constitutes competent medical evidence, but regardless of what evidence qualifies, this added requirement, again, is unique to work-related psychological injury claims.

Until employers, insurers, adjudicators, and legislators overcome the bias against psychological injuries, they will never be treated the same as physical injuries, but the solution is simple - just follow the law; apply the Presumption to psychological injuries the same way it applies to headaches, physical injuries that cannot be causally linked to employment through objective diagnostic testing, and all other physical injuries. Admittedly, the precise cause of a psychological injury is multifaceted, but under the Act, no unusual incident is needed, the employer takes the claimant as it finds him, and if conditions of employment contribute to or aggravate an injury the claimant is entitled to compensation. On the other hand, if conditions of employment do not cause or contribute to an injury, the injury does not arise out of and in the course of employment; whether physical or mental, non-work-related injuries are not compensable. When the Presumption is applied properly there is no need for a separate test for psychological injuries because the parties still must meet their assigned burdens.

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[353] *Ramey on Remand*.

The Presumption is an intentional, architectural advantage to claimants; it is meant to level the playing field between Have-Not claimants and Have employers. As such, it would be bad enough if the Presumption is misapplied in just two specific categories of cases; however, the Presumption frequently is misapplied in District of Columbia private sector workers' compensation cases in general. As a result the Haves still come out ahead.

In *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*,[354] Marc Galanter asserts the American legal system lacks opportunities for systemic equalizing, but in District of Columbia private sector workers' compensation cases, claimants have distinct advantages built into the architecture of the system, not the least of which is the Presumption. Conceptually, it would seem that the Presumption-advantage should allow the Have-Nots to come out ahead, but analysis of published administrative appellate decisions reveals that not only is the Presumption recurrently misapplied, its application on remand does not translate into a claimant-favorable change in the result of a case.

When arising out of and in the course of employment is an issue in a private sector workers' compensation case, the Presumption is the starting point of the analysis. By establishing a causal connection between a disability and a work-related event, the Presumption is supposed to enable a claimant to establish entitlement to workers' compensation benefits more easily. This research exposes that it is questionable whether it actually does.

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[354] Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

Appendix
Proving Psychological Injuries in Workers' Compensation Cases[355]

Alabama	**Mental-Mental** "'Injury and personal injury' shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except for an occupational disease or where it results naturally and unavoidably from the accident. . . . Injury does not include a mental disorder or mental injury that has neither been produced nor been proximately caused by some physical injury to the body." ALA. CODE §25-5-1(9) (2020). Furthermore, "an occupational disease does not include a mental disorder resulting from exclusively nonphysical stimuli." *Cocking v. City of Montgomery*, 48 So.3d 647, 650 (Ala. Civ. App. 2010). **Physical-Mental** "Under Alabama law, for an employee to recover for psychological disorders, the employee must have suffered a physical injury to the body and that physical injury must be a proximate cause of the psychological disorders." *Ex Parte Vongsouvanh*, 795 So. 2d 625, 628 (Ala. 2000). **Mental-Physical**[356] "An employee bears the burden of proving that his injuries arose out of and in the course of his employment. In cases involving nonaccidental injuries, the employee must prove both legal and medical causation to meet the 'arising out of' requirement. Furthermore, in cases involving gradual deterioration or cumulative stress, the employee must establish both legal and medical causation by clear and convincing evidence, rather than by a mere preponderance of the evidence. Under the

[355] The burdens of proof set forth in this appendix may be subject to exceptions or to interpretation by caselaw. Furthermore, this appendix represents the burdens that apply to generic employees; specific rules may apply to police officers, fire fighters, first responders, or other special categories of employee. Specific rules also may apply to claimants with pre-existing conditions.

[356] Mental-physical claims may be based on various physical injuries. In the absence of a general burden of proof for this type of claim the burden of proof for a stress-related heart attack is provided.

	Workers' Compensation Act, 'clear and convincing evidence' is defined as "'evidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt.' "Ala. Code 1975, §25-5-81(c). "To establish legal causation, the injured employee must prove that 'the performance of the duties for which he [or she] is employed … as an employee exposed [him or her] to a danger or risk materially in excess of that to which people not so employed are exposed [ordinarily in their everyday lives].'" *Safeco Ins. Cos. v. Blackmon*, 851 So.2d 532, 537 (Ala. Civ. App. 2002) (internal citations omitted).
Alaska	**Mental-Mental** "Compensation and benefits under this chapter are not payable for mental injury caused by mental stress, unless it is established that (1) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment; and (2) the work stress was the predominant cause of the mental injury. The amount of work stress shall be measured by actual events. A mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer." ALASKA STAT. §23.30.010(b) (2020). See also ALASKA STAT. §23.30.120(c) (2020): "The presumption of compensability established in [ALASKA STAT. §23.30.120(a)] does not apply to a mental injury resulting from work-related stress." **Physical-Mental** "Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical

	treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment." ALASKA STAT. §23.30.010(a) (2020). **Mental-Physical** "Except as provided in (b) of this section, compensation or benefits are payable under this chapter for disability or death or the need for medical treatment of an employee if the disability or death of the employee or the employee's need for medical treatment arose out of and in the course of the employment. To establish a presumption under AS 23.30.120(a)(1) that the disability or death or the need for medical treatment arose out of and in the course of the employment, the employee must establish a causal link between the employment and the disability or death or the need for medical treatment. A presumption may be rebutted by a demonstration of substantial evidence that the death or disability or the need for medical treatment did not arise out of and in the course of the employment. When determining whether or not the death or disability or need for medical treatment arose out of and in the course of the employment, the board must evaluate the relative contribution of different causes of the disability or death or the need for medical treatment. Compensation or benefits under this chapter are payable for the disability or death or the need for medical treatment if, in relation to other causes, the employment is the substantial cause of the disability or death or need for medical treatment." ALASKA STAT. §23.30.010(a) (2020).

Arizona	**Mental-Mental** "A mental injury, illness or condition shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless some unexpected, unusual or extraordinary stress related to the employment or some physical injury related to the employment was a substantial contributing cause of the mental injury, illness or condition." ARIZ. REV. STAT. §23-1043.01(B) (2020). **Physical-Mental** "A mental injury, illness or condition shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless some unexpected, unusual or extraordinary stress related to the employment or some physical injury related to the employment was a substantial contributing cause of the mental injury, illness or condition." ARIZ. REV. STAT. §23-1043.01(B) (2020). **Mental-Physical** "A heart-related or perivascular injury, illness or death shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this chapter unless some injury, stress or exertion related to the employment was a substantial contributing cause of the heart-related or perivascular injury, illness or death." ARIZ. REV. STAT. §23-1043.01(A) (2020).
Arkansas	**Mental-Mental** "A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence." ARK. CODE ANN. §11-9-113(a)(1) (2020). **Physical-Mental** "(1) A mental injury or illness is not a compensable injury unless it is caused by physical injury to the employee's body, and shall not be considered an injury arising out of and in the course of employment or compensable unless it is demonstrated by a preponderance of the

	evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence. "(2) No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders." ARK. CODE ANN. §11-9-113(a) (2020). **Mental-Physical** "(a) A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, an accident is the major cause of the physical harm. "(b) "(1) An injury or disease included in subsection (a) of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment or, alternately, that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm. "(2) Stress, physical or mental, shall not be considered in determining whether the employee or claimant has met his or her burden of proof." ARK. CODE ANN. §11-9-114 (2020).
California	**Mental-Mental** "(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally

	approved and accepted nationally by practitioners in the field of psychiatric medicine. "(b) "(1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury. "(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury. "(3) For the purposes of this section, 'substantial cause' means at least 35 to 40 percent of the causation from all sources combined. "(c) It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division. "(d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition. Nothing in this subdivision shall be construed to authorize an employee, or the employee's dependents, to bring an action at law or equity for damages against the employer for a psychiatric injury, where those rights would not exist pursuant to the exclusive remedy doctrine set forth in Section 3602 in the absence of the amendment of this section by the act adding this subdivision. "(e) Where the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that actual events of

	employment were predominant as to all causes combined of the psychiatric injury and one or more of the following conditions exist: "(1) Sudden and extraordinary events of employment were the cause of the injury. "(2) The employer has notice of the psychiatric injury under Chapter 2 (commencing with Section 5400) prior to the notice of termination or layoff. "(3) The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury. "(4) Upon a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial. "(5) Evidence that the date of injury, as specified in Section 5411 or 5412, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff. "(f) For purposes of this section, an employee provided notice pursuant to Sections 44948.5, 44949, 44951, 44955, 44955.6, 72411, 87740, and 87743 of the Education Code shall be considered to have been provided a notice of termination or layoff only upon a district's final decision not to reemploy that person. "(g) A notice of termination or layoff that is not followed within 60 days by that termination or layoff shall not be subject to the provisions of this subdivision, and this subdivision shall not apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of termination or layoff to an employee shall be considered a bad faith personnel action and shall make this subdivision inapplicable to the employee. "(h) No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue. "(i) When a psychiatric injury claim is filed against an employer, and an application for adjudication of claim is filed by an employer or employee, the division shall provide the employer with information concerning psychiatric injury prevention programs.

	"(j) An employee who is an inmate, as defined in subdivision (e) of Section 3351, or their family on behalf of an inmate, shall not be entitled to compensation for a psychiatric injury except as provided in subdivision (d) of Section 3370. "(k) An employee who is a patient, as defined in subdivision (h) of Section 3351, or their family on behalf of a patient, shall not be entitled to compensation for a psychiatric injury except as provided in subdivision (d) of Section 3370.1." CAL. LAB. CODE §3208.3 (2020). **Physical-Mental** "(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine. "(b) "(1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury. "(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury. "(3) For the purposes of this section, 'substantial cause' means at least 35 to 40 percent of the causation from all sources combined.

	"(c) It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division. "(d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition. Nothing in this subdivision shall be construed to authorize an employee, or the employee's dependents, to bring an action at law or equity for damages against the employer for a psychiatric injury, where those rights would not exist pursuant to the exclusive remedy doctrine set forth in Section 3602 in the absence of the amendment of this section by the act adding this subdivision. "(e) Where the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury and one or more of the following conditions exist: "(1) Sudden and extraordinary events of employment were the cause of the injury. "(2) The employer has notice of the psychiatric injury under Chapter 2 (commencing with Section 5400) prior to the notice of termination or layoff. "(3) The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury. "(4) Upon a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial. "(5) Evidence that the date of injury, as specified in Section 5411 or 5412, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

	"(f) For purposes of this section, an employee provided notice pursuant to Sections 44948.5, 44949, 44951, 44955, 44955.6, 72411, 87740, and 87743 of the Education Code shall be considered to have been provided a notice of termination or layoff only upon a district's final decision not to reemploy that person. "(g) A notice of termination or layoff that is not followed within 60 days by that termination or layoff shall not be subject to the provisions of this subdivision, and this subdivision shall not apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of termination or layoff to an employee shall be considered a bad faith personnel action and shall make this subdivision inapplicable to the employee. "(h) No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action. The burden of proof shall rest with the party asserting the issue. "(i) When a psychiatric injury claim is filed against an employer, and an application for adjudication of claim is filed by an employer or employee, the division shall provide the employer with information concerning psychiatric injury prevention programs. "(j) An employee who is an inmate, as defined in subdivision (e) of Section 3351, or their family on behalf of an inmate, shall not be entitled to compensation for a psychiatric injury except as provided in subdivision (d) of Section 3370. "(k) An employee who is a patient, as defined in subdivision (h) of Section 3351, or their family on behalf of a patient, shall not be entitled to compensation for a psychiatric injury except as provided in subdivision (d) of Section 3370.1." CAL. LAB. CODE §3208.3 (2020). **Mental-Physical** The claimant must prove employment is a contributing cause of the heart attack. *Lamb v. Workmen's Comp. Appeals Bd.*, 520 P.2d 978 (Cal. 1974).
Colorado	**Mental-Mental** "(2) (a) A claim of mental impairment must be proven by evidence supported by the testimony of a licensed psychiatrist or psychologist. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work

	evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim must have arisen primarily from the claimant's then occupation and place of employment in order to be compensable. * * * "(c) The claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment. "(d) The mental impairment which is the basis of the claim must be, in and of itself, either sufficient to render the employee temporarily or permanently disabled from pursuing the occupation from which the claim arose or to require medical or psychological treatment. "(3) For the purposes of this section: "(a) 'Mental impairment' means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event. 'Mental impairment' also includes a disability arising from an accidental physical injury that leads to a recognized permanent psychological disability. "(b) "(I) 'Psychologically traumatic event' means an event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances. "(II) 'Psychologically traumatic event' also includes an event that is within a worker's usual experience only when the worker is diagnosed with post-traumatic stress disorder by a licensed psychiatrist or psychologist after the worker experienced exposure to one or more of the following events: "(A) The worker is the subject of an attempt by another person to cause the worker serious bodily injury or death through the use of deadly force,

and the worker reasonably believes the worker is the subject of the attempt;

"(B) The worker visually or audibly, or both visually and audibly, witnesses a death, or the immediate aftermath of the death, of one or more people as the result of a violent event; or

"(C) The worker repeatedly and either visually or audibly, or both visually and audibly, witnesses the serious bodily injury, or the immediate aftermath of the serious bodily injury, of one or more people as the result of the intentional act of another person or an accident.

"(c) 'Serious bodily injury' means bodily injury that, either at the time of the actual injury or a later time, involves a substantial risk of death, a substantial risk of serious permanent disfigurement, or a substantial risk of protracted loss or impairment of the function of any part or organ of the body."

COLO. REV. STAT. §8-41-301 (2020).

See also COLO. REV. STAT. §8-41-302(1) (2020):

"'Accident', 'injury', and 'occupational disease' shall not be construed to include disability or death caused by or resulting from mental or emotional stress unless it is shown by competent evidence that such mental or emotional stress is proximately caused solely by hazards to which the worker would not have been equally exposed outside the employment."

Physical-Mental

"(2) (a) A claim of mental impairment must be proven by evidence supported by the testimony of a licensed psychiatrist or psychologist. A mental impairment shall not be considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, lay-off, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. The mental impairment that is the basis of the claim must have arisen primarily from the claimant's then occupation and place of employment in order to be compensable.

* * *

	"(c) The claim of mental impairment cannot be based, in whole or in part, upon facts and circumstances that are common to all fields of employment. "(d) The mental impairment which is the basis of the claim must be, in and of itself, either sufficient to render the employee temporarily or permanently disabled from pursuing the occupation from which the claim arose or to require medical or psychological treatment. "(3) For the purposes of this section: "(a) 'Mental impairment' means a recognized, permanent disability arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event. 'Mental impairment' also includes a disability arising from an accidental physical injury that leads to a recognized permanent psychological disability." COLO. REV. STAT. §8-41-301 (2020). **Mental-Physical** "'Accident', 'injury', and 'occupational disease' shall not be construed to include disability or death caused by heart attack unless it is shown by competent evidence that such heart attack was proximately caused by an unusual exertion arising out of and within the course of the employment." COLO. REV. STAT. §8-41-302(2) (2020).
Connecticut	**Mental-Mental** "'Personal injury' or 'injury' shall not be construed to include: * * * "(ii) A mental or emotional impairment, unless such impairment [] arises from a physical injury or occupational disease. . . "(iii) A mental or emotional impairment that results from a personnel action, including, but not limited to, a transfer, promotion, demotion or termination." CONN. GEN. STAT. §31-275(16)(B) (2020).

	Physical-Mental "[B]oth this court and our Supreme Court explicitly have interpreted the term 'arises from' in §31-275(16)(B)(ii) to require a causal relationship between a physical injury or occupational disease and a claimed mental impairment in order for the mental impairment to be compensable under the act. The plaintiff's argument that under §31-275(16)(B)(ii) he need only show that the mental impairment was 'accompanied by' a physical injury, therefore is contrary to both the plain meaning of 'arises from' and prior judicial interpretations of §31-275(16)(B)(ii). For these reasons, we conclude that the board properly interpreted 'arises from' in §31-275(16)(B)(ii) to require a causal relationship between the plaintiff's injury and his disorder." *Biasetti v. City of Stamford*, 1 A.3d 1231, 1235-1236 (Conn. App. Ct. 2010) (Although the claimant in this case is a police officer, the rule of law applies generally to all employees.) **Mental-Physical** "[A] physical injury precipitated by work-related stress is a compensable injury under §31-275(16)(B)(ii) and (iii). . . . [T]he [claimant] has the burden of proving that the injury claimed arose out of the employment and occurred in the course of the employment. There must be a conjunction of [these] two requirements . . . to permit compensation." *Chesler v. City of Derby*, 899 A.2d 624, 627-629 (Conn. App. Ct. 2006) (internal quotation marks omitted).
Delaware	**Mental-Mental** "[I]n order to be compensated for a mental injury in the absence of a specific and identifiable industrial accident (i.e., a mental injury which is gradually caused by stress), a claimant must offer evidence demonstrating objectively that his or her work conditions were actually stressful and that such conditions were a substantial cause of claimant's mental disorder. . . . The stress causing the injury need not be unusual or extraordinary, but it must be real and proved by objective evidence. Where a claimant merely imagines or subjectively concludes that his or her work conditions have caused a psychological illness, there is no basis for holding the employer responsible since the connection between work and injury is perceived only by the impaired worker." *State v. Cephas*, 637 A.2d 20, 27-28 (Del. 1994).

	Physical-Mental "The law seems settled that, provided a sufficient causal connection is proved by competent evidence between an industrial accident and a resulting psychological or neurotic disorder resulting therefrom, such disability is compensable under Workmen's Compensation Law." *Rice's Bakery v. Adkins*, 269 A.2d 215, 216-217 (Del. 1970). **Mental-Physical** "[T]he 'usual exertion' rule . . . provides that irrespective of [a] previous condition, an injury is compensable if the ordinary stress and strain of employment is a substantial cause of the injury." *Duvall v. Charles Connell Roofing*, 564 A.2d 1132, 1136 (Del. 1989).
District of Columbia	**Mental-Mental** "[A]n injured worker alleging a mental-mental claim invokes the statutory presumption of compensability by showing a psychological injury and actual workplace conditions or events which could have caused or aggravated the psychological injury. The injured worker's showing must be supported by competent medical evidence. The [administrative law judge], in determining whether the injured worker invoked the presumption, must make findings that the workplace conditions or events existed or occurred, and must make findings on credibility. If the presumption is invoked, the burden shifts to the employer to show, through substantial evidence, the psychological injury was not caused or aggravated by workplace conditions or events. If the employer succeeds, the statutory presumption drops out of the case entirely and the burden reverts to the injured worker to prove by a preponderance of the evidence that the workplace conditions or events caused or aggravated the psychological injury." *Ramey v. Potomac Elec. Power Co.*, CRB No. 06-38(R), AHD No. 05-318, OWC No. 576531 (July 24, 2008). **Physical-Mental** "[W]here a claimant in a physical-mental claim presents competent medical evidence connecting a work related physical injury to a claimed psychiatric injury the claimant has established a *prima facie* case of either a new injury or an aggravation of a pre-existing condition. Although this case is a claim under the public sector act, the [District of Columbia Court of Appeals] did not limit its ruling or rationale to that act, but explicitly indicated that the ruling applies to the public and private sector acts.

	"Thus, under the new rule, . . . the injured worker, having established a causal link between the physical injury and the employment, bears the burden of proving by a preponderance of the evidence that the physical injury caused or contributed to the claimed psychological injury. The injured worker satisfies this burden by presenting evidence not only of the occurrence of the physical injury, but also competent medical evidence showing the physical injury caused or contributed to the psychological injury. The [Court] wrote that 'Where the presumption is either inapplicable or has been rebutted, the burden falls on the claimant to prove by a preponderance of the evidence that the physical accident caused or contributed to the psychological injury'. [*McCamey v. D.C. Dep't of Employment Servs.*, 947 A.2d 1191, 1214 (D.C. 2008)] The [Court] went on to state that 'In determining whether a claimant has met his or her burden, [an administrative law judge] must weigh and consider the evidence as well as make credibility determinations [and may] of course consider the reasonableness of the testimony and whether or not particular testimony has been contradicted or corroborated by other evidence.' [*Id.*]" *McCamey v. D.C. Pub. Sch.*, CRB No. 10-03(R), AHD No. PBL 02-031, DCP No. LT2-DDT002160 (June 17, 2008). **Mental-Physical** "[T]he question whether a claim presents a compensable 'accidental injury' does not depend on whether the employment event which allegedly caused it was an emotional or a physical stressor, or whether that stressor was usual or unusual. Rather, the injury, to be 'accidental,' need only be something that unexpectedly goes wrong within the human frame. A heart attack clearly can meet that test." *Jones v. D.C. Dep't of Emp't Servs.*, 519 A.2d 704, 708-709 (D.C. 1987).
Florida	**Mental-Mental** "A mental or nervous injury due to stress, fright, or excitement only is not an injury by accident arising out of the employment. Nothing in this section shall be construed to allow for the payment of benefits under this chapter for mental or nervous injuries without an accompanying physical injury requiring medical treatment." FLA. STAT. §440.093(1) (2020). **Physical-Mental** "(2) Mental or nervous injuries occurring as a manifestation of an injury compensable under this chapter shall be demonstrated by clear and

	convincing medical evidence by a licensed psychiatrist meeting criteria established in the most recent edition of the diagnostic and statistical manual of mental disorders published by the American Psychiatric Association. The compensable physical injury must be and remain the major contributing cause of the mental or nervous condition and the compensable physical injury as determined by reasonable medical certainty must be at least 50 percent responsible for the mental or nervous condition as compared to all other contributing causes combined. Compensation is not payable for the mental, psychological, or emotional injury arising out of depression from being out of work or losing employment opportunities, resulting from a preexisting mental, psychological, or emotional condition or due to pain or other subjective complaints that cannot be substantiated by objective, relevant medical findings. "(3) Subject to the payment of permanent benefits under s. 440.15, in no event shall temporary benefits for a compensable mental or nervous injury be paid for more than 6 months after the date of maximum medical improvement for the injured employee's physical injury or injuries, which shall be included in the period of 104 weeks as provided in s. 440.15(2) and (4). Mental or nervous injuries are compensable only in accordance with the terms of this section." FLA. STAT. §440.093 (2020). **Mental-Physical** "A physical injury resulting from mental or nervous injuries unaccompanied by physical trauma requiring medical treatment shall not be compensable under this chapter." FLA. STAT. §440.093(1) (2020).
Georgia	**Mental-Mental** "[T]o be compensable a psychic trauma must arise naturally and unavoidably from some discernible physical occurrence." *Hanson Buick, Inc. v. Chatham*, 295 S.E.2d 846, 847 (Ga. Ct. App. 1982). **Physical-Mental** "[A] psychological injury or disease is compensable if it arises ''naturally and unavoidably' . . . from some discernible physical occurrence.' . . . [A] claimant is entitled to benefits under the Workers' Compensation Act for mental disability and psychic treatment which, while not necessarily precipitated by a physical injury, arose out of an

	accident in which a compensable physical injury was sustained, and that injury contributes to the continuation of the psychic trauma. The physical injury need not be the precipitating cause of the psychic trauma; it is compensable if the physical injury contributes to the continuation of the psychic trauma." *Southwire Co. v. George*, 470 S.E.2d 865, 866-867 (Ga. 1996). **Mental-Physical** "'[I]njury' and 'personal injury' [shall not] include heart disease, heart attack, the failure or occlusion of any of the coronary blood vessels, stroke, or thrombosis unless it is shown by a preponderance of competent and credible evidence, which shall include medical evidence, that any of such conditions were attributable to the performance of the usual work of employment." GA. CODE ANN. §34-9-1(4) (2020).
Hawaii	**Mental-Mental** "'Disability' means loss or impairment of a physical or mental function." HAW. REV. STAT. §386-1 (2020). Also, "[i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary: "(1) That the claim is for a covered work injury." HAW. REV. STAT. §386-85 (2020). In addition, "an employee suffers a work-related injury within the meaning of HRS §386-3 when he sustains a psychogenic disability precipitated by the circumstances of his employment." *Royal State Nat'l Ins. Co. v. Labor & Indus. Relations Appeal Bd.*, 487 P.2d 278, 282 (Haw. 1971). However, "[a] claim for mental stress resulting solely from disciplinary action taken in good faith by the employer shall not be allowed; provided that if a collective bargaining agreement or other employment agreement specifies a different standard than good faith for disciplinary

	actions, the standards set in the collective bargaining agreement or other employment agreement shall be applied in lieu of the good faith standard. For purposes of this subsection, the standards set in the collective bargaining agreement or other employment agreement shall be applied in any proceeding before the department, the appellate board, and the appellate courts." HAW. REV. STAT. §386-3(c) (2020). **Physical-Mental** "'Disability' means loss or impairment of a physical or mental function." HAW. REV. STAT. §386-1 (2020). Also, "[i]n any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary: "(1) That the claim is for a covered work injury." HAW. REV. STAT. §386-85 (2020). **Mental-Physical** "Operation of the statutory presumption [HAW. REV. STAT. §386-85(1)] is crucial in cardiac cases where the causes of heart disease are not readily identifiable." *Akamine v. Hawaiian Packing & Crating Co., Ltd.*, 495 P.2d 1164, 1166 (Haw. 1972).
Idaho	**Mental-Mental** "'Injury' and 'personal injury' shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body. The terms shall in no case be construed to include an occupational disease and only such nonoccupational diseases as result directly from an injury." IDAHO CODE ANN. §72-102(18)(c) (2020). See also IDAHO CODE ANN. §72-451(2) (2020): "Nothing in subsection (1) of this section shall be construed as allowing compensation for psychological injuries from psychological causes

	without accompanying physical injury." **Physical-Mental** "(1) Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met: "(a) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by accident and physical injury as defined in section 72-102(18)(a) through (18)(c), Idaho Code, or only if accompanying an occupational disease with resultant physical injury, except that a psychological mishap or event may constitute an accident where: "(i) It results in resultant physical injury as long as the psychological mishap or event meets the other criteria of this section; "(ii) It is readily recognized and identifiable as having occurred in the workplace; and "(iii) It must be the product of a sudden and extraordinary event; "(b) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from a personnel-related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination; "(c) Such accident and injury must be the predominant cause as compared to all other causes combined of any consequence for which benefits are claimed under this section; "(d) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense; "(e) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho worker's compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistical manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and must be made by a psychologist or psychiatrist

	duly licensed to practice in the jurisdiction in which treatment is rendered; and "(f) Clear and convincing evidence that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required. * * * "(3) The provisions of subsection (1) of this section shall apply to accidents and injuries occurring on or after July 1, 1994, and to causes of action for benefits accruing on or after July 1, 1994, notwithstanding that the original worker's compensation claim may have occurred prior to July 1, 1994. * * * "(5) No compensation shall be paid for such injuries described in subsection (2) of this section arising from a personnel-related action including, but not limited to, disciplinary action, changes in duty, job evaluation, or employment termination." IDAHO CODE ANN. §72-451 (2020). **Mental-Physical** "(1) Psychological injuries, disorders or conditions shall not be compensated under this title, unless the following conditions are met: "(a) Such injuries of any kind or nature emanating from the workplace shall be compensated only if caused by accident and physical injury as defined in section 72-102(18)(a) through (18)(c), Idaho Code, or only if accompanying an occupational disease with resultant physical injury, except that a psychological mishap or event may constitute an accident where: "(i) It results in resultant physical injury as long as the psychological mishap or event meets the other criteria of this section; "(ii) It is readily recognized and identifiable as having occurred in the workplace; and "(iii) It must be the product of a sudden and extraordinary event;

	"(b) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from a personnel-related action including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination; "(c) Such accident and injury must be the predominant cause as compared to all other causes combined of any consequence for which benefits are claimed under this section; "(d) Where psychological causes or injuries are recognized by this section, such causes or injuries must exist in a real and objective sense; "(e) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho worker's compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistical manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and must be made by a psychologist or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered; and "(f) Clear and convincing evidence that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required. * * * "(3) The provisions of subsection (1) of this section shall apply to accidents and injuries occurring on or after July 1, 1994, and to causes of action for benefits accruing on or after July 1, 1994, notwithstanding that the original worker's compensation claim may have occurred prior to July 1, 1994. * * * "(5) No compensation shall be paid for such injuries described in subsection (2) of this section arising from a personnel-related action including, but not limited to, disciplinary action, changes in duty, job evaluation, or employment termination." IDAHO CODE ANN. §72-451 (2020).

Illinois	**Mental-Mental** "[A]n employee who, like the claimant here, suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm has suffered an accident within the meaning of the Act, though no physical trauma or injury was sustained." *Pathfinder Co. v. Indus. Comm'n*, 343 N.E.2d 913, 917 (Ill. 1976). However, "[r]ecovery for nontraumatically induced mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience; (2) the conditions exist in reality, from an objective standpoint; and (3) the employment conditions, when compared with the nonemployment conditions, were the 'major contributory cause' of the mental disorder." *Runion v. Indus. Comm'n*, 615 N.E.2d 8, 10 (Ill. App. Ct. 1993). **Physical-Mental** "Psychological injuries are compensable under the Act when they are related to and caused by a work-related physical injury. *Matlock v. Industrial Comm'n*, 321 Ill. App. 3d 167, 171, 746 N.E.2d 751, 253 Ill. Dec. 930 (2001). In these so-called 'physical-mental' cases, even a minor physical contact or injury may be sufficient to trigger compensability. *Id.*; see also *Marshall Field & Co. v. Industrial Comm'n*, 305 Ill. 134, 137 N.E. 121 (1922); *Chicago Park District v. Industrial Comm'n*, 263 Ill. App. 3d 835, 842, 635 N.E.2d 770, 200 Ill. Dec. 431 (1994). Moreover, the work-related physical trauma need not be the sole causative factor, but need only be *a* causative factor of the subsequent mental condition. *City of Springfield v. Industrial Comm'n*, 291 Ill. App. 3d 734, 738, 685 N.E.2d 12, 226 Ill. Dec. 198 (1997); see also *Amoco Oil Co. v. Industrial Comm'n*, 218 Ill. App. 3d 737, 747, 578 N.E.2d 1043, 161 Ill. Dec. 397 (1991)." *Boyer v. Ill. Workers' Comp. Comm'n*, 2015 IL App (3d) 130184WC-U, ¶33 (April 27, 2015) (unpublished decision). **Mental-Physical** "Generally, even when an employee suffers from heart disease, if the heart attack which brings on disability or death is work related, the employee may recover workers' compensation. (*Associates Corp. of North America v. Industrial Comm'n* (1988), 167 Ill. App. 3d 988, 522 N.E.2d 102, 118 Ill. Dec. 647.) It is well established that if there is work-related stress, either physical or emotional, that aggravates the

	disease so as to cause the heart attack, then there is an accidental injury or death arising out of and during the course of the employment. (*Associates Corp. v. Industrial Comm'n*, citing *City of Des Plaines v. Industrial Comm'n* (1983), 95 Ill. 2d 83, 88-89, 447 N.E.2d 307, 309, 69 Ill. Dec. 90.) Further, while the claimant must prove that some act of employment was a causative factor, the act need not be the sole, or even the principal, causative factor. (*Northern Illinois Gas Co. v. Industrial Comm'n* (1986), 148 Ill. App. 3d 48, 498 N.E.2d 327, 101 Ill. Dec. 145.) In addition, a preexisting heart condition does not preclude the Commission's finding that the heart attack is compensable. *Sears, Roebuck & Co. v. Industrial Comm'n* (1980), 79 Ill. 2d 59, 402 N.E.2d 231, 37 Ill. Dec. 341." *Wheelan Funeral Home v. Indus. Comm'n*, 567 N.E.2d 662, 665 (Ill. App. Ct. 1991).
Indiana	**Mental-Mental** "Whether the injury is mental or physical, the determinative standard should be the same. The issue is *not* whether the injury resulted from the *ordinary* events of employment. Rather, it is simply whether the injury arose out of and in the course of employment." *Hansen v. Von Duprin, Inc.*, 507 N.E.2d 573, 576 (Ind. 1987). **Physical-Mental** "It is our opinion that when a purely mental condition known as a neurosis is shown by competent evidence to be the direct result of a physical injury sustained by an employee arising out of and in the course of the employment and which neurosis, through functional disturbances of the nervous system, disables the employee from working at his former occupation, he has suffered a compensable injury under the terms of the Indiana Workmen's Compensation Act." *E. I. Du Pont De Nemours & Co. v. Green*, 63 N.E.2d 547, 548 (Ind. Ct. App. 1945). **Mental-Physical** "Indiana courts have held that in order for a heart attack to be considered a work-related injury, it must be shown that: "the employment, or the conditions of the employment, must have been, in some proximate way, accountable for, conducive to, or in aggravation of or the hastening of, the failing activity of the heart.

	"Douglas v. Warner Gear Division of Borg Warner Corp. (1961), 131 Ind. App. 664, 174 N.E.2d 584, 588; *see also Harris v. Rainsoft of Allen County, Inc.* (1981), Ind. App., 416 N.E.2d 1320. In other words, the claimant must demonstrate that the heart attack was precipitated by some unusual stress related to his employment." *Hansen v. Von Duprin, Inc.*, 496 N.E.2d 1348, 1350-1351 (Ind. Ct. App. 1986).
Iowa	**Mental-Mental** "[W]e adopt an objective standard of legal causation and place the burden on the employee to establish that the mental injury was caused by workplace stress of greater magnitude than the day-to-day mental stresses experienced by other workers employed in the same or similar jobs, regardless of their employer. Although evidence of workers with similar jobs employed by a different employer is relevant, evidence of the stresses of other workers employed by the same employer with the same or similar jobs will usually be most persuasive and determinative on the issue." *Dunlavey v. Econ. Fire & Cas. Co.*, 526 N.W.2d 845, 858 (Iowa 1995). **Physical-Mental** "An employee has the burden to prove by a preponderance of the evidence that her injuries arose out of and in the course of employment. *See Quaker Oats Co. v. Ciha*, 552 N.W.2d 143, 150 (Iowa 1996). An injury is considered to arise out of employment 'if there is a causal connection between the employment and the injury.' *St. Luke's Hosp. v. Gray*, 604 N.W.2d 646, 652 (Iowa 2000). In this case, the employer questions whether Schneberger's mental health problems are causally related to the physical trauma she sustained on the job." *Menard, Inc. v. Schneberger*, 2015 Iowa App. LEXIS 101, *2-3 (Iowa Ct. App. February 11, 2015). **Mental-Physical** "One issue is determining which legal causation standard should be applied, the heart attack standard, or the mental injury standard. Legal causation standards were developed in order to distinguish the injuries that are actually caused by the employment from those that simply occur in the course of employment. The employment must be more than merely the setting in which a preexisting condition manifests itself. *Miedema v. Dial Corp*, 551 N.W.2d 309 (Iowa 1996), *Newman v. John Deere Ottumwa Works of Deere & Co.*, 372 N.W.2d 199 (Iowa 1985). The agency previously ruled that a heart attack induced by

	mental stress is governed by the heart attack standard. *Jackson v. The Britwill Company*, No. 976793 (App. August 29, 1995). That precedent is well founded. A heart attack of any variety that is brought about by mental stress is a mental-physical injury that has been compensated in Iowa using the heart attack standard. "There are three classes of mental injury, (1) physical-mental, (2) mental-physical and (3) mental-mental. The normal standard for recovery under workers' compensation is proof by a preponderance of the evidence that the injury arose out of and in the course of employment. Mental injuries were traditionally viewed with skepticism due to the belief that they could be feigned. A legal causation standard of unusual stress developed for mental-mental injuries as a means of determining the legitimacy of claims. "A legal causation standard for unusual stress is not applied to physical-mental or mental-physical injuries because the physical component is considered to be adequate corroboration for the genuineness of the mental injury claim." *Kimrey v. Digital Data Res.*, 2002 IA Wrk. Comp. LEXIS 368, *2-4 (July 22, 2002).
Kansas	**Mental-Mental** "[T]he obligation of an employer under K.S.A. 44-501 *et seq.* does not extend to mental disorders or injuries unless the mental problems stem from an actual physical injury to the claimant." *Followill v. Emerson Elec. Co.*, 674 P.2d 1050, 1053 (Kan. 1984). **Physical-Mental** "There is no distinction between physical and psychological injuries for the purpose of determining whether a workman's disability from an injury is compensable." *Reese v. Gas Eng'g & Constr. Co.*, 532 P.2d 1044, 1046 (Kan. 1975). **Mental-Physical** "[C]ompensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment." KAN. STAT. ANN. §44-501(c)(1) (2020).

Kentucky	**Mental-Mental** "'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 an 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." KY. REV. STAT. ANN. §342.0011(1) (2020). **Physical-Mental** "'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 an 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." KY. REV. STAT. ANN. §342.0011(1) (2020). **Mental-Physical** "[T]he apparent goal of the disputed amendment [to KRS 342.0011(1)] was to prevent compensation for so-called 'mental-mental' claims. The legislature attempted to do so in 1994, and we are persuaded that its goal in 1996 was to do so more effectively by preventing compensation for all mental changes that resulted from mental stress or trauma, including those that resulted from a physical change. There is no indication that it intended to preclude compensation for 'mental-physical' claims as well. Furthermore, had that been the legislature's intent, it would have defined 'injury' as a work-related physically traumatic event, thereby precluding both 'mental-mental' and 'mental-physical' claims. But it did not. In view of this and of the fact that the last sentence of KRS 342.0011(1) refers to psychological and psychiatric changes but

	not to physical changes, we are convinced that by including the term 'stress-related,' the legislature intended to denote another type of mental condition. We conclude, therefore, that the last sentence of KRS 342.0011(1) applies only to mental changes and requires that such changes must directly result from a physically traumatic event in order to be compensable." *McCowan v. Matsushita Appliance Co.*, 95 S.W.3d 30, 32-33 (Ky. 2002).
Louisiana	**Mental-Mental** "(b) Mental injury caused by mental stress. Mental injury or illness resulting from work-related stress shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this Chapter, unless the mental injury was the result of a sudden, unexpected, and extraordinary stress related to the employment and is demonstrated by clear and convincing evidence. * * * "(d) No mental injury or illness shall be compensable under . . . Subparagraph (b) . . . unless the mental injury or illness is diagnosed by a licensed psychiatrist or psychologist and the diagnosis of the condition meets the criteria as established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders presented by the American Psychiatric Association." LA. REV. STAT. ANN. §23:1021(8) (2020). **Physical-Mental** "(c) Mental injury caused by physical injury. A mental injury or illness caused by a physical injury to the employee's body shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this Chapter unless it is demonstrated by clear and convincing evidence. "(d) No mental injury or illness shall be compensable under . . . Subparagraph . . . (c) unless the mental injury or illness is diagnosed by a licensed psychiatrist or psychologist and the diagnosis of the condition meets the criteria as established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders presented by the American Psychiatric Association." LA. REV. STAT. ANN. §23:1021(8) (2020).

	Mental-Physical "Heart-related or perivascular injuries. A heart-related or perivascular injury, illness, or death shall not be considered a personal injury by accident arising out of and in the course of employment and is not compensable pursuant to this Chapter unless it is demonstrated by clear and convincing evidence that: "(i) The physical work stress was extraordinary and unusual in comparison to the stress or exertion experienced by the average employee in that occupation, and "(ii) The physical work stress or exertion, and not some other source of stress or preexisting condition, was the predominant and major cause of the heart-related or perivascular injury, illness, or death." LA. REV. STAT. ANN. §23:1021(8)(e) (2020).
Maine	**Mental-Mental** "Mental injury caused by mental stress. Mental injury resulting from work-related stress does not arise out of and in the course of employment unless: "A. It is demonstrated by clear and convincing evidence that: "(1) The work stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee; and "(2) The work stress, and not some other source of stress, was the predominant cause of the mental injury. "The amount of work stress must be measured by objective standards and actual events rather than any misperceptions by the employee[.] * * * "A mental injury is not considered to arise out of and in the course of employment if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action, taken in good faith by the employer." ME. REV. STAT. ANN. tit. 39-A §201(3-A) (2020).

	Physical-Mental "A long-standing principle in workers' compensation jurisprudence provides that a mental or psychological abnormality which is 'caused by [a physical work] injury, or...a preexisting state of mental abnormality or sub-abnormality [which] was excited and caused to flame up with overpowering vigor by her injury' is compensable. [citations omitted] In this regard, a so-called 'physical-mental' injury was distinguished by the Law Court, in 1979, from a gradual mental injury due to work stresses, with the latter requiring a higher standard of proof as to causation." *Sincyr v. M.S.A.D. #54*, 2009 ME Wrk. Comp. LEXIS 468, *2 (April 08, 2009). **Mental-Physical** A heart attack caused by stress is compensable if it arises out of and in the course of employment. *Stadler v. Nativity Lutheran Church*, 438 A.2d 898 (Me. 1981).
Maryland	**Mental-Mental** "'[A]n injury under the Act may be psychological in nature if the mental state for which recovery is sought is capable of objective determination.' [*Belcher v. T. Rowe Price Found., Inc.*, 621 A.2d 872, 890 (1993); however,] 'a mere showing that a mental injury was related to *general conditions* of employment, or to incidents occurring over an extended period of time, is not enough to entitle the claimant to compensation. The mental injury must be precipitated by an accident, i.e., an unexpected and unforeseen event that occurs suddenly or violently.'" *Davis v. Dynacorp*, 647 A.2d 446, 448 (Md. 1994). See also *Means v. Baltimore County*., 689 A.2d 1238, 1242 (Md. 1997): "PTSD may be compensable as an occupational disease under the Workers' Compensation Act if the claimant can present sufficient evidence to meet the statutory requirements. *See* §9-101(g) (disease must be contracted as the result of and in the course of employment and the disease must cause the employee to become incapacitated); §9-502(d)(1)(i) (disease must be due to nature of an employment in which the hazards of the occupational disease exist)." **Physical-Mental** "'[A]n injury under the Act may be psychological in nature if the mental state for which recovery is sought is capable of objective determination.' [*Belcher v. T. Rowe Price Found., Inc.*,

	621 A.2d 872, 890 (1993); however,] 'a mere showing that a mental injury was related to *general conditions* of employment, or to incidents occurring over an extended period of time, is not enough to entitle the claimant to compensation. The mental injury must be precipitated by an accident, i.e., an unexpected and unforeseen event that occurs suddenly or violently.'" *Davis v. Dynacorp*, 647 A.2d 446, 448 (Md. 1994). **Mental-Physical** A heart attack caused by stress is compensable if it arises out of and in the course of employment. *Huffman v. Koppers Co.*, 616 A.2d 451 (Md. 1992).
Massachusetts	**Mental-Mental** "Personal injuries shall include mental or emotional disabilities only where the predominant contributing cause of such disability is an event or series of events occurring within any employment. If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment. No mental or emotional disability arising principally out of a bona fide, personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm shall be deemed to be a personal injury within the meaning of this chapter." MASS. GEN. LAWS ANN. ch. 152, §1(7A) (2020). **Physical-Mental** "[T]he third sentence of [MASS. GEN. LAWS ANN. ch. 152, §1(7A) setting out a heightened standard of causation for claims for psychological disabilities] applies only to those mental or emotional disabilities that are not consequential to work-related physical injury." *Cornetta's Case*, 860 N.E.2d 687, 695 (Mass. App. Ct. 2007). **Mental-Physical** A heart attack caused by stress is compensable if it arises out of and in the course of employment. *Larocque's Case*, 582 N.E.2d 959 (Mass. App. Ct. 1991).

Michigan	**Mental-Mental** "'Personal injury' includes a disease or disability that is due to causes and conditions that are characteristic of and peculiar to the business of the employer and that arises out of and in the course of the employment. An ordinary disease of life to which the public is generally exposed outside of the employment is not compensable. A personal injury under this act is compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury. Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, and degenerative arthritis shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality." MICH. COMP. LAWS SERV. §418.401(2)(b) (2020). **Physical-Mental** "'Personal injury' includes a disease or disability that is due to causes and conditions that are characteristic of and peculiar to the business of the employer and that arises out of and in the course of the employment. An ordinary disease of life to which the public is generally exposed outside of the employment is not compensable. A personal injury under this act is compensable if work causes, contributes to, or aggravates pathology in a manner so as to create a pathology that is medically distinguishable from any pathology that existed prior to the injury. Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions, and degenerative arthritis shall be compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities shall be compensable when arising out of actual events of employment, not unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality." MICH. COMP. LAWS SERV. §418.401(2)(b) (2020). **Mental-Physical** "Mental disabilities and conditions of the aging process, including but not limited to heart and cardiovascular conditions and degenerative arthritis, are compensable if contributed to or aggravated or accelerated by the employment in a significant manner. Mental disabilities are compensable if arising out of actual events of employment, not

	unfounded perceptions thereof, and if the employee's perception of the actual events is reasonably grounded in fact or reality." MICH. COMP. LAWS SERV. §418.301(2) (2020).
Minnesota	**Mental-Mental** "Subd. 15. *Occupational disease.* "(a) 'Occupational disease' means a mental impairment as defined in paragraph (d) or physical disease arising out of and in the course of employment peculiar to the occupation in which the employee is engaged and due to causes in excess of the hazards ordinary of employment and shall include undulant fever. Physical stimulus resulting in mental injury and mental stimulus resulting in physical injury shall remain compensable. Mental impairment is not considered a disease if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. Ordinary diseases of life to which the general public is equally exposed outside of employment are not compensable, except where the diseases follow as an incident of an occupational disease, or where the exposure peculiar to the occupation makes the disease an occupational disease hazard. A disease arises out of the employment only if there be a direct causal connection between the conditions under which the work is performed and if the occupational disease follows as a natural incident of the work as a result of the exposure occasioned by the nature of the employment. An employer is not liable for compensation for any occupational disease which cannot be traced to the employment as a direct and proximate cause and is not recognized as a hazard characteristic of and peculiar to the trade, occupation, process, or employment or which results from a hazard to which the worker would have been equally exposed outside of the employment. * * * "(d) For the purposes of this chapter [for injuries occurring on or after October 1, 2013], 'mental impairment' means a diagnosis of post-traumatic stress disorder by a licensed psychiatrist or psychologist. For the purposes of this chapter, 'post-traumatic stress disorder' means the condition as described in the most recently published edition of the Diagnostic and Statistical Manual of Mental Disorders by the American Psychiatric Association.

	* * * "Subd. 16. *Personal injury.* — 'Personal injury' means any mental impairment as defined in subdivision 15, paragraph (d), or physical injury arising out of and in the course of employment and includes personal injury caused by occupational disease; but does not cover an employee except while engaged in, on, or about the premises where the employee's services require the employee's presence as a part of that service at the time of the injury and during the hours of that service. Where the employer regularly furnished transportation to employees to and from the place of employment, those employees are subject to this chapter while being so transported. Physical stimulus resulting in mental injury and mental stimulus resulting in physical injury shall remain compensable. Mental impairment is not considered a personal injury if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, promotion, termination, retirement, or similar action taken in good faith by the employer. Personal injury does not include an injury caused by the act of a third person or fellow employee intended to injure the employee because of personal reasons, and not directed against the employee as an employee, or because of the employment. An injury or disease resulting from a vaccine in response to a declaration by the Secretary of the United States Department of Health and Human Services under the Public Health Service Act to address an actual or potential health risk related to the employee's employment is an injury or disease arising out of and in the course of employment." MINN. STAT. ANN. §176.011 (2020). **Physical-Mental** "Cases in which work-related physical injury or trauma causes, aggravates, accelerates or precipitates mental injury are compensable. [*Hartman v. Cold Spring Granite Co.*, 18 W.C.D. 206, 67 N.W.2d 656 (Minn. 1954).] It is not necessary the physical injury be the sole cause of the mental injury; it is sufficient the work-related physical injury be a substantial contributing factor to producing the mental injury. [*Miels v. NW Bell Tel. Co.*, 37 W.C.D. 164, 355 N.W.2d 710 (Minn. 1984).] Minnesota courts have not required a physical injury be of a specific degree or severity when a physical injury results in a mental injury. The employee, to prove a compensable mental injury, must merely show a physical stimulus/injury caused the resulting mental injury. [*Mitchell v. White Castle Sys. Inc.*, 32 W.C.D. 164, 355 N.W.2d 710 (1984).] However, there must be 'a clear medical opinion connecting the psychological condition to the injury.' [*Westling v. Untiedt & Vegetable Farm*, slip op. (W.C.C.A. Apr. 29, 2004). See also, *Dotolo v.*

	FMC Corporation, 375 N.W.2d 25 (1985), *Steinbach v. B.E. & K Construction Co.*, WCCA (1991), *Nelson v. Hobart Corporation*, WCCA (1992), *Rindahl v. Brighton Wood Farms, Inc.*, 382 N.W.2d 855 (1986), *Dahlman v. Deer River Community Clinic*, 47 W.C.D. 183 (1992), *Castner v. MCI Telecommunications Corp.*, 415 N.W.2d 873 (1988), *Goodwin v. Tek Mechanical*, WCCA 7-29-93, *Kvenvold v. Freeborn County Sheriff's Dep't.*, WCCA 9-15-93, *Schmidt v. Healtheast/Bethesda Hospital*, WCCA 5-6-94, *Poppitz v. Minnegasco*, slip op. (W.C.C.A. Nov. 30, 1998), *Underhill v. Minn. Dep't of Veteran's Affairs*, slip op. (W.C.C.A. May 5, 1997), *Cartagena Quijada v. Heikes Farm, Inc.*, slip op., No. WC10-5222 (W.C.C.A. May 4, 2011), *Polecheck v. State*, slip op., No. WC09-157 (W.C.C.A. Oct. 5, 2009), *Dunn v. U.S., West*, slip op. (W.C.C.A. Mar. 21, 1995) *Harrison v. Special School District No. 1*, (W.C.C.A. 1993).]" Minnesota Department of Labor and Industry, "Workers' compensation: Post-traumatic stress disorder and mental injuries," https://www.dli.mn.gov/sites/default/files/pdf/infosheet_ptsd_and_mental_injuries.pdf (last visited October 5, 2020). **Mental-Physical** "Cases in which work-related mental stress or stimulus produces identifiable physical ailments may be compensable workers' compensation injuries. The work-related stress need not be the only cause of the physical injury; it is sufficient for the stress to be a substantial contributing factor. [*Aker v. Minnesota*, 32 W.C.D. 50, 282 N.W.2d 533 (Minn. 1979); *Wever v. Farmhand, Inc.*, 243 N.W.2d 37 (Minn. 1976).] A two-step test is necessary to prove causation for a stress-induced injury; the employee must prove elements of both legal and medical causation to prevail with this type of claim. [*Courtney v. City of Orono*, 43 W.C.D. 571, 463 N.W.2d 514 (Minn. 1990). *Romens v. Ballet of Dolls, Inc.*, WCCA 1-19-17.] Medical causation requires proof that the mental stress resulted in the employee's physical condition. Legal causation requires the employee to show that the mental stress was extreme or at least 'beyond the ordinary day-to-day stress to which all employees are exposed.' [*Egeland v. City of Minneapolis*, 36 W.C.D. 465, 344 N.W.2d 597 (Minn. 1984).] The test of 'beyond day-to-day stress' includes situations where stress has accumulated over a long period of time. The mental stress must relate to the nature, conditions and obligations or incidents of the employment relationship. [*Solem v. College of St. Scholastica*, slip op. (W.C.C.A. June 27, 2000).] "Also, to be compensable, the physical ailments caused by the mental stress must be susceptible to medical treatment that is separate and

	independent of treatment for the employee's mental condition. If the physical ailments are 'characterized not as independently treatable physical injuries but as physical symptoms or manifestations of employee's anxiety or personality disorder and amenable to treatment only as an inseparable aspect of employee's psychiatric condition, the claim is not compensable." Minnesota Department of Labor and Industry, "Workers' compensation: Post-traumatic stress disorder and mental injuries," https://www.dli.mn.gov/sites/default/files/pdf/infosheet_ptsd_and_mental_injuries.pdf (last visited October 5, 2020).
Mississippi	**Mental-Mental** "[W]hen a claimant seeks compensation benefits for disability resulting from a mental or psychological injury, the claimant has the burden of proving by clear and convincing evidence the connection between the employment and the injury. Furthermore, to be compensable, a mental injury, unaccompanied by physical trauma, must have been caused by something more than the ordinary incidents of employment." *Fought v. Stuart C. Irby Co.*, 523 So.2d 314, 317 (Miss. 1988) (internal citations omitted). **Physical-Mental** "While *Powers* [*v. Armstrong Tire & Rubber Co.*, 173 So.2d 670 (1965)] held that the causal connection between an industrial accident and a mental injury must be proven by 'clear evidence,' a review of this state's precedent shows that 'clear evidence' and 'clear and convincing evidence' are used synonymously, and apply to a claimant's burden of proof under either a mental/mental or physical/mental case." *Hosp. Housekeeping Sys. v. Townsend*, 993 So.2d 418, 424 (Miss. Ct. App. 2008). **Mental-Physical** "[U]nder the rule in Mississippi in heart cases, the injury must be shown to have arisen within the time and space boundaries of the employment and within the course of activity whose purpose is related to the employment." *Mississippi Research & Dev. Ctr. v. Dependents of Shults*, 287 So.2d 273, 276 (Miss. 1973).

Missouri	**Mental-Mental** "8. Mental injury resulting from work-related stress does not arise out of and in the course of the employment, unless it is demonstrated that the stress is work related and was extraordinary and unusual. The amount of work stress shall be measured by objective standards and actual events. "9. A mental injury is not considered to arise out of and in the course of the employment if it resulted from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action taken in good faith by the employer." MO. REV. STAT. §287.120 (2020). **Physical-Mental** "We conclude that the Commission erred in applying Section 287.120.8 to determine that Claimant did not sustain an accidental injury arising out of and in the course of her employment. The plain language of Section 287.120.8 indicates that it applies only to claims of mental injury resulting from work-related stress. Claimant's claim of mental injury was not based upon work-related stress, i.e., based upon work conditions over a period of time. [citations omitted] Rather, Claimant's claim of mental injury was based upon the physical assault that occurred on December 30, 2000. Claimant's claim is for mental injury resulting from a traumatic incident, one which included the physical contact or impact of Patient grabbing Claimant's breast, not from work-related stress. Therefore, by its terms, Section 287.120.8 does not apply to Claimant's claim, and she was not required to prove that the stress was extraordinary and unusual. [citation omitted] Thus, the compensability of Claimant's claim should be determined under Section 287.120.1. . . . "The Final Award of the Commission is reversed and remanded with instructions to apply Section 287.120.1 to determine whether Claimant sustained an accidental injury arising out of and in the course of her employment and, if necessary, to address the remaining issues for determination." *Jones v. Washington Univ.*, 199 S.W.3d 793, 796-97 (Mo. Ct. App. 2006). **Mental-Physical** "A cardiovascular, pulmonary, respiratory, or other disease, or cerebrovascular accident or myocardial infarction suffered by a worker is an injury only if the accident is the prevailing factor in causing the

	resulting medical condition." MO. REV. STAT. §287.020(3)(4) (2020). Also, "[t]he word 'accident' as used in this chapter shall mean an unexpected traumatic event or unusual strain identifiable by time and place of occurrence and producing at the time objective symptoms of an injury caused by a specific event during a single work shift. An injury is not compensable because work was a triggering or precipitating factor." MO. REV. STAT. §287.020(2) (2020).
Montana	**Mental-Mental** "'Injury' or 'injured' does not mean a physical or mental condition arising from: "(a) emotional or mental stress; or "(b) a nonphysical stimulus or activity." MONT. CODE ANN. §39-71-119(3) (2019). In addition, "(a) 'Occupational disease' means harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift. "(b) The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity." MONT. CODE ANN. §39-71-116(23) (2019). Finally, "[i]t is the intent of the legislature that: "(a) a stress claim, often referred to as a 'mental-mental claim' or a 'mental-physical claim', is not compensable under Montana's workers' compensation and occupational disease laws. The legislature recognizes that these claims are difficult to objectively verify and that the claims have a potential to place an economic burden on the workers' compensation and occupational disease system. The legislature also recognizes that there are other states that do not provide compensation for various categories of stress claims and that stress claims have presented economic problems for certain other jurisdictions. In

	addition, not all injuries are compensable under the present system, and it is within the legislature's authority to define the limits of the workers' compensation and occupational disease system." MONT. CODE ANN. §39-71-105(6) (2019). **Physical-Mental** In order to be compensable, a mental injury must "directly result[] from those physical injuries [defined in MONT. CODE ANN. §39-71-119(1)(a).]" *Burgan v. Liberty Northwest Ins. Co.*, 2003 MT Wrk. Comp. LEXIS 61 (August 27, 2003). **Mental-Physical** "'Injury' or 'injured' does not mean a physical or mental condition arising from: "(a) emotional or mental stress; or "(b) a nonphysical stimulus or activity." MONT. CODE ANN. §39-71-119(3) (2019). In addition, "(a) 'Occupational disease' means harm, damage, or death arising out of or contracted in the course and scope of employment caused by events occurring on more than a single day or work shift. "(b) The term does not include a physical or mental condition arising from emotional or mental stress or from a nonphysical stimulus or activity." MONT. CODE ANN. §39-71-116(23) (2019). Finally, "[i]t is the intent of the legislature that: "(a) a stress claim, often referred to as a 'mental-mental claim' or a 'mental-physical claim', is not compensable under Montana's workers' compensation and occupational disease laws. The legislature recognizes that these claims are difficult to objectively verify and that the claims have a potential to place an economic burden on the workers' compensation and

	occupational disease system. The legislature also recognizes that there are other states that do not provide compensation for various categories of stress claims and that stress claims have presented economic problems for certain other jurisdictions. In addition, not all injuries are compensable under the present system, and it is within the legislature's authority to define the limits of the workers' compensation and occupational disease system." MONT. CODE ANN. §39-71-105(6) (2019).
Nebraska	**Mental-Mental** "A claim for a psychological or mental condition requires that the mental condition must be related to or caused by the physical injury. See *Zach v. Nebraska State Patrol*, 273 Neb. 1, 727 N.W.2d 206 (2007). An injury caused by a mental stimulus does not meet the requirement that a compensable accidental injury involve violence to the physical structure of the body. *Id.*" *Hynes v. Good Samaritan Hosp.*, 869 N.W.2d 78, 88 (Neb. 2015). **Physical-Mental** "Compensation may be recovered for emotional or psychological conditions which are proximately caused by a work-related injury and result in disability." *Van Winkle v. Elec. Hose & Rubber Co.*, 332 N.W.2d 209, 210 (Neb. 1983). **Mental-Physical** "Injury and personal injuries mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom and personal injuries described in section 48-101.01. The terms include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in such employment. The terms include an aggravation of a preexisting occupational disease, the employer being liable only for the degree of aggravation of the preexisting occupational disease. The terms do not include disability or death due to natural causes but occurring while the employee is at work and do not include an injury, disability, or death that is the result of a natural progression of any preexisting condition." NEB. REV. STAT. ANN. §48-151(4) (2020).

Nevada	**Mental-Mental** "1. Except as otherwise provided in this section, an injury or disease sustained by an employee that is caused by stress is compensable pursuant to the provisions of chapters 616A to 616D, inclusive, or chapter 617 of NRS if it arose out of and in the course of his or her employment. "2. Any ailment or disorder caused by any gradual mental stimulus, and any death or disability ensuing therefrom, shall be deemed not to be an injury or disease arising out of and in the course of employment. "3. Except as otherwise provided by subsections 4 and 5 [regarding first responders and state employees], an injury or disease caused by stress shall be deemed to arise out of and in the course of employment only if the employee proves by clear and convincing medical or psychiatric evidence that: "(a) The employee has a mental injury caused by extreme stress in time of danger; "(b) The primary cause of the injury was an event that arose out of and during the course of his or her employment; and "(c) The stress was not caused by his or her layoff, the termination of his or her employment or any disciplinary action taken against him or her." NEV. REV. STAT. ANN. §616C.180 (2020). **Physical-Mental** Physical-mental injuries are compensable if they are a "direct consequence of physical injuries sustained in the work place." *Roberts v. State Indus. Ins. Sys.*, 956 P.2d 790, 792 (Nev. 1998). **Mental-Physical** "2. For the purposes of chapters 616A to 616D, inclusive, of NRS: "(a) Coronary thrombosis, coronary occlusion, or any other ailment or disorder of the heart, and any death or disability ensuing therefrom, shall be deemed not to be an injury by accident sustained by an employee arising out of and in the course of his or her employment." NEV. REV. STAT. ANN. §616A.265 (2020).

New Hampshire	**Mental-Mental** "'Injury' or 'personal injury' as used in and covered by this chapter means accidental injury or death arising out of and in the course of employment, or any occupational disease or resulting death arising out of and in the course of employment, including disability due to radioactive properties or substances or exposure to ionizing radiation. 'Injury' or 'personal injury' shall not include diseases or death resulting from stress without physical manifestation. . . . 'Injury' or 'personal injury' shall not include a mental injury if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer." N.H. REV. STAT. ANN. §281-A:2(XI) (2020). **Physical-Mental** "'Injury' or 'personal injury' as used in and covered by this chapter means accidental injury or death arising out of and in the course of employment, or any occupational disease or resulting death arising out of and in the course of employment, including disability due to radioactive properties or substances or exposure to ionizing radiation. 'Injury' or 'personal injury' shall not include diseases or death resulting from stress without physical manifestation. . . . 'Injury' or 'personal injury' shall not include a mental injury if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or any similar action, taken in good faith by an employer." N.H. REV. STAT. ANN. §281-A:2(XI) (2020). **Mental-Physical** "[P]sychological stress and overexertion *can* cause a work-related heart attack. Once the causal relationship is accepted as possible the claimant still must prove that 'the work-related stresses in the particular case at issue were a causal factor in the heart attack which ensued.' In each case, analysis should therefore focus on whether there is sufficient proof of causal work-related stress. The claimants had to show by a preponderance of evidence that the actual work-related stress precipitated decedent's heart attack. In other words, the claimants had to prove both medical and legal causation. "The legal causation test defines the degree of exertion that is necessary to make the injury work-connected. . . . Thus, heart attacks that actually result from work-related stress are distinguished from those that occur at work merely as a result of natural physiological process. If there is no prior weakness or disease of the heart, *any* exertion connected with the

	heart attack as a matter of medical fact is adequate to satisfy the legal test of causation so as to make the injury or death compensable. "In addition to legal causation, that is, that the stress was work-connected, the claimants must also prove as a fact medical causation. In other words, the claimant must medically prove that the work stress or exertion probably caused or contributed to decedent's heart attack." *N.H. Supply Co. v. Steinberg*, 400 A.2d 1163, 1168-69 (N.H. 1979) (internal citations omitted).
New Jersey	**Mental-Mental** "[F]or a worker's mental condition to be compensable, the working conditions must be stressful, viewed objectively, and the believable evidence must support a finding that the worker reacted to them as stressful. In addition, for a present-day claimant to succeed, the objectively stressful working conditions must be 'peculiar' to the particular work place, and there must be objective evidence supporting a medical opinion of the resulting psychiatric disability, in addition to 'the bare statement of the patient.'" *Goyden v. State, Judiciary, Superior Court of N.J.*, 607 A.2d 651, 655 (N.J. Super. Ct. App. Div. 1991). **Physical-Mental** "There is no doubt that psychiatric illness secondary to injuries is compensable under New Jersey Worker's Compensation Law providing that the essential elements of the psychiatric impairment are established by competent medical criteria." *Borkowski v. Pathmark Stores, Inc.*, 2003 NJ Wrk. Comp. LEXIS 6, *8 (January 6, 2003). **Mental-Physical** "In any claim for compensation for injury or death from cardiovascular or cerebral vascular causes, the claimant shall prove by a preponderance of the credible evidence that the injury or death was produced by the work effort or strain involving a substantial condition, event or happening in excess of the wear and tear of the claimant's daily living and in reasonable medical probability caused in a material degree the cardiovascular or cerebral vascular injury or death resulting therefrom.

	"Material degree means an appreciable degree or a degree substantially greater than de minimis." N.J. STAT. ANN. §34:15-7.2 (2020).
New Mexico	**Mental-Mental** "As used in the Workers' Compensation Act [52-1-1 NMSA 1978]: *** * *** "B. 'primary mental impairment' means a mental illness arising from an accidental injury arising out of and in the course of employment when the accidental injury involves no physical injury and consists of a psychologically traumatic event that is generally outside of a worker's usual experience and would evoke significant symptoms of distress in a worker in similar circumstances, but is not an event in connection with disciplinary, corrective or job evaluation action or cessation of the worker's employment[.]" N.M. STAT. ANN. §52-1-24 (2020). **Physical-Mental** "As used in the Workers' Compensation Act [52-1-1 NMSA 1978]: * * * "C. 'secondary mental impairment' means a mental illness resulting from a physical impairment caused by an accidental injury arising out of and in the course of employment." N.M. STAT. ANN. §52-1-24 (2020). **Mental-Physical** "[W]here an employer denies a disability is a result of an accident, the claimant 'must establish that causal connection as a probability by expert testimony of a health care provider.' In other words, Herman had to show by medical evidence that decedent's death and heart attack was a medically probable result of the work-related stress." *Herman v. Miners' Hosp.*, 807 P.2d 734, 736 (N.M. 1991).

New York	**Mental-Mental** "It is well settled that mental injuries caused by work-related stress are compensable if the claimant can establish that the stress that caused the injury was 'greater than that which other similarly situated workers experienced in the normal work environment.'" *Matter of Lozowski v. The Wiz*, 134 A.D.3d 1177, 1178 (N.Y. App. Div. 2015). However, "'[i]njury' and 'personal injury' mean only accidental injuries arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom. The terms 'injury' and 'personal injury' shall not include an injury which is solely mental and is based on workrelated stress if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer." N.Y. WORKERS' COMP. LAW §2(7) (2020). **Physical-Mental** "Since there is no statutory definition of [accidental injury] we turn to the relevant decisions. These may be divided into three categories: (1) psychic trauma which produces physical injury, (2) physical impact which produces psychological injury, and (3) psychic trauma which produces psychological injury. [citations omitted] As to the first class our court has consistently recognized the principle that an injury caused by emotional stress or shock may be accidental within the purview of the compensation law. [citations omitted] Cases falling into the second category have uniformly sustained awards to those incurring nervous or psychological disorders as a result of physical impact." *Wolfe v. Sibley, Lindsay & Curr Co.*, 330 N.E.2d 603, 605 (N.Y. 1975). **Mental-Physical** "Since there is no statutory definition of [accidental injury] we turn to the relevant decisions. These may be divided into three categories: (1) psychic trauma which produces physical injury, (2) physical impact which produces psychological injury, and (3) psychic trauma which produces psychological injury. [citations omitted] As to the first class our court has consistently recognized the principle that an injury caused by emotional stress or shock may be accidental within the purview of the compensation law. [citations omitted] Cases falling into the second category have uniformly sustained awards to those incurring nervous or psychological disorders as a result of physical impact. [citations

	omitted] As to those cases in the third category the decisions are not as clear." *Wolfe v. Sibley, Lindsay & Curr Co.*, 330 N.E.2d 603, 605 (N.Y. 1975).
North Carolina	**Mental-Mental** "An occupational disease is compensable under N.C. Gen. Stat. §97-53(13) where it is 'characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged; [and] not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation.' *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citation omitted). In addition, 'there must be a causal connection between the disease and the [claimant's] employment.' *Id.* (citation and internal quotation marks omitted). 'In cases where the employment exposed the worker to a greater risk of contracting the disease than the general public, the first two elements are satisfied.' *Chambers v. Transit Mgmt.*, 360 N.C. 609, 612, 636 S.E.2d 553, 555 (2006) (internal citations and quotation marks omitted). "It is well established that '[u]nder appropriate circumstances, work-related depression or other mental illness may be a compensable occupational disease' pursuant to N.C. Gen. Stat. § 97-53. *Pitillo v. N.C. Dep't of Envtl. Health & Natural Res.*, 151 N.C. App. 641, 648, 566 S.E.2d 807, 813 (2002) (citation omitted); *accord Clark v. City of Asheville*, 161 N.C. App. 717, 721, 589 S.E.2d 384, 386 (2003). In such cases, 'the claimant must prove that the mental illness or injury was due to stresses or conditions different from those borne by the general public.' *Pitillo*, 151 N.C. App. at 648, 566 S.E.2d at 813 (citation omitted)." *Day v. Travelers Ins. Co.*, 845 S.E.2d 208 (N.C. Ct. App. 2020) (unpublished decision). **Physical-Mental** "This case is properly characterized as a 'physical/mental case' -- i.e., physical insult resulting in mental injury -- as opposed to the 'mental/mental' or 'mental/physical' scenario that requires a more difficult evaluation of whether the mental insult is 'objectively' causative, 'in light of the common sense viewpoint of the average man[.' T]his is not a case of a minor work-related injury that 'triggers' or 'precipitates' an extreme and unpredictable reaction in the claimant far out of proportion to what one might expect from 'the average reasonable man' or normal run of employees. . ., so that the cause is

	seen as arising out of the employee and not the employment. While plaintiff's physical problems were more persistent and painful than her orthopaedists would have anticipated, and were worse because of her mental vulnerability as Dr. Comer testified, they were significant enough to justify substantial impairment ratings by her treating physician. The employee had an established pattern of difficulty with mental stressors, and it would have been surprising if the situational depression that most people experience due to the pain and hardship of a significant injury had not affected her more markedly than normal. Our Courts long ago established that when the physical injury is substantial enough to cause disability, pain and the likelihood of situational depression in the average or normal employee, the 'thin skull' principle conventionally applied in 'physical/physical' workers' compensation cases will be applicable." *Ring v. Hillcrest Foods d/b/a Waffle House*, 1997 NC Wrk. Comp. LEXIS 5393, *3-5 (February 10, 1997). **Mental-Physical** "Ordinarily a death from heart disease is not an injury by accident arising out of and in the course of the employment, nor an occupational disease, so as to be compensable under our statute." *Lewter v. Abercrombie Enters., Inc.*, 82 S.E.2d 410, 414 (N.C. 1954).
North Dakota	**Mental-Mental** "'Compensable injury' means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings. * * * "b. The term does not include: "(10) A mental injury arising from mental stimulus." N.D. CENT. CODE §65-01-02(11) (2019). **Physical-Mental** "'Compensable injury' means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings. "a. The term includes:

	* * * "(6) A mental or psychological condition caused by a physical injury, but only when the physical injury is determined with reasonable medical certainty to be at least fifty percent of the cause of the condition as compared with all other contributing causes combined, and only when the condition did not pre-exist the work injury." N.D. CENT. CODE §65-01-02(11) (2019). **Mental-Physical** "'Compensable injury' means an injury by accident arising out of and in the course of hazardous employment which must be established by medical evidence supported by objective medical findings. "a. The term includes: * * * "(3) Injuries due to heart attack or other heart-related disease, stroke, and physical injury caused by mental stimulus, but only when caused by the employee's employment with reasonable medical certainty, and only when it is determined with reasonable medical certainty that unusual stress is at least fifty percent of the cause of the injury or disease as compared with all other contributing causes combined. Unusual stress means stress greater than the highest level of stress normally experienced or anticipated in that position or line of work." N.D. CENT. CODE §65-01-02(11) (2019).
Ohio	**Mental-Mental** "'Injury' includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. 'Injury' does not include: "(1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant's

	psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate." OHIO REV. CODE ANN. §4123.01(C) (2020). **Physical-Mental** "*Armstrong [v. John R. Jurgensen Co.*, 990 N.E.2d 568 (Ohio 2013)] holds that there must be a causal connection between the physical and psychological injuries in order to obtain workers' compensation for the psychological injury, but it does not discuss or in any way suggest that the psychological injury must occur contemporaneously with or within a certain period of time of the physical injury to be compensable. Of course, the passage of time is one factor to be considered in factually determining whether a causal connection has been established, and may make it more difficult for the claimant to establish such a connection. But *Armstrong* does not stand for the proposition that the absence of a psychological injury at the time of the physical injury, or sooner thereafter, is determinative." *Coleman v. KBO, Inc.*, 2018 Ohio App. LEXIS 799 (Ohio Ct. App. March 2, 2018). **Mental-Physical** "Because stress is experienced by every person in everyday life, it is necessary to define what kind of mental or emotional stress is legally sufficient to give rise to a compensable injury. Much stress occurring in the course of, and arising out of, employment, is simply a result of the demands of functioning in our society, and participating in the work force, in and of itself, is a stressful activity. In order for a stress-related injury to be compensable, therefore, it must be the result of mental or emotional stress that is, in some respect, unusual. Over twenty years ago, the New York Court of Appeals developed a test that has since effectively been applied by the courts of a number of jurisdictions to determine whether the stress alleged to be the cause of a claimant's injury is legally sufficient to merit an award of workers' compensation. We, too, adopt this test and hold that in order for a stress-related injury to be compensable, the claimant must show that the injury resulted from 'greater emotional strain or tension than that to which all workers are occasionally subjected * * *.' "Once a claimant has met this first test, he still must establish that the stress to which he (or claimant's decedent) was subjected in his employment was, in fact, the medical cause of his injury. In this regard, the claimant must show a substantial causal relationship between the

	stress and the injury for which compensation is sought. The claimant therefore must 'show by a preponderance of the evidence, medical or otherwise, * * * that a direct or proximate causal relationship existed between * * * [the stress] and his harm or disability,' or, when death benefits are sought, that the claimant's decedent's death was 'accelerated by a substantial period of time as a direct and proximate result of the * * * [stress].'" *Ryan v. Connor*, 503 N.E.2d 1379, 1382 (Ohio 1986) (internal citations omitted).
Oklahoma	**Mental-Mental** "1. A mental injury or illness is not a compensable injury unless caused by a physical injury to the employee, and shall not be considered an injury arising out of and in the course and scope of employment or compensable unless demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence. "2. No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders." OKLA. STAT. tit. 85A, §13(A) (2020). **Physical-Mental** "1. A mental injury or illness is not a compensable injury unless caused by a physical injury to the employee, and shall not be considered an injury arising out of and in the course and scope of employment or compensable unless demonstrated by a preponderance of the evidence; provided, however, that this physical injury limitation shall not apply to any victim of a crime of violence. "2. No mental injury or illness under this section shall be compensable unless it is also diagnosed by a licensed psychiatrist or psychologist and unless the diagnosis of the condition meets the criteria established in the most current issue of the Diagnostic and Statistical Manual of Mental Disorders." OKLA. STAT. tit. 85A, §13(A) (2020).

	Mental-Physical "A. A cardiovascular, coronary, pulmonary, respiratory, or cerebrovascular accident or myocardial infarction causing injury, illness, or death is a compensable injury only if, in relation to other factors contributing to the physical harm, the course and scope of employment was the major cause. "B. An injury or disease included in subsection A of this section shall not be deemed to be a compensable injury unless it is shown that the exertion of the work necessary to precipitate the disability or death was extraordinary and unusual in comparison to the employee's usual work in the course of the employee's regular employment, or that some unusual and unpredicted incident occurred which is found to have been the major cause of the physical harm." OKLA. STAT. tit. 85A, §14 (2020).
Oregon	**Mental-Mental** "(1) "(a) As used in this chapter, 'occupational disease' means any disease or infection arising out of and in the course of employment caused by substances or activities to which an employee is not ordinarily subjected or exposed other than during a period of regular actual employment therein, and which requires medical services or results in disability or death, including: * * * "(B) Any mental disorder, whether sudden or gradual in onset, which requires medical services or results in physical or mental disability or death. "(C) Any series of traumatic events or occurrences which requires medical services or results in physical disability or death. "(b) As used in this chapter, 'mental disorder' includes any physical disorder caused or worsened by mental stress. "(2) "(a) The worker must prove that employment conditions were the major contributing cause of the disease.

	* * * "(c) Occupational diseases shall be subject to all of the same limitations and exclusions as accidental injuries under ORS 656.005(7). "(d) Existence of an occupational disease or worsening of a preexisting disease must be established by medical evidence supported by objective findings. * * * "(3) Notwithstanding any other provision of this chapter, a mental disorder is not compensable under this chapter unless the worker establishes all of the following: "(a) The employment conditions producing the mental disorder exist in a real and objective sense. "(b) The employment conditions producing the mental disorder are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment or employment decisions attendant upon ordinary business or financial cycles. "(c) There is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community. "(d) There is clear and convincing evidence that the mental disorder arose out of and in the course of employment." OR. REV. STAT. §656.802 (2020). **Physical-Mental** "If . . . ORS 656.802 (relating to occupational diseases in the form of mental disorders) applies, [] the requirements of that provision must be met, whether the cause of the mental disorder was physical, non-physical, or both." *DiBrito v. SAIF Corp. (In re DiBrito)*, 875 P.2d 459, 462 (Or. 1994).

	Mental-Physical "[A] heart attack, whether it is caused by physical exertion, by job stress, or by both, is an accidental injury within the meaning of ORS 656.005(7). A heart attack is not a 'mental disorder' within the meaning of ORS 656.802. Accordingly, the requirements relating to mental disorders established in ORS 656.802(3) do not apply to a claim for compensation for a heart attack." *Mathel v. Josephine County (In re Mathel)*, 875 P.2d 455, 459 (Or. 1994).
Pennsylvania	**Mental-Mental** "[W]hile establishing a causal nexus between an injury and the work place is ordinarily sufficient to establish one's entitlement to benefits under the Act, there exists a heightened burden of proof for individuals who wish to recover benefits for purely psychological injuries. In the so called 'mental/mental' case, a claimant has the burden of proving not only that he or she suffered a work-related injury, but also that the mental injury was the result of *abnormal* working conditions and not simply a subjective reaction to normal events in the work place." *Grimes v. Workmen's Comp. Appeal Bd. (Proctor & Gamble)*, 679 A.2d 1356, 1360 (Pa. Commw. Ct. 1996) (internal citations omitted). **Physical-Mental** "As in all cases where a claimant seeks [workers' compensation] benefits via claim petition, Claimant has the initial 'burden of proving all the elements necessary to support an award' of benefits. Where, as here, a claimant asserts a claim under the physical/mental standard, the claimant must establish, in relevant part, that the mental injury resulted from a triggering physical stimulus and arose during the course of employment. 'A claimant need not prove that he or she suffered a physical disability that caused a mental disability for which he or she may receive benefits. Nor must a claimant show that the physical injury continues during the life of the [mental] disability.' However, . . . our precedent has interpreted the term 'physical stimulus' as a physical injury that requires medical treatment, even if that physical injury is not disabling under the Law. Additionally, the mental injury must be related to the physical stimulus." *Murphy v. Workers' Comp. Appeal Bd. (Ace Check Cashing, Inc.)*, 110 A.3d 227, 234 (Pa. Commw. Ct. 2015) (internal citations omitted).

	Furthermore, "[i]f the casual [sic] relationship between the claimant's work and the injury is not clear, the claimant must provide unequivocal medical testimony to establish the necessary relationship." *Bartholetti v. Workers' Comp. Appeal Bd. (Sch. Dist.)*, 927 A.2d 743, 746 (Pa. Commw. Ct. 2007). **Mental-Physical** "In 1972, the General Assembly enacted substantial changes in the Act which shifted the focus from injuries *by accidents* in the course of employment to injuries *arising from and related to* the course of employment. [citation omitted] With these amendments, the legislature clearly manifested its intention to expand workmen's compensation coverage to include stress heart attack victims. [citation omitted] * * * "A straight forward reading of the Act demonstrates there are only *two* requirements for compensability -- (1) that the injury arose in the course of employment and (2) that the injury was related to that employment. "The operative language in section 301(a), 77 P.S. § 431 is '[e]very employer shall be liable for compensation for personal injury to, or for the death of each employee, by an *injury in the course of employment*.' In section 301(c), 77 P.S. § 411(1), the operative language is ''injury' and 'personal injury' . . . shall be construed to mean an injury to an employe [sic], regardless of his previous physical condition, *arising in the course of his employment and related thereto . . . .*' This Court and the Commonwealth Court have consistently construed section 301(c) to require the establishment by the claimant of only two facts -- that the injury arose in the course of employment and was related thereto. *See, e.g., . . . Workmen's Compensation Appeal Board v. Bernard S. Pincus Co.*, [479 Pa. 286, 388 A.2d 659 (1978)] (under the amended Workmen's Compensation Act, a heart attack is a compensable injury as long as the claimant proves that it occurred in the course of employment and was related thereto.); *Faust v. Workmen's Compensation Appeal Board*, 55 Pa. Cmwth. 285, 422 A.2d 1246 (1980) ('heart attacks are compensable injuries . . . if they (1) arise in the course of employment and (2) are related thereto.')." *Krawchuk v. Philadelphia Elec. Co.*, 439 A.2d 627, 630 (Pa. 1981).
Rhode Island	**Mental-Mental** "The disablement of any employee resulting from an occupational disease or condition described in the following schedule shall be treated

	as the happening of a personal injury, as defined in §28-33-1, within the meaning of chapters 29 - 38 of this title, and the procedure and practice provided in those chapters shall apply to all proceedings under this chapter, except where specifically provided otherwise in this chapter: * * * "(36) The disablement of an employee resulting from mental injury caused or accompanied by identifiable physical trauma or from a mental injury caused by emotional stress resulting from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees encounter daily without serious mental injury shall be treated as an injury as defined in §28-29-2(7)." R.I. GEN. LAWS §28-34-2 (2020). **Physical-Mental** "The disablement of any employee resulting from an occupational disease or condition described in the following schedule shall be treated as the happening of a personal injury, as defined in §28-33-1, within the meaning of chapters 29 - 38 of this title, and the procedure and practice provided in those chapters shall apply to all proceedings under this chapter, except where specifically provided otherwise in this chapter: * * * "(36) The disablement of an employee resulting from mental injury caused or accompanied by identifiable physical trauma or from a mental injury caused by emotional stress resulting from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees encounter daily without serious mental injury shall be treated as an injury as defined in §28-29-2(7)." R.I. GEN. LAWS §28-34-2 (2020). **Mental-Physical** "In heart-attack cases the inquiry centers not on whether the work activity involved physical exertion but rather whether there existed a causal connection between the employee's work and the resulting heart attack." *Blecha v. Wells Fargo Guard-Company Serv.*, 610 A.2d 98, 103 (R.I. 1992).

South Carolina	**Mental-Mental** "(B) Stress, mental injuries, and mental illness arising out of and in the course of employment unaccompanied by physical injury and resulting in mental illness or injury are not considered a personal injury unless the employee establishes, by a preponderance of the evidence: "(1) that the employee's employment conditions causing the stress, mental injury, or mental illness were extraordinary and unusual in comparison to the normal conditions of the particular employment; and "(2) the medical causation between the stress, mental injury, or mental illness, and the stressful employment conditions by medical evidence. "(C) Stress, mental injuries, heart attacks, strokes, embolisms, or aneurisms arising out of and in the course of employment unaccompanied by physical injury are not considered compensable if they result from any event or series of events which are incidental to normal employer/employee relations including, but not limited to, personnel actions by the employer such as disciplinary actions, work evaluations, transfers, promotions, demotions, salary reviews, or terminations, except when these actions are taken in an extraordinary and unusual manner." S.C. CODE ANN. §42-1-160 (2020). **Physical-Mental** "Where . . . the mental injury is *induced* by physical injury, it is not necessary that it result from unusual or extraordinary conditions of employment. "A condition which is induced by a physical injury, is thereby causally related to that injury. [citations omitted] It is a new symptom manifesting from the same harm to the body. In such circumstances, it may properly be compensated in a change of condition proceeding as a part of the original injury." *Estridge v. Joslyn Clark Controls*, 482 S.E.2d 577, 580-581 (S.C. Ct. App. 1997). **Mental-Physical** "(B) Stress, mental injuries, and mental illness arising out of and in the course of employment unaccompanied by physical injury and resulting

	in mental illness or injury are not considered a personal injury unless the employee establishes, by a preponderance of the evidence: "(1) that the employee's employment conditions causing the stress, mental injury, or mental illness were extraordinary and unusual in comparison to the normal conditions of the particular employment; and "(2) the medical causation between the stress, mental injury, or mental illness, and the stressful employment conditions by medical evidence. "(C) Stress, mental injuries, heart attacks, strokes, embolisms, or aneurisms arising out of and in the course of employment unaccompanied by physical injury are not considered compensable if they result from any event or series of events which are incidental to normal employer/employee relations including, but not limited to, personnel actions by the employer such as disciplinary actions, work evaluations, transfers, promotions, demotions, salary reviews, or terminations, except when these actions are taken in an extraordinary and unusual manner." S.C. CODE ANN. §42-1-160 (2020).
South Dakota	**Mental-Mental** "'Injury' or 'personal injury,' only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions: * * * "The term does not include a mental injury arising from emotional, mental, or nonphysical stress or stimuli. A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought." S.D. CODIFIED LAWS §62-1-1(7) (2020). **Physical-Mental** "'Injury' or 'personal injury,' only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions:

	"(a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of; [] ". . . A mental injury is compensable only if a compensable physical injury is and remains a major contributing cause of the mental injury, as shown by clear and convincing evidence. A mental injury is any psychological, psychiatric, or emotional condition for which compensation is sought." S.D. CODIFIED LAWS §62-1-1(7) (2020). **Mental-Physical** "'Injury' or 'personal injury,' only injury arising out of and in the course of the employment, and does not include a disease in any form except as it results from the injury. An injury is compensable only if it is established by medical evidence, subject to the following conditions: "(a) No injury is compensable unless the employment or employment related activities are a major contributing cause of the condition complained of." S.D. CODIFIED LAWS §62-1-1(7) (2020).
Tennessee	**Mental-Mental** "'Injury' and 'personal injury' mean an injury by accident, a mental injury, occupational disease including diseases of the heart, lung and hypertension, or cumulative trauma conditions including hearing loss, carpal tunnel syndrome or any other repetitive motion conditions, arising primarily out of and in the course and scope of employment, that causes death, disablement or the need for medical treatment of the employee; provided, that: "(A) An injury is 'accidental' only if the injury is caused by a specific incident, or set of incidents, arising primarily out of and in the course and scope of employment, and is identifiable by time and place of occurrence, and shall not include the aggravation of a preexisting disease, condition or ailment unless it can be shown to a reasonable degree of medical certainty that the aggravation arose primarily out of and in the course and scope of employment; "(B) An injury 'arises primarily out of and in the course and scope of employment' only if it has been shown by a preponderance of the evidence that the employment contributed

	more than fifty percent (50%) in causing the injury, considering all causes; "(C) An injury causes death, disablement or the need for medical treatment only if it has been shown to a reasonable degree of medical certainty that it contributed more than fifty percent (50%) in causing the death, disablement or need for medical treatment, considering all causes; "(D) 'Shown to a reasonable degree of medical certainty' means that, in the opinion of the physician, it is more likely than not considering all causes, as opposed to speculation or possibility; "(E) The opinion of the treating physician, selected by the employee from the employer's designated panel of physicians pursuant to §50-6-204(a)(3), shall be presumed correct on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence." TENN. CODE ANN. §50-6-102(14) (2020) (for injuries occurring on or after July 1, 2014). In addition, "'[m]ental injury' means a loss of mental faculties or a mental or behavioral disorder, arising primarily out of a compensable physical injury or an identifiable work related event resulting in a sudden or unusual stimulus, and shall not include a psychological or psychiatric response due to the loss of employment or employment opportunities." TENN. CODE ANN. §50-6-102(17) (2020) (for injuries occurring on or after July 1, 2014). **Physical-Mental** "'Injury' and 'personal injury' mean an injury by accident, a mental injury, occupational disease including diseases of the heart, lung and hypertension, or cumulative trauma conditions including hearing loss, carpal tunnel syndrome or any other repetitive motion conditions, arising primarily out of and in the course and scope of employment, that causes death, disablement or the need for medical treatment of the employee; provided, that: "(A) An injury is 'accidental' only if the injury is caused by a specific incident, or set of incidents, arising primarily out of and in the course and scope of employment, and is identifiable by time and place of occurrence, and shall not include the

	aggravation of a preexisting disease, condition or ailment unless it can be shown to a reasonable degree of medical certainty that the aggravation arose primarily out of and in the course and scope of employment; "(B) An injury 'arises primarily out of and in the course and scope of employment' only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes; "(C) An injury causes death, disablement or the need for medical treatment only if it has been shown to a reasonable degree of medical certainty that it contributed more than fifty percent (50%) in causing the death, disablement or need for medical treatment, considering all causes; "(D) 'Shown to a reasonable degree of medical certainty' means that, in the opinion of the physician, it is more likely than not considering all causes, as opposed to speculation or possibility; "(E) The opinion of the treating physician, selected by the employee from the employer's designated panel of physicians pursuant to §50-6-204(a)(3), shall be presumed correct on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence." TENN. CODE ANN. §50-6-102(14) (2020) (for injuries occurring on or after July 1, 2014). In addition, "'[m]ental injury' means a loss of mental faculties or a mental or behavioral disorder, arising primarily out of a compensable physical injury or an identifiable work related event resulting in a sudden or unusual stimulus, and shall not include a psychological or psychiatric response due to the loss of employment or employment opportunities." TENN. CODE ANN. §50-6-102(17) (2020) (for injuries occurring on or after July 1, 2014). **Mental-Physical** "'Injury' and 'personal injury' mean an injury by accident, a mental injury, occupational disease including diseases of the heart, lung and hypertension, or cumulative trauma conditions including hearing loss, carpal tunnel syndrome or any other repetitive motion conditions,

	arising primarily out of and in the course and scope of employment, that causes death, disablement or the need for medical treatment of the employee; provided, that: "(A) An injury is 'accidental' only if the injury is caused by a specific incident, or set of incidents, arising primarily out of and in the course and scope of employment, and is identifiable by time and place of occurrence, and shall not include the aggravation of a preexisting disease, condition or ailment unless it can be shown to a reasonable degree of medical certainty that the aggravation arose primarily out of and in the course and scope of employment; "(B) An injury 'arises primarily out of and in the course and scope of employment' only if it has been shown by a preponderance of the evidence that the employment contributed more than fifty percent (50%) in causing the injury, considering all causes; "(C) An injury causes death, disablement or the need for medical treatment only if it has been shown to a reasonable degree of medical certainty that it contributed more than fifty percent (50%) in causing the death, disablement or need for medical treatment, considering all causes; "(D) 'Shown to a reasonable degree of medical certainty' means that, in the opinion of the physician, it is more likely than not considering all causes, as opposed to speculation or possibility; "(E) The opinion of the treating physician, selected by the employee from the employer's designated panel of physicians pursuant to §50-6-204(a)(3), shall be presumed correct on the issue of causation but this presumption shall be rebuttable by a preponderance of the evidence." TENN. CODE ANN. §50-6-102(14) (2020) (for injuries occurring on or after July 1, 2014).
Texas	**Mental-Mental** "It is well-settled that mental trauma, even without an accompanying physical injury, can produce a compensable injury if it arises in the course and scope of employment and can be traced to a definite time, place and cause. *Bailey v. American General Insurance Co.*, 279 S.W.2d 315 (Tex. 1955); *Olson v. Hartford Accident and Indemnity Co.*, 477 S.W.2d 859 (Tex. 1972). However, the Texas Supreme Court has specifically held that damage or harm caused by repetitious mentally

	traumatic activity, as opposed to physical activity, cannot constitute an occupational disease. *Transportation Insurance Co. v. Maksyn*, 580 S.W.2d 334 (Tex. 1979); *see also* [Texas Workers' Compensation Commission] Appeal No. 941551, [decided December 23, 1994]; and Texas Workers' Compensation Commission Appeal No. 94785, decided July 29, 1994." Texas Workers' Compensation Commission Appeal No. 000445, 2000 TX Wrk. Comp. LEXIS 407, *8-9 (April 12, 2000). See also TEX. LAB. CODE ANN. §408.006 (2019): "(a) It is the express intent of the legislature that nothing in this subtitle shall be construed to limit or expand recovery in cases of mental trauma injuries. "(b) Notwithstanding Section 504.019 [Coverage for Post-Traumatic Stress Disorder for Certain First Responders], a mental or emotional injury that arises principally from a legitimate personnel action, including a transfer, promotion, demotion, or termination, is not a compensable injury under this subtitle." **Physical-Mental** "The 1989 Act defines 'injury' as 'damage or harm to the physical structure of the body and a disease or infection naturally resulting from the damage or harm.' Section 401.011(26). The scope of an injury thus can encompass ancillary conditions which are connected to the injury." Texas Workers' Compensation Appeal No. 93697, 1993 TX Wrk. Comp. LEXIS 3564, *10 (September 23, 1993). In addition, "in finding that the hearing officer was sufficiently supported in concluding that claimant's psychiatric conditions are compensable, we do not hold that a 'direct result,' as opposed to a 'result,' must be found in order to find a mental condition compensable in every case in which a mental condition arises after sustaining a physical compensable injury." Texas Workers' Compensation Appeal No. 960526, 1996 TX Wrk. Comp. LEXIS 4294, *8 (April 29, 1996). **Mental-Physical** "A heart attack is a compensable injury under this subtitle only if: "(1) the attack can be identified as:

	"(A) occurring at a definite time and place; and "(B) caused by a specific event occurring in the course and scope of the employee's employment; "(2) the preponderance of the medical evidence regarding the attack indicates that the employee's work rather than the natural progression of a preexisting heart condition or disease was a substantial contributing factor of the attack; and "(3) the attack was not triggered solely by emotional or mental stress factors, unless it was precipitated by a sudden stimulus." TEX. LAB. CODE ANN. §408.008 (2019).
Utah	**Mental-Mental** "(1) Physical, mental, or emotional injuries related to mental stress arising out of and in the course of employment shall be compensable under this chapter only when there is a sufficient legal and medical causal connection between the employee's injury and employment. "(2) "(a) Legal causation requires proof of extraordinary mental stress from a sudden stimulus arising predominantly and directly from employment. "(b) The extraordinary and sudden nature of the alleged mental stress is judged according to an objective standard in comparison with contemporary national employment and nonemployment life. "(3) Medical causation requires proof that the physical, mental, or emotional injury was medically caused by the mental stress that is the legal cause of the physical, mental, or emotional injury. "(4) Good faith employer personnel actions including disciplinary actions, work evaluations, job transfers, layoffs, demotions, promotions, terminations, or retirements, may not form the basis of compensable mental stress claims under this chapter. "(5) Alleged discrimination, harassment, or unfair labor practices otherwise actionable at law may not form the basis of compensable mental stress claims under this chapter.

	"(6) An employee who alleges a compensable industrial accident involving mental stress bears the burden of proof to establish legal and medical causation by a preponderance of the evidence." UTAH CODE ANN. §34A-2-402 (2020). See also UTAH CODE ANN. §34A-3-106 (2020) pertaining to occupational diseases: "(1) Physical, mental, or emotional diseases related to mental stress arising out of and in the course of employment shall be compensable under this chapter only when there is a sufficient legal and medical causal connection between the employee's disease and employment. "(2) "(a) Legal causation requires proof of extraordinary mental stress arising predominantly and directly from employment. "(b) The extraordinary nature of the alleged mental stress is judged according to an objective standard in comparison with contemporary national employment and nonemployment life. "(3) Medical causation requires proof that the physical, mental, or emotional disease was medically caused by the mental stress that is the legal cause of the physical, mental, or emotional disease. "(4) Good faith employer personnel actions including disciplinary actions, work evaluations, job transfers, layoffs, demotions, promotions, terminations, or retirements, may not form the basis of compensable mental stress claims under this chapter. "(5) Alleged discrimination, harassment, or unfair labor practices otherwise actionable at law may not form the basis of compensable mental stress claims under this chapter. "(6) An employee who alleges a compensable occupational disease involving mental stress bears the burden of proof to establish legal and medical causation by a preponderance of the evidence." **Physical-Mental** "(1) Physical, mental, or emotional injuries related to mental stress arising out of and in the course of employment shall be compensable under this chapter only when there is a sufficient legal and medical causal connection between the employee's injury and employment.

	"(2) "(a) Legal causation requires proof of extraordinary mental stress from a sudden stimulus arising predominantly and directly from employment. "(b) The extraordinary and sudden nature of the alleged mental stress is judged according to an objective standard in comparison with contemporary national employment and nonemployment life. "(3) Medical causation requires proof that the physical, mental, or emotional injury was medically caused by the mental stress that is the legal cause of the physical, mental, or emotional injury. "(4) Good faith employer personnel actions including disciplinary actions, work evaluations, job transfers, layoffs, demotions, promotions, terminations, or retirements, may not form the basis of compensable mental stress claims under this chapter. "(5) Alleged discrimination, harassment, or unfair labor practices otherwise actionable at law may not form the basis of compensable mental stress claims under this chapter. "(6) An employee who alleges a compensable industrial accident involving mental stress bears the burden of proof to establish legal and medical causation by a preponderance of the evidence." UTAH CODE ANN. §34A-2-402 (2020). See also UTAH CODE ANN. §34A-3-106 (2020) pertaining to occupational diseases: "(1) Physical, mental, or emotional diseases related to mental stress arising out of and in the course of employment shall be compensable under this chapter only when there is a sufficient legal and medical causal connection between the employee's disease and employment. "(2) "(a) Legal causation requires proof of extraordinary mental stress arising predominantly and directly from employment.

	"(b) The extraordinary nature of the alleged mental stress is judged according to an objective standard in comparison with contemporary national employment and nonemployment life. "(3) Medical causation requires proof that the physical, mental, or emotional disease was medically caused by the mental stress that is the legal cause of the physical, mental, or emotional disease. "(4) Good faith employer personnel actions including disciplinary actions, work evaluations, job transfers, layoffs, demotions, promotions, terminations, or retirements, may not form the basis of compensable mental stress claims under this chapter. "(5) Alleged discrimination, harassment, or unfair labor practices otherwise actionable at law may not form the basis of compensable mental stress claims under this chapter. "(6) An employee who alleges a compensable occupational disease involving mental stress bears the burden of proof to establish legal and medical causation by a preponderance of the evidence." **Mental-Physical** "(1) Physical, mental, or emotional injuries related to mental stress arising out of and in the course of employment shall be compensable under this chapter only when there is a sufficient legal and medical causal connection between the employee's injury and employment. "(2) "(a) Legal causation requires proof of extraordinary mental stress from a sudden stimulus arising predominantly and directly from employment. "(b) The extraordinary and sudden nature of the alleged mental stress is judged according to an objective standard in comparison with contemporary national employment and nonemployment life. "(3) Medical causation requires proof that the physical, mental, or emotional injury was medically caused by the mental stress that is the legal cause of the physical, mental, or emotional injury. "(4) Good faith employer personnel actions including disciplinary actions, work evaluations, job transfers, layoffs, demotions, promotions,

	terminations, or retirements, may not form the basis of compensable mental stress claims under this chapter. "(5) Alleged discrimination, harassment, or unfair labor practices otherwise actionable at law may not form the basis of compensable mental stress claims under this chapter. "(6) An employee who alleges a compensable industrial accident involving mental stress bears the burden of proof to establish legal and medical causation by a preponderance of the evidence." UTAH CODE ANN. §34A-2-402 (2020). See also UTAH CODE ANN. §34A-3-106 (2020) pertaining to occupational diseases: "(1) Physical, mental, or emotional diseases related to mental stress arising out of and in the course of employment shall be compensable under this chapter only when there is a sufficient legal and medical causal connection between the employee's disease and employment. "(2) "(a) Legal causation requires proof of extraordinary mental stress arising predominantly and directly from employment. "(b) The extraordinary nature of the alleged mental stress is judged according to an objective standard in comparison with contemporary national employment and nonemployment life. "(3) Medical causation requires proof that the physical, mental, or emotional disease was medically caused by the mental stress that is the legal cause of the physical, mental, or emotional disease. "(4) Good faith employer personnel actions including disciplinary actions, work evaluations, job transfers, layoffs, demotions, promotions, terminations, or retirements, may not form the basis of compensable mental stress claims under this chapter. "(5) Alleged discrimination, harassment, or unfair labor practices otherwise actionable at law may not form the basis of compensable mental stress claims under this chapter.

	"(6) An employee who alleges a compensable occupational disease involving mental stress bears the burden of proof to establish legal and medical causation by a preponderance of the evidence."
Vermont	**Mental-Mental** "(i) A mental condition resulting from a work-related event or work-related stress shall be considered a personal injury by accident arising out of and in the course of employment and be compensable if it is demonstrated by the preponderance of the evidence that: "(I) the work-related event or work-related stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee across all occupations; and "(II) the work-related event or work-related stress, and not some other event or source of stress, was the predominant cause of the mental condition. "(ii) A mental condition shall not be considered a personal injury by accident arising out of and in the course of employment if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action taken in good faith by the employer." VT. STAT. ANN. tit. 21 §601(11)(J) (2019). **Physical-Mental** "The key component of any workers' compensation claim is the causal nexus between a work-related accident and a resulting injury. 21 V.S.A. 618. Most compensable claims originate with a physical stimulus, a slip and fall, for example, and result in a physical injury, such as a disc herniation or a ligament tear. The same causal nexus is required in a physical-mental claim, the only difference being that the work-related physical stimulus gives rise to a psychological injury rather than a physical one." *Lydy v. Trustaff, Inc.*, 2012 VT Wrk. Comp. LEXIS 3, *17 (2012). **Mental-Physical** "In determining the compensability of heart attacks, Vermont follows those jurisdictions that require evidence that the heart attack was the product of some unusual or extraordinary exertion or stress in the work

	environment." *Mattson v. C.E. Bradley Labs.*, 1995 VT. Wrk. Comp. LEXIS 157, *9 (November 1, 1995).
Virginia	**Mental-Mental** "A claimant establishes an injury by accident if there is '(1) an identifiable incident; (2) that occurs at some reasonably definite time; (3) an obvious sudden mechanical or structural change in the body; and (4) a causal connection between the incident and the bodily change.' *Chesterfield County v. Dunn*, 9 Va. App. 475, 476, 389 S.E.2d 180, 181 (1990). Whenever the injury is strictly psychological, it 'must be causally related to a physical injury or be causally related to an obvious sudden shock or fright arising in the course of employment.' *Id*. at 477, 389 S.E.2d at 182 (1990). . . . However, disagreements over managerial decisions and conflicts with supervisory personnel that cause stressful consequences which result in purely psychological disability ordinarily are not compensable." *Teasley v. Montgomery Ward & Co.*, 415 S.E.2d 596, 597-598 (Va. 1992). A mental-mental claim may be compensable as an occupational disease if it satisfies the requirements of VA. CODE ANN. §65.2-400 (2020): "A. As used in this title, unless the context clearly indicates otherwise, the term '*occupational disease'* means a disease arising out of and in the course of employment, but not an ordinary disease of life to which the general public is exposed outside of the employment. "B. A disease shall be deemed to arise out of the employment only if there is apparent to the rational mind, upon consideration of all the circumstances: "1. A direct causal connection between the conditions under which work is performed and the occupational disease; "2. It can be seen to have followed as a natural incident of the work as a result of the exposure occasioned by the nature of the employment; "3. It can be fairly traced to the employment as the proximate cause;

	"4. It is neither a disease to which an employee may have had substantial exposure outside of the employment, nor any condition of the neck, back or spinal column; "5. It is incidental to the character of the business and not independent of the relation of employer and employee; and "6. It had its origin in a risk connected with the employment and flowed from that source as a natural consequence, though it need not have been foreseen or expected before its contraction." **Physical-Mental** "The burden was upon the claimant to satisfy the Commission by a preponderance of the evidence both that he suffered from a psychological disability and that the disability was causally related to his industrial accident." *Daniel Constr. Co. v. Baker*, 331 S.E.2d 396, 398 (Va. 1985). **Mental-Physical** "The claimant, however, did not prove by a preponderance of the evidence that his heart attack was an injury by accident arising out of his employment by Winkler. To show an 'injury by accident,' a claimant must prove both 'an indentifiable [sic] incident that occurs at some reasonably definite time' and that such incident caused 'an obvious sudden mechanical or structural change in the body.' *Lane Company, Incorporated* v. *Saunders*, Va. , 326 S.E.2d 702, 703 (1985) [citations omitted] The opinion of the deputy commissioner correctly sets forth the applicable standard under the Supreme Court's cases, beginning with *Badische Corporation* v. *Starks*, 221 Va. 910, 275 S.E.2d 605 (1981) and culminating in *Saunders*: "[T]he claimant must trace his injury to a definite time, place or circumstance. It cannot be the result of a breakdown of a gradual development. . . . [A] claimant must identify his injury with a movement made or an action taken at a particular time at work. When a claimant cannot so identify an accident causing his injury, he cannot recover compensation. "We understand the Supreme Court's decision in *Saunders* to suggest that this element of 'injury by accident' applies also to an employee who claims injury as a result of work that is unusual to him or unusually strenuous, repetitive or stressful. Va. at , 326 S.E.2d at 703.

	"Moreover, we can discern no exception to the 'injury by accident' test established by the Supreme Court in *Starks, Cogbill* [223 Va. 354, 288 S.E.2d 485], and *Saunders* which permits a different analysis in the heart attack cases, although each of these decisions involved back injuries. Although other states may allow a different result in unusual exertion or stress cases, and the commentators have criticized a resolution of heart attack cases under an accidental injury portion of a statute, we believe that the requirement of showing 'injury by accident,' as developed by the Supreme Court in cases of back injury, applies equally to claims resulting from heart attacks." *Woody v. Mark Winkler Mgmt., Inc.*, 336 S.E.2d 518, 520-521 (Va. Ct. App. 1985).
Washington	**Mental-Mental** "(1) Claims based on mental conditions or mental disabilities caused by stress do not fall within the definition of an occupational disease in RCW 51.08.140. "Examples of mental conditions or mental disabilities caused by stress that do not fall within occupational disease shall include, but are not limited to, those conditions and disabilities resulting from: "(a) Change of employment duties; "(b) Conflicts with a supervisor; "(c) Actual or perceived threat of loss of a job, demotion, or disciplinary action; "(d) Relationships with supervisors, coworkers, or the public; "(e) Specific or general job dissatisfaction; "(f) Work load pressures; "(g) Subjective perceptions of employment conditions or environment; "(h) Loss of job or demotion for whatever reason; "(i) Fear of exposure to chemicals, radiation biohazards, or other perceived hazards; "(j) Objective or subjective stresses of employment;

	"(k) Personnel decisions; "(l) Actual, perceived, or anticipated financial reversals or difficulties occurring to the businesses of self-employed individuals or corporate officers. "(2) "(a) Stress resulting from exposure to a single traumatic event will be adjudicated as an industrial injury. See RCW 51.08.100. "(b) Examples of single traumatic events include: Actual or threatened death, actual or threatened physical assault, actual or threatened sexual assault, and life-threatening traumatic injury. "(c) These exposures must occur in one of the following ways: "(i) Directly experiencing the traumatic event; "(ii) Witnessing, in person, the event as it occurred to others; or "(iii) Extreme exposure to aversive details of the traumatic event. "(d) Repeated exposure to traumatic events, none of which are a single traumatic event as defined in subsection (2)(b) and (c) of this section, is not an industrial injury (see RCW 51.08.100) or an occupational disease (see RCW 51.08.142). A single traumatic event as defined in subsection (2)(b) and (c) of this section that occurs within a series of exposures will be adjudicated as an industrial injury (see RCW 51.08.100). "(3) Mental conditions or mental disabilities that specify pain primarily as a psychiatric symptom (e.g., somatic symptom disorder, with predominant pain), or that are characterized by excessive or abnormal thoughts, feelings, behaviors or neurological symptoms (e.g., conversion disorder, factitious disorder) are not clinically related to occupational exposure." WASH. ADMIN. CODE §296-14-300 (2020). In addition, "[a]n injury or illness occurring in the work environment is not recordable or considered work-related if it meets one of the following exceptions:

	"The illness is a mental illness. Mental illness will not be considered work-related unless the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related." WASH. ADMIN. CODE §296-27-01103(2)(i) (2020). **Physical-Mental** A mental injury proximately caused by a physical injury may be compensable, and "[t]he test for proximate cause or the 'but for' test does not require that the amount of causation be quantified in terms of magnitude. It is sufficient that if the expert testifying can state that 'but for' the conditions of the industrial injury the worker would not have otherwise suffered the condition complained of when, where, or how, he or she did. *In re Robert B. Tracy*, BIIA Dec., 88 1695 (1990). Dr. Burlingame's testimony established the required causal connection when he stated that the, 'industrial injuries under consideration had exacerbated his anxiety and depression.' Burlingame Dep. at 11. The impact of the carpal tunnel condition created additional mental/emotional stressors due to Mr. Albee's inability to continue working at his job. Thus, while Mr. Albee's anxiety and depression conditions preexisted his carpal tunnel condition, we find that this physical condition worsened his mental difficulties." *In re: David R. Albee,* 2000 WA Wrk. Comp. LEXIS 204 (November 21, 2000). In addition, "[a]n injury or illness occurring in the work environment is not recordable or considered work-related if it meets one of the following exceptions: "The illness is a mental illness. Mental illness will not be considered work-related unless the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, etc.) stating that the employee has a mental illness that is work-related." WASH. ADMIN. CODE §296-27-01103(2)(i) (2020).

	Mental-Physical "The rule is well settled in heart cases that unless the attack is precipitated by some unusually strenuous exertion on the part of the workman (and hence 'a sudden and tangible happening of a traumatic nature') there is no 'injury.'" *Warner v. Dep't of Labor & Indus.*, 414 P.2d 628, 630 (Wash. 1966). However, a heart attack may qualify as an occupational disease if the claimant proves proximate cause: "[I]t is now clear that there can be a legal dichotomy between the disease process underlying an occupational disease claim and the disability arising out of such disease process. Under *Dennis* [*v. Department of Labor and Industries*, 109 Wn.2d 467 (1987)], the disease process itself need not be employment-related to sustain the claim of occupational disease. It is legally sufficient if the disease-based disability is employment-related, i.e., related in the sense that the disability arose naturally and proximately out of the employment. "In determining whether a disease-based disability arose naturally out of employment, the *Dennis* court noted that the focus is upon the conditions of employment alleged to be the causal culprit of the disability. While these conditions need not be peculiar or unique to the worker's particular employment, they must be distinctive thereto. The court further noted that there must be a showing that such particular work conditions more probably caused the worker's disease-based disability than conditions in everyday life or all employment in general. In the case before us, assuming *arguendo* that the work conditions of Mr. Swartz's job as a test board operator were distinctive from a stress-inducing standpoint, the widow must still prove proximate cause." *Orville E. Schwartz, Dec'd.*, 1988 WA Wrk. Comp. LEXIS 395 (August 15, 1988).
West Virginia	**Mental-Mental** "For the purposes of this chapter, no alleged injury or disease shall be recognized as a compensable injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits. It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter." W. VA. CODE ANN. §23-4-1f (2020).

	Physical-Mental "[T]his Court has held that, '[i]n order for a claim to be held compensable under the Workmen's Compensation Act, three elements must coexist: (1) a personal injury (2) received in the course of employment and (3) resulting from that employment.' Syllabus Point 1, *Barnett v. State Workmen's Comp. Comm'r*, 153 W.Va. 796, 172 S.E.2d 698 (1970). 'A claimant in a workmen's compensation case must bear the burden of proving his claim but in doing so it is not necessary to prove to the exclusion of all else the causal connection between the injury and employment.' Syllabus Point 2, *Sowder v. State Workmen's Comp. Comm'r*, 155 W.Va. 889, 189 S.E.2d 674 (1972). This Court has also stated that 'a psychiatric disability arising out of a compensable physical injury may also be compensable.' *Harper v. State Workmen's Comp. Comm'r*, 160 W.Va. 364, 366, 234 S.E.2d 779, 781 (1977)." *Hale v. W. Va. Office of the Ins. Comm'r*, 724 S.E.2d 752, 755 (W. Va. 2012). **Mental-Physical** "It is settled law in West Virginia that under the Workmen's Compensation Act disease, whether occupational or not, is not a personal injury within the meaning of Code, 23-4-1, and is not compensable, unless it is attributable to a specific and definite event arising in the course of and resulting from the employment. It is equally well settled in West Virginia that disease that is attributable to a specific and definite event arising in the course of and resulting from the employment, is compensable. [citations omitted] On the basis of these decisions, it is clear that the term 'personal injury' as used in the Workmen's Compensation Act of this state contemplates and includes the result of unusual exposure, shock, exhaustion, and other conditions not of traumatic origin provided that they are attributable to a specific and definite event arising in the course of and resulting from the employment." *Montgomery v. State Comp. Comm'r*, 178 S.E. 425, 426 (W. Va. 1935). However, "in case of heart attack or heat prostration frequently occasioned by bodily and other conditions to which the employment may not in any wise contribute, we have great difficulty in determining what should be done. The consideration which this Court has given to cases of this character attests this difficulty. While we have awarded compensation in heat prostration cases, within strictly defined limits, . . . we are not disposed to extend the rule laid down therein, and make it applicable to situations not there present, and where the risks are less.

	Considering all that has been written on the subject, and appraising this case in its entirety, we are unable to see that the Commissioner and Appeal Board were justified in awarding compensation. To do so they must have held that decedent was exposed to a particular risk or danger attendant to his employment, to which the general public, as that phrase is herein interpreted, was not exposed, and we do not think the facts of this case justified such a holding." *Williams v. State Comp. Comm'r*, 31 S.E.2d 546, 551 (W. Va. 1944).
Wisconsin	**Mental-Mental** "[M]ental injury nontraumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience. Only if the 'fortuitous event unexpected and unforeseen' can be said to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury will liability under ch. 102, Stats., be found." *Sch. Dist. v. Dep't of Indus.*, 215 N.W.2d 373, 377 (Wis. 1974). **Physical-Mental** "If the mental injury suffered by [the claimant] was the result of an accident, the injury is compensable under the Workmen's Compensation Act. It is clear that the legislature intended to impose liability against the employer for *mental* and physical injuries which are caused by accident or disease. [See WIS. STAT. §102.01(2)(c), "'Injury' means mental or physical harm to an employee caused by accident or disease."]" *Sch. Dist. v. Dep't of Indus.*, 215 N.W.2d 373, 375 (Wis. 1974). **Mental-Physical** "The underlying heart disease is a compensable occupational disease '[i]f the work activity precipitates, aggravates and accelerates beyond normal progression, a progressively deteriorating or degenerative condition.'" *Schiller v. Labor & Indus. Review Comm'n*, 1984 Wisc. App. LEXIS 3577, *2-3 (Wis. Ct. App. 1984) (unpublished decision). (Although the claimant in this case is a police officer, the rule of law applies generally to all employees.)
Wyoming	**Mental-Mental** "'Injury' means any harmful change in the human organism other than normal aging and includes damage to or loss of any artificial

	replacement and death, arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer's business requires an employee's presence and which subjects the employee to extrahazardous duties incident to the business. 'Injury' does not include: * * * "(J) Any mental injury unless it is "(I) Caused by a compensable physical injury, it occurs subsequent to or simultaneously with, the physical injury and it is established by clear and convincing evidence, which shall include a diagnosis by a licensed psychiatrist, licensed clinical psychologist or psychiatric mental health nurse practitioner meeting criteria established in the most recent edition of the diagnostic and statistical manual of mental disorders published by the American Psychiatric Association. In no event shall benefits for a compensable mental injury under this subdivision be paid for more than thirty-six (36) months after an injured employee's physical injury has healed to the point that it is not reasonably expected to substantially improve." WYO. STAT. ANN. §27-14-102(a)(xi) (2020). **Physical-Mental** "'Injury' means any harmful change in the human organism other than normal aging and includes damage to or loss of any artificial replacement and death, arising out of and in the course of employment while at work in or about the premises occupied, used or controlled by the employer and incurred while at work in places where the employer's business requires an employee's presence and which subjects the employee to extrahazardous duties incident to the business. 'Injury' does not include: * * * "(J) Any mental injury unless it is "(I) Caused by a compensable physical injury, it occurs subsequent to or simultaneously with, the physical injury and it is established by clear and convincing evidence, which shall include a diagnosis by a licensed psychiatrist,

	licensed clinical psychologist or psychiatric mental health nurse practitioner meeting criteria established in the most recent edition of the diagnostic and statistical manual of mental disorders published by the American Psychiatric Association. In no event shall benefits for a compensable mental injury under this subdivision be paid for more than thirty-six (36) months after an injured employee's physical injury has healed to the point that it is not reasonably expected to substantially improve." WYO. STAT. ANN. §27-14-102(a)(xi) (2020). **Mental-Physical** "Benefits for employment-related coronary conditions except those directly and solely caused by an injury, are not payable unless the employee establishes by competent medical authority that: "(i) There is a direct causal connection between the condition under which the work was performed and the cardiac condition; and "(ii) The causative exertion occurs during the actual period of employment stress clearly unusual to or abnormal for employees in that particular employment, irrespective of whether the employment stress is unusual to or abnormal for the individual employee; and "(iii) The acute symptoms of the cardiac condition are clearly manifested not later than four (4) hours after the alleged causative exertion." WYO. STAT. ANN. §27-14-603(b) (2020).