Mental Stress and Workers' Compensation in Nebraska

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I. INTRODUCTION

In recent years, the number of claims for mental injuries resulting from work-related emotional stress has increased dramatically.1 In

1. 1B A. Larson, The Law of Workmen's Compensation § 42.25 (a)(1987 & Supp. 1989), states "The most lively development in compensation law in the last 15 years has been the explosion of 'stress claims.'" Larson recognizes three categories of employee mental injury and disorder cases: (1) physical-mental cases which involve an injury to the physical structure of the body, resulting in a mental injury to the employee (such as a back injury that does not improve because of emotional tension arising from the original accident); (2) mental-physical cases where a work-related accident or occurrence causes an employee to suffer mental distress which causes a physical injury to the employee (such as a sudden fright that results in a heart attack); and (3) mental-mental cases involv-
1980, only 4.7 percent of workers' compensation cases dealt with employees seeking benefits for mental disorders caused by job stress. Today, the number of these so-called "mental-mental" cases has more than tripled and continues to grow.

Experts cite various reasons for the explosion in mental-mental workers' compensation claims. First, the complications of contemporary life and mechanized workplaces have increased mental stress on the job. Second, industrial psychologists have heightened the awareness of mental stress in the workplace. Third, the increasing number of two-wage-earner families has contributed to mental stress injuries. As more women enter the workforce, the burdens of child-rearing, household duties, and job responsibilities fall on both men and women. Fourth, medical advances have led to better diagnosis and understanding of mental-mental injuries. Finally, the dissipation of the stigma once associated with mental problems appears to have increased mental-mental claims.

In 1988, the Nebraska Supreme Court considered a claim for mental stress compensation in Sorensen v. City of Omaha. Ignoring precedents from more than 25 states allowing compensation for mental injuries caused by mental stress in the workplace, the court...
denied relief based on Nebraska’s statutory definition of “injury.” Nebraska’s statute requires that a claimant suffer harm to the “physical structure of the body” to recover workers’ compensation benefits.

This Comment will examine the feasibility of allowing workers’ compensation benefits for plaintiffs claiming mental-mental injuries. In Part II, this Comment will address the origin of workers’ compensation in Nebraska and will evaluate Nebraska’s denial of relief for mental-mental injuries. In Part III, this Comment will explore causation and workers’ compensation decisions from other jurisdictions and will contrast the majority and minority positions. In Part IV, this Comment will address various rules of statutory construction and interpretation and will apply such rules to present workers’ compensation statutes. Furthermore, mental-mental injuries will be compared with tort and heart attack cases in an effort to show their similarity and how recovery for mental-mental injuries would be consistent with public policy. Finally, this Comment will propose a statutory compromise to provide limited relief for workers who can prove an injury while guarding against fraudulent claims. The statutory compromise would better serve the purposes of workers’ compensation law by developing rules of fact to consider mental-mental claims, rather than the present rule of law barring all mental-mental claims whether or not the employee can prove an injury. Under the proposed rule of fact approach, courts could evaluate mental-mental claims on a case-by-case basis and generally could leave the loss on the employee, unless the employee could prove a mental stimulus in the workplace substantially contributed to the mental injury.

II. WORKERS’ COMPENSATION LAW IN NEBRASKA

A. Background

Nebraska first passed a workers’ compensation act in 1913. Nebraska was among the first wave of states to enact workers’ compensation legislation similar to worker protections offered in England. Workers’ compensation represented a compromise between employers and employees. Both parties waived their common law tort rights in exchange for more certain legislative remedies.

Before the enactment of workers’ compensation law, injured work-
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ers could recover only through tort law. Tort remedies, however, often were inadequate because employers could avoid liability through the defenses of contributory negligence, assumption of the risk, and the fellow-servant rule. As a result, workers and their families bore most of the costs of workplace injuries. Nebraska and several other states recognized the need for workers' compensation with the rise of the industrial revolution. Under the fixed compensation system, states spread the cost of worker injuries throughout an industry, rather than on a single worker and his family.

Although Nebraska has amended its workers' compensation law several times, the statute still serves as the exclusive remedy for workplace injuries. Nebraska courts continually recognize that workers' compensation law was designed to place the cost of workplace injuries on industries and their customers, rather than on individual workers or the public. In addition, the workers' compensation act helps employees avoid tedious legal disputes with their employers. Most importantly, courts recognize that the workers' compensation act must be construed broadly to accomplish its purposes and to keep up with changes in the workplace.

B. Statutory and Case Law

Nebraska statutes indicate that workers' compensation will be made "[w]hen personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment. . . ." The statute further defines injury as "only violence to the physical structure of the body and such disease or infection as naturally results therefrom." Occupational disease refers to "only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process or employment and shall exclude all ordinary diseases of life to which the gen-

16. Id. Under the fellow-servant rule, workers could not sue their employers for injuries caused by the negligence of fellow workers.
17. See id.
18. A. Larson, supra note 1, at § 5.30.
19. A. Larson, supra note 1, at § 5.20.
20. Id.
22. See Tralle v. Hartman Furniture & Carpet Co., 116 Neb. 418, 423, 217 N.W. 952, 954 (1928)(stating that the purpose of workers' compensation law is to shift the burden of economic loss from the employee to the industry).
eral public is exposed.”28

Because of the statutory “physical injury” requirement, Nebraska does not recognize mental-mental claims. Nebraska has not yet addressed the issue of mental-physical cases, but the state has allowed compensation for physical-mental claims since 1944.29

In *Lee v. Lincoln Cleaning & Dye Works*,30 the plaintiff received a severe and painful shock while ironing a garment. Experts testifying at the trial stated that the employee suffered nerve damage to her right shoulder, arm, and hand. In addition, she experienced hysteria, neurosis, and mental disabilities. The district court set aside an award for the plaintiff. The plaintiff appealed, alleging that the district court erred in refusing to “follow the long-established rule of our Supreme Court and the statutes of the state of Nebraska which provide for a liberal interpretation of the evidence in compensation cases.”31 The Nebraska Supreme Court reversed, holding that the mental injury was compensable if it was the proximate result of a physical injury and if it results in a disability.32

In more recent cases, Nebraska has continued to allow recovery for physical-mental injuries. The Nebraska Supreme Court now, however, appears to require more proof of causation and disability than under *Lee*.33 Thus, Nebraska will allow workers’ compensation benefits for mental injuries, but only if evidence proves that the mental problems resulted from a physical injury.34 The Nebraska Supreme Court, however, demands strict proof of causation and disability to avoid fraudulent claims by “malingering” workers.35

31. *Id.* at 127, 15 N.W.2d at 332.
32. *Id.* at 138, 15 N.W.2d at 336.
33. See Kaufman, *Compensability of Mental Injury, Workers’ Compensation*: a seminar presented by Nebraska Continuing Legal Education, Inc., 1988. See also Cardenas v. Peterson Bean Co., 180 Neb. 605, 144 N.W.2d 154 (1966)(an employee must show that neurosis is the proximate result of his injury and that it results in a disability); Davis v. Western Elec., 210 Neb. 771, 317 N.W.2d 68 (1982)(competent medical testimony must show a causal connection between the alleged injury, the employment, and the psychological disorder); Van Winkle v. Electric Hose & Rubber Co., 214 Neb. 8, 332 N.W.2d 209 (1983)(employees must prove by a preponderance of the evidence that their mental disabilities resulted from a work-related accident).
35. In workers’ compensation cases, malingering generally involves deception, prac-
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In contrast, Nebraska has never allowed recovery for a mental-mental claim. In a case of first impression, a divided Nebraska Supreme Court denied a claim for mental injury caused by a mental stimulus in *Bekelski v. O. F. Neal Co.* The *Bekelski* plaintiff suffered shock after she was trapped in an elevator with a passenger who was crushed to death between floors. The court refused to award workers’ compensation benefits, stating that although the plaintiff suffered shock to her nervous system, lost control of her emotions, and spent several days in the hospital, the injuries did not constitute violence to the physical structure of the body.

The *Bekelski* court followed a three-part test for workers’ compensation claims. To recover benefits, employees had to prove (1) an unexpected or unforeseen event, happening suddenly and violently; (2) producing at the time objective symptoms of injury; and (3) violence to the physical structure of the body.

In considering the claim of the *Bekelski* plaintiff, the court acknowledged that the primary purpose of the workers’ compensation act is to insure employees against accidental injuries arising out of and in the course of employment. Further, the court stated that the workers’ compensation act should be liberally construed, not strictly interpreted. Despite its recognition of workers’ compensation policy, the majority strictly construed Nebraska’s “injury” statute to require physical harm to the body. The court relied in part on a Texas decision, *Southern Casualty Co. v. Flores,* which interpreted a statute similar to Nebraska’s to require “harm or damage to the physical structure of the body.”

In a strong dissent, Judge Rose argued for a traditional reading...
supporting the purposes of workers' compensation law — to protect employees. Judge Rose recognized that a worker can be harmed as much by a mental injury as by a physical injury. Because the brain and nervous system are part of the body, Judge Rose argued, mental injuries should be considered physical injuries to the body.45

The statutory construction arguments of the Bekelski majority carry little weight in certain states that traditionally allowed workers' compensation claims only where plaintiffs demonstrated physical injury. Two states with “physical” injury statutory definitions46 allow limited relief in mental-mental cases despite the literal wording of their statutes. The Texas Supreme Court allowed relief in a mental stress case despite its physical injury statute in a landmark 1955 decision. In Bailey v. American General Insurance Co.,47 the plaintiff watched a co-worker plunge to his death when a scaffold collapsed. The plaintiff thought he also would be killed, but he was caught in a cable and managed to jump safely to the roof. Because of the accident, the plaintiff could no longer function as a steel worker. He would blank out at heights, his blood pressure was high, and he experienced violent nightmares.

The Texas court ruled that “physical” structure involves an entire interrelated, living, functioning organism. The court determined that because the employee’s body no longer functioned properly, he had suffered the required physical injury.48 Bailey followed the position of the dissent in Bekelski. Nebraska’s dissenting Judge Rose stated:

[T]he claim of plaintiff is clearly within the purposes of the workmen’s compensation law, if not within its terms. . . . I am inclined to think that the lawmakers, by the use of the term “violence to the physical structure of the body,” meant an animate body with a directing brain containing blood, sensitive nerves, fibers and convolutions.49

Despite the contrary (but now restricted) precedent in Texas, the Nebraska Supreme Court reaffirmed Bekelski in the 1985 case of Johnston v. State.50 In Johnston, the plaintiff was a secretary to Nebraska Supreme Court Judge Donald Brodkey. Mrs. Johnston obtained what she thought was a cup of coffee from the statehouse cafeteria. Instead, she received urn cleaner, which caused minor esophageal and gastric problems. In addition, Mrs. Johnston experienced panic attacks, anxiety, and depression because of the accident.51

47. 154 Tex. 430, 279 S.W.2d 315 (1955).
48. Id. Texas has since limited its mental-mental claims to only cases involving a “sudden” mental stimulus.
51. Id. at 459, 364 N.W.2d at 3.
The court allowed relief, stating that "[t]here can be no question that Mrs. Johnston suffered an injury, no matter how slight, when she ingested the urn cleaner."52 The court further stated that workers can recover compensation for neurosis only if it is a proximate result of their physical injuries resulting in a disability.53

Three years later, the Nebraska Supreme Court considered Sorensen v. City of Omaha.54 In Sorensen, the plaintiff, James H. Sorensen, had served for 21 years as a firefighter for the City of Omaha. Sorensen, age 43, passed the captain's examination and in January 1986 began a six-month probationary period as acting captain.55 On June 26, 1986, Sorensen reported in full-dress uniform for what he assumed to be a promotion ceremony.56 Instead, Sorensen was demoted for alleged poor work performance.57 Sorensen protested the demotion, and his supervisors granted a second six-month probationary period.58

After the demotion, family doctors treated Sorensen for "considerable stress at work and epigastric problems with nausea and abdominal pain."59 In addition, a psychologist treated Sorensen for job-related stress.60 Approximately two months into the second probationary period, Sorensen left his job because of "harassment," "pressure," and "stress" caused by his failure to be promoted and his treatment by supervisors during the probationary periods.61

On January 2, 1987, Sorensen filed a petition in the Nebraska Workers' Compensation Court for stress-related physical and mental injury in the course of his employment. The Workers' Compensation Court agreed that "while engaged in the duties of his employment [Sorensen] suffered gastritis and injury to his psyche as a result of an accident or occupational disease arising out of and in the course of his employment by the defendant."62 The court awarded medical expenses and temporary disability compensation to Sorensen.

52. Id. at 466, 364 N.W.2d at 7.
53. Id.
55. Id. at 287, 430 N.W.2d at 697.
57. Brief for Appellee at 3, Sorensen v. City of Omaha, 230 Neb. 286, 430 N.W.2d 696 (1988)(No. 88-130). Sorensen was told that he would not be confirmed as a captain because of his poor work performance, of which he had been warned on several occasions, and because of the recommendations of his supervisors.
60. Id.
62. Id. at 288, 430 N.W.2d at 697.
On rehearing, a three-judge panel of the Workers' Compensation Court reversed the award. The panel relied on the Nebraska statute defining "injury" as harm "to the physical structure of the body." The panel stated: "Plaintiff's primary complaints are emotional. . . . The Nebraska Supreme Court has consistently [sic] held that in order for a mental or nervous injury to be compensable it must arise from violence to the physical structure of the body."64

Sorensen appealed to the Nebraska Supreme Court claiming he suffered an accidental injury as defined by Nebraska law. In the original petition before the Workers' Compensation Court, Sorensen's attorney characterized the claim as a mental-mental injury, indicating that Sorensen had suffered a mental injury because of stress on the job.65

On appeal, however, Sorensen's attorney urged the court to characterize Sorensen's injury as a mental-physical claim, which occurs when a mental stimulus results in a distinct physical injury (such as a sudden fright resulting in a heart attack). To recover for a mental-physical injury, a plaintiff must prove (1) a mental stimulus (2) resulting in a distinct physical injury.66 Nebraska courts have not directly addressed claims for mental-physical injuries, and the court again refused to do so in Sorensen. Instead, the court considered Sorensen's claim a mental-mental claim.67

Affirming the decision of the rehearing panel, the Nebraska Supreme Court denied Sorensen's claim for workers' compensation. The court based its decision on Bekelski v. O.F. Neal Co., which required employees to prove actual physical injuries to recover workers' compensation benefits.68

The Sorensen court determined that the plaintiff failed to prove the third element of the test — violence to the physical structure of the body. Therefore, the court declined to address the first two elements.69 Strictly construing the "injury" definition, the court indicated that Sorensen had to produce at least some minimal evidence of actual physical injury, exter-

64. Sorensen v. City of Omaha, Neb. Workers' Comp. Ct., Docket 76, No. 403, at 3 (January 15, 1988).
65. The type of injury Sorensen claimed would be defined by Professor Arthur Larson as a "mental-mental" injury. A. Larson, supra note 1, at § 42.23.
67. A. Larson, supra note 1, at § 42.21(b).
69. Id.
70. 141 Neb. 657, 4 N.W.2d 741 (1942).
71. Id. at 661, 4 N.W.2d at 744.
72. However, the court did state that Sorensen's injuries clearly met the second requirement of objective symptoms of injury. Sorensen v. City of Omaha, 230 Neb. 286, 289, 430 N.W.2d 696, 698 (1988).
nal or internal. . . . Common sense tells us that appellant's ailments were probably the products of physical injury, possibly an ulcer, but the appellant has failed to meet his evidentiary burden showing an actual injury such as a minimal superficial erosion of the lower esophagus.73

The court ignored a strong dissent by Judge Rose in Bekelski. Judge Rose had focused on the purpose of workers' compensation law — protection of the worker — and favored a broad application of the physical injury definition to include damage to the brain and nervous system.74 Further, the court in Sorensen ignored medical advances and social issues supporting recovery for mental-mental claims. Instead, the court relied on a rule of law barring all mental-mental claims in Nebraska.75

Bekelski, Johnston, and Sorensen do not further the purpose of workers' compensation laws. The Nebraska Supreme Court acknowledges that workers' compensation laws should be construed to benefit workers who can prove factually that a work-related stimulus caused harm.76 Yet, the court continues to follow a minority position drawing an arbitrary line between physical injuries and mental disorders, rather than looking at the functions of the body as a whole. Instead of denying all mental-mental claims through a rule of law, the court should allow workers to present their cases through more equitable rules of fact.

The arbitrariness of the physical injury requirement becomes even more clear when Johnston and the more recent Sorensen case are contrasted. In Johnston, the plaintiff's physical injuries were relatively minor throat pains and gastritis. The court noted that Johnston's injuries were slight.77 Johnston's physical injuries arguably were not as severe as those of the Sorensen plaintiff, who suffered from epigastric pain, insomnia, stomach pain, nausea, vomiting, and rectal bleeding.78 Yet, only Johnston was allowed to recover because her injuries allegedly met Nebraska's statutory physical injury requirement.79

III. OTHER JURISDICTIONS' TREATMENT OF MENTAL-MENTAL CLAIMS

A. Causation

One major barrier to the recognition of mental-mental claims in-

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73. Id. at 290, 430 N.W.2d at 698.
77. "There can be no question that Mrs. Johnston suffered an injury, no matter how slight, when she ingested the urn cleaner." Johnston v. State, 219 Neb. 457, 466, 364 N.W.2d 1, 7 (1985).
volves proof of causation. Workers' compensation statutes generally require that an injury (1) arise out of employment and (2) be in the course of employment. To be compensated for a mental-mental injury, the employee generally must show that mental injury arose out of employment. Problems arise when employees experience mental stress from "mixed" causes. For example, the stress leading to the injury may be a combination of personal stress and work-related stress.

Among the twenty-five states recognizing mental-mental claims, the laws regarding burden of proof and presumptions differ. In the majority of strict states, such as Iowa, the worker has the burden of proof. No presumptions exist to help establish injury or causation. Further, although such statutes indicate that they should be liberally construed, liberal construction applies only to the law, not to the evidence. To prove that an employee was injured in the course of employment, the employee must show a causal link between the work environment and the mental injury. Causation is especially difficult in mental-mental cases because mental illnesses have various causes.

Courts have developed tests for meeting the causation require-
ments in mental-mental workers' compensation cases: the subjective causal test, once applied in Michigan; and the objective test, applied by a majority of jurisdictions recognizing mental-mental claims. The subjective causal test allows an employee to recover if the employee "honestly perceived" that a mental injury occurred in the course of employment. Michigan later amended its laws to prevent recovery under the subjective test.

In contrast, the objective test examines the type, duration, and intensity of stress affecting the employee. Employees must show that stress existed on the job and was a contributing cause of the mental illness. Within the objective test, courts are divided on the type of stress required. One group requires that the stress be unusual or extraordinary compared to the stress of everyday employment. A second group allows compensation for mental-mental claims if the mental injuries are caused by normal daily stress.

The different standards of causation applied by the courts create significant proof problems in mental-mental cases. In states currently recognizing mental-mental claims, courts have developed differing approaches to causation in mental-mental cases. The following section

87. A. Larson, supra note 1, at § 42.23(c), (d). See also Deziel v. Difco Laboratories, Inc., 403 Mich. 1, 26, 268 N.W.2d 1, 13 (1978).
88. A. Larson, supra note 1, at § 42.23(d), (e).
89. Deziel v. Difco Laboratories, Inc., 403 Mich. 1, 26, 268 N.W.2d 1, 13 (1978)(the court stated that the employee could recover even if he mistakenly believed the illness was caused by a work-related injury.) See also Petersen v. SAIF Corp., 78 Or. App. 167, 171, 714 P.2d 1108, 1110 (1986) review denied, 301 Or. 193, 719 P.2d 1 (1986)(worker's reaction to stressful events can be compensated even if the worker's reaction is irrational.)
93. See Sloss v. Industrial Comm’n, 121 Ariz. 10, 11-12, 588 P.2d 303, 304 (1978). In addition, some states such as Massachusetts, North Dakota, and Illinois have held that no mental or emotional disability caused by a bona fide personnel action such as a transfer, promotion, demotion, or firing, is compensable because it is not an unusual or extraordinary event. See A. Larson, supra note 1, at § 42.23(c).
95. See Larson, supra note 1, at § 42.25(c) & n.9. The following states currently recognize mental-mental claims: Arizona, Arkansas, California, Hawaii, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, West Virginia, and Wisconsin.
examines the individual approaches states have adopted for dealing with mental-mental claims.

B. Majority View

More than half of all states allow workers' compensation relief for a mental disorder caused by a mental stimulus such as stress.96 However, the states allowing mental-mental claims disagree on the types of compensable stress injuries. Stress compensation generally can be

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divided into three categories: (1) mental disorders compensable even if the mental stimulus causing the injury was gradual and even if the stress is not unusual compared to ordinary life or employment; (2) mental disorders compensable only if the stress is unusual; (3) mental disorders compensable only if the stimulus is sudden. A discussion of these three types of workers’ compensation follows.

1. Traditional Recovery for Mental-Mental Injuries

Traditional workers’ compensation law allowed recovery for work-related injuries regardless of whether the injury was caused by an extraordinary accident or an occurrence in the ordinary course of employment. Applying traditional workers’ compensation law to mental-mental claims would allow compensation for mental injuries even if the mental stimulus is gradual and even if the stress is not unusual compared to everyday life in the workplace. The nine states currently following the traditional approach place little emphasis on the

worker totally splashed with molten metal was compensable under WCA); Baker v. Wendy's of Montana, Inc., 687 P.2d 885 (Wyo. 1984).

Colorado amended its statute in 1986 to provide that claimants can recover for mental stress only if they show by competent evidence that the stress was “proximately caused solely by hazards to which the worker would not have been equally exposed outside the employment.” COLO. REV. STAT. § 8-41-108(2.2)(1986).

In 1986, New Mexico amended its statute to read that “physical impairment” does not include impairment of function due solely to psychological or emotional conditions. However, in 1987, New Mexico again amended its statute, dividing injuries into physical impairment, primary mental impairment, and secondary mental impairment. A primary mental impairment is:

[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 workers' employment . . . .


In 1988, the Wisconsin legislature amended its definition of “injury” to exclude any injury causing mental harm or emotional stress or strain without physical trauma arising from exposure to conditions or circumstances beyond those common to occupational or nonoccupational life. Wis. STAT. ANN. § 102.01 (West Supp. 1990).

97. A. LARSON, supra note 1, at § 42.25(b).
98. Id. at § 42.25(g).
causal connection between stress and the workplace. Instead, the courts follow the general rule of workers' compensation law and determine whether the employment contributed to the mental injury disorder.

Statutory causation requirements pose the major problem for the traditional approach. Most workers' compensation statutes indicate that the injury must "arise out of" the employment. As a result, some courts attempt to impose additional requirements, such as a "physical injury" requirement, a "sudden/traumatic" event requirement, or an "objective (greater than usual) stress" requirement to ensure that the job in fact caused the stress.

Courts adopting the traditional approach, however, avoid causation problems by establishing a preliminary link between the employment and the mental stress. In Fox v. Alascom, Inc., the Alaska Supreme Court acknowledged causation difficulties, but granted relief through the fundamental principle of workers' compensation law — that the act should be read liberally and that the employer takes the employee "as he finds him." The Alaska court stated that once a preliminary link between the employment and mental stress is established, the claimant has a rebuttable presumption for compensation and need not present substantial evidence that his job caused the mental disorder.

2. Recovery for Unusual Stress

A more restricted view of mental stress compensation allows recovery only if the stress is unusual, meaning greater than the stress of everyday life or ordinary employment. The eleven states that have

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100. See Sersland, Mental Disability Caused by Mental Stress: Standards of Proof in Workers' Compensation Cases, 33 Drake L. Rev. 751, 752 (1983-84).

101. A. Larson, supra note 1, at § 6.10.

102. Id. at § 42.10.

103. Id. at § 42.25(e).

104. Id. at § 42.25(f).


106. Id. at 982.

107. Id. at 984.

adopted the unusual stress test apparently hope to satisfy causation requirements with the unusual stress requirement and to avoid malingering, which occurs when workers feign unsubstantiated mental injuries.  

In *Martin v. Rhode Island Public Transit Authority,* an employee recovered workers' compensation benefits for mental injuries after he was harassed and abused by co-workers. The claimant, who refused to participate in a work slowdown designed to discredit his supervisor, suffered from nervousness, anxiety, loss of appetite, and sweatiness. The court held that the co-workers' intentional and malicious harassment exceeded the normal stress in the workplace. Thus, the worker received compensation for his mental stress.

### 3. Recovery When the Stimulus is Sudden

The most restrictive mental-mental category limits recovery only to cases involving a sudden mental stimulus, such as shock or fright. Six states currently allow recovery if the mental disorder is caused


In 1988, however, the Wisconsin legislature amended the statutory definition of "injury" to exclude injuries causing mental harm or emotional stress or strain without physical trauma arising from exposure to conditions or circumstances beyond those common to occupational or nonoccupational life.

109. See generally Annotation, *Mental Disorders as Compensable under Workmen's Compensation Acts,* 97 A.L.R. 3d 161, 168 (1980 and Supp. 1990). In *Sorensen,* the plaintiff arguably met the unusual stress test because his injuries were caused by unusual problems not normally in the course of everyday employment.


111. Id.

112. A. LARSON, *supra* note 1, at § 42.25(e).

by a sudden mental stimulus. Courts adopting the narrow "sudden stimulus" test base their decisions on causation requirements and the need to discourage malingering.114

In Pathfinder Co. v. Industrial Commission,115 a worker fainted and suffered from anxiety after pulling a co-worker's severed hand from a machine. The court allowed recovery, stating that the worker had suffered a mental disorder caused by a sudden shock arising from her employment.116 Noting the broad purposes of workers' compensation, the court found no justification for a rule allowing compensation for mental disabilities caused by minor physical injuries but denying compensation if the same mental disorders were caused by a sudden mental shock.117

4. Conclusion

Although more than half of the states now recognize compensation for mental-mental injuries, the jurisdictions still are unable to uniformly resolve problems such as causation, malingering, and eggshell plaintiffs. Some states follow traditional workers' compensation principles and allow recovery for gradual job stress,118 while others allow compensation only if the stress is extraordinary or unusual.119 Despite the differing remedies, the majority of states agree that mental-mental claimants deserve some workers' compensation benefits.

B. Minority View

Despite the growing majority of states allowing recovery for a mental disorder resulting from a work-related emotional problem, the minority view denying compensation for mental-mental injuries continues to control in a few jurisdictions. The minority courts deny recovery based on narrow statutory definitions, despite medical advances and public policy to the contrary. Nebraska is one of ten states currently refusing compensation for mental-mental cases.120

(1955); Burlington Mills Corp. v. Hagood, 177 Va. 204, 210-11, 13 S.E.2d 291, 293-94 (1941).

Texas has held that mental-mental cases are compensable only if the stimulus is sudden. A. Larson, supra note 1, at § 42.25(e) (citing Transportation Ins. Co. v. Marksyn, 580 S.W.2d 334 (Tex. 1979), reh'g granted, 567 S.W.2d 845 (Tex. Civ. App. 1979)).

115. Id.
116. Id. at 567-68, 343 N.E. 2d at 919.
117. Id. at 564-65, 343 N.E.2d 917.
118. See supra note 99.
119. See supra note 108.
120. In one Alabama case, a worker sought relief for mental disabilities caused by harassment and the discriminatory practices of her supervisors. The court denied relief, stating that an "accident" requires an injury to the physical structure of
Like Nebraska, the states denying relief generally base their decisions on statutory definitions such as "injury,"\textsuperscript{121} "accident,"\textsuperscript{122} or "occupational disease." The courts cling to narrow statutory interpretations, requiring proof of a physical impairment to the body.

Courts upholding the minority view rarely go beyond statutory definitions to consider public policy reasons for allowing workers' comp-

\begin{footnotesize}


\textsuperscript{122} FLA. STAT. ANN. § 440.02(18)(West Supp. 1990).

\end{footnotesize}
pensation in mental-mental cases. In a recent case, the Alabama Court of Appeals at least acknowledged the beneficent purposes of workers' compensation. However, the court ignored the broad purposes of the act, basing its decision on a nineteenth-century definitional approach to mental injuries.

In addition, minority courts consistently ignore psychological advances and the need for the law to keep abreast of changes in other fields. In 1984, the Kansas Supreme Court acknowledged medical advances in psychology. The court stated:

[T]he evidence indicates that the injury sustained by [the worker] was real. It was as disabling as many physical injuries. It occurred by accident. It arose out of and in the course of his employment with respondent. But under our construction of the Kansas Workmen's Compensation Act, it was not a compensable "personal injury."

Yet, the Kansas court chose to ignore the evidence of medical advances and leave the issue of compensation for mental problems, absent physical injury, to the Kansas legislature.

IV. TOWARD RECOVERY FOR CERTAIN MENTAL-MENTAL INJURIES IN NEBRASKA

A. Statutory Construction

To understand the Nebraska Supreme Court's decisions in Bekelski, Johnston, and Sorensen, Nebraska's laws of statutory construction must be analyzed. The rules generally are complex and contradictory. Thus, courts are often left to their own discretion.

Only one clear rule of statutory construction emerges in Nebraska law: The courts must determine and follow legislative intent. The factors for determining legislative intent vary. Courts first look to the policy and purpose of the legislation. In addition, courts consider the entire language of a statute in its plain, ordinary, and popular sense. As a secondary source, courts can examine legislative history such as floor debates.

Under some precedents, courts need not apply literal meanings to

124. Id. at 58.
125. A. Larson, supra note 1, at § 42.23 & n.82. See also DSM-III, supra note 7; Melton, Petrla, Poythress & Slobogin, Psychological Evaluations for the Courts § 10.02 (1987).
127. Id.
words if the literal definitions do not further the purpose of the act.\textsuperscript{132} However, other cases seem to contradict the "literal meaning" exclusion, stating that a court cannot ignore plain, direct, and unambiguous statutory language.\textsuperscript{133}

Statutory construction rules also indicate that if a statute enumerates items to be controlled (or excludes items not affected by the statute), the statute will be construed to exclude all items not mentioned.\textsuperscript{134} However, the implied exclusion can be overcome if the legislature clearly indicated a contrary purpose.\textsuperscript{135}

Finally, when the court judicially construes a statute, the construction will be presumed correct if the legislature does not amend the statute to alter the interpretation.\textsuperscript{136} As a result, if the legislature fails to respond to a court decision based on statutory interpretation, the decision is presumed to correctly reflect legislative intent.

With regard to mental-mental injuries, courts first must look to the plain language of the workers' compensation statute. According to the statute, "The terms injury and personal injuries shall mean only violence to the physical structure of the body and such disease or infection as naturally results therefrom."\textsuperscript{137} Second, the court must determine the legislative intent of the workers' compensation act. The Nebraska Supreme Court has acknowledged that the purpose of workers' compensation is to insure employees against accidental injuries arising out of and in the course of employment.\textsuperscript{138} In addition, the purpose of the act should be broadly construed, but should not impose liability without required proof.\textsuperscript{139}

Under the rules of statutory construction, the court's main focus should be legislative intent — insuring employees against accidental injuries arising in the workplace. Nebraska's Supreme Court, however, appears to place more emphasis on a literal reading of the statute and a duty to give plain meaning to all words in the statute.

To properly construe the workers' compensation statutes, the court must examine the legislative intent of a 1963 statutory amendment designed to modernize workers' compensation laws. In the 1963 amendment, legislators eliminated the requirement that an accident be the result of a "slip, trip or fall."\textsuperscript{140} The amendment was intended

\textsuperscript{135}. \textit{id}.
\textsuperscript{136}. Ersparmer Advertising Co. v. Dep't of Labor, 214 Neb. 68, 333 N.W.2d 646 (1983)(superseded by statute as stated in State Dep't of Pub. Welfare v. Saville, 219 Neb. 81, 361 N.W.2d 215 (1985)).
\textsuperscript{137}. NEB. REV. STAT. § 48-151 (1958).
\textsuperscript{138}. Bekelski v. O.F. Neal Co., 141 Neb. 657, 659, 4 N.W.2d 741, 743 (1942).
\textsuperscript{139}. \textit{id}.
\textsuperscript{140}. See Gradwohl, \textit{supra} note 38.
to eliminate the unjust results of an external cause requirement for recovery of workers’ compensation benefits. Legislators noted the unjust results for two workers who failed to meet the external cause requirement. First, a police chief who struggled with an armed man and afterward suffered a heart attack was denied compensation because he did not slip, trip or fall. Second, a garbage collector who suffered neck injuries was denied relief because the injury was caused by ordinary work, not by an external cause. Thus, the 1963 amendment eliminated the unjust external cause requirement and provided relief for workers who could prove an injury arising from employment.

The 1963 amendment and the legislative intent behind the amendment suggest that employees who can show a mental-mental injury arising substantially from employment should receive the opportunity to prove the mental-mental injury, regardless of whether the worker also suffers a physical injury. Rather than barring all mental-mental claims, the court should note the legislative intent of the 1963 amendment — aiding workers injured in the course of employment regardless of external causation. Although the legislature failed to discuss the physical injury definition in the 1963 amendment, the legislative intent behind the amendment clearly covers recognition of mental-mental claims if the worker can prove a mental-mental injury. Thus, the court and the legislature should allow workers a chance to prove causation in mental-mental cases rather than barring all mental-mental claims.

B. Public Policy

Several analogies exist between policy reasons for the legislature’s 1963 amendment of the accident definition and the arguments favoring recognition of mental-mental claims. Further, the analogies are more clear when comparing the Nebraska Supreme Court’s treatment of mental injuries in tort cases and heart attack cases to the court’s treatment of mental-mental workers’ compensation claims. During the floor debate for the 1963 amendment, the themes of justice and fairness to workers continually surfaced. Advocates of the amendment questioned a rule allowing recovery only for workers who “slipped, tripped, or fell,” but not for those who suffered a heart attack or back injury arising out of the employment. One speaker also noted that Nebraska workers should have the same right to recover workers’ compensation benefits as workers in other states that had eliminated the external cause requirement.

141. MINUTES OF THE COMMITTEE ON JUDICIARY, LB 497 & 498, April 17, 1963 (comments by Senator Don McGinley).
142. Id. (statement by Tom Kelley of Omaha).
143. Id. (statement by Senator Don McGinley).
144. Id. (statement by Omaha lawyer Robert O’Connor).
The policy concerns spurring the legislature's expanded definition of "accident" also justify a broader definition of "injury." Unlike the workers in 25 other states, Nebraska workers are denied recovery for mental disorders caused by a mental stimulus in the workplace. Nebraska's "physical" injury distinction is arbitrary and unfair to workers. A worker with mental disorders caused by a slight physical injury can recover workers' compensation benefits. Yet, a worker with mental disorders caused by a mental stimulus cannot recover benefits.

Courts rejecting claims for mental stress caused by a mental stimulus generally rely on three basic arguments to deny recovery. First, the courts cite the need to establish a direct causal link between the mental disorder and the workplace. Second, the courts fear a flood of fraudulent claims for mental injuries that are often more difficult to analyze than physical injuries. Third, and often most importantly, courts rely on strict statutory construction rules, leaving any statutory changes to the legislature.

The causation argument carries little weight. The link between mental disorder and stress in the workplace can be decided by the finder of fact. Through discovery and evidence presented at trial, the court can determine whether the claimant's stress was caused by the work environment or by other non-employment factors or a combination of factors. Courts and legislatures could develop proof in fact requirements for mental-mental cases rather than flatly barring all claims.

Similarly, courts' fear of fraudulent claims can easily be dismissed. Medical and legal experts generally agree that no valid distinction exists between physical and "nervous" injury. The law constantly must adapt to advances in medicine and other areas of science. As Larson states:

Perhaps, in earlier years, when much less was known about mental and nervous injuries and their relation to "physical" symptoms and behavior, there was an excuse, on grounds of evidentiary difficulties, for ruling out recoveries based on such injuries, both in tort and workmen's compensation. But the excuse no longer exists.

Ironically, although Nebraska clings to the "physical injury" causation requirement in workers' compensation, Nebraska abandoned the physical injury requirement in tort cases. The court allowed compensation for mental distress in the case of Rasmussen v. Benson. In Rasmussen, a dairy farmer unknowingly bought poison bran at a farm sale and fed the bran to his dairy herd and other animals. The farmer

145. See cases cited supra notes 80-95. See also A. Larson, supra note 1, at 42.23(d).
146. A. Larson, supra note 1, at 42.24(c).
147. See supra notes 128-36.
148. A. Larson, supra note 1, at § 42.23(a).
149. Id.
150. 133 Neb. 449, 275 N.W. 674 (1937).
died from a "decompensated heart caused by emotional disturbance" caused in large part by an unreasonable fear that dairy customers would be injured by drinking milk from the poisoned cows.151

In a dissenting opinion, Judge Carter, joined by Judge Eberly, argued that the death was not proximately caused by the negligent sale of the poison bran. Judge Carter further stated that the farmer's death was not a foreseeable consequence of the sale and that the bran seller owed no duty to the buyer for the mental distress.152

Despite the Nebraska Supreme Court's liberal tort interpretation, Judge Carter's dissenting view has prevailed in workers' compensation cases.153 Judge Carter wrote the majority opinion in *Bekelski v. O. F. Neal Co.*,154 which established the rule that claimants must have "violence to the physical structure of the body" to recover workers' compensation benefits.155 Thus, while Nebraska tort law does not require physical impact, workers' compensation law, despite its broad goal of protecting workers, requires physical impact for recovery in mental stress cases.

Analogies also can be drawn between mental-mental claims and heart attack cases. Rather than simply barring all heart attack claims because of causation problems, the Nebraska Supreme Court has developed rules of fact for such cases.

When analyzing heart attack cases, the court allows recovery of workers' compensation benefits if the evidence shows that the employment contributed in some material and substantial degree to cause the injury.156 A pre-existing disease or condition does not bar workers' compensation; however, a pre-existing problem enhances the degree of proof needed to establish that the employment substantially contributed to the injury.157

Thus, as in mental-mental cases, the primary issue in heart attack cases is causation. Yet, despite the similar causative issue, the court's approach to the two cases differs. In mental-mental claims, the court bars all claims based on a rule of law. In contrast, in heart attack cases, the employee has the chance to prove the injury arose out of employment. The court has established no fixed formula to resolve the causation issue. Instead, the court decides the issue based on the

151. *Id.*
154. 141 Neb. 657, 4 N.W.2d 741 (1942).
155. *Id.* at 661, 4 N.W.2d at 744.
157. *Id.*
facts of each case. 158

The court has eased the causation burden slightly in heart attack cases, ruling that the injury need not be caused by a single traumatic event. Instead, the employment exertion must contribute in some material and substantial degree to the cause of injury. 159 Because similar causation problems exist among heart attack and mental-mental cases, the Nebraska Supreme Court could adopt a common approach in both categories. Rather than barring mental-mental claims, the court could allow claimants to attempt to prove causation through rules of fact. The factual compromise generally would leave the loss on the worker, unless the worker could prove workplace stress contributed materially and substantially to the mental injury.

V. A STATUTORY COMPROMISE

Public policy and the purposes of the workers' compensation law mandate that Nebraska workers receive fair treatment regardless of whether they suffer a minor physical injury or a serious mental injury. States currently recognizing mental-mental claims have varying statutory forms. 160 Thirteen states allowing workers' compensation for mental-mental injuries have statutes requiring that the injury "arise out of and in the course of employment." 161 The "arising out of" statutes are inadequate because they are ambiguous and leave the issue of mental stress compensation to the courts. Although thirteen states have interpreted their unclear statutes to include mental-mental claims, four jurisdictions with similar statutes 162 have denied relief in mental-mental cases. 163 Thus, Nebraska would gain little by adopting a statute defining an injury as merely a disorder "arising out of or in the course of employment."

A second group of statutes allows recovery for mental-mental inju-

160. See infra notes 161-72.
ries, but statutorily limits recovery to cases involving a sudden stimulus\textsuperscript{164} (such as shock or fright) or unusual stress greater than the normal tension all employees must face.\textsuperscript{165} The limitations imposed by these states are similar to the traditional "physical" requirement of courts in the minority jurisdictions. Legislatures generally adopt the limitations to provide some assurance that the claims will be genuine and that job stress actually caused the mental injury.\textsuperscript{166}

Several problems exist with the "sudden" stimulus statutory limitation. The "sudden" limitation is arbitrary and unfair to workers. Further, the "sudden" requirement does not guarantee the legitimacy of claims, although it may help establish a causal link. Because Nebraska already has removed the "sudden" requirement from its workers' compensation "accident" definition,\textsuperscript{167} the state should not again adopt the arbitrary limitation in its "injury" definition.

If Nebraska legislators determine that mental-mental claims must be limited, the more logical limitation would be to allow recovery only in cases of "unusual or extraordinary" stress. The "unusual stress" statutes provide some relief for workers, but do not unduly burden the workers' compensation system. Workers cannot recover for the stresses of everyday living caused by employment. In addition, the "unusual stress" requirement provides some guarantees of claim legitimacy and causation.\textsuperscript{168} By adopting an unusual stress recovery statute, Nebraska could provide relief for some workers who have suffered mental-mental injuries, yet maintain some assurance that claims will be genuine and causally linked to job stress.

The traditional approach to workers' compensation suggests that Nebraska adopt a statute providing for mental injuries contributed to

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\item \textsuperscript{164} WASH. REV. CODE ANN. § 51.08.100 (1990).
\item \textsuperscript{165} ALASKA STAT. § 23.30.265 (Supp. 1989); ARIZ. REV. STAT. ANN. § 23-1043.01 (1983); COLO. REV. STAT. § 8-41-108 (2.2)(1986); ME. REV. STAT. ANN. tit. 39, § 51 (1989); N.M. STAT. ANN. § 52-1-24 (1987); WIS. STAT. ANN. § 102.01 (West Supp. 1989). Wisconsin's statute defines "injury" as "mental or physical harm" to an employee. However, in April 1988, Wisconsin deleted an additional clause stating that: "Injury' includes mental harm or emotional stress or strain without physical trauma, if it arises from exposure to conditions or circumstances beyond those common to occupational or nonoccupational life."
\item \textsuperscript{166} Joseph, The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective, 36 VAND. L. REV. 263 (1983).
\item \textsuperscript{167} See Gradwohl, supra note 38.
\item \textsuperscript{168} In 1986, Colorado adopted a statute designed to ensure a causal connection between the mental injury and the employment stress. According to the statute, an injury:
\begin{itemize}
\item 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.
\end{itemize}
COLO. REV. STAT. § 8-41-108(2.2)(1986).\
\end{itemize}
by employment or for any harmful change in the human organism arising out of the workplace. However, broad mental-mental statutes fail to deter fraudulent claims and allow a weak causal link between the job stress and the mental injury. In California, which compensates gradual stress injuries so long as the workplace contributed to the stress, the number of stress claims significantly increased during the last five years.

Despite causation problems, broad statutes protecting gradual mental-mental injuries are within the spirit of workers' compensation laws. Workers' compensation was designed to protect all employees, regardless of their ability to handle normal workplace stress. Thus, Nebraska's most rational approach would be to adopt a statute allowing relief for mental injuries caused by mental stress if the worker can meet proof of fact requirements established by the legislature and the courts. The courts and the legislature should not simply block all recovery for mental-mental claims. Instead, the state must establish rules of fact and allow employees the opportunity to prove mental-mental claims. The proof of fact approach would provide the necessary guarantees of claim validity and causation.

Finally, Nebraska also should include a clause designed to protect employers' right to continue normal business practices. Two states recently added statutory clauses stating that:

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.

The clause basically insures that normal business practices such as demotions, transfers, work evaluations and layoffs, will not result in mental injury claims so long as the employer acts in good faith. By enacting a similar clause, the Nebraska legislature could further assure that only legitimate mental-mental claims will be compensated and that industries and consumers will not bear the costs of everyday employment stress.

IV. CONCLUSION

Current Nebraska decisions denying workers' compensation benefits for all mental-mental injuries are contrary to the purpose and in-
tent of workers' compensation law. The "physical injury" requirement should be eliminated by statutory amendment, judicial decision or both. The Sorensen case demonstrates the injustices that can and will occur if Nebraska continues to deny relief to workers who were mentally injured by a mental stimulus.

Public policy and precedents from other jurisdictions support the right of all workers to attempt to recover for mental-mental injuries through rules of fact. If the workers' compensation system does not bear the cost of mental injuries, the burden will fall on individual workers or public welfare systems. In addition, Nebraska's workers deserve the same protection as employees in other states.

By adopting and establishing rules of fact in mental-mental cases, the Nebraska legislature and the courts could provide justice for workers, yet guard against fraudulent claims. A statutory compromise in the mental injury area would protect both employees and employers, as well as fulfill the purpose of workers' compensation law. The statutory compromise generally would leave the loss on the employee, unless the employee could prove a mental stimulus in the workplace substantially contributed to the mental injury.

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