Extraordinary and Unusual Circumstances: Compensability of Psychological Injuries Under South Carolina's Workers' Compensation Law

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I. INTRODUCTION

Consider, for a moment, the challenges faced by two police officers injured in the line of duty. The first, Officer Andrews, is a beat cop with Patrol Team Two of the Charleston Police Department. Officer Andrews, while on his beat,
observes a purse-snatcher stealing a young lady’s handbag. He chases after the thief but falls and breaks his wrist while pursuing the miscreant down a flight of stairs. Consequently, Officer Andrews needs surgery to repair his wrist, and he misses two weeks of work. The Charleston Police Department’s workers’ compensation insurance paid for his medical expenses and lost wages, and he eventually returns to his post as good as new.

The second officer, Detective Baker, is an undercover officer with the Organized Crime and Narcotics Team of the Columbia Police Department. During a sting operation, Detective Baker’s cover is blown. A firefight ensues, during which Detective Baker is forced to shoot and kill an assailant in self-defense. Detective Baker suffers no physical injuries, but in the weeks that follow the shooting, he suffers from anxiety, depression, and flashbacks. He is eventually diagnosed with severe post-traumatic stress disorder, and his psychiatrist concludes that he is unable to continue working. Because Detective Baker’s injuries are psychological and because they arose from conditions that South Carolina does not consider to be “extraordinary or unusual” to his employment, he is unable to claim workers’ compensation benefits. Detective Baker never returns to work and is forced to go on Social Security Disability.

Is this a just result? This Note makes the case that it is not. Part II is an examination of the history and purposes of workers’ compensation statutes. Part III surveys the four primary approaches that states have taken in determining compensability for psychological injuries. Next, Part IV argues that South Carolina’s approach to this issue is flawed because it unnecessarily distinguishes between physical injuries and psychological injuries, resulting in substantial hardship on workers whose psychological injuries are no less devastating than the physical injuries suffered by their peers. Part V examines alternative methods of determining compensability that South Carolina policymakers might consider, while Part VI explores the different methods legislators, judges, and lawyers might employ to remedy this issue. Finally, Part VII concludes this Note.

II. A BRIEF HISTORY OF WORKERS’ COMPENSATION IN THE UNITED STATES

First, an examination of the history and purposes of workers’ compensation statutes will be helpful in evaluating the current rules of compensability for psychological injuries.

A. Adoption and Implementation of Workers’ Compensation

At common law, workers who suffered injuries arising out of the course of their employment were entirely barred from recovering against their employers. Although employees theoretically were entitled to relief through common law actions for torts, three doctrines—assumption of the risk, contributory negligence, and common employment—served to deny employees from successfully asserting causes of action for negligence against their employers. As the industrial revolution lurched into the twentieth century, it brought about a dramatic increase in the number of workers injured on the job and a concomitant dissatisfaction with the lack of remedies for these injuries. State legislatures responded by abandoning the concept of fault entirely and predicking liability on the risk inherent to employment in general.

The resulting statutes—now effective in every state—strike a bargain between employees and employers: employees give up their right to common law causes of action and the attendant right to traditional measures of damages, and in return, they receive compensation for all injuries incurred in the scope of their employment. In exchange for accepting no-fault liability, employers are spared the costs of litigation and the unpredictability of damages from negligence verdicts. The measure of compensation is limited to two costs—(1) medical expenses related to the injury and (2) lost earnings, usually determined by a schedule. Though each state has tweaked the details of its system over the past century, these general mechanics remain in place today.

4. Id. at 776.
5. See, e.g., Philip J. Fulton, Ohio Workers’ Compensation Law § 2.8 (4th ed. 2011) (noting that workers’ compensation law was a response to increased workplace injuries and the lack of legal remedies); Terry A. Moore, Alabama Workers’ Compensation § 1:1 (1998) (explaining that the Alabama workers’ compensation statute was the product of “the harsh realities of industrialization and the inadequacies of the common-law system”).
7. Id. (quoting State ex rel. Munding v. Indus. Comm’n of Ohio, 111 N.E. 299, 303 (Ohio 1915), overruled in part by State ex rel. Crawford v. Indus. Comm’n of Ohio, 143 N.E. 574 (Ohio 1924)).
10. See id. at 196–97 (comparing common arguments for and against the then-new statutory scheme).
B. The Purposes of Workers' Compensation

In examining the history of workers' compensation statutes, judges and scholars have identified a core group of purposes that motivated the adoption of these schemes across the country: (1) “provid[ing] shelter to employees and to their families ‘from the various hardships that result from employment-related injuries’”;

13 (2) protecting employers from “the unpredictable nature and expense of litigation”; 14 and (3) “cast[ing] upon the industry in which [employees] are employed a share of the burden resulting from industrial accidents.”

Similarly, the South Carolina Workers' Compensation Commission has recognized a corresponding group of objectives that underlie the system in South Carolina:

[(1)] Provide sure, prompt, and reasonable income and medical benefits to work-related accident victims, or income benefits to their dependents, regardless of fault;

[(2)] Provide a single remedy and reduce court delays, costs, and judicial workloads arising out of personal injury litigation;

[(3)] Relieve public and private charities of financial demands incident to uncompensated occupational accidents;

[(4)] Minimize payment of fees to lawyers and witnesses as well as time-consuming trials and court appeals;

[(5)] Encourage maximum employer interest in safety and rehabilitation through an appropriate experience-rating mechanism; and

[(6)] Promote frank study of the causes of accidents (rather than concealment of fault) in an effort to reduce preventable accidents and human suffering. 16

Additionally, in South Carolina, as in many states, “compensation laws [are] given a liberal construction in furtherance of [these] beneficent purposes . . . so as to avoid incongruous or harsh results.” 17


14. Id. (quoting Polomski v. Mayor & City Council of Baltimore, 684 A.2d 1338, 1341 (Md. 1996)) (internal quotation marks omitted); see also COLO. REV. STAT. § 8-40-102 (2012) (noting the legislature’s desire to avoid litigation in establishing the workers’ compensation statute); N.M. STAT. ANN. § 52-5-1 (LexisNexis 2004) (noting the legislature’s consideration of employer costs in establishing the workers’ compensation statute).


Throughout the country and in South Carolina, courts refer to these purposes of workers’ compensation when interpreting relevant legislative acts. Some statutes explicitly require the courts to construe the statutes liberally in order to achieve these purposes. In examining South Carolina’s compensability rules, it is necessary to refer back to these purposes in deciding whether the current rule—the “extraordinary or unusual circumstances” requirement—is really in the best interests of South Carolina workers and employers.

III. FOUR APPROACHES TO COMPENSATING PSYCHOLOGICAL INJURIES

At the outset, it is important to identify and examine the various approaches states have taken in determining compensability for psychological injuries. Professor Larson, in his treatise on workers’ compensation, identifies three kinds of psychological injuries. The first, termed “mental–physical,” involves a scenario where psychological stress in the workplace results in a physical symptom of injury. Injuries of this type are universally considered to be compensable. The second, called “physical–mental,” involves situations in which a physical stimulus causes mental injury symptoms. As with the first category, injuries of this type are also universally considered compensable. The third kind of psychological injury, called “mental–mental,” involves cases in which a mental stressor or stimulus results in mental symptoms. For this third category, an “impressive majority” of courts support compensability; however, a substantial minority of courts still deny compensation.

Although each state has taken its own approach in determining compensability for these psychological injuries, the results can be gathered into four general groups: (1) the “unusual or extraordinary circumstances”

19. See, e.g., KY. REV. STAT. ANN. § 446.080 (LexisNexis 2010) (stating that all statutes should be liberally construed “to promote their objects and carry out the intent of the legislature”).
21. 3 LARSON & LARSON, supra note 8, § 56.02.
22. Id. § 56.02[1].
23. Id.
24. Id. § 56.03[1].
25. Id.
26. Id. § 56.04.
27. Id.
requirement; (2) the sudden stimulus requirement; (3) the physical injury causation requirement; and (4) the employment causation requirement.

A. The “Extraordinary or Unusual Circumstances” Requirement

The first approach—and the one currently used in South Carolina—is the “unusual or extraordinary circumstances” requirement. The test requires the stimulus that caused the injury to be “extraordinary and unusual in comparison to the normal conditions of the particular employment.” This requirement is distinguished from the others in that the “extraordinary or unusual” circumstances need not involve a physical stimulus, nor do they need to occur suddenly or be traceable to a single discernible event. In South Carolina, this approach was first propounded in Stokes v. First National Bank. In Stokes, a bank officer suffered a nervous breakdown shortly after a substantial increase in his working hours and job responsibilities. Searching for an analogue to mental injuries from which to draw a legal standard for compensability, the court of appeals adopted the rule applied to heart attack cases. The court of appeals explained that it adopted the “extraordinary or unusual conditions” standard because the courts in South Carolina had previously “likened mental injur[i]es . . . to heart attack[s].” The statutory language that appears today was a legislative ratification of this approach.

In some ways, the analogy used by the court of appeals makes sense. Both heart conditions and mental injuries are susceptible to initiation or aggravation by workplace stressors. Additionally, and perhaps of greatest concern to the

29. Id.
30. See id.
32. See id. However, the court in Stokes gave credit for the “new and . . . enlightened rule” to the South Carolina Supreme Court’s decision in Kearse v. South Carolina Wildlife Resources Department, 236 S.C. 540, 544, 115 S.E.2d 183, 186 (1960).
33. Id. at 15–16, 377 S.E.2d at 923.
34. See id. at 18–19, 377 S.E.2d at 925 (citations omitted).
35. Id. at 18, 377 S.E.2d at 925.
37. See, e.g., Bentley v. Spartanburg Cnty., 398 S.C. 418, 420–21, 730 S.E.2d 296, 297–98 (2012), reh’g denied (Aug. 10, 2012) (describing employee police officer’s psychological symptoms following his shooting a suspect while on patrol); Westbury v. Heslep & Thomason Co., 199 S.C. 124, 130, 18 S.E.2d 668, 671 (1942) (explaining that testimony that victim of a heart attack had not experienced symptoms prior to a fall at work could lead to a reasonable inference that the heart attack was sustained as a result of the fall); Green v. City of Bennettsville, 197 S.C. 313, 328, 15 S.E.2d 334, 340–41 (1941) (holding that there was sufficient evidence that deceased employee died of a heart attack as a result of the circumstances of his employment). For a discussion of the compensability of injuries to which a preexisting condition contributed, see Sweat v. Marlboro Cotton Mills, 206 S.C. 476, 480, 34 S.E.2d 762, 763 (1945) (citing Cromer v.
courts, both present knots of causative factors that are difficult for courts to untangle. Requiring “extraordinary or unusual” conditions of employment for compensability provides courts with a shortcut through this problem. If the onset of an injury coincides with extraordinary or unusual conditions of employment, courts reason that the conditions probably caused the injury; and if no such coincidence was present, then internal factors, such as an underlying condition, or nonemployment external factors, such as marital problems, probably caused the injury.  

B. The Sudden Stimulus Requirement

The second approach—the sudden stimulus requirement—allows for compensation without a physical stimulus, but only when the employee has suffered a “sudden stimulus.” Tennessee courts, for example, recognize “that a mental stimulus, such as fright, shock or even excessive, unexpected anxiety could amount to an ‘accident’ sufficient to justify an award for a resulting mental or nervous disorder.” Jurisdictions adopting this approach tend to focus on the definition of the terms “accident” or “injury” as used in the statute. In these jurisdictions, “accident” has been given a relatively narrow construction. For example, Texas requires that the stimulus be “an undesigned, untoward event that is traceable to a definite time, place, and cause” before allowing compensation for a mental—mental injury.

Nevada is the exception, having adopted this approach by statute. Nevada prohibits compensation for “[a]ny ailment or disorder caused by any gradual mental stimulus.” For an injury caused by stress to be compensable in Nevada, the employee must show “by clear and convincing medical or psychiatric evidence” that the “mental injury [was] caused by extreme stress in time of danger.”

Newberry Cotton Mills, 201 S.C. 349, 364, 23 S.E.2d 19, 25 (1942); Ferguson v. State Highway Dep’t, 197 S.C. 520, 527, 15 S.E.2d 775, 778 (1941); Cole v. State Highway Dep’t, 190 S.C. 142, 147, 2 S.E.2d 490, 492 (1939)).

38. See, e.g., Westbury, 199 S.C. at 130, 18 S.E.2d at 671 (heart attack resulting from fall); Green, 197 S.C. at 328, 15 S.E.2d at 340–41 (heart attack resulting from police officer’s arrest of an uncooperative suspect).

39. See 3 LARSON & LARSON, supra note 8, § 56.06[5].

40. Henley v. Roadway Express, 699 S.W.2d 150, 154 (Tenn. 1985) (quoting Jose v. Equifax, Inc., 556 S.W.2d 82, 84 (Tenn. 1977)).

41. See, e.g., id. (quoting Jose, 556 S.W.2d at 84) (discussing the term “accident” in the Tennessee statute); Transp. Ins. Co. v. Maksyn, 580 S.W.2d 334, 335–36 (Tex. 1979) (citations omitted) (discussing Texas’s construction of the terms “accidental injury” and “occupational disease,” as applied to a stress case).

42. Maksyn, 580 S.W.2d at 336.

43. See NEV. REV. STAT. ANN. § 616C.180 (LexisNexis 2012).

44. Id. § 616C.180(2).

45. Id. § 616C.180(3)(a).
The common factor among the “sudden stimulus” jurisdictions is a statutory construction that views employment-related injuries as the product of single events, rather than general conditions of employment. This narrowness is stark contrast from the broader definitions embraced in other states. The primary reason for this narrow construction is “apprehension about fraudulent claims and the genuineness of the causal relation between employment and the mental injury [compared to] cases in which . . . the causal stimulus is a traumatic mental impact.”

C. The Physical Injury Causation Requirement

The third approach—the physical injury causation requirement—requires claimants to demonstrate that their psychological injuries arise from a physical injury to the body. In states that have adopted this requirement, mental—mental injuries are simply not recognized. Additionally, in some states, compensability is expressly limited by statute, while in others, courts have declined to construe ambiguous statutes in favor of compensating these injuries absent a physical injury.

Courts have suggested several rationales for this rule. For example, the Minnesota Supreme Court declined to construe that state’s ambiguous workers’ compensation statute in favor of compensability because it believed that doing so would reallocate costs from health disability insurance to the workers’ compensation system. The court felt such a reallocation was a “major policy determination” and one it was unwilling to make absent clear intent of the

46. See, e.g., Henley, 699 S.W.2d at 155 (noting that “it must be shown that at the time and place of the injury the employee was performing a duty he was employed to do”); Makany, 580 S.W.2d at 336 (explaining that an injury must be “traceable to a definite time, place, and cause”).

47. See, e.g., CAL. LAB. CODE § 3208.3(b)(1) (West 2011) (providing that a psychiatric injury will be compensable if an employee proves by a preponderance of the evidence “that actual events of employment were predominant as to all causes combined of the psychiatric injury”); MICH. COMP. LAWS ANN. § 418.301(2) (West Supp. 2012) (providing that “[m]ental disabilities are compensable if arising out of actual events of employment . . . and if the employee’s perception of the actual events is reasonably grounded in fact or reality”).


49. See, e.g., ALA. CODE § 25-5-1(9) (LexisNexis 2007) (specifying that “[i]njury 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”); OHIO REV. CODE ANN. § 4123.01(C)(1) (LexisNexis Supp. 2012) (limiting compensable psychiatric injuries to those that “have arisen from an injury or occupational disease sustained by that claimant” or as a result of forced sexual conduct).


51. See statutes cited supra note 49.

52. See Lockwood, 312 N.W.2d at 926–27.

53. Id. at 927.
Likewise, the Ohio Supreme Court has held that the workers’ compensation statute in that state was written so as to exclude mental–mental injuries from the scope of the statute entirely. The court reasoned that while the claimant is denied recovery under the workers’ compensation system for such injuries, the employer is also denied immunity from liability. Other courts have expressed concern for imposing liability on employers for mental injuries that are perceived to be too “remote” from a work-related cause.

**D. The Causal Relation Requirement**

The final approach—the causal relation requirement—encompasses several different causal standards, but the primary requirement is that the employee shows that conditions of employment, in fact, caused the psychological injury. In these states, any mental injury, including a mental–mental injury, is theoretically compensable so long as the employee can demonstrate that conditions of employment are a sufficient causative factor to meet the state’s standard.

Although the states that adhere to the causal relation requirement all allow compensation for mental–mental injuries, the standards applied by each state vary. For a time, the California courts interpreted the state’s labor code as allowing compensability for stress based on the employee’s subjective perception of the stress and not an objective evaluation of the workplace stress placed on the employee. The result was a massive increase in the volume of mental–mental claims filed in the succeeding years. The increased cost of these claims led California to reform its compensation system to limit their compensability. That reform required “an employee [to] demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.” California courts now construe their workers’ compensation statute as requiring claimants to demonstrate “that industrial factors account for more than 50 percent of the employee’s psychiatric injury.”

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54. Id.
56. Id.
57. See, e.g., Superior Mill Work v. Gabel, 89 So. 2d 794, 795 (Fla. 1956) (noting that the causal connection between an injury and its cause “must not be remote” (quoting Thompson v. Ry. Express Agency, 236 S.W.2d 36, 39 (Mo. Ct. App. 1951))).
58. See statutes cited supra note 47.
60. See 3 Larson & Larson, supra note 8, § 56.06[1][a].
61. Id.
62. CAL. LAB. CODE § 3208.3(b)(1) (West 2011).
63. Verga, 70 Cal. Rptr. 3d at 877 (quoting Pac. Gas & Elec. Co. v. Workers’ Comp. Appeals Bd., 8 Cal. Rptr. 3d 467, 473 (Ct. App. 2004)).
Michigan has long recognized mental–mental injuries, first by judicial interpretation and today by express statutory provision. The Michigan statute appears to favor compensation in more cases than the California statute, allowing compensation for mental injuries, including degenerative diseases, as long as work conditions “contributed to or aggravated” the injury. Like the current California statute, the Michigan legislature amended its workers’ compensation laws to require an objective standard for determining whether the workplace stress was sufficient to cause the injury.

The early Michigan cases suggest the primary rationale for the adoption of the causal relation standard: “The injury to [the worker is] no less real and fatal in its consequences than a mortal wound.” This rationale is in accord with the many provisions found in workers’ compensation statutes requiring that the entire scheme be construed in favor of compensation and the beneficent purposes behind the scheme. Implicit in this approach is a rejection of concerns regarding the cost to industry and the difficulties of proving the causal relationship between employment and injury.

IV. PROBLEMS WITH THE “EXTRAORDINARY OR UNUSUAL CIRCUMSTANCES” REQUIREMENT

When the South Carolina Court of Appeals adopted the “extraordinary or unusual circumstances” requirement in Stokes, it was rightfully regarded as a step forward for employees suffering from psychological injuries: where once no remedy was available for mental–mental injuries, a path to compensation had been beaten. The South Carolina Supreme Court affirmed the decision, and the General Assembly added its approval in 1996 by codifying the “extraordinary or unusual circumstances” requirement in the state’s workers’ compensation law. However, two recent cases, Martinez v. Spartanburg

64. See Klein v. Len H. Darling Co., 187 N.W. 400, 403 (Mich. 1922) (holding that the state’s workers’ compensation statute permitted compensation for an employee who lapsed into “delirium” and died when he dropped a radiator on the head of a fellow employee, mistakenly believing that he had killed his co-worker).
66. Id.
68. Klein, 187 N.W. at 408 (Wiest, J., concurring).
69. See, e.g., Ohio Rev. Code Ann. § 4123.95 (LexisNexis 2007) (“The act shall be liberally construed in favor of employees and the dependents of deceased employees.”).
72. See supra note 36 and accompanying text.
County,73 and Bentley v. Spartanburg County,74 illustrate the limits of this approach and the challenges remaining for South Carolina workers who suffer from psychological injuries.

A. Martinez v. Spartanburg County

Martinez involved the plight of Raquel Martinez, a forensic investigator and twenty-eight-year law enforcement veteran.75 On April 4, 2005, Martinez was called to the scene of an accident involving a friend and fellow law enforcement officer.76 The officer had accidentally struck and killed his two-year-old daughter while backing out of his driveway.77 While on the scene, Martinez performed all of her standard investigatory duties, including measuring the child’s body and taking photographs of the yard where the child lay.78 The night after the investigation, Martinez wept and experienced nightmares.79 Martinez’s supervisor testified that “she was depressed, and within . . . three weeks, it showed in her work, in her habits.”80 Four months after her work on the accident scene, Martinez suffered a nervous breakdown, during which she mentioned to her father that she wanted him “to meet an imaginary ‘little girl.’”81

The South Carolina Court of Appeals held that Martinez’s case was not compensable under the Workers’ Compensation Act because she did not suffer an “‘unusual or extraordinary’ condition in her particular employment.”82 In so doing, the court referred to a line of cases holding that “unusual or extraordinary” working conditions were determined relative to the employee’s given line of work and not to working conditions of the general public.83

The original case in this line of cases was Shealy v. Aiken County.84 In Shealy, the South Carolina Supreme Court surveyed the laws and jurisprudence of other states and identified three approaches to defining “extraordinary and unusual”: (1) compare the work conditions with those normally experienced in the employee’s day-to-day duties; (2) compare the work conditions with those present in employment among the general population; and (3) compare the work

75. Martinez, 394 S.C. at 227, 715 S.E.2d at 341.
76. Id. at 227–28, 715 S.E.2d at 341.
77. Id. at 227, 715 S.E.2d at 341.
78. Id.
79. Id. at 228, 715 S.E.2d at 341.
80. Id. at 229, 715 S.E.2d at 342.
81. Id. at 228, 715 S.E.2d at 341.
82. Id. at 334, 715 S.E.2d at 344.
83. See id. at 232–33, 715 S.E.2d at 344 (citing Frame v. Resort Servs. Inc., 357 S.C. 520, 529, 593 S.E.2d 491, 496 (Ct. App. 2004))
conditions with the “wear and tear of [everyday] life.” The supreme court chose to adopt the first standard. In doing so, it relied exclusively on two propositions. First, this standard is the same that the courts in South Carolina have applied to heart attack cases for decades—echoing the Stokes court used when it adopted the “extraordinary or unusual circumstances” test in the first place. Second, the supreme court quoted Professor Larson, who noted that the “own normal working conditions” definition feels “the most familiar.”

Notably absent from the court’s decision in this portion of Shealy was any analysis regarding the policy behind the adoption of this standard. The court made a token reference to the principle of liberal construction, but it provided no discussion of the purposes of the workers’ compensation statute. In particular, two purposes stand out as favoring a broader definition. First, as noted previously, one reason workers’ compensation exists is to protect workers “from the various hardships that result from employment-related injuries.” Naturally, a definition that broadens coverage furthers this goal; additional coverage would better protect employees from workplace risks.

Second, workers’ compensation also exists to spread to industry the costs of the risks it imposes on employees. The Shealy court had a golden opportunity to advance this goal by adopting a more inclusive definition of “unusual or extraordinary” circumstances. A broad definition would have shifted the burden in high-stress industries, such as law enforcement, from the employee to the employer, the latter of which is in a better position to bear the cost. Instead, the Shealy court took the opposite approach, selecting the most restrictive definition. In addition to casting aside the opportunity to further two important

85. Id. at 457–58, 535 S.E.2d at 443 (quoting 2 LARSON & LARSON, supra note 8, § 44.05(4)(d)(i) (1999)).
86. See id. at 458, 535 S.E.2d at 444.
89. Shealy, 341 S.C. at 458, 535 S.E.2d at 443 (quoting 2 LARSON & LARSON, supra note 8, § 44.05(4)(d)(i) (1999)).
90. See id.
92. See id. at 455–59, 535 S.E.2d at 442–44 (citations omitted).
93. See supra note 13 and accompanying text.
94. See, e.g., Taylor v. Mount Vernon-Woodberry Mills, 211 S.C. 414, 422, 45 S.E.2d 809, 812 (1947) (“The Workmen’s Compensation Act was adopted . . . to protect industrial workers against the hazards of their employment and to cast upon the industry in which they are employed a share of the burden resulting from industrial accidents.”).
96. See Shealy, 341 S.C. at 458, 535 S.E.2d at 444.
policy goals, this decision effectively denied compensation for mental–mental injuries to every employee involved in high-stress industries by setting the standard of “unusual or extraordinary” unreachably high. The result is that the employees who are most susceptible to job-related mental injuries are the least able to meet the standard for compensability. Unfortunately for these workers, the definition of “conditions of employment” applied in Shealy has been codified in South Carolina’s workers’ compensation statute, precluding judicial reconsideration of the issue.97

B. Bentley v. Spartanburg County

The second case is illustrative of the problem presented by the Shealy ruling. In Bentley v. Spartanburg County,98 Officer Brandon Bentley was dispatched to investigate an apparent dispute between neighbors.99 Upon arriving on the scene, Bentley encountered one of the men involved in the disturbance and asked the man to come speak with him.100 The man refused to do so and “exchanged words” with Officer Bentley before approaching him with an umbrella raised in an “offensive posture.”101 Bentley issued several commands to the man to cease this action, but the man instead threatened to take Bentley’s gun and kill him.102 Bentley then fired one shot at the man, killing him.103 In the weeks that followed, Officer Bentley began suffering from “psychological symptoms including anxiety and depression.”104 Bentley sought treatment, and as a result, his psychiatrist determined that he was unable to work.105 The Workers’ Compensation Commission denied Bentley’s compensation claim,106 and on review, the South Carolina Supreme Court affirmed.107 Because Bentley was a trained police officer and, therefore, the shooting did not constitute an “extraordinary or unusual” circumstance of his employment, the court ruled that his injuries were noncompensable under the Act.108

In affirming, however, the court took the unusual step of offering its opinion that the General Assembly should amend the workers’ compensation statute to

97. See S.C. CODE ANN. § 42-1-160(B)(1) (Supp. 2012) (requiring the employee to prove by a preponderance of the evidence “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”).
99. Id. at 420, 730 S.E.2d at 297.
100. Id.
101. Id. (internal quotation marks omitted).
102. Id.
103. Id.
104. Id. at 421, 730 S.E.2d at 297.
105. Id.
106. Id. at 421, 730 S.E.2d at 298.
107. Id. at 431, 730 S.E.2d at 303.
108. Id. at 430–31, 730 S.E.2d at 303.
remove the “unusual and extraordinary circumstances” requirement.\(^\text{109}\) The court argued that the traditional basis for denying compensability—fear of fraud and falsification—was obsolete in light of continuing medical advances in the fields of psychology and psychiatry and that the bright line rules favored in the past were no longer necessary.\(^\text{110}\) The court pointed to the ability of several states to operate successful workers’ compensation systems without the “extraordinary or unusual circumstances” requirement.\(^\text{111}\) The court also noted that claims for physical injury and pain and suffering were equally susceptible to falsification, and that no justification remained for treating them differently than psychological injuries.\(^\text{112}\)

V. SEARCHING FOR AN ALTERNATIVE

Although the South Carolina Supreme Court requested a change to the law concerning mental–mental injuries, the justices were vague about which approach they favored. Recall the objectives of the workers’ compensation system identified by the South Carolina Workers’ Compensation Commission:

([(1)] Provide sure, prompt, and reasonable income and medical benefits to work-related accident victims, or income benefits to their dependents, regardless of fault;

[(2)] Provide a single remedy and reduce court delays, costs, and judicial workloads arising out of personal injury litigation;

[(3)] Relieve public and private charities of financial demands incident to uncompensated occupational accidents;

[(4)] Minimize payment of fees to lawyers and witnesses as well as time-consuming trials and court appeals;

[(5)] Encourage maximum employer interest in safety and rehabilitation through an appropriate experience-rating mechanism; and

\(^{109}\) Id. at 423–25, 730 S.E.2d at 299–300 (citing Molien v. Kaiser Found. Hosps., 616 P.2d 813, 820 (Cal. 1980)).

\(^{110}\) See id. at 424, 730 S.E.2d at 299.

\(^{111}\) See id. at 426 & n.4, 730 S.E.2d at 300 & n.4 (naming Hawaii, Michigan, New Jersey, New York, and Oregon (citing 3 Larson & Larson, supra note 8, § 56.06D[7])). However, as noted in Part III.B–D, there are many others.

\(^{112}\) Id. at 424–25, 730 S.E.2d at 299–300 (citing Molien, 616 P.2d at 821).
[6] Promote frank study of the causes of accidents (rather than concealment of fault) in an effort to reduce preventable accidents and human suffering.\textsuperscript{113}

The “extraordinary or unusual circumstances” requirement thwarts the first, third, and fifth goals by denying compensation for injuries that can clearly be tied to workplace conditions and by freeing from liability employers that may be in a position to reduce the risk of such injuries. On the other hand, this approach does protect employers from the expense of litigation, albeit by barring compensation for these injuries entirely.

Using the original purpose and goals of workers’ compensation statutes as a guide, this Part compares the approaches used in other states to see what changes might improve South Carolina’s law.

A. The Sudden Stimulus Requirement

Of the three approaches that South Carolina might adopt, the sudden stimulus requirement is perhaps the most similar in terms of its overall effect on compensability. Like the “extraordinary or unusual circumstances” requirement, it occupies the middle ground between the restrictive physical injury causation requirement and the generous causal relation requirement. Nonetheless, it is not an ideal model for change because it still excludes a substantial portion of mental–mental injuries—those that cannot be “trace[d] to a definite time, place, and cause” are excluded.\textsuperscript{114} Indeed, under this test, even the employee in Stokes who received compensation would be denied because an extended period of stressful working conditions caused his injury.\textsuperscript{115} Therefore, adopting this approach would merely shift the parameters of compensability, creating new protections for workers injured in one fashion and removing protections for those injured in a different fashion. This result is a clear failure to “[p]rovide sure, prompt, and reasonable . . . benefits to work-related accident victims,” or to “[r]elieve . . . charities of financial demands incident to uncompensated occupational accidents.”\textsuperscript{116} By denying compensation entirely for these work-related injuries, this approach places the costs squarely on the employee and any charities. This method also fails to “[e]ncourage maximum employer interest in safety and rehabilitation” or to “[p]romote frank study of the causes of accidents”\textsuperscript{117} because it does not impose any liability on employers for the psychological injuries that stressful, long-term working conditions cause. If

\textsuperscript{113} ANN. REP., supra note 16, at 1.


\textsuperscript{116} See supra notes 16, 113 and accompanying text.

\textsuperscript{117} See supra notes 16, 113 and accompanying text.
employers suffer no liability, even under the generous workers’ compensation statute, what incentive do they have to change the conditions?

Because the sudden stimulus requirement is a rule of compensability and not a fundamental change to the structure or procedure of workers’ compensation, the remaining objectives—exclusivity of remedy and minimization of costs of traditional litigation—would be unaffected by a change to this approach.

B. The Physical Injury Causation Requirement

The physical injury causation requirement is an even worse model for change than the sudden stimulus requirement for the same reasons: (1) it imposes the costs of work-related injuries on the employee and charity, rather than on the employer; and (2) it fails to encourage employers to take an interest in employee safety or to engage in a frank study of the causes of injury because it does not impose liability for the consequences of injurious workplace conditions. Moreover, because the physical injury causation requirement denies compensability entirely, it exacerbates the problem by denying protection and refusing to impose liability on the entire class of workers suffering mental injuries, not just a portion thereof.

C. The Causal Relation Requirement

The causal relation requirement is the ideal model for change because it does a better job of furthering the objectives of workers’ compensation. By providing compensation to all employees who can demonstrate that workplace conditions were the predominant cause of their psychological injury, the requirement provides protection for all workers injured by workplace conditions without discriminating between causes of injury. In adopting this requirement, the system would relieve charities of the financial burden of caring for individuals with psychological injuries caused by workplace conditions. This approach would also improve workplace conditions, generally, by imposing the costs of the risks of such conditions on employers, who will have a financial incentive to keep psychological, as well as physical, injuries to a minimum.

Although the causal relation requirement is the preferred approach, it is not perfect. As the South Carolina Supreme Court noted in Bentley, taking too expansive an approach to compensability “could indeed unintentionally unleash a flood of litigation that raises costs, burdens the courts, and unduly interferes

118. See supra notes 16, 113 and accompanying text.
119. As previously noted, the physical injury causation requirement requires claimants to demonstrate that their psychological injuries arise from a physical injury to the body. See statutes cited supra note 49.
120. See supra notes 16, 113 and accompanying text.
with the hiring and firing of workers,” as took place in California.\textsuperscript{121} The language of the requirement must be carefully crafted. By including an objective standard for determining the stressfulness of workplace conditions and a requirement that employees show that workplace conditions were the primary or predominant cause of the injury, the system can compensate the injuries fairly without subjecting itself to a deluge of frivolous claims.

VI. PATHS TO CHANGE

Because the General Assembly has codified both the \textit{Stokes} and \textit{Shealy} holdings,\textsuperscript{122} most workers in South Carolina seeking compensation for mental—mental injuries will need legislative action to relieve their situations. A small number of workers, whose injuries are the result of intentional or negligent torts, should still be able to pursue relief because their injuries do not fall under the exclusive-remedy provision of the Workers’ Compensation Act.

A. Legislative Action

Legislative action is necessary to change the statute and move South Carolina toward the causal relation requirement. Although South Carolina’s “extraordinary or unusual circumstances” rule was first adopted by the judiciary, it has since been codified by the General Assembly.\textsuperscript{123} As the supreme court noted in its call for reform in \textit{Bentley}, the courts are now “bound by the language of section 42-1-160 as written.”\textsuperscript{124} Any permanent solution will depend on legislative action.

In crafting language effecting this change, the General Assembly might consider looking to other states that have adopted some version of the causal relation requirement. The versions of the test codified in California and Michigan provide two good models for statutory language.\textsuperscript{125}

In California, “[i]n 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

\begin{itemize}
\item \textsuperscript{121} Bentley v. Spartanburg Cnty., 398 S.C. 418, 425 n.3, 730 S.E.2d 296, 300 n.3 (2012) (citing 3 LARSON & LARSON, supra note 8, § 56.06[1][a]), reh’g denied (Aug. 10, 2012).
\item \textsuperscript{122} Recall that \textit{Stokes}, which articulated the “extraordinary or unusual circumstances” requirement, was codified into the Workers’ Compensation Act by 1996 S.C. Acts 2566 (codified as amended at S.C. CODE ANN. § 42-1-160 (Supp. 2012)). Similarly, \textit{Shealy}, which further interpreted “extraordinary or unusual” as referring to the conditions of the employee’s particular employment, rather than the working public at large, was codified in 2007 S.C. Acts 610–11 (codified as amended at S.C. CODE ANN. § 42-1-160 (Supp. 2012)).
\item \textsuperscript{123} See supra note 122 and accompanying text.
\item \textsuperscript{124} Bentley, 398 S.C. at 426, 730 S.E.2d at 301 (citing Citizens’ Bank v. Heyward, 135 S.C. 190, 204, 133 S.E. 709, 713 (1925)).
\item \textsuperscript{125} See CAL. LAB. CODE § 3208.3(b)(1) (West 2011); MICH. COMP. LAWS ANN. § 418.301 (West Supp. 2012).
\end{itemize}
the psychiatric injury.”126 Under this statute, compensation “may be awarded only when industrial factors account for more than 50 percent of a psychiatric disability.”127 This language was adopted in “response to increased public concern about the high cost of workers’ compensation coverage, limited benefits for injured workers, suspected fraud and widespread abuses in the system,”128 and its effect is “to impose a significantly higher quantum of proof to establish that a psychiatric injury is compensable.”129 This underlying policy makes the language suitable, perhaps ideal, for addressing the concerns that led to the adoption of the current requirement in South Carolina, while still expanding compensability to include all workers suffering psychological injuries caused by workplace conditions.

Michigan’s statute provides a slightly more generous standard: “[m]ental 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.”130 All injuries under the Michigan statute, not just psychological injuries, are 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.”131 No “50 percent” requirement132 is imposed.

While either standard would achieve the objectives of the workers’ compensation system discussed above, the California standard seems more likely to be enacted from both a political and a practical perspective. Because the California standard is more restrictive, it is less susceptible to attack from arguments that it will open the floodgates to frivolous psychological-injury claims. Additionally, because the existing language was enacted in direct response to exactly such a deluge and because it appears to have resolved the issue in California, advocates can point to that success in recommending the language. The language also charges claimants with proving that work conditions really were the primary cause of their psychological injury and not just an excuse to file a workers’ compensation claim. This charge should further alleviate fears that any amendment would “open the floodgates” to fraudulent claims.

Although legislative action is the best and most permanent solution, it is also the most difficult to achieve and the most time consuming to initiate. Until such action is taken, some relief is available to employees whose circumstances

126. LAB. § 3208.3(b)(1).
128. Id. (quoting Hansen v. Workers’ Comp. Appeals Bd., 23 Cal. Rptr. 2d 30, 33 (Ct. App. 1993)).
129. Id.
130. MICH. COMP. LAWS ANN. § 418.301(2) (West Supp. 2012).
131. Id. § 418.301(1).
132. See supra note 127 and accompanying text.
exempt them from the exclusive-remedy provision of the Workers’ Compensation Act.

B. A Practical Solution

Despite the supreme court’s call to action, legislative deliberation takes time. Any statutory amendment that would replace the “extraordinary or unusual circumstances” requirement is, therefore, unlikely to occur in the near future. Nonetheless, under certain circumstances, an employee who suffers a mental–mental injury that is not caused by “extraordinary or unusual” conditions of employment may be able to sustain a cause of action by avoiding the workers’ compensation system entirely. Instead of filing a workers’ compensation claim, employees may, under certain circumstances, instead be able to seek a remedy by pursuing a traditional cause of action in tort. Specifically, actions for intentional infliction of emotional distress and negligence should both be exempt from the exclusive-remedy provision, under the right circumstances.

1. Intentional Infliction of Emotional Distress

Ordinarily, the exclusive remedy for injuries sustained by employees while on the job is a workers’ compensation claim. However, South Carolina has recognized an exception to this provision in cases where a fellow employee or employer intentionally caused the injury to the employee. In the first case recognizing the exception, Stewart v. McLellan’s Stores Co., the South Carolina Supreme Court heard the case of a minor, whose manager slapped her face while they both worked in the defendant’s store. In rejecting the employer’s argument that Stewart’s exclusive remedy was the Workers’ Compensation Act, the court explained that “[t]o say that an intentional and malicious assault and battery by an employer on an employee is such an accident is a travesty on the use of the English language.”

Furthermore, in McSwain v. Shei, the South Carolina Supreme Court expressly included intentional infliction of emotional distress in the list of torts excepted from the exclusive-remedy provision. In that case, the court

considered the case of an employee, Marie McSwain, who suffered from a bladder condition that required surgery.\textsuperscript{140} The employer knew that Marie had this condition and was aware that she was not supposed to engage in strenuous exercises.\textsuperscript{141} Nonetheless, the employer demanded that Marie engage in daily exercises or be fired.\textsuperscript{142} Because of the resulting humiliation, Marie filed suit alleging intentional infliction of emotional distress.\textsuperscript{143} The employer responded, \textit{inter alia}, by moving for summary judgment on the basis of the exclusive-remedy provision of the Workers’ Compensation Act.\textsuperscript{144} In affirming the lower court’s denial of the motion, the supreme court recognized that intentional infliction of emotional distress should be included among the torts excepted from the exclusive-remedy provision.\textsuperscript{145} The court reasoned that “the compensation laws were [not] enacted to protect an employer where he deliberately and intentionally inflicts... outrageous actions upon an employee to cause him emotional distress.”\textsuperscript{146}

While \textit{McSwain} is useful to employees injured by the intentional infliction of emotional distress, it does little to help employees who suffer mental–mental injuries that do not rise to the level of “extraordinary or unusual” circumstances or go beyond “all possible bounds of decency.”\textsuperscript{147} What can be done for these employees? The answer lies with the definition of “injury” as it is used in the statute.

2. \textit{Noncompensable Psychological Injuries Are Not “Injuries”}

Because the “extraordinary or unusual circumstances” requirement is used to determine whether a claimant has suffered an “injury” under the Workers’ Compensation Act, any mental–mental injury a claimant suffers is not an “injury” for the purposes of the Act unless it was caused by “extraordinary and unusual” circumstances of employment.\textsuperscript{148} In other words, as far as the Workers’ Compensation Act is concerned, an employee who suffers a mental–mental injury absent “extraordinary or unusual” conditions never suffered an “injury” at all. This distinction is important because the exclusive-remedy provision applies to employees’ rights that become applicable “on account of personal injury or death by accident.”\textsuperscript{149} Thus, if the Act does not recognize that

\begin{itemize}
\item \textsuperscript{140} \textit{Id.} at 27, 402 S.E.2d at 891.
\item \textsuperscript{141} \textit{Id.}
\item \textsuperscript{142} \textit{Id.}
\item \textsuperscript{143} \textit{Id.} at 27, 402 S.E.2d at 890.
\item \textsuperscript{144} \textit{Id.} at 27, 402 S.E.2d at 891.
\item \textsuperscript{145} \textit{Id.} at 29, 402 S.E.2d at 892.
\item \textsuperscript{146} \textit{Id.} at 30, 402 S.E.2d at 892.
\item \textsuperscript{147} See \textit{Id.} at 28, 402 S.E.2d at 891 (quoting Ford v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981)).
\item \textsuperscript{149} S.C. CODE ANN. § 42-1-540 (1976).
\end{itemize}
an “injury” has occurred, such a “non-injury” cannot be subject to the exclusive-remedy provision.

Although this argument has yet to be raised in South Carolina, it is not a unique position on the national level. In Bunger v. Lawson Co.,\(^ {150}\) the Ohio Supreme Court ruled that Ohio’s workers’ compensation statute, which contains a restriction similar to South Carolina’s on mental–mental injuries in its definition of the term “injury,”\(^ {151}\) was not the proper remedy for a worker who suffered a mental–mental injury.\(^ {152}\) The plaintiff, Rachel Bunger, was a convenience store employee who suffered symptoms of post-traumatic stress disorder after surviving a robbery during her shift.\(^ {153}\) Bunger filed both a workers’ compensation claim and a tort claim for negligence against her employer.\(^ {154}\) The trial court dismissed both actions, ruling that the workers’ compensation claim did not result from an “injury” under the statute, rendering the claim noncompensable, and that the employer was immune from the tort claim under the exclusive-remedy provision of the statute.\(^ {155}\)

The Ohio Supreme Court reversed the trial court on the tort claim, reasoning that “[i]f a psychological injury is not an injury according to the statutory definition of ‘injury,’ then it is not among the class of injuries from which employers are immune from suit.”\(^ {156}\) The court determined that any other holding would be “nonsensical,” “unfair,” “absurd,” and would work upon employees a “Catch-22.”\(^ {157}\) The court also chastised the lower courts by referencing the bargain between employers and employees that underlies the workers’ compensation system: “The lower court decisions remove psychological injuries from the tradeoff between employers and employees—employees relinquish their common-law remedies for psychological injuries in return for nothing. That [result] is antithetical to the philosophical underpinnings of the system.”\(^ {158}\)

The exceptions to the exclusive-remedy provision outlined above, while hopefully useful to some injured workers, are limited to situations in which a cognizable tort action against an employer will lie.\(^ {159}\) As the Ohio Supreme Court noted in Bunger, “the common law itself does not leave much room for recovery for purely psychological injuries.”\(^ {160}\) Because the class of injured workers who can take advantage of the exceptions is so small, any action taken

\(^{150}\) 696 N.E.2d 1029 (Ohio 1998).
\(^{152}\) Bunger, 696 N.E.2d at 1031.
\(^{153}\) Id. at 1030.
\(^{154}\) Id.
\(^{155}\) Id. at 1030–31.
\(^{156}\) Id. at 1031.
\(^{157}\) Id.
\(^{158}\) Id. at 1032.
\(^{159}\) See supra text accompanying notes 135–37, 145–46, 156–58.
\(^{160}\) Bunger, 696 N.E.2d at 1032.
utilizing them will be limited. Therefore, legislative action is still imperative to remedy this issue.

VII. CONCLUSION

South Carolina’s rules for compensability for psychological injuries are broken. They reflect an outdated understanding of medical science and a hesitance to tackle what are, at times, tricky evidentiary issues. Because of these failures, the system currently does not adequately address the needs of South Carolinians nor does it fully achieve the objectives of all workers’ compensation systems. Nevertheless, the situation is not hopeless. Other states have adopted successful measures that protect workers while still preserving the integrity of the system for employers. The models are there, and the South Carolina Supreme Court has issued the call. It is time to make a change for South Carolina’s workers.

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