Finding a Way Out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century

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FINDING A WAY OUT OF NO MAN'S LAND:
COMPENSATING MENTAL-MENTAL CLAIMS AND BRINGING
WEST VIRGINIA'S WORKERS' COMPENSATION SYSTEM INTO
THE 21ST CENTURY

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I. INTRODUCTION

Of the social welfare programs, workers' compensation occupies a unique position. From its inception, it was "legislated at the state level with no federal involvement and has remained a state responsibility ever since." It is a no-fault system designed to shield employers from excessive liability and guarantee workers some level of compensation for work-related injuries in exchange for waiving the right to sue in civil court. In a system ripe for abuse, claims with a psychological element present a particular challenge in substantiation. Of these cases, mental-mental claims pose the greatest challenge: a mental injury caused by a non-physical stimulus.

In West Virginia, mental-mental claims are expressly prohibited by West Virginia Code section 23-4-1f. However, the Supreme Court of Appeals allowed recovery for a mental-mental injury in a 2013 memorandum decision. This decision signals a need for revision of the workers' compensation statute in light of increased acceptance and awareness of non-physical mental injuries as "personal injuries" within the scope of the Workers' Compensation Act.

Part II of this Note provides background and context for a discussion of mental-mental claims within the West Virginia Workers' Compensation system. Specifically, it explores the development of workers' compensation from common law negligence and the importance of the overall system to both employers and workers. It also provides an overview of the three types of mental claims and discusses other states' approaches to mental-mental claims. Finally, it examines West Virginia's Workers' Compensation system, including state-specific issues and the history of mental-mental claims in West Virginia.

Part III of this Note analyzes the problems with West Virginia's current handling of mental-mental workers' compensation claims, discussing the effective "No Man's Land" created by statute and common law. It also explores
potential revisions to the West Virginia Workers’ Compensation system by evaluating how Pennsylvania, New Jersey, and New York address mental-mental claims. Further, this Part suggests a revision to West Virginia’s mental-mental statute and proposes a secondary, alternative solution. Lastly, Part IV of this Note provides a brief summary of the arguments presented.

II. BACKGROUND

A. Before Workers’ Compensation: The Tort System and Negligence Liability

Workers’ compensation is a bargain system that comes at a price to both employers and employees. This section explores the origins of the workers’ compensation system and the failure of tort liability to address workplace injuries.

1. Historical Background

The roots of the workers’ compensation system can be traced back to the Industrial Revolution. With the advent of machines and mass production, work-related injuries increased in both number and severity, resulting in the need for a specific system to address and redress the needs of workers. Further, the traditional means of recovery were “cumbersome, unfair, and wholly inadequate to the task of charging industry with the economic costs of the human injury it caused.”

The first workers’ compensation law was passed in 1884 by then-Chancellor of Germany, Otto von Bismarck. This new statutory scheme, and its modern counterpart, was “an effort...to insure the workman to a limited extent against loss from accidents in his employment, to give him a speedy and expeditious remedy for his injury, and to place upon industry the burden of losses incident to its conduct.” Bismarck’s new system created a wave of similar programs in England and throughout Europe. The American system borrows two defining characteristics from England’s system: (1) the liability formula which seeks to redress an employee’s “personal injury by accident

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12 Id.
13 JEFFREY V. ACKLEY, PRIMER ON WORKERS' COMPENSATION 1 (2d ed. 1989).
14 Davis & Palmer, supra note 11, at 50–51.
16 Davis & Palmer, supra note 11, at 51–52.
arising out of and in the course of employment” and (2) the requirement that employers fund the system.17

The workers’ compensation system was established with the underlying notion that “the cost of the product should bear the blood of the working man” whose labor created it.18 It was intended as both a means of redress for injured workers and their families, and as a shield for employers. Creation of the workers’ compensation system recognized the shortcomings of the common law system and tort law’s inability to provide an adequate solution. Workers’ compensation represents a compromise between employers and employees in which both sides paradoxically make themselves both more vulnerable and more insulated: in exchange for guaranteed payments, workers give up the right to sue their employers for workplace injuries, and employers provide employees with benefits for workplace injuries in exchange for tort immunity.

2. Injured on the Job: Common Law Negligence

Before the creation of the workers’ compensation system, the only recourse for employees injured on the job was through common law negligence.19 Because some work-related accidents occurred as a result of dangerous working conditions that were neither the fault of the worker nor the fault of the employer, this scheme left some injured workers without any means of compensation.20 Therefore, under the tort system, if an employee was injured or killed while working, he, or his family, would only be able to recover damages if the employer was at fault.21 This presented a very large hurdle for injured workers and their heirs to successfully meet their burden in any lawsuit. Indeed, out of those cases, only approximately 15% of injured workers were awarded damages, and after the costs of litigation, the worker’s recovery was next to nothing.22

Under the tort system, employers were only required to exercise “due care” in providing a safe workplace.23 This included hiring “suitable and sufficient” coworkers, creating and enforcing proper workplace rules, providing a safe work environment and safe equipment, and informing workers of

17 Id. at 52.
19 FISHBACK & KANTOR, supra note 1, at 3.
20 Id. at 11.
21 Id. at 3.
23 FISHBACK & KANTOR, supra note 1, at 30.
workplace hazards related to dangerous working conditions.24 Under the tort system, the worker carried the burden to prove the employer’s fault. Successfully meeting this burden required two showings: (1) that the employer had failed to exercise due care and (2) that the employer’s negligence proximately caused the worker’s injury.25 If the court found the employer to be at fault, the injured worker was entitled to lost wages and medical expenses (his “financial losses”) and compensation for pain and suffering.26 However, the employer had no duty to unemployed or retired workers,27 meaning that the employer only had a duty to its current employees. Simply put, there were no unemployment or retirement benefits.

Bringing a suit against an employer was a long, drawn out, and expensive process for both parties. It involved significant court costs and attorneys’ fees,28 and it was not uncommon for cases to last several years.29 Further, employers could use three defenses against allegations of fault: (1) assumption of risk, (2) contributory negligence, and (3) fellow servant.30 If successful in its defenses, the employer could reduce or eliminate any payments made to the injured worker.

Under the assumption of risk defense, an employer could be relieved of liability “if the accident was caused by factors that were ordinary for that type of work,” or, if extraordinary, “the risks were known and acceptable to the worker when he took the job.”31 For example, a coal miner who was injured in a mine cave-in may not have received damages due to the inherently dangerous nature of the job. Because the worker was aware of the risks involved in mining coal, he assumed the risks and, in many cases, was compensated to reflect that risk.32

If a worker failed to take due care to avoid workplace accidents, his employer could claim contributory negligence as a defense.33 That is, if the worker could have avoided the accident by exercising due care, he would not have been entitled to compensation.34 Continuing with the coal miner example,
if the miner knew that he needed to reinforce the ceiling as he was working but failed to do so, he would have failed to exercise due care, and in the event of a subsequent cave-in, would be denied any compensation.

The fellow servant defense shields employers from liability in the event that one worker caused the injury of another. This defense highlights the requirement under the negligence liability system that the employer, and only the employer, must be at fault. If our miner failed to reinforce the ceiling of the mineshaft and his coworker was injured in the cave-in, then the employer would be free from liability. In this example, the coworker’s only option would be to bring a suit against the miner whose negligence caused the accident.

3. Shortcomings of the Tort System

Under the negligence liability system, a workplace injury claim was expensive for both the worker and the employer. Even if the employer successfully defended the suit, it would still have to pay attorneys’ fees and administrative costs. Therefore, from a time-value-of-money perspective, it was more cost-effective and efficient for an employer to settle out of court and pay an injured worker even if the employer was not at fault or could have successfully defended the suit. Yet, the settlement amounts were often merely a fraction of the worker’s costs and could not provide much monetary support to the worker’s family. Additionally, the negligence system involved adversarial proceedings that created tension between the employer and the workers.

One of the most significant shortcomings of the negligence standard for workplace injuries was that some injuries were neither the fault of the employer nor the employee. Rather, some injuries occurred as a result of dangerous workplace conditions associated with industrial operations. Because the system only compensated injured workers if the employer was at fault, these neither-nor cases left a meaningful number of injured workers without redress.

35 Id.
36 See supra Part II.A.2.
37 Mandolidis v. Elkins Indus., 246 S.E.2d 907, 910 n.3 (W. Va. 1978); FISHBACH & KANTOR, supra note 1, at 33.
38 FISHBACH & KANTOR, supra note 1, at 11.
39 Davis & Palmer, supra note 11, at 70.
40 FISHBACH & KANTOR, supra note 1, at 11.
41 Id.
42 Id.
B. Emergence of Workers' Compensation: The Modern System

This section provides an overview of the modern workers' compensation system and its benefits to both employees and employers. It examines the three types of mental workers' compensation claims, focusing on mental-mental claims. The following section also examines the relationship between stress and workers' compensation. Then it discusses Pennsylvania, New Jersey, and New York's various approaches to managing the subjective nature of mental-mental claims before turning to West Virginia's workers' compensation system.

1. Growth out of the Tort System

Because the common law negligence system created an "injustice to the employee" and was a waste of time and money for both the courts and the employer, states began to craft a system specifically designed to address workplace injuries.\(^43\) This new system removed fault from the equation, creating a no-fault system wherein many "negligently caused industrial accidents" were removed from the common law tort system.\(^44\) The workers' compensation system is intended to be a non-litigation insurance process wherein all claims by employees of injuries or disease arising out of employment are handled.\(^45\) It was created as "a nonadversarial disbursement of benefits to injured employees"\(^46\) based upon a mutual waiver of common law rights by both employees and employers.\(^47\) The system, however, comes at a price: "in return for swift and sure protection, the employer is immune from tort action by the disabled worker, and the levels of compensation benefits are limited by statute."\(^48\) This exchange is referred to as the "quid pro quo" aspect of workers' compensation.\(^49\) Coverage under the system varies by state and degree of disability, but generally, all covered employers are required to provide medical benefits, although not all claims receive lost wages or wage compensation.\(^50\)

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\(^44\) Id. at 911.
\(^45\) See generally id. at 907; Gobble v. Clinch Valley Lumber Co., 127 S.E. 175, 176 (Va. 1925); FISHBACK & KANTOR, supra note 1.
\(^46\) Davis & Palmer, supra note 11, at 70.
\(^47\) W. VA. CODE ANN. § 23-1-1(b) (LexisNexis 2007).
\(^48\) Peter S. Barth, Workers' Compensation for Mental Stress Cases, 8 BEHAV. SCI. & L. 349, 350 (1990).
\(^49\) See generally 9 LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 100.01 (Matthew Bender ed., rev. ed. 2015).
\(^50\) Barth, supra note 48, at 350.
There are six categories of benefits: (1) temporary total disability, (2) temporary partial rehabilitation, (3) permanent partial disability, (4) permanent total disability, (5) death, and (6) medical. Most claims are either injury or accident claims, but one can also bring claims for occupational disease, death, and in some jurisdictions, safety-code violations. Most workplace injury claims are physical, but there are also a number of injury claims that involve a mental component in conjunction with a physical injury and still others that are purely mental.

2. Types of Mental Claims

Workers’ compensation claims with a mental component can be broken into three sub-categories: (1) physical-mental, (2) mental-physical, and (3) mental-mental. When a claimant suffers a physical injury that gives rise to a secondary, psychological disease, he or she has a physical-mental claim within the workers’ compensation framework. Typically, the psychological response to the physical injury further disables the worker. For example, an oil rig worker is badly burned in a freak rig fire. His physical injuries heal, but he develops a paralyzing fear that there will be another fire. Because he is mentally unable to return to work despite being physically healthy, he has a physical-mental claim. Generally, physical-mental claims are compensable workers’ compensation claims because the claimant has suffered a distinct, objective physical and traumatic injury during the course of his employment.

Unlike physical-mental claims, mental-physical claims often have no distinct point at which the injury was caused. For mental-physical claims, there is a mental stimulus that causes a physical response: an extraordinarily stressful office environment causes an employee to have a heart attack, or a sudden loud noise causes extreme fright and paralysis. Nevertheless, despite an objective, physical response, the causal relationship between the mental stimulus and the reaction is often difficult for the employee to prove. Heart attacks and strokes are one of the most common mental-physical claims, but

51 Davis & Palmer, supra note 11, at 63.
52 NACKLEY, supra note 13, at 2–4.
54 Barth, supra note 48, at 351.
55 Id.
56 Id. at 350–54.
57 Id. at 354.
58 Id.
59 9 LARSON, supra note 49, at 1245.
many people are predisposed or susceptible to having them. 60 These types of claims are less compensable than physical-mental but more compensable than mental-mental claims. 61

The most controversial workers’ compensation claim for a mental injury is the mental-mental claim. As the term indicates, these claims do not contain a physical element. They solely involve mental stimuli and mental responses. There are three scenarios in which mental-mental claims may arise: (1) a sudden and unusual event; (2) continuous, but unusual stress; and (3) an unusual condition or stress with no discrete or sudden triggering-event. 62 The third scenario is the least common. 63 An example of a mental-mental claim would be a bank teller who suffers from post-traumatic stress disorder (PTSD) after being held at gunpoint during a robbery. The teller suffers no physical injury and is not touched by the robber, but suffers a consequence nonetheless.

But, mental-mental claims are problematic. There are numerous hurdles in establishing proof, causation, and an objective or substantiated degree of impairment. 64 Further, medicine and psychiatry have differing evaluations of mental-mental claimants, and they have difficulty “speaking authoritatively on the causes and consequences of mental and nervous injury.” 65 Despite the lack of unanimity between medicine and psychiatry, psychiatric injuries are better understood than ever before, an understanding that should be extended to the workers’ compensation framework within a changing workplace.

C. Changes in the Workplace and the Relationship Between Stress and Workers’ Compensation

When workers’ compensation was created out of the tort system, 66 the focus of the American workplace was on manufacturing, agriculture, and other highly physical industries. 67 In the past 50 years, American society has shifted from manufacturing to the exchange of information and digital technology. 68 With this change in emphasis, workplace stress has become commonplace: “In
a world of computer cubicles and global competition, stress-related disability is . . . no longer a rare, exceptional occurrence."69 This section explains the role of stress in modern workers’ compensation claims by first discussing how stress physically affects the body and then exploring PTSD as one of the most prevalent stress-induced psychological conditions.

1. The Effects of Stress on the Body

There are many disciplines concerned with the relationship between stress and work, including medicine, physiology, psychology, public health, and sociology.70 Workplace stress has been part of an intellectual discussion for many years, but a large hurdle to its official acceptance is a lack of standard nomenclature.71 Specifically, what many cannot seem to agree upon is the precise role of stress in injury and disease claims.72 The competing views characterize stress as a source of disease itself, an intervening variable in the development of disease, as well as the outcome of certain exposures and stimuli.73

According to the Mayo Clinic, stress can affect one’s body, mood, and behavior.74 Physical symptoms include headaches, muscle pain, chest pain, fatigue, upset stomach, and sleep disorders.75 Stress can affect one’s mood by creating anxiety, restlessness, lack of focus, irritability, and depression.76 Similarly, behavioral symptoms of stress include appetite changes, angry outbursts, drug or alcohol abuse, and social withdrawal.77 Stress can make the body tense, sometimes making it difficult to breathe, overworking the cardiovascular system, and sending internal organs into overdrive.78

Exposure to stress triggers a complex chemical reaction within the brain, signaling an interaction between neurons and brain cells and resulting in the secretion of the stress hormone cortisol.79 Stress exposure can also

69 Id.
70 Barth, supra note 48, at 351.
71 See id.
72 Id.
73 Id.
75 Id.
76 Id.
77 Id.
compromise the immune system, making the body more vulnerable to disease.\textsuperscript{80}

2. Post-Traumatic Stress Disorder

Post-Traumatic Stress Disorder ("PTSD") is one of the most commonly diagnosed stress-induced psychological conditions.\textsuperscript{81} PTSD is a psychological condition that has physical manifestations and behavioral symptoms.\textsuperscript{82} Symptoms of PTSD include intrusive memories, flashbacks, hyper-vigilance, sleep disturbance, avoidance of traumatic stimuli, numbing of emotions, social dysfunction, and physiological hyper-responsivity.\textsuperscript{83} PTSD symptoms are "believed to reflect stress-induced changes in neurobiological systems and/or an inadequate adaptation of neurobiological systems to exposure to severe stressors."\textsuperscript{84} Notably, the Americans with Disabilities Act ("ADA") considers PTSD a disability.\textsuperscript{85}

Many people who suffer from PTSD have delayed symptoms, meaning that PTSD can manifest at a time remote from the initial trauma.\textsuperscript{86} PTSD can manifest as a "progressive escalation of distress or a later emergence of... symptoms."\textsuperscript{87} Not all people exposed to extreme stress or trauma develop PTSD, and there is no set pattern to PTSD cases.\textsuperscript{88}
Although neuroimaging technology has helped document the changes that PTSD causes in brain function and structure, there is no standard, objective PTSD test.\(^9\) Even so, research has documented “functional changes and structural abnormalities in certain brain regions associated with memory, fear processing, and emotion.”\(^9\)

**D. Other States’ Approaches to Mental-Mental Claims**

Pennsylvania, New Jersey, and New York all recognize mental-mental claims.\(^9\) Exploring their tests and approaches will help provide a lens through which this Note will evaluate potential revisions to West Virginia’s mental-mental statute.

1. Pennsylvania

Pennsylvania’s workers’ compensation system recognizes mental-physical, physical-mental, and mental-mental injuries as compensable.\(^9\) Prior to 1972, recovery was limited to physical injuries stemming from a work-related accident.\(^9\) In 1972, the Workmen’s Compensation Act was amended to eliminate the requirements that an injury be physical and the result of an accident.\(^9\) However, the amended statute makes no explicit mention of psychological injuries.\(^9\) With those requirements eliminated, case law expanded to allow claims for mental injuries, so long as the claimant could produce objective evidence that the injury was work-related.\(^9\)

To prevent a groundswell of mental injury claims and stem potential abuse of its workers’ compensation system, Pennsylvania case law has refined the requirements for mental injury claims.\(^7\) A compensable mental-mental

\(^{89}\) Id.

\(^{90}\) Id. at 86.

\(^{91}\) See 77 PA. CONS. STAT. § 411 (2015); N.J. STAT. ANN. § 34:15-30 (West 2015); N.Y. WORKERS’ COMP. LAW § 2(7) (McKinney 2015).


\(^{94}\) Id.

\(^{95}\) Tit. 77, § 411.

\(^{96}\) Reilly, supra note 93, at 684; see also Univ. of Pittsburgh v. Workmen’s Comp. Appeal Bd., 405 A.2d 1048 (Pa. Commw. Ct. 1979).

\(^{97}\) Reilly, supra note 93, at 685–88.
A claim in Pennsylvania requires a claimant to "adequately identify actual (not merely perceived or imagined) employment events which have precipitated psychiatric injury," and the event in question must be abnormal. A successful mental-mental claim requires three showings: (1) objective evidence of a psychiatric or mental injury, (2) objective evidence showing an actual work event caused the injury, and (3) that the work event was an "abnormal working condition." What constitutes an abnormal working condition depends almost wholly on the specific type of employment and work environment and is determined on a case-by-case basis.

Establishing an abnormal working condition is not a bright-line test. An abnormal working condition is not a "subjective reaction to a normal working condition." The courts will instead look at the facts of the case, taking several factors into consideration. These factors include the following: (1) whether the event could have been anticipated or was foreseeable, (2) whether the event was extraordinary, (3) whether the employer provided training for that type of scenario, (4) whether the event was the first of its kind at that place of employment, (5) whether the event was anticipated by either the claimant or the employer, and (6) what is ordinary for that type of job or industry. Further, abnormal working conditions are not necessarily "unique" working conditions.

2. New Jersey

New Jersey's workers' compensation law allows for "personal injuries" caused by "any compensable occupational disease arising out of and in the course of his [or her] employment." "Compensable occupational disease" is defined as "all diseases arising out of and in the course of employment . . . due in material degree to causes and conditions . . . characteristic of or peculiar to a particular trade, occupation, process[,] or place of employment." A mental injury claim must further meet all five prongs of the Goyden Test: (1) the working conditions must be objectively stressful, (2) there must be evidence

98 Id.
100 Id. at 552.
102 Id. at 511.
103 Id. at 510–11.
104 Payes, 79 A.3d at 556 n.8.
106 Id. § 34:15-31(a).
showing that the claimant responded to them as stressful, (3) the objectively stressful working conditions must be “peculiar” to the work environment, (4) there must be objective evidence supporting a medical opinion of the resulting psychiatric disability in addition to the “bare statement of the patient,” and (5) the workplace exposure must have been a “material” cause of the disability.\(^{107}\)

To be “objectively stressful,” the disability must not be a result of “the worker’s subjective view concerning what working conditions [are] sufficiently stressful.”\(^{108}\) The claimant’s condition does not need to be solely work-related,\(^{109}\) but if the claimant suffers from a condition that “predates the claimant’s employment or arises from circumstances outside of work, it is not compensable.”\(^{110}\) Further, if the triggering event is work-related but there is an underlying, pre-existing condition, the claimant has failed to meet the fifth prong of the \textit{Goyden} Test.\(^{111}\)

New Jersey’s workers’ compensation system does not require a discrete, traumatic event for a mental-related claim to be compensable, nor does it differentiate between the three types of mental claims.\(^{112}\) The court in \textit{Rizzo v. Kean University}\(^{113}\) noted that “the broadest compensable ‘mental’ cause is a gradual work-related mental stimulus rather than one traumatic incident.”\(^{114}\) Thus, compensability of mental injuries under New Jersey’s workers’ compensation system primarily focuses on causation and establishing objective evidence.

3. New York

New York’s workers’ compensation laws allow for “accidental injuries arising out of and in the course of employment and such disease or infection as

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\(^{109}\) See \textit{Dudley v. Victor Lynn Lines, Inc.}, 161 A.2d 479, 491–92 (N.J. 1960) (“It does not matter that one of the contributing causes of the . . . injury was a disease or condition unrelated to the employment as long as the employment was also a contributing factor.”).

\(^{110}\) \textit{Goyden}, 607 A.2d at 652 (referencing \textit{Williams}, 429 A.2d at 1065).

\(^{111}\) See \textit{id.} at 651 (holding that the claimant’s underlying compulsive personality and childhood trauma were the actual causes of his mental ailment); \textit{Rizzo}, 2014 N.J. Super. Unpub. LEXIS 1358 (holding that the claimant’s childhood sexual abuse was the actual cause of her mental condition).


\(^{113}\) \textit{Id.}

\(^{114}\) \textit{Id.} at *7.
may naturally and unavoidably result therefrom." Notwithstanding this broad language, "solely mental" injuries based upon work-related stress are excluded "if such mental injury is a direct consequence of a lawful personnel decision involving a disciplinary action, work evaluation, job transfer, demotion, or termination taken in good faith by the employer." This caveat is the only direct mention of mental workers' compensation claims.

To establish a work-related stress claim, the claimant must prove that the stress was "greater than that which usually occurs in the normal work environment." The mental condition in question must be adequately substantiated by medical evidence and expert opinion. Causation is a question of fact and must be answered on a case-by-case basis. There are generally two types of causation: "a discrete, identifiable trauma" or "prolonged, unusual circumstances." A claimant will not be denied compensation if he or she is particularly vulnerable to stress or certain circumstances or if work-related stress "cause[s] an underlying personality disorder to manifest itself." Although medical evidence and expert testimony are components of mental-mental workers' compensation claims in New York, the primary focus is on establishing "greater than . . . normal" stress in the claimant's work environment.

115 N.Y. WORKERS' COMP. LAW § 2(7) (McKinney 2014).
116 Id.
117 Id.
120 Troy, 649 N.Y.S.2d at 747.
E. Workers' Compensation in West Virginia

The evolution of workers' compensation in West Virginia has been complicated and riddled with political and financial issues. Understanding the context in which mental-mental claims were originally disallowed will help shape any potential revisions to the statute.

1. Historical Context

West Virginia's workers' compensation system was officially created by Chapter Ten of the Acts of 1913 ("Acts"), later codified as West Virginia Code sections 23-1-1 to 23-6-3. According to the Acts' preamble, the purpose of the new system was "to provide a method of compensation for employe[e]s that may be injured, or the dependents of those killed in the course of their employment . . . and to define and fix the rights of employees and employers." A successful claim under the Workers' Compensation Act requires a personal injury received in the course of and resulting from employment. There are six categories of benefits: (1) temporary total disability benefits, (2) temporary partial rehabilitation benefits, (3) permanent partial disability benefits, (4) permanent total disability benefits, (5) death benefits, and (6) medical benefits.

The workers' compensation system was created to prevent litigation between employers and employees and reduce the overall burden on the court system. However, West Virginia's workers' compensation system has a history of financial problems, reform efforts, and backlogged litigation. These problems can largely be attributed to a combination of economic factors: (1) the primary and largest claims-producing industries are coal mining,
timbering, and construction, all of which are fundamentally dangerous and prone to disabling injuries;\(^{133}\) (2) the injury and fatality rates of these industries are higher than national averages;\(^{134}\) and (3) the average age of the working population increased because younger workers moved out of the state, leaving an older workforce characterized by fewer, but more severe, injuries.\(^{135}\)

West Virginia’s workers’ compensation system has been through several rounds of reforms.\(^{136}\) One of the recurring concerns of workers’ compensation reform is preventing abuse of the system and fraudulent receipt of benefits, which, in turn, create a drag on the entire system.\(^{137}\) In the 1990s, reform measures specifically targeted preventing abuse by claimants and health care providers.\(^{138}\) One of these reforms addressed mental-mental claims, which is discussed in the following section.

2. Mental-Mental Claims

Although the West Virginia Supreme Court of Appeals held in 1981 that mental or emotional injuries are compensable injuries under the Workers’ Compensation Act,\(^ {139}\) the Act itself did not specifically mention mental-mental claims until the 1993 reform.\(^ {140}\) The 1993 reform upended the Supreme Court’s prior ruling and declared that non-physical injuries caused by a non-physical stimulus are not compensable under the Workers’ Compensation Act.\(^ {141}\) In 2006, the Supreme Court of Appeals further held that any claimant who would be denied compensation under West Virginia Code section 23-4-1f (the 1993 amendment) cannot file a civil suit against his or her employer because of the immunity afforded employers by section 23-2-6 of the Workers’ Compensation Act.\(^ {142}\) Thus, a mental-mental claimant can neither receive workers’


\(^{134}\) *Id.* at 40.

\(^{135}\) *Id.* at 41 (attributing increased workers’ compensation costs with an older workforce and decreased revenue for the workers’ compensation fund).

\(^{136}\) *See id.*; *see also* Davis & Palmer, *supra* note 11; Spieler, *New Perspectives*, *supra* note 126.

\(^{137}\) Davis & Palmer, *supra* note 11, at 76, 81–83.

\(^{138}\) *Id.*


\(^{140}\) W. VA. CODE ANN. § 23-4-1f (LexisNexis 1993).

\(^{141}\) *Id.* (“It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter.”).

compensation benefits nor file a civil action against his or her employer because of the overall immunity afforded employers by the Workers' Compensation Act.\textsuperscript{143}

However, in United Parcel Service, Inc. v. Hannah,\textsuperscript{144} a 2013 memorandum decision, the Supreme Court of Appeals affirmed a decision by the Workers' Compensation Board of Review granting benefits to a claimant who filed for workers' compensation benefits after being diagnosed with PTSD.\textsuperscript{145} In this instance, the claimant was a delivery driver for UPS and while on his route, was hijacked by a man with a rifle and repeatedly threatened.\textsuperscript{146} The hijacker spotted a police cruiser and forced the driver to pull over, at which point the driver was able to escape, and the hijacker was fatally shot.\textsuperscript{147} The claimant suffered from hyper-vigilance, sleeplessness, nightmares, and depression.\textsuperscript{148} The court affirmed the Board's reasoning that the claimant was entitled to compensation because he "was physically detained[,] . . . assaulted by the sound of gunfire, and stripped of his keys."\textsuperscript{149} The court concluded that "[the claimant's] claim for post-traumatic stress disorder is not barred by West Virginia Code § 23-4-1f because the condition was manifested by demonstrable physical symptoms, including sleep disturbances and jumpiness."\textsuperscript{150}

III. ANALYSIS

A. No Man's Land

West Virginia's treatment of mental-mental claims creates an effective "No Man's Land" in which mental-mental claimants have no recourse in the system, yet are still bound by the initial bargain to forgo common law remedies to work-related injuries. Examining the successes and shortcomings of Pennsylvania, New Jersey, and New York's approaches to tackling the mental-mental quandary will provide insight into how West Virginia can remedy this problem and bring its workers' compensation system into the 21st century.

\textsuperscript{145} \textit{Id.} at *1.
\textsuperscript{146} \textit{Id.}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}
\textsuperscript{149} \textit{Id.} at *2.
\textsuperscript{150} \textit{Id.}
1. Not in the System, but Not out of It Either

The problem with mental-mental claims in West Virginia is not simply that they are disallowed by a statute that effectively shuts workers out of the system that they should rightfully be part of, but also that would-be claimants are denied redress through the court system because employers are covered by the sweeping immunity of the Workers' Compensation Act. This scheme leaves claimants who suffer from PTSD or other mental injuries arising out of employment, but brought on by non-physical harms, in No Man's Land.

Mental-mental claimants are wrongfully excluded from the workers' compensation system because of fear of abuse. With a system as particularly fragile as West Virginia's, it is understandable why the legislature cut off the head of what were considered spurious claims in 1993. Nevertheless, for claimants who have bona fide diagnoses of PTSD or other psychological conditions as a result of work-related trauma, they are left with serious conditions that affect not only their abilities to perform their essential job functions, but also their daily lives and their families. Excluding mental-mental claimants from the workers' compensation system treats legitimate, work-related injuries as if they do not exist. Further, excluding these claims treats claimants who have given up their common law rights in exchange for guaranteed workers' compensation payments as if their bargain did not matter and casts them aside without a second thought.

To compound the hurdles for these marginalized claimants, the highest court in the state has seen fit to shield employers from all liability when the workers themselves are not included in the system. That is, the claimants are kicked out of the workers' compensation system but are then forced to remain within its bounds, denied their non-workers' compensation rights. The employers who have no duties to these mental-mental claimants in the system are thus doubly shielded outside of the system. This one-two punch of West Virginia Code section 23-4-if and Bias v. Eastern Associated Coal Corp. voids the employer-employee bargain and denies the employees their pre-bargain rights, leaving them and their families in limbo.

What Bias overlooks, however, is the significance of the quid pro quo agreement that undergirds all workers' compensation systems. Workers' compensation is effective because employees give up their common law rights

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151 See W. VA. CODE ANN. § 23-4-1f (LexisNexis 2015); Bias v. E. Associated Coal Corp., 640 S.E.2d 540 (W. Va. 2006); supra Part II.E.2.
152 § 23-4-1f.
153 See Bias, 640 S.E.2d at 540.
154 Id.
155 See id. at 551–55 (Starcher, J., dissenting).
156 See id.
to sue their employers for work-related injuries, taking reduced, but guaranteed, payments in lieu of gambling in court. In return, employers pay into the system and are shielded from liability.\textsuperscript{157} Bias eviscerates this agreement on the employees’ part, but leaves the employers encased in an immunity bubble.\textsuperscript{158}

2. \textit{United Parcel Service, Inc. v. Hannah}

The Supreme Court of Appeals of West Virginia's recent decision, \textit{United Parcel Service, Inc. v. Hannah},\textsuperscript{159} signals the need for revision to the mental-mental provision of the Workers' Compensation Act.\textsuperscript{160} \textit{Hannah} was decided by reasoning that the claimant's PTSD had physical manifestations (e.g., sleep disturbances, jumpiness) and, therefore, section 23-4-1f did not apply.\textsuperscript{161} However, that reasoning skirts the issue without remedying the problem. Indeed, the court flew under the radar and issued a memorandum opinion on the matter.\textsuperscript{162} The court recognized that the claimant suffered serious mental trauma during the course of his employment and, more importantly, that those injuries are properly characterized as “personal injuries” within the definition of the Workers' Compensation Act.\textsuperscript{163}

The \textit{Hannah} decision creates tension with section 23-4-1f and highlights the absurdity of denying mental-mental claims when psychological conditions such as PTSD have far-reaching, tangible consequences.\textsuperscript{164} The court determined that the claimant deserved compensation because his mental injury caused by non-physical means manifested in physical terms. Notwithstanding the court’s determination, the claimant’s case is a classic mental-mental claim: he suffered no physical harm during the hijacking but the psychological ramifications have changed the quality of his life.\textsuperscript{165} As a result of his experience, he developed depression and nervousness.\textsuperscript{166} The claimant’s condition is very real, despite the lack of a true physical injury.

Mr. Hannah’s injuries illustrate the importance of a revision to the Code. His injuries are personal injuries received in the regular course of and resulting from his employment.\textsuperscript{167} But for his going to work that day, Mr.

\textsuperscript{157} See supra Part II.B.

\textsuperscript{158} See Bias, 640 S.E.2d at 551–55 (Starcher, J., dissenting).


\textsuperscript{160} W. VA. CODE ANN. § 23-4-1f (LexisNexis 2015); \textit{Hannah}, 2013 WL 5777878, at *2.

\textsuperscript{161} \textit{Hannah}, 2013 WL 5777878, at *2; see supra Part II.E.2.

\textsuperscript{162} See \textit{Hannah}, 2013 WL 5777878, at *2.

\textsuperscript{163} Id.

\textsuperscript{164} Id.; see supra Part II.C.

\textsuperscript{165} \textit{Hannah}, 2013 WL 5777878, at *1.

\textsuperscript{166} Id.

\textsuperscript{167} Id.
Hannah would not have received his injuries.\textsuperscript{168} Claims such as Mr. Hannah’s rightfully belong in the workers’ compensation system. However, any revision to the statute needs to address concerns of fraud and abuse of the workers’ compensation system. Without clearly articulated standards and substantiation requirements, the workers’ compensation system would become that which the 1993 revision feared: a general welfare program vulnerable to fraudulent claims and an undue burden on employers.\textsuperscript{169}

The key to a successful mental-mental revision is requiring a measure of objectivity in an area that is inherently subjective. Determining where to draw the line in the sand is the crux of the problem. By looking at other states’ approaches, West Virginia can shortcut the trial-and-error of revising the statute by evaluating their strengths and weaknesses, cobbling together a test that will both stem potential abuse of the system and allow previously marginalized claimants a path out of No Man’s Land.

B. Other States’ Approaches

Pennsylvania, New Jersey, and New York all recognize mental-mental claims, but have varying approaches to how to prevent abuse while compensating valid claims.\textsuperscript{170} By evaluating each state’s effectiveness at preventing abuse and overall efficiency, West Virginia can glean some insight into how to revise its mental-mental statute to include a standard of objectivity in an otherwise subjective area and provide redress to those who have been denied compensation since 1993.

1. Pennsylvania

Pennsylvania’s approach to mental-mental claims successfully prevents abuse of the workers’ compensation system but levies a burden on claimants that largely renders the system moot.\textsuperscript{171} Mental-related workers’ compensation claims are implicitly authorized by statute but almost entirely controlled by case law.\textsuperscript{172} Under Pennsylvania common law, a mental-mental claim requires three showings: (1) objective evidence of a psychiatric or mental injury, (2) objective evidence showing an actual work event caused the injury, and (3) that the work event was an “abnormal working condition.”\textsuperscript{173} The biggest hurdle to

\textsuperscript{168} Id.
\textsuperscript{169} See generally Davis & Palmer, supra note 11.
\textsuperscript{170} See supra Part II.D.
\textsuperscript{171} See supra Part II.D.1.
\textsuperscript{172} See generally Payes v. Workers’ Comp. Appeal Bd., 79 A.3d 543, 552 (Pa. 2013); Reilly, supra note 93, at 685–88.
\textsuperscript{173} Payes, 79 A.3d at 551–52.
mental-mental claims in Pennsylvania is establishing what constitutes an abnormal working condition.

Although there is no bright-line test for abnormal working conditions, a considerable number of mental-mental claims have been denied if a claimant received training for a certain type of event or if such an event was foreseeable for the type of work at issue.174 For example, if a convenience store clerk were given training on how to handle an armed robbery, a subsequent robbery would likely fail the abnormal working condition test because it was foreseeable that a convenience store might be robbed and the employee had been trained on official protocol.175

The problem with the abnormal working condition test is that it imposes a prohibitively and disproportionately high burden on claimants, frustrating its very purpose. In its most recent mental-mental decision, Payes v. Workers’ Compensation Appeal Board,176 the Supreme Court of Pennsylvania “emphasize[d] that . . . case law in the area of mental-mental injuries was developed simply to ensure that the Act’s requirements that compensable injuries are truly work-related and objectively established are met.”177 However, this statement does not reflect the actual application of the doctrine. Returning to the convenience store clerk example, if the clerk were shot in the arm during a robbery, there is little dispute that she would receive benefits under the Workers’ Compensation Act. By contrast, if the clerk had only had the gun held to her head and been repeatedly told she would be murdered if she called the police, any resulting mental sequelae would likely be non-compensable because it is foreseeable that a convenience store may be robbed.

Pennsylvania’s approach to mental-mental claims effectively closes the floodgates before they can open, rejecting claims that are objectively established and work-related because of an over-emphasis on “abnormal working conditions.” The test was originally intended to ensure that mental claims were more than a subjective reaction to normal workplace conditions and establish causation, but the current application of the abnormal working

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174 See Bush v. Workers’ Comp. Appeal Bd. (Commonwealth Liquor Control Bd.), 2013 Pa. Commw. Unpub. LEXIS 452 (2013) (denying compensation to claimant who received trainings and “should have anticipated being robbed at gunpoint”); Close v. Workers’ Comp. Appeal Bd. (Phila. Park Racetrack), 2010 Pa. Commw. Unpub. LEXIS 70 (2010) (denying compensation to claimant who was robbed at gunpoint because the employer had been robbed several times and the claimant had received training related to armed robberies); McLaurin v. Workers’ Comp. Appeal Bd. (SEPTA), 980 A.2d 186 (Pa. Commw. Ct. 2009) (denying compensation to claimant bus driver who was held at gunpoint because such an occurrence was relatively frequent and foreseeable, and the claimant had received trainings on how to handle such a situation).


176 79 A.3d 543.

177 Id. at 555.
condition test "seemingly equates 'foreseeability' with 'normalcy.'"\(^{178}\) This application is flawed. Nevertheless, the abnormal working condition test, as originally intended, provides a good model for a revision to West Virginia's Workers' Compensation Act.

2. New Jersey

New Jersey's statute compensates all occupational diseases arising out of the claimant's employment,\(^{179}\) provided that the disease is "due in material degree" to work-related factors.\(^{180}\) The statute makes no distinction between physical and mental injuries, nor does it require a physical injury in order to be eligible for workers' compensation benefits.\(^{181}\) New Jersey takes a more balanced approach to mental injuries than Pennsylvania. In *Goyden v. State Judiciary*,\(^{182}\) the court's focus was on ensuring that the injury can be objectively established and is sufficiently work-related.\(^{183}\) Requiring a claimant to produce objective evidence that supports a medical diagnosis of psychiatric disability creates a substantial threshold that winnows the potential pool of claimants from the outset.\(^{184}\)

The *Goyden* Test is particularly helpful in further limiting the mental-related claims.\(^{185}\) It does so not by outright denying mental claims, but by requiring several layers of objective evidence that establish both the mental injury itself and causation.\(^{186}\) The *Goyden* Test, therefore, relates back to the original statutory language: "personal injuries" caused by "any compensable occupational disease arising out of and in the course of his [or her] employment."\(^{187}\)

New Jersey's approach to mental-related claims is successful due to the *Goyden* Test. Without those requirements, its workers' compensation system would be vulnerable to rampant abuse. If West Virginia revised its workers' compensation laws to permit mental-mental claims, codifying New Jersey's

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\(^{179}\) N.J. STAT. ANN. § 34:15-30 (West 2015).

\(^{180}\) *Id.* § 34:15-31(a); see *supra* Part II.D.2.

\(^{181}\) § 34:15-30; see *supra* Part II.D.2.


\(^{183}\) *Id.* at 655.

\(^{184}\) *Id.* at 654.


\(^{187}\) N.J. STAT. ANN § 34:15-30 (West 2015).
Goyden Test would be a way to weave in several requirements of objectivity to prevent an influx of fraudulent claims, while allowing those workers with genuine mental injuries arising out of his or her employment a form of redress.

3. New York

New York's approach treats mental-related injuries no differently than physical workers' compensation injuries. So long as the claimant has suffered an accident, the accident is work-related, and the stress causing the accident is greater than an ordinary work environment, the claimant has likely met his or her burden. New York takes the claimant as he or she is, awarding compensation for a work-related stress injury regardless of the claimant's predisposition or any pre-existing conditions that may render the claimant particularly susceptible to stress-induced injuries.

Allowing compensation based on the claimant's "peculiar vulnerability" creates tension with the "greater than ... normal" work-environment stress test. The "greater than ... normal" test is a mixed objective-subjective test, but granting compensation to claimants who are particularly vulnerable when "the cause is common to all similarly employed" effectively renders any objective aspect null and void. Unlike New Jersey, New York's workers' compensation scheme has little emphasis on establishing objective criteria. The lack of objective criteria and heavy emphasis on the facts of each respective case creates a permissive standard that is vulnerable to systemic abuse. Focusing the workers' compensation system on the subjective reactions of the claimant yields a statutory scheme in which a claimant who suffers recovers, so long as there is evidence that establishes (1) the claimant's condition and (2) work-related causation. Although the "greater than ...
normal" test is a good example for West Virginia in spirit, its practical application allows too much latitude to claimants and does not provide enough structure and objective substantiation of mental-mental claims.

C. A Way out of No Man's Land

The best solution to the mental-mental quandary would be to revise the Act to recognize mental-mental claims as being compensable and put in place a framework for evaluating these claims based on objective and subjective criteria. However, a secondary solution would be to allow mental-mental claimants to exercise their common law rights against employers.

1. Abnormal Working Conditions and Goyden

Because workers’ compensation claims with a mental component have an inherent element of subjectivity, and mental-mental claims are predominantly subjective, any new statutory scheme must necessarily include substantiation requirements and a built-in objectivity framework. Combining Pennsylvania’s abnormal working conditions test and New Jersey’s Goyden Test results in a balanced, objective approach that is both wary of abuse and fair to claimants.

i. Abnormal Working Condition Test

The abnormal working condition test is used to “ensure that the Act’s requirements that compensable injuries are truly work-related and objectively established are met.” Yet, the current application of the abnormal working condition test prevents bona fide compensable injuries that are both work-related and objectively established. Therefore, West Virginia should adopt the abnormal working condition test as it was intended: to establish (1) that the claimant’s reaction to a mental stimulus is more than a subjective reaction to a normal working condition and (2) that the stimulus is adequately work-related.

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197 Payes, 79 A.3d at 555.
198 See id.; supra Part II.B.
In implementing the abnormal working condition test in West Virginia, it is imperative to avoid the aberration that has seeped into Pennsylvania’s case law, that is, to “equate[] ‘foreseeability’ with ‘normalcy’.”\textsuperscript{200} Disallowing mental-mental claims because an event is foreseeable yields an absurd result: the claimant is left with a legitimate psychological injury and is again pushed into No Man’s Land. This erroneous application also treats mental-mental claimants as second-class citizens. For example, if a bank teller is robbed at gunpoint, repeatedly threatened and told she would be shot, and as a result develops post-traumatic stress disorder and cannot return to work, her disability would be non-compensable because a bank robbery is foreseeable. By contrast, if in the same scenario the bank teller gets shot in the arm, there is no question that her injuries would be compensable. This application effectively dismisses mental-mental injuries despite the very real consequences of post-traumatic stress disorder, negating the purpose of including these claims in the workers’ compensation system.

West Virginia’s workers’ compensation system could benefit tremendously by adopting the abnormal working condition test as originally intended.\textsuperscript{201} It provides a means of establishing causation and imposes a modicum of objectivity, which winnows the number of potential claims and helps ensure that mental-mental claims are truly compensable.

\textit{ii. Goyden}

New Jersey’s Goyden Test uses several layers of objective elements to establish the claimant’s psychological injury and causation, ensuring that any compensable injury is both legitimate and arising out of the claimant’s employment.\textsuperscript{202} There are five elements to the Goyden Test: (1) the working conditions must be objectively stressful, (2) there must be evidence showing that the claimant responded to them as stressful, (3) the objectively stressful working conditions must be “peculiar” to the work environment, (4) there must be objective evidence supporting a medical opinion of the resulting psychiatric disability in addition to the “bare statement of the patient,” and (5) the workplace exposure must have been a “material” cause of the disability.\textsuperscript{203}

The benefits of including the Goyden Test in a revision to the West Virginia workers’ compensation statute are myriad. The Goyden Test addresses nearly every possible angle of a mental-mental claim: substantiation, objective

\textsuperscript{200} Id.
\textsuperscript{201} Id.
\textsuperscript{203} Id.
evidence, medical evidence, causation, and materiality. The *Goyden* Test provides a solid framework for addressing mental-mental claims without imposing a prohibitively large burden on claimants. Thus, the test should be included wholesale in any revision to the West Virginia statute.

Combining the abnormal working condition test and the *Goyden* Test results in a mental-mental scheme that provides the best of both worlds to employers and employees, mirroring the original compromise that undergirds the foundation of workers’ compensation. The two tests complement one another and create a burden that is attainable and legitimizes the claimant’s case. The fear lurking behind the 1993 amendment to the West Virginia workers’ compensation system was rooted in concern of fraudulent behavior and over-burdening a system that was near its breaking point. Using the abnormal working condition test and *Goyden* Test to supplement one another creates an objective framework, eliminates any genuine concerns of fraud, and recognizes the legitimacy of psychological injury claims, thus providing assurances to employers and lawmakers alike and giving mental-mental claimants a path out of No Man’s Land.

2. If They Can’t Come in, Let Them out

Although far from ideal for both employers and employees, permitting mental-mental claimants to be fully freed from the workers’ compensation system, and therefore able to pursue their claims in tort, is a solution secondary to permitting mental-mental claims but a better solution than further alienating them by banishing them to No Man’s Land. To deny mental-mental claimants their non-workers’ compensation rights to sue their employers for a work-related injury that is expressly excluded from the workers’ compensation system effectively voids the employee bargain of the workers’ compensation system while allowing employers to reap the benefits of their bargain.

To shackle would-be claimants in a system that explicitly rejects them is patently unfair. Why should employers be covered by sweeping immunity for a claim that is specifically set outside of the workers’ compensation system? *Larson’s Workers’ Compensation Law* illustrates the conflict that West Virginia has created by stripping employees of their workers’ compensation bargain right to be compensated while simultaneously enforcing their waiver of common law remedies:

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204 *Id.*
206 See *supra* Part II.A.
207 See *Bias v. E. Associated Coal Corp.*, 640 S.E.2d 540 (W. Va. 2006).
If... the exclusiveness defense is a part of the *quid pro quo* by which the sacrifices and gains of employees and employers are to some extent put in balance, it ought logically to follow that the employer should be spared damage liability *only when compensation liability has actually been provided in its place*.[1] [To] state the matter from the employee’s point of view, rights of action for damages should not be deemed taken away *except* when something of value has been put in their place.208

If a revision to the West Virginia workers’ compensation statute is untenable, then exempting mental-mental claimants from the shackles of the workers’ compensation system and recognizing their right to pursue redress by way of civil action is a better alternative than relegating these claimants to statutory limbo.209 Pursuing recovery through the court system as an individual is more costly to the injured worker, poses a greater threat to employers than simply paying workers’ compensation benefits, and involves a great deal of risk on both sides.210 Thus, this concession is a much better solution to the mental-mental morass than outright denying employee rights and providing employers blanket immunity.

IV. Conclusion

In this day and age, it is borderline absurd and without legitimate cause to exclude mental-mental claims from any workers’ compensation system. The political fears and motivations that prompted the 1993 amendment to the West Virginia workers’ compensation statute have no place in a 21st-century workers’ compensation scheme. Given the decrease in industrial jobs and increase in digital technology, it is likely that psychological injuries will eventually overcome physical injuries as the primary claims for workers’ compensation. West Virginia has the opportunity to recognize mental-mental claims in a controlled, objective manner that tests the validity and legitimacy of psychological claims in order to prevent fraud and abuse of the workers’ compensation system. Utilizing the abnormal working condition and Goyden Tests provides a firm foundation for revising the statute, providing employers a way to compensate employees for work-related psychological injuries and providing mental-mental claimants with a tangible path out of No Man’s Land.

208 6 *LEX K. LARSON, LARSON’S WORKERS’ COMPENSATION LAW* § 100.04, at 100–23 (Matthew Bender ed., rev. ed. 2014) (emphasis added) (citations omitted).
209 *See supra* Part II.E.
210 *See supra* Parts II.A–B.
FINDING A WAY OUT OF NO MAN’S LAND

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