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This Job is Making Me Anxious—Mental Health Workers' Compensation Claims

I. How Mental Health Claims Arise in Workers' Compensation

While a workers' compensation "injury" may bring to mind only physical traumas or cumulative physical injuries, "injury" can encompass both physical as well as emotional injuries that arise within the course of employment. As such, depression, anxiety, PTSD, and other psychological conditions can be compensable injuries within the context of workers' compensation. It is important to understand how these claims arise in workers' compensation, how various jurisdictions classify mental health claims, what types of mental health claims are compensable, and how to thoroughly investigate these claims to mitigate exposure and quickly reach a decision point in the claims handling process.

California, for example, distinguishes between "specific" injuries occurring as the result of one incident or exposure which causes disability or need for medical treatment and "cumulative" injuries, occurring as repetitive mentally or physically traumatic activities extending over a period, the combined effect of which causes any disability or need for medical treatment. Ann. Cal. Labor Code § 3208.3.

Mental health claims that arise from a physical injury

One way that mental health arise in the context of workers' compensation are mental health injuries that arise as a direct consequence of a physical injury. One example could be depression that arises after a work-related physical injury renders an employee unable to perform work consistent with his or her background and experience. For employees who have been physically active throughout their entire careers, significant restrictions that prohibit returning to work in the same capacity in which they are accustomed can require significant emotional adjustments. Similarly, a lengthy period of treatment during which the injured employee is unable to return to work can lead to emotional conditions. This can be exacerbated when the injured worker has been the primary breadwinner of his or her family, and/or whether the injured worker begins experiencing financial difficulties due to his or her inability to return to full duty work. Additionally, some injured workers are terminated by their employers when it appears, they will be unable to return to full duty work, which can also impact the injured worker's mental health. Another example of this type of injury could be an employee who experiences an amputation injury from a power tool and has PTSD symptoms in the shop area, around power tools, etc. This is not to say that these injury circumstances certainly result in a

psychological injury, as PTSD or other conditions may or may not develop in every case, but physical injuries can certainly cause psychological injury or “flare up” an underlying psychological condition (exacerbation or aggravation) in someone with or without a pre-existing history of psychological conditions.

Mental health claims that arise in absence of a physical injury

As will be more fully explained below, not all jurisdictions recognize purely emotional injuries. However, some jurisdictions do recognize mental health claims that arise in absence of a physical injury. A common example would be an employee who is the victim of an armed robbery at work. The employee may be physically unharmed by the robbers but may experience anxiety or PTSD because of the event. Despite the lack of physical injury, the employee may require significant treatment for the work-related emotional trauma.

II. Compensability of Mental Health Claims

There are three primary categories of mental health workers’ compensation claims. The first is physical-mental injuries. The second is mental-mental injuries. The third is mental-physical injuries.

“Physical-Mental” Injuries

Physical-mental injuries involve an emotional injury which resulted from a physical trauma. Physical-mental injuries involve both an injury to the body as well as one to the emotions/mind. For physical-mental injuries to be compensable, they must have a causal connection to the injured worker’s employment. This means that an employee who has pre-existing psychological conditions must generally prove a material aggravation of those pre-existing conditions which was caused by their employment. Expert testimony is generally critical in proving/disproving these claims.

Alabama recognizes physical-mental injuries where the employee suffered a physical injury to his or her body and that physical injury is the proximate cause of a psychological disorder. *See, e.g., Goolsby v. Family Dollar Stores of Alabama, Inc.*, 689 So.2d 104, 106 (Ala.Civ.App.1996).

Florida recognizes mental injuries only where a compensable physical injury has occurred. *Sarasota County School Bd. v. Roberson*, App. 1 Dist., 135 So.3d 587 (2014). To be compensable, a post-traumatic mental disorder must be the direct and immediate result of the industrial injury. *Kentucky Fried Chicken v. Tyler*, 716 So. 2d 295 (Fla. Dist. Ct. App. 1998).

In Indiana, “injury,” as used in the Workmen’s Compensation Act, is broader than mere reference to some objective physical break or wound to the body, but also any consequences therefrom, including mental ailments or nervous conditions. *Sollitt Constr. Co. v. Walker*, 127 Ind. App. 213, 135 N.E.2d 623 (1956).

“Mental-Mental” Injuries

In Nebraska, purely mental injuries are not allowed under the current Workers’ Compensation Act. A mental injury must be accompanied by a physical injury to be compensable. A worker is entitled to recover compensation for a mental illness if it is a proximate result of the worker’s physical injury and results in disability. *Sweeney v. Kerstens & Lee, Inc.*, 2004, 68 N.W.2d 350, 268 Neb. 752.

Similarly, Alabama does not recognize purely mental injuries. “Injury” does not include a mental disorder or mental injury that has neither been produced nor been proximately caused by some physical injury to the body. Ala. Code § 25-5-1(9).

Kansas also prohibits recovery for purely mental injuries, finding that purely mental disorders sustained by an employee, though arising by accident and out of and in the course of employment, are not compensable personal injuries under the Kansas Workmen’s Compensation Act. *Followill v. Emerson Elec. Co.*, 234 Kan. 791, 674 P.2d 1050 (1984).

While not all jurisdictions recognize purely emotional/ “mental-mental” injuries, some do. For example, in Iowa, purely non-traumatic mental injuries are compensable under the Iowa Workers’ Compensation Act. To prevail on a mental-mental claim in Iowa, the injured worker must prove both medical as well as legal causation. Medical causation is the connection between the condition alleged and the injured worker’s employment. Legal causation is established if the injured worker can prove that the alleged injuries were caused by workplace stress of a greater magnitude than is generally experienced by other workers in the same or similar job. *Dunlavey v. Economy Fire and Cas. Co.*, 526 N.W.2d 845, 855 (Iowa 1995). Where there is a sudden and traumatic event such as a robbery, it is assumed that legal causation has been met. *Brown v. Quik Trip Corp.* 641 N.W.2d 725 (Iowa 2002).

Missouri also recognizes mental injuries where such injuries result from unusual and extraordinary work-related stress. MO Rev. Stat § 287.120(2013). Injured workers in Missouri can meet their burden to show that the stress endured was work-related and extraordinary and unusual by comparing the level of stress with the level of stress faced by other employees in the same profession. *Shipley v. Office of Admin.*, No. SD 36643, 2020 WL 6281201 (Mo. Ct. App. Oct. 27, 2020) reh’g and/or transfer denied (Nov. 9, 2020), transfer denied (Jan. 26, 2021).

Indiana allows compensation for mental injuries that arise out of and in the course of employment even if there is no accompanying physical injury. *Eastham v. Whirlpool Corp.*, 524 N.E.2d 23 (Ind. Ct. App. 1988).

Similarly, Texas allows employees to recover for an accidental injury due to mental trauma where there is evidence of an undesigned, untoward event traceable to a definite time, place, and cause. *State Office of Risk Mgmt. v. Foutz*, 279 S.W.3d 826 (Tex. App. 2009).

“Mental-Physical” Injuries

Mental-physical injuries occur when a psychological stimulus results in a physical injury that continues even after the stimulus is removed. An example of this could be a heart attack experienced as the result of being held at gunpoint while at work.

Wisconsin is one of the few jurisdictions that recognizes mental-physical injuries. See e.g., *United Parcel Serv., Inc. v. Lust*, 208 Wis. 2d 306, 560 N.W.2d 301 (Ct. App. 1997).

Understanding the Burden of Proof for Mental Health Claims

The burden of proof is on the injured employee to prove that the alleged injury occurred and was the result of his or her work. Preponderance of the evidence is a common standard amongst workers compensation jurisdictions. That said, as would be expected, different jurisdictions have different standards.

In Kansas, disabilities resulting from psychological injuries are compensable when directly traceable to a compensable injury. *Helmstetter v. Midwest Grain Prod., Inc.*, 29 Kan. App. 2d 278, 28 P3d 398 (2001).

In Wisconsin, a mental-mental injury requires that the injured employee prove that he or she experienced “extraordinary stress” when compared to others who are similarly situated. See, e.g., *School Dist. No. 1, Village of Brown Deer v. Department of Industry, Labor and Human Relations*, 62 Wis.2d 370, 215 N.W.2d 373 (1974).

For a Wisconsin injured worker alleging a definable physical injury because of emotional stress in the workplace, the employee must show that the work activity precipitated, aggravated, or accelerated a progressively deteriorating or degenerative condition beyond its normal progression, and this standard does not require that work activity involve unusual stress. *United Parcel Serv., Inc. v. Lust* 208 Wis. 2d 306, 560 N.W.2d 301 (Ct. App. 1997).

To receive workers’ compensation benefits based upon a psychological disorder in Alabama, an employee must demonstrate that he or she suffered a physical injury to the body and that the physical injury is a proximate cause of the psychological disorder. Ala. Code § 25-5-1.

In Nebraska, in the context of coverage for a psychological injury, medical expert testimony linking post-traumatic stress disorder to the overall accident, and not to the physical injuries sustained within the accident, is insufficient to prove a causal relationship. *Rue v. Douglas County Corr.*, 2007 Neb. App. Lexis 67, 2007 WL 1276950 (2007).

To recover for a mental injury in Florida, the compensable physical injury must be, as determined by reasonable medical certainty, to be at least 50% responsible for the mental or nervous condition as compared to all other contributing causes combined. Fla. Stat. Ann. § 440.093.

In California, the injured worker must prove by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury. Ann. Cal. Labor Code § 3208.3.

Other Things to Consider When Analyzing a Mental Health Workers' Compensation Claim

Mental health injuries generally significantly increase exposure on a claim, as they are compensable as a body as a whole injury rather than a scheduled member. See e.g., *Kraft v. Paul Reed Const. & Supply, Inc.*, 239 Neb. 257, 475 N.W.2d 513 (1991). In Iowa, where a body as a whole injury potentially entitled to claimant to industrial disability benefits, the impact on exposure can be significant. See e.g., Iowa Code § 85.34(2)(v) (2017).

In many jurisdictions, the employer takes employees "as is" and subject to any underlying, latent, and/or pre-existing conditions. As such, pre-existing conditions such as depression, anxiety, and suicidal tendencies may be aggravated by employment and entitle an employee to compensation in those jurisdictions that acknowledge mental-mental injuries.

Effective July 21, 2021, mental injuries without the presence of a physical injury will be compensable in Nebraska if the employee is a first responder. Neb. Rev. Stat § 48-101.01.

In California, no compensation shall be paid... for a psychiatric injury related to a claim against an employer unless the employee has been employed by the employer for at least six months. Ann. Cal. Labor Code § 3208.3.

III. Investigation and Handling of Alleged Mental Health Claims

When an employee alleges a work-related mental injury, it is important to promptly investigate the claim. We recommend that you first gather information from the employer, including incident reports, witness statements, and the statement of the injured employee. Obtain the employee's personnel records as well.

Next, investigate the employee's prior mental health history. This may include obtaining a medical canvass, requesting past medical records, and taking the employee's statement. Pharmacy records can often serve to identify treating physicians that the employee may not have identified or psychiatric medications that the employee was previously taking. If the matter is litigated and the jurisdiction allows discovery, this may also include serving discovery requests upon the injured employee that seek information regarding his or her mental health medical history and taking the employee's deposition.

Some jurisdictions consider mental health records privileged. In these jurisdictions, mental health records are considered distinct from an employee's other medical records and may require a special authorization to obtain.

For example, AL Code § 34-26-2 (2016) reads, "... the confidential relations and communications between licensed psychologists, licensed psychiatrists, or licensed psychological technicians and their clients are placed upon the same basis as those provided by

law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.”

Another critical aspect of the investigation is establishing causation. Just because an employee is experiencing mental health symptoms or has been diagnosed with a mental health condition does not necessarily mean that the condition is work-related. If possible, obtain a causation opinion from the treating physician. If your jurisdiction does not allow the defendants to select care, or the employee has obtained psychiatric evaluation and treatment outside of the workers’ compensation system, consider an Independent Medical Examination/Defense Medical Examination. To the extent that you were successful obtaining the employee’s relevant past medical records, provide those to the physician ahead of the examination to inform the physician’s opinions.

Medical – Psychological Perspective.

The biopsychosocial model has been demonstrated to be the most heuristic approach to emotional injury in and of itself, as well as emotional injuries arising from physical injuries and vice versa. In addition, biopsychosocial assessment is the gold standard for chronic pain assessment, prevention, and treatment, as chronic pain is widely accepted as both an unpleasant and physical and emotional experience (IASP, July 2020). The biopsychosocial model also provides the best foundation for tailoring the most comprehensive pain management program for each specific patient. As one example, chronic pain patients have an increased risk for developing deficits in physical functioning, emotional reactivity, and cognition. Interdisciplinary treatment, based on the biopsychosocial model, is vital to address these multifaceted issues facing chronic pain sufferers.

Biopsychosocial assessment includes a thorough interview uncovering the biological, psychological, and socio-cultural factors that influence individuals’ responses to injury, be they physical, mental or both, as well as an assessment of current and past functioning. It is very important that this assessment occur early in the injury claim, as research has repeatedly shown that when factors that influence delayed recovery are left untended, they will result in poorer outcomes for the injured worker and the insurance carrier. The presence of psychological distress when left untreated, can become very complicating in the long term. After timely biopsychosocial assessment occurs, biopsychosocial treatment would include tailoring treatment to the needs of the individual claimant. In the case of chronic pain, for example, interdisciplinary pain management strategies would be employed to address function, disability, and promote adaptability and recovery. Multi-modal pain treatments have progressed with advancements in science and technology to provide the best possible outcomes for pain patients. Additionally, functional restoration and other early interdisciplinary intervention programs are important and effective in chronic pain management, assessment, and prevention.

With respect to factors which predict delayed recovery and treatment outcomes, there is a growing body of evidence that psychosocial variables have a significant ability to predict the outcome of medical treatment. These include female gender, older age, negative expectations of recovery, low self efficacy, low social functioning, poor injury education, low educational attainment to name a few. While a few of these factors are not modifiable, most of them are and this offers opportunities to tailor interventions at the individual level. There is also

considerable evidence that psychosocial variables can affect the outcome of invasive procedures such as spinal surgeries and spinal cord stimulation (SCS) especially when the procedure is performed to reduce pain. Overall, there is strong evidence that a collaborative biopsychosocial model is superior to the traditional biomedical model (i.e., medical treatment only) of patient care.

Extensive reviews of the literature concluded that psychometric tests are roughly equivalent to medical tests in their ability to diagnose and predict outcomes and are sometimes superior. Research sponsored by the World Health Organization found psychopathology to be a stronger contributor to disability than disease severity. In another study, psychosocial variables predicted delayed recovery correctly 91% of the time, without using any medical diagnostic information (Gatchel, Polatin, & Mayer, 1995). Psychosocial variables have been found to be especially important in the assessment of chronic pain, and pain related disability.

One example of how mental and physical factors can interact to produce delayed recovery is the following finding: Depression and pain at 1-month post-injury are both common and important modifiable predictors of recovery at 12 months post-injury amongst a general injury population. It is important for injured workers to understand the relationship between depression, pain, and recovery and to seek advice and support for these problems. Primary and secondary health-care services need to identify, clinically assess, and manage persisting depression at 1 month, and measure and adequately control persisting pain, as part of post-injury care and rehabilitation. The relationship between pain and depression is complex, and each may have multiple contributory factors, but both needs addressing in post-injury care. These challenges can be addressed via simple or more complex screening of psychological health and taking appropriate action to refer to appropriate services as necessary within a timely manner.

With respect to psychological testing, psychological testing and assessment can take many forms in work injury. It can include assessment of neuropsychological status, personality, malingering, motivators for change, predictions of recovery, quantification of coping skills, the impact of chronic pain, and identify risk factors for delayed recovery such as severe psychological symptoms of depression and trauma. Psychological testing should always be supplemented with a thorough clinical interview, which typically lasts several hours. Psychological testing can be used to diagnose, track, and predict the course of various psychological symptoms and disorders. Psychological testing can identify patterns of exaggeration, magnification and malingering tendencies which can dramatically influence recovery potential as well as progress. Psychological testing can also be misused and misinterpreted and therefore use of qualified examiners is crucial.

The report of mental health injuries in workers compensation is not unique and prevalent currently. This is due to both increased awareness of mental health issues as well as capitalization on mental health issues which are typically harder to prove / disprove and don't rely on what is viewed as traditionally "objective" evidence. However, the use of psychological testing, informed providers, and an awareness of factors that influence delayed recovery, and employers and their representatives being proactive and supporting early intervention can assist in the process of claims resolution. There are ways in which attorneys, case managers, and employers can support empirical evaluations of claimants.

Some key pieces of evidence that assist practitioners in making informed assessments of injured workers include relevant documentation, including past medical records (depending on the claimant this may include records for 5 years or more), records pertaining to pre-existing mental health issues or treatment, original/first injury report, all treatment records stemming from injury, records of treatment approvals and denials, depositions. Ultimately it is the collaboration of all parties involved with the claim that allows a claim to progress or stall in recovery. Taking an active, early intervention and informed role helps both the injured worker and the claims process go smoothly and ensure the best outcome for all.

Conclusion

Prompt and thorough investigation and early intervention are the keys to mitigating exposure on a mental health workers' compensation claim. When presented with a mental health workers' compensation claim, first obtain information from the employee and employer regarding the claim, such as the incident report, personnel records, witness statements, and the statement of the injured worker. Next, investigate the employee's past psychiatric history by obtaining the employee's prior medical records. While this is in progress, obtain a legal opinion regarding the nuances of the particular jurisdiction, the burden of proof, and other legal issues that would impact the claim. Next, consider how involvement of a mental health injury could impact exposure, understanding that in most jurisdictions, a mental injury could significantly increase claim exposure. Retain medical experts to provide causation opinions. On accepted claims, get mental health professionals involved early in the treatment process and consider ordering psychological testing to identify and mitigate the factors that can delay recovery. Mental health workers' compensation claims can be daunting, but pursuing a comprehensive investigation and claims handling process and involving the best legal and medical professionals to assist can ensure the best possible outcome for all involved.