WORKERS COMPENSATION MENTAL INJURY CLAIMS: COMPENSABLE OR NOT COMPENSABLE?

Very few, if any, concepts in workers compensation can be described as black and white. This is especially so when venturing into the evolving landscape of workers compensation claims for mental injuries. The treatment of mental injury claims varies from state to state. Even in those states with statutory provisions or case law addressing the compensability of mental injury claims, there are still twists and turns for the seasoned workers compensation practitioner and employer alike to navigate.

Two recent cases address the compensability of claims for Post-Traumatic Stress Disorder (PTSD).

**Police Officer in Pennsylvania**
The Supreme Court of Pennsylvania, in Payes v. WCAB (Workers’ Compensation Appeal Board), awarded workers compensation benefits to a state trooper for PTSD suffered after he struck and killed a pedestrian with his patrol car. Philip Payes was on the interstate driving back to his barracks when a woman dressed in black—who was later found to suffer from mental illness—ran in front of his patrol car for no apparent reason and was hit. Despite his efforts to administer mouth-to-mouth resuscitation while simultaneously attempting to divert oncoming traffic from hitting them, Payes was unable to revive the pedestrian, who was pronounced dead at the scene. Payes was allowed time off work. Upon his return to work, however, he began feeling anxiety and stress, which prevented him from performing his job duties. Payes filed for workers compensation benefits, alleging that he suffered from PTSD as a result of the incident. The workers compensation judge awarded benefits to a state trooper for PTSD suffered after he struck and killed a pedestrian with his patrol car. Philip Payes was on the interstate driving back to his barracks when a woman dressed in black—who was later found to suffer from mental illness—ran in front of his patrol car for no apparent reason and was hit. Despite his efforts to administer mouth-to-mouth resuscitation while simultaneously attempting to divert oncoming traffic from hitting them, Payes was unable to revive the pedestrian, who was pronounced dead at the scene.

On appeal, the Workers’ Compensation Appeal Board reversed the workers compensation judge’s decision. The WCAB found that while Payes’ involvement in the accident may not have been routine, it did not amount to abnormal working conditions in light of the stress and peril already inherent in his profession. The Pennsylvania Commonwealth Court affirmed the WCAB’s decision and agreed that Payes’ mental injury did not result from an abnormal working condition. Payes appealed. The issue for review before the supreme court was whether Payes’ PTSD resulted from abnormal working conditions. The court noted that claimants like Payes were required to provide proof that the mental injury resulted from abnormal working conditions as distinguished from suffering a subjective reaction to otherwise normal working conditions. The court emphasized that the inquiry was fact-sensitive. As such, while Payes’ professional occupation as a state trooper was considered in the Court’s analysis, the analysis did not end simply because he was in a line of work that was inherently stressful.

After reviewing the record, the Court held that Payes established that he suffered from a work-related injury and disability. Additionally, he established that the incident would not normally be anticipated or experienced in his profession. In sum, Payes did not experience a subjective reaction to otherwise normal working conditions; instead, he reacted to a single and highly unusual event. As such, Payes mental injury claim was compensable.

**UPS Driver in West Virginia**
Similar to Payes, the Supreme Court of Appeals in West Virginia, in United Parcel Service, Inc. v. Hannah, found a claim for PTSD compensable under the workers compensation act; however, unlike Payes, §§23-4-1f of the West Virginia Code provides, in part, that so-called mental-mental claims are not compensable.

In United Parcel Service, Inc., Jay Hannah was on his UPS delivery route when his truck was hijacked by a man with a rifle. The gunman shot into the air, threatened Hannah’s life, and forced Hannah to drive to the police station. Upon arrival, the gunman noticed a police cruiser parked at a gas station and forced Hannah to pull over. The gunman took the keys, exited the vehicle, and fired a shot into the ground, at which point Hannah was able to escape and hide. Law enforcement eventually shot and killed the gunman.

After the incident, Hannah began seeing a licensed counselor, who diagnosed him with PTSD stemming from the hijacking. Hannah sought workers compensation benefits. The claims administrator denied benefits on the basis that Hannah’s injury was a psychiatric claim prohibited under Code §23-4-1f. The Office of Judges affirmed the claim administrator’s denial of benefits, but the decision was later reversed by the Board of Review. UPS appealed.

The issue before the supreme court was whether Hannah’s injury was compensable and not barred by Code §23-4-1f. Reviewing the Board’s fact finding, the court noted the physical nature of the hijacking (i.e., Hannah was detained and threatened with gunfire). The court ultimately reasoned that Hannah’s claim for PTSD was compensable and not barred by §23-4-1f because the condition was manifested by physical symptoms like sleep disturbances and jumpiness.

**Conclusion**
While the standards for compensability for mental injuries may vary from jurisdiction to jurisdiction, what remains unquestionably true is that these types of work-related mental injury claims are not likely to disappear or diminish in complexity in the near future.

Jennifer A. Chamagua, Esq., is a staff counsel with NCCI’s Legal Division.
Investigating workers compensation claims is getting easier because of the explosion in popularity of social media sites like Facebook, Twitter, and MySpace. As social media matures, it is becoming a multigenerational phenomenon in which people of all ages, races, and educational and financial backgrounds are posting pictures, videos, and text about their lives, experiences, and activities. A simple Google search of an individual can return numerous social media sites in which the person participates. What is surprising is the type of content that people post to their sites.

Historically, employers searched the Internet for information about job candidates and, in some cases, accessed their social media accounts to determine if they possessed good character and participated in mainstream or legal activities. It is an obvious next step that employers and workers compensation investigators would turn to social media to investigate workers compensation claims.

Dubious Postings
It seems that the news media reports daily on someone who is in trouble for posting inappropriate comments or pictures on their social media site. The spectrum of “misbehavior” includes embarrassing, distasteful, and criminal content. And it is shocking that the poster of the information either does not anticipate the consequences of such postings or simply does not care. One would think that with the national media coverage providing example after example of how social media has led to criminal convictions, employment firings, and even a congressional resignation, the users of social media sites would be somewhat guarded in their postings.

One example of a criminal conviction was posted on the Ohio Bureau of Workers’ Compensation website. In that case, an Ohio man pled guilty to workers compensation fraud after posting on his Facebook page photos of himself performing construction work in Arizona while collecting Ohio workers compensation benefits. He also posted pictures that showed him in rappelling gear doing rappelling work. He paid $6,000 at sentencing and was given a six-month suspended jail sentence provided he paid the balance of the $7,644.08 in restitution and investigation costs to the Ohio Bureau of Workers’ Compensation.

The use of social media to investigate workers compensation claims is not unique. Social media is simply another investigative tool that can be used to evaluate whether a workers compensation claimant is legitimately injured, the circumstances surrounding their injury, the extent of the injury, and the scope of activities they are able to participate in.

Quite often, the evidence obtained from social media will either substantiate evidence already discovered or lead to other admissible evidence, such as follow-up deposition testimony from the claimant or other witnesses. Videotape surveillance of the claimant may be both warranted and cost-effective if the claimant’s social media site shows the claimant participating in activities inconsistent with the injury claimed.

Admissibility of Evidence
Information obtained directly from social media may not be admissible because the information must be authenticated, and that can prove to be challenging. Depending on jurisdiction, the testimony of a witness with personal knowledge may be required, or an Internet consultant may have to be hired to establish the authenticity of information obtained from a website.

Advancements in technology such as “geotagging” should contribute to the admissibility of social media in workers compensation cases. Geotagging is the process of adding geographical identification metadata that can be used to determine the date, time, and place (by capturing GPS data) of videos and photos.

Furthermore, social networking websites have privacy policies to protect their users. If a civil subpoena is served on a social networking website, the claimant or social networking provider may argue that the disclosure of social networking information is barred by the Stored Communications Act. With regard to criminal investigations, such as insurance fraud, if there is probable cause, a search warrant can be obtained, requiring the social media site to provide the information.

Conclusion
Although there may be challenges associated with the admissibility of social media in workers compensation cases, investigating workers compensation claims is easier as a result of social media. It may take some time for the law to catch up with social media technology as it relates to admissibility in workers compensation cases, but the legal trend is toward admissibility. If social media continues in popularity and is not simply a fad, it will be a valuable tool in investigating workers compensation claims in the future.

Jeff Selbach, Esq., is a senior counsel with NCCI’s Legal Division.
In the majority of states, workers compensation laws provide the exclusive remedy for employees’ workplace injuries arising out of and occurring in the course and scope of employment, with limited and narrow exceptions. Yet workers compensation benefits and exclusivity have not always been extended for workplace injuries stemming from mold exposure—carriers often successfully argued that the condition was not work-related, particularly when the industry involved did not have greater risk of exposure to mold than other industries or like work environments.

But since the 2009 North Carolina case Steve R. Jones v. Steve Jones Auto Group, most state courts have found that where there is a link between workplace mold and the alleged injuries, workers compensation is the exclusive remedy. Nonetheless, as demonstrated by a recent case in Mississippi, it is evident that the relationship between workers compensation exclusivity and workplace mold will continue to face challenges.

Mold in Mississippi
In the Mississippi case Bowden v. Young (2013), plaintiffs Blackmore and Young were legal assistants at a law firm. From 2006 through 2009, plaintiff Blackmore worked in two of the firm’s buildings and contended that her health deteriorated significantly as a result of exposure to toxic mold in the buildings. Blackmore alleged that the supervisors at the firm ignored her complaints. In 2009, a mold-killer chemical was applied to surfaces of the office where the plaintiffs worked.

Plaintiff Young began working for the law firm at the same office building and said that she also immediately began to suffer health problems because of exposure to mold. Defendant Bowden claimed to have repeatedly told the office building landlord fix the moisture problem and had ultimately decided to move from the building. Neither plaintiff returned to work for the defendant after the 2009 holiday season.

The plaintiffs subsequently brought intentional tort claims—including battery and intentional infliction of emotional distress—against their employer for exposure to toxic mold and toxic mold-killer chemicals where they worked. The defendant employer moved to dismiss the case, arguing that workers compensation was the sole remedy and there were no allegations of intentional conduct that would remove the claims from the exclusivity of the Mississippi Workers’ Compensation Act (MWCA).

The trial court denied the motion to dismiss, and the Mississippi Supreme Court granted the interlocutory appeal to determine whether the claims were outside the exclusivity of the MWCA.

**Intent to Injure Is Key**
The court, in its discussion of the case, reflected on several previous Mississippi cases that challenged workers compensation exclusivity and its narrow interpretation of the intentional tort exception. The court explained its repeated holdings that “in order for a willful tort to be outside the exclusivity of the [MWCA], the employer’s action must be done with an actual intent to injure the employee” and opined that Mississippi was in agreement with the majority of states in requiring an “actual intent to injure.” The court also noted that “[A] mere willful and malicious act is insufficient to give rise to the intentional tort exception to the exclusive remedy provisions of the [MWCA]. … Reckless or grossly negligent conduct is not enough to remove a claim from the exclusivity of the [MWCA]” and further emphasized its refusal to expand the “actual intent” standard to include behavior that was “substantially certain to” injure the employees.

Continuing its analysis, the court maintained its narrow interpretation of the exceptions to evade workers compensation exclusivity in the present case, just as it had in previous holdings, noting that:

Although the plaintiffs may disagree with how [the defendants] attempted to remedy the mold problem, they have failed to state a claim upon which relief can be granted, because they have failed to show that any of the actions alleged as battery were taken with the specific and actual intent to injure them.

And further,

While the defendants’ handling of the mold problem may have been negligent, the allegations do not rise to the level of outrageous and extreme conduct that is necessary to support a claim for intentional infliction of emotional distress. Further, the plaintiffs still must be able to show that the actions of the defendants were conducted with “actual intent” to injure the plaintiffs. The fact that [the defendants] attempted to remediate the mold issue, and ultimately decided to relocate its offices due to the mold, leads to the inevitable conclusion that the actions of [the defendants] were not done with the actual intent to inflict emotional distress upon the plaintiffs.

**Motion to Dismiss Prevails**
The court concluded that the only way to bring a tort claim outside the exclusivity of workers compensation is to allege that the employer acted with “actual intent to injure the injured party.” And although the defendants may have been negligent or even grossly negligent, the defendants’ actions “did not rise to the level of actual intent,” and the complaint does not support such an argument. Thus the court found that the Workers’ Compensation Act was the plaintiffs’ sole remedy. Ultimately, the denial of the defendants’ Motion to Dismiss was reversed, and all claims against the defendants were dismissed.

**Conclusion**
Time will tell whether courts will expand the “actual intent” standard of the intentional tort exception to include behavior that is negligent/grossly negligent or substantially certain to injure. But for now, at least in Mississippi, the trend appears to be on a continued path of narrow interpretation and workers compensation exclusivity for workplace injuries related to mold.

Adam Levell, Esq., is a counsel with NCCI’s Legal Division.
EMPLOYEE RUNNING PERSONAL ERRAND FOR EMPLOYER PROVES COSTLY

Doesn’t it seem that in order to manage work, family, a house, and all the things that go along with those responsibilities, it takes an army to get anything accomplished, especially if your work is running your own business? Reliance upon relatives, friends, and even our employees seems unavoidable if we are to have a properly functioning life. Well, a Louisiana court has ruled that asking employees to run personal errands can prove costly.

The Facts of the Case
In Chatagnier v. 1st A Southeast Incs. L.L.C., the claimant, Ms. Chatagnier, worked for 1st A Southeast as a senior team leader/receptionist. Having transportation was essential for her position because she was required to drive in order to carry out her work responsibilities, and she received an $80.00 per month stipend for gas. In her job, she often received direction from Ms. Geason, an employee in another location, to carry out work that Ms. Jackson, Ms. Chatagnier’s boss, wanted her to perform.

On the morning of September 9, 2010, Ms. Geason asked Ms. Chatagnier if she would go to a local store to get a canister that Ms. Jackson and she had forgotten to pick up. Ms. Geason never told the claimant what the canister was for, and Ms. Chatagnier assumed she was running an errand for the business.

After eating lunch out and before heading back to the office, Ms. Chatagnier attempted to pick up the canister. But, while sitting at a stoplight, her car was rear-ended. Ms. Chatagnier claimed that she was injured in that accident and that her injuries were compensable by her office, Ms. Chatagnier attempted to pick up the canister. After eating lunch out and before heading back to the office, Ms. Chatagnier attempted to pick up the canister. Ms. Geason never told the claimant what the canister was for, and Ms. Chatagnier assumed she was running an errand for the business.

The Office of Workers’ Compensation (OWC) found Southeast liable and ordered the company to pay for:

1. The claimant’s medical expenses
2. Continuing indemnity benefits from the date Ms. Chatagnier left her employment (October 2010) until there was a material change in circumstances
3. Lumbar spine surgery and all reasonable and necessary treatment incidental to that surgery

The Issue—Did the Claimant’s Injury Happen in the Course of Employment?
At issue for the OWC, and ultimately on appeal for Louisiana’s First Circuit Court of Appeal, was whether the claimant’s alleged injury arose out of and in the course and scope of her employment. Ms. Chatagnier took the position that it did since she “believed” she was on a business mission at the direction of her boss. Southeast argued that the facts, rather than the claimant’s belief, should control the outcome of that issue. And the fact was that Ms. Chatagnier was running a personal errand while she was injured.

The Court’s Analysis
In making its determination, the court relied upon a legal doctrine that provides that an injury sustained by an employee “deemed to be on a specific mission for the employer, such as making a trip . . . pursuant to his employer’s orders” is compensable.

Here, the court ruled that the claimant was acting at her employer’s direction even though Ms. Geason was not Ms. Chatagnier’s boss. The court found that Ms. Geason often gave Ms. Chatagnier direction at work on behalf of Ms. Jackson, who was Ms. Chatagnier’s boss.

As such, that leaves open the issue of the specific mission. Does the specific mission have to be business related, or can it be any mission as long as the claimant is directed to perform the mission by her employer? While the court did not directly address that question,

The Conclusion
If you’re an employer, and you intend to rely on your employees to run personal errands for you, make sure you are clear that it is a personal errand. Moreover, while the court in Chatagnier did not address a situation where the employer required an employee to run a personal errand or risk termination, employers are probably better served by asking for help, not demanding it.

Kacy Marshall, Esq., is a senior counsel with NCCI’s Legal Division.

1 Also at issue in Chatagnier, but not discussed in this article, was whether there was a causal connection between the car accident and Ms. Chatagnier’s injury.
THE STREET PERIL DOCTRINE AND RANDOM ASSAULTS

Random assaults have been a hot topic in the media. It’s surprising, but an employee’s injuries resulting from random assaults are not necessarily compensable.

Two recent state supreme court cases dealt with random assaults, and both courts considered whether the street peril doctrine should be extended to include random assaults. The Rhode Island Supreme Court held that a cable company employee who was the victim of a random criminal assault while repairing outdoor cable lines was entitled to compensation (Ellis v. Verizon New England, Inc.). The Ellis decision stands in contrast to a 2010 Tennessee Supreme Court decision, in which the court declined to extend the street risk doctrine to include a random murder of an employee on the employer’s premises (Padilla v. Twin City Fire Insurance Company).

Assault in Rhode Island

In Ellis v. Verizon New England, Inc., Paul Ellis, a Verizon employee, was struck on the head with a stick by a random stranger while working on outdoor cable lines. Workers compensation benefits were awarded to the trial judge, who concluded that Ellis had failed to prove that his injuries arose out of and in the course of his employment. The appellate division agreed with the trial judge’s assessment that the crime data submitted by Ellis was not specific enough to establish that he was subjected to a special or increased risk of being assaulted.

In its analysis, the supreme court explained that in Rhode Island, only those injuries arising from the actual risks of employment are compensable. In a matter of first impression, the Rhode Island Supreme Court had to determine under what circumstances the risk of random assault by a stranger is an actual risk of employment. The court acknowledged that certain street perils, such as automobile accidents, are considered actual risks of employment, and held that Ellis’s injuries were compensable under the street peril doctrine.

Extending the street peril doctrine beyond automobile accidents, the court reasoned that Ellis’s injuries would be compensable if he had been struck by a car. The court held that there was no meaningful difference between being randomly struck by an assailant and being struck by a car since workers are exposed to both risks if they are required to travel on public roads.

When determining whether to apply the street risk doctrine, the Tennessee Supreme Court explained that the application of the street risk doctrine had expanded to include employees whose work exposes them to the public. The court then considered whether Mr. Sanchez was exposed to the public when he was randomly murdered.

The court acknowledged that the shop was located in a high crime area and that Mr. Sanchez was the first person at the shop, which arguably put him first in line to encounter intruders. Yet, the court was not persuaded to apply the street risk doctrine based upon the dissimilarities between the employer’s shop and the neighboring business that had been burglarized frequently. Unlike the neighboring business that was open to the public, the employer’s shop was not frequented by the public, nor did it advertise or attract the public.

Similarly, in Padilla, the Tennessee Supreme Court held that the shop was not frequented by the public. The court then considered whether Mr. Sanchez was exposed to the public when he was randomly murdered.

Additionally, while it is uncontested that Mr. Sanchez was the first person to arrive at the shop, he was as removed from the public as he could possibly be, and Mr. Sanchez’s duties did not require him to deal with the public. The court acknowledged that this was a tragic case but concluded that the facts did not provide a sound basis to apply the street risk doctrine.

Conclusion

These two cases are disturbing due to their arbitrariness and brutality; fortunately, random violence in the workplace is rare. It seems possible that both cases may have had different outcomes if the facts were slightly different. In Padilla, the Tennessee Supreme Court may have provided compensation death benefits if Mr. Sanchez’s job required more interaction with the public. And with the Tennessee case, one wonders whether the Rhode Island Supreme Court would have changed its holding of compensability if Mr. Ellis was randomly assaulted in a Verizon warehouse that was not open to the public.

Evelyn M. Garbett, Esq., is a staff counsel with NCCI’s Legal Division.