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RESEARCH ARTICLE

Interpretation of the Mental Stress Taxonomy under Nigeria's Employees' Compensation Act 2010

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Abstract
Prior to the inception of the Employees' Compensation Act 2010 ("ECA"), the workers' compensation system in Nigeria was governed by the Workmen's Compensation Act 1987 (Cap W6 LFN 2004) ("WCA"). The WCA failed to provide an adequate compensation regime for employees, notwithstanding the fact that payment of compensation stems from the employer's duty of care to the employee. Though an employer may be liable for injury, whether physical or mental, sustained by an employee, the WCA, among other things, had no provision for mental stress claims. Neither was the mental health of employees contemplated under its regime. The ECA has sought to close this gap by the provisions of its section 8. Using a comparative perspective, this article examines the dynamics as well as the challenges of applying section 8 of the ECA in the overall interest of the legal system and the labour environment.

Keywords: Mental stress taxonomy; Employees' Compensation Act; workers' compensation; mental stress claim; mental-mental claim; physical-mental claim; mental-physical claim; Nigeria

Introduction

Prior to the Employees' Compensation Act 2010 ("ECA"), the workers' compensation system in Nigeria was governed by the Workmen's Compensation Act 1987 (Cap W6 LFN 2004) ("WCA"). The WCA failed to provide an adequate compensation regime for employees, and the mental health of employees was not contemplated.[1] The recently enacted ECA of 2010 now provides for claims for mental stress disability in its section 8. However, the application of this section may be quite challenging, thanks to its subjective nature and the fear of "opening the floodgates" to numerous fraudulent claims of mental injury, which is a limiting criteria for a mental stress claim. Furthermore, mental stress claims are complex, and the fact that mental stress has many causes raises the challenge of determining what is work-related. Obtaining redress for a mental stress problem in Nigeria therefore appears to be an uphill task for the average worker. Anushiem and Oamen observe that while the provision for compensation for mental stress is commendable, the Act leaves

1 M Dugeri asserts that compensation for mental stress is a completely novel provision; see "The Employee's Compensation Act 2010: Issues, prospects and challenges" (2013) *SSRN Electronic Journal*, DOI:10.2139/ssrn.3509243 (last accessed 14 July 2022), 1 at 18. Also see MI Anushiem and PE Oamen "Nigerian Employees' Compensation Act 2010: Issues arising" (2017) 1 *African Journal of Constitutional and Administrative Law* 53 at 60; and O Atilola "The challenges of assessing and providing compensation for mental stress under Nigeria's 2010 Employee's Compensation Act" (2012) 65/4 *International Social Security Review* 31.

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the determination of what amounts to mental stress to the whims and caprices of the board of the body charged with implementing the ECA, the Nigerian Social Insurance Trust Fund (NSITF), and its associates, which is problematic and deserves legislative review.[2] Omoro and Okaka have noted that the NSITF is finding it difficult to implement the Act in the area of compensation for mental stress.[3] On the other hand, studies have shown that mental illness as a result of job-related issues is on the increase in Nigeria.[4] The judicial response to mental stress claims in Nigeria is so far not clear; at best, it could be described as an attitude of reluctance to grant mental stress claims. This can be seen in the absolute refusal to grant relief for mental stress in addition to reinstatement in cases of unlawful dismissal or termination. Such cases unarguably result in untold mental stress for the worker who successfully challenges the same, but the courts insist that they can only award reinstatement, not reinstatement plus damages for mental stress. According to the court in *PTI v Nesimone*, "[i]t is settled that under our law a wrongfully terminated or dismissed person cannot get both damages and reinstatement at one and the same time. It must be one or the other."[5] Studies from other jurisdictions have shown that judicial decisions on the subject do not appear to be in sync with theoretical foundations and research findings on the causes, nature and magnitude of mental stress resulting from the workplace; this has resulted in an erratic set of rulings from the courts on stress claims under workers' compensation.[6] This article therefore seeks to critically analyse the requirements, dynamics and application of the mental stress provisions as a ground for the compensation of employees in Nigeria. In doing so, it adopts a comparative approach, with a view to showing that the introduction of the mental stress claims provisions in our law is not only timely but also in line with international best practice.

The article is in six parts. Following the introduction is a conceptual analysis and clarification of the concept of mental stress. We then examine in detail categories of mental stress claims in the workplace, such as mental-physical claims, physical-mental claims and mental-mental claims, before critically dissecting the requirements, standard of causation, dynamics and challenges of a successful claim for mental stress under section 8 of the ECA, with a view to showing that this section may not be as straightforward as it appears. The article concludes that the work-relatedness test, combined with the doctrine of predominant cause, should be a fundamental basis for mental stress compensation in Nigeria, as the very nature of the "arising out of or in the course of employment"[7] test presupposes that the stress results largely from the employee's employment, not some other way(s). Such an approach will help to eliminate mental stress claims that do not arise from or in the course of employment.

Meaning, nature and features of mental stress

Mental stress has been defined as "a state of being, resulting from the tension experienced by the imbalance between what is demanded and what is offered to meet that demand".[8] Mental stress also refers to the emotion and mental response that occurs when there is conflict between meeting job demands and the control that the employer has over the employee meeting those demands. When the demands of the job and the effects of the work environment exceed the individual's

2 Anushiem and Oamen, ibid.

3 JO Omoro and EO Okaka "Evaluation of the implementation of ECA Amendment Act 2011 of Nigeria" (2016) 11 *International Journal of Development and Management Review* 187 at 189.

4 Ibid.

5 [1995] 6 NWLR (Pt 402) 474, 484.

6 See for instance P Pattison and P Varca "Workers' compensation for mental stress claims in Wyoming" (1994) 29/1 *Land & Water Law Review* 146 at 167.

7 ECA, secs 7 and 8.

8 C Chermiss *Staff Burnout* (1980, Sage), cited in B Atilola and O Atilola "Compensation for mental stress under the new Employees' Compensation Act 2010: Implications for human resource and management" (2011) 5/3 *Labour Law Review* 58 at 65.

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capacity to adapt and cope, and the person has little control over the situation, mental stress results.[9] The term also includes where work-related occurrences negatively affect the employee's mental capacity. Mental injuries could also refer to psychological conditions resulting from an event that interferes with an individual's normal ability to function; this includes a range of conditions, such as stress, depression, anxiety, post-traumatic stress disorder (PTSD) and adjustment disorder. Incidentally, the ECA does not define mental stress, which is a serious deficiency in the Act; people should not be left to guess what it could actually mean, and its definition should be included.

There is a large distinction between physical injury cases and mental stress claims. Physical problems are more visible to the eye and identifiable to medics, lawyers and adjudicators. While there is a reasonable degree of common knowledge among both medical experts and laypeople in analysing physical injury, mental stress disability is unidentifiable and exists solely in the mind of the individual.[10] In any claim involving mental disease, the authenticity of a mental condition is determined largely on the basis of observed behaviour and subjective history, while that of the physical condition will be less readily challenged as it can be confirmed by physical and biological evidence.[11] This "intangible" feature of mental stress imposes limitations on these claims; there is no test or diagnosis which can accurately measure mental stress disability or precisely determine its source. The intangibility of the disability that characterizes mental stress cases differentiates it from physical injury and occupational disease claims, but mental disabilities are just as costly to the production process as physical injuries.

Courts and adjudicators in the employees' compensation system usually find themselves adrift in uncertainty, turning with something close to helplessness towards psychiatric and psychological experts.[12] It is this significant distinction between mental and physical injuries and disabilities that has produced the greatest challenges in the employees' compensation system. As a result, the courts impose on a claimant for mental stress disability the burden of proving objectively and convincingly that a work-related mental disability exists.

Categorization of mental stress claims and workers' compensation

Claims involving either mental stress or mental disability are often divided into three categories. First, a worker could claim that a work-related physical injury or disease caused a mental condition, which is known as a physical-mental claim. Second, a worker could allege that workplace stress caused a physical condition, known as a mental-physical claim. Third, a worker could contend that workplace stress caused a mental condition, known as a mental-mental claim.

Physical-mental claims

This category involves cases where there is greater acceptance of the premise that physical infirmity may have psychological side effects or that physical stimuli may result in disabling psychological repercussions.[13] For a claim to be sustained under this category, a mental disability must result

9 In tort, initially, "stress", "mental stress or "distress" per se could not be a ground for awarding damages or compensation to an employee. However, presently under the law of tort, there is a significant shift, though restricted, towards compensation in these cases, as seen in the decisions of *Walker v Northumberland County Council* [1995] IRLR 35; *Robb v Salamis Ltd* [2006] URHL 56; *Dickens v 02 plc* [2009] IRLR 58; and *Hatton v Sutherland* [2002] EWCA Civ 76. For critical discussion of the workplace stress compensation regime in tort, see D Marshall *Compensation for Stress at Work* (2009, Jordan Publishing Company).

10 JO Skoppek "Stress claim in Michigan: Worker's compensation entitlement for mental disability" (1995), available at: <http://www.mackinac.org/5244> (last accessed 14 July 2022).

11 See PJ Resnick "Malingering of post-traumatic disorders" in R Rogers (ed) *Clinical Assessment of Malingering and Deception* (1988, Guilford Press) 84 at 85–86.

12 Skoppek "Stress claim", above at note 10 at 181.

13 See *Hohlstein v St. Louis Roofing Co* [1932] 49 SW 2d 226 (Mo Ct App) (the employee's mental injury resulted from the physical injury he received when he fell twenty feet from the roof of the building he was working on to the ground);

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from a physical industrial injury or occupational disease. Two recently decided cases in Pennsylvania are quite instructive on this point.

In *New Enterprise Stone and Lime Co Inc and PMA Management Corp v WEAB (Kalmanowicz)*,[14] the Commonwealth of Pennsylvania stated that in a physical-mental claim, the claimant need not prove that they suffered a physical disability or that a physical injury continues throughout the life of the mental disability; rather, a claimant need only show that a physical stimulus resulted in a mental disability.[15] The emphasis was on the triggering physical event, rather than on the claimant's physical condition or injuries immediately or thereafter. This case contrasts with *Armstrong v John R Jurgensen Co*,[16] where a truck driver who was awarded state workers' compensation benefits for physical injuries he suffered in a work-related traffic accident made a subsequent claim for his PTSD. The court held that the claimant was not eligible to receive workers' compensation benefits for the PTSD related to that accident because his PTSD was not caused by his compensable injuries, but rather by his witnessing the accident and the fact that it could have been life-threatening to him at some point. The position of the court in *Armstrong* indicates rejection of a physical event (cause), rather than a physical injury (effect), as being a physical stimulus for the purpose of a physical-mental claim, while the court in *New Enterprise Stone* considered such an event sufficient to ground a physical-mental claim.

The foregoing indicates that the compensation of a physical-mental disability can be determined by two approaches: the physical event approach (represented by *New Enterprise Stone*) and the physical injury approach (represented by *Armstrong*). The physical event approach would include cases where mental stress results from experiencing or witnessing a shocking or traumatic event, even though physical injury does not result. The physical injury approach requires that, except in cases where the mental stress results from a physical injury, there is no physical-mental disability. This latter approach is mostly preferred in Ohio and New Zealand, and, incidentally, the Nigerian ECA contemplates such a physical-mental disability. We, however, hold the view that cases where an employee suffers mental stress disability from a physical event, but without a physical injury, would fall more aptly into mental-mental claims. The only way to justify the ruling in *New Enterprise Stone* is that since mental-mental claims were not compensable in that jurisdiction, the court was looking for any element of physicality to redress the employee's mental injury. This was not found in a physical injury since there was none, so the court had to rely on the physical event. Apart from this equitable ground, the approach in *New Enterprise Stone* is tenuous and untenable.

Admittedly, section 8(1)(b) of the ECA contemplates that compensation may be awarded for mental stress where it is "diagnosed as a physical condition amounting to mental stress". For this section to ground a physical-mental claim, the physical condition must have arisen either "*out of the nature of work or the occurrence of an event in the course of employment*".[17] These two limbs operate alternatively to ground a claim. While the "nature of work" requirement may suggest a gradual process, the "any event in the course of employment" requirement may be met where a single event results in physical injury that triggers mental stress, and may be the more frequent limb to ground a physical-mental claim under the ECA. In addition, compensation may be awarded where the mental stress disability results from a physical injury or disease not compensable under

Rainbolt v Andrain Medical Center [2013] Mo WCLR Lexis 161; *Lawson v Boone Hospital Center* [2013] Mo WCLR Lexis 158.

14 [2012] Pa Common Lexis 328.

15 Ibid.

16 [2013] Ohio 2237, reported in D Whalen "Workers' compensation covers injured employees' mental condition only if caused by physical injury", available at: <https://www.leagle.com/decision/inohco20130604527> (last accessed 23 July 2022).

17 ECA, sec 8(1)(b) (emphasis added).

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the Act.[18] Under this category, compensation is usually awarded for both the physical injury and the mental stress disability.

In *Mortimer v Fruehauf Corporation*,[19] the court ruled that a claimant whose psychological impairment is aggravated by a scheduled physical injury is entitled to workers' compensation for both the physical injury and the unscheduled psychological injury. Instructively, the court in this case stressed the provision in Iowa compensation law that an employer is liable "for any and all personal injuries sustained by an employee arising out of and in the course of employment". It therefore follows that under this, a claimant whose physical disability claim is allowed can request that the claim be additionally allowed for a mental condition, alleging that the previously allowed physical condition caused the mental condition. Such a claim may also succeed even where a time period of several years has elapsed between the date of the initial physical condition and the diagnosis of a related mental disability.[20] The court relied on earlier cases to hold that when a mental condition directly results from a physical injury sustained by an employee which deprived the employee from work in their former occupation, compensation would be awarded.[21] The theory of compensation rested upon the claimant's wage loss rather than his physical disability, and compensation awarded for a mental condition was contingent upon that condition depriving the employee of working in his former job.[22] As such, the court linked the claimant's mental disability with his inability to earn a living.

The above case would be decided differently under the ECA provision, because under the latter it appears that compensation can be allowed for the physical condition or the mental stress, but not for both. This argument could be rationalized thus: section 8(1) of the ECA provides that subject to section 8(2), the employee shall be entitled to compensation for mental stress "*not resulting from an injury* for which the employee is otherwise entitled to compensation".[23] First, this implies that where a mental stress condition results from a physical injury which is compensable under the Act, compensation for the mental stress is excluded. Second, where the physical condition is not compensable under the Act, compensation is allowed only for the mental stress. If this argument is in order, it follows that an employee who suffers from a compensable physical disability may not additionally recover compensation for any mental stress.

This proposition finds support in the fact that the primary objective of the employees' compensation scheme is to compensate the employee for loss of earning capacity, and no further. It follows that if the compensation for the physical injury can adequately compensate the loss of earning capacity, there seems to be no rationale for awarding additional compensation for mental stress, as provided under the ECA regime. It means that where the additional mental stress disability renders the initial award insufficient, no additional award would be made under the ECA as was made in the *Zaratsky* case in Ohio.[24]

It is also significant to note that while section 73 of the ECA defines an "injury" to include bodily injury and diseases, section 7(1) allows compensation for *any* work-related injury. Similarly, section 8 covers a very wide range of compensable occupational diseases, but if our argument – that compensation for a mental stress claim arising from a compensable injury is excluded by section 8(1) – is accepted, then it follows that the possibility of a successful physical-mental claim under the ECA

18 Id, sec 8(1).

19 [1993] 502 NW 2d 12.

20 FJ Pompeani "Mental stress and Ohio workers' compensation: When is a stress-related condition compensable?" (1992) 40/1 *Cleveland State Law Review* 35 at 39. See also *Zaratsky v Stringer* [1978] 384 NE 2d at 695; *Ralto Lead and Zinc Co v State Industrial Commission* [1925] 112 OK1a 101, 240; *General Tool & Supply v Somers* [1987] 731 p 2d 581; *Hohlstein v St. Louis Roofing Co*, above at note 13.

21 *Ralto*, ibid at 103.

22 Ibid.

23 Emphasis added.

24 Above at note 20.

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is small, if not impossible. This situation is further supported by the ECA in that despite the fact that the second schedule features a wide array of disabling physical conditions, mental disorders, either as a group or as specific syndromes, are not included on the list. The same applies to the first schedule, which contains a long list of possible occupational diseases; this schedule falls short of international standards as it leaves out 33 categories of internationally recognized occupational diseases, such as conditions relating to "mental and behavioural disorders". The implication of this omission is that in the event of disputes over compensation claims relating to categories of diseases not recognized in the Act, the court may not find in favour of the employee-claimant. For a claimant to establish "a reasonable cause of action" against a defendant, s/he must show that the liability of the defendant arises within the relevant statutory provision. The omission is not likely to be deliberate; it may just reflect the much discussed poor knowledge and lukewarm attitude of policymakers in this region to mental health issues.[25] However, it provides little value to the physical-mental stress provision in section 8.

It remains to be said that it must be shown that the mental stress resulted from an employment-related physical stimulus or injury. If the claimant cannot establish that the physical condition is work-related, both the mental stress and physical disability claims will fail.[26] Section 25(1)(c) of the New Zealand Health and Safety at Work Act 2015, which provides cover for mental injuries that arise "because of a physical injury", is a typical example of physical-mental disability statute.

Mental-physical claims

A mental-physical claim results from a mentally stressful work environment or event that causes the worker to suffer a physical disability.[27] Larson notes that:

> "Mental-physical claims will be sustained in cases involving a sudden noise or flash resulting in paralysis, heart attack, and the like, accidents or near accidents, heart attacks or cerebral hemorrhages … and assorted other sudden frights or emotions accompanied by direct physical consequences."[28]

The Ohio Supreme Court in *Ryan v Conner* held that a physical injury occasioned solely by mental or emotional stress received in the course of, and arising out of, an injured employee's employment is compensable.[29] Other cases may involve a sudden traumatic event with an immediate physical reaction and which comes under work-related stress: the court held a claimant compensable for a nearby explosion (which frightened the claimant, who jumped off a ladder and suffered physical injuries), irrespective of his pre-existing nervous disposition.[30] The court held that the jumping was precipitated by the explosion. Also, sustained anxiety or pressure associated with work has led to a claimant's compensable heart attack or cerebral haemorrhage.[31] Such cases include the cerebral thrombus of a deputy commissioner of insurance as a result of job pressures[32] and the heart attack

25 See generally O Gureje and A Alem "Mental health policy development in Africa" (2000) 78/4 *Bulletin of the World Health Organization* 475, cited in Atilola and Atilola "Compensation for mental stress", above at note 8 at 178.

26 *Armstrong v John R Jurgensen Co*, above at note 16.

27 See *Montgomery County v Grounds* [1993] 862 SW 2d 35; the deputy police chief suffered a heart attack after the sheriff failed to inform the deputy that he would not be indicted for altering reports.

28 A Larson *Workers' Compensation Law* (1993, Matthew Bender) at 56–59, cited in L Copeley "Applicability of workers' compensation acts to mental disabilities: The plaintiff's perspective", available at: <https://pdf4pro.com/download/applicability-of-workers-compensation-1c28e.html> (last accessed 28 July 2022) at 5.

29 [1986] 503 NE 2d 1379.

30 *Northwestern Refining Co v State Industrial Commission* [1930] 145 Okla 72 291, 533.

31 Larson *Workers' Compensation Law*, above at note 28 at 190.

32 *Insurance Department v Dinsmore* [1958] 223 Miss 569.

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of an employee who was subjected to stress and strain owing to the additional duties she was required to perform.[33] A successful mental-physical claim under the ECA would be possible if the claimant could show that the physical disability resulted from employment-related mental stress.[34]

Mental-mental or pure stress claims

Claims under this category have caused serious judicial concern, as the courts are more reluctant to allow mental-mental claims than physical-mental and mental-physical claims.[35] Mental-mental claims arise when both the injury and the effects are mental in nature. Mental-mental is used to describe mental claims that are unaccompanied by a physical injury. Larson characterizes a mental-mental claim as "a disability for a mental stimulus producing a mental or nervous result, with no physical component in either the cause or the disabling consequences".[36] The attitudes of courts in several jurisdictions towards mental-mental claims are not uniform. The four basic approaches taken by states regarding compensation for mental-mental claims include:

a. no compensation is allowed under any circumstances;[37]
b. compensation is allowed if the mental stress results from a sudden, frightening or shocking event;
c. compensation is allowed for gradual stress that is not unusual; and
d. compensation can only be allowed if the stress is unusual or extraordinary.[38]

Several states have expressly ruled out liability for mental-mental claims from their workers' compensation policies,[39] the rationale including: the fear of fraud, because unlike physical injuries, there is no visible proof of a mental injury from work-related stress; subjectivity in determining compensation for mental-mental claims; the inability of courts to determine whether stress is attributable to one's work, as opposed to external factors that stem from one's personal life; and the worker's ability to feign mental disabilities more easily than physical ones.[40] Again, there is the fear that fraudulent mental claims will diminish funding for physical injury claims due to the former's cost-intensive

33 *Bill Gover Ford Co v Romiger* [1967] 426 p 2d 701.

34 *Stuckey v Underground Services Co* [2011] Mo WCLR Lexis 216.

35 In *McGarrah v SAIF* [1983] 676 p 2d 159, the Oregon Supreme Court stated: "It seems that no problem in recent years has given court and commissions administering workers' compensation more difficulty than on-the-job mental stress which results in either emotional or physical illness. The causal relationship between employment stress and a resulting mental or emotional disorder presents one of the most complex issues in workers' compensation law." See *Darnell v North Dakota Workers' Compensation Bureau* [nd 1990] 450 NW 2d 271; L Joseph "The causation issue in workers' compensation mental disability cases: An analysis, solution and a perspective" (1983) 36 *Vanderbilt Law Review* 263. See also A Tucker "How denying mental-mental claims frustrates the central purposes of workers' compensation law" (2010) 31/4 *Journal of Legal Medicine* 467.

36 Larson *Workers' Compensation Law*, above at note 28 at 42–45, cited in RJ Guite and LA Rodeghiero "*Stratemeyer v Lincoln County*: Mental injuries and workers' compensation policy" (1994) 55/2 *Montana Law Review* 525.

37 The Minnesota Supreme Court recently restated in *Schnette v City of Hutchinson* [2014] 843 NW 2d 233 that mental disability without physical injury was not compensable under the Minnesota Workers' Compensation Law.

38 Larson *Workers' Compensation Law*, above at note 28 at 842.

39 In 1996 Kentucky eliminated its liability for mental-mental claims by excluding them from the statute, in Kentucky Revised Statute, S 342-20011(1) (1997), which provides that "injury" is "not to include a psychological, psychiatric or stress-related change in the human organism, unless it is a direct result of a physical injury".

40 CL Da Vader and A Gaimpetro-Meyer "Reducing managerial distress about stress: An analysis and evaluation of alternatives for reducing stress-based workers' compensation claims" (1990) 31 *Santa Clara Law Review* 1 at 11, cited in FJ Pompeani "Mental stress", above at note 20 at 52.

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nature.[41] The persistent perception of pure mental injury as "unreal" calls for concern; Larson has referred to this situation as "how could it be real … when it was purely mental".[42]

This concern has generated a lot of judicial opinion. For instance, the Georgia Court of Appeal has ruled that no injury is purely mental; rather, an injury is a physical injury, no matter what caused it.[43] This decision finds support in the Louisiana Supreme Court, which stated that an individual's mental health is essential to the "operation of the physical structure of his body".[44] Simply put, a disability in the mental health of an employee will invariably affect their physical body, thus the impact of the mental stress disability on the physical person neutralizes the mental condition from being purely mental. This position is adopted by jurisdictions where pure mental stress claims are not compensable in order to protect employees who may be denied compensation for suffering a mental-mental disability. It follows, then, that if the court accepts that by having an impact, though intangible, on the physical body, a mental stress disability qualifies as "physical", then compensation may be allowed for a mental-mental disability. However, we observe that under the mental-mental category are cases where there are no injuries to a physical part of the body. It makes no difference that the mental disability affects the employee's ability to use their physical body in so far as the disability is "unphysical" or intangible.

Be that as it may, in jurisdictions that are predisposed to compensating pure mental injuries, the requirement is whether the stress is "unusual", meaning "greater … than the day-to-day mental stress and tensions which all employees must experience or more than that of everyday employment".[45] Oftentimes, courts are minded to award compensation for mental stress claims once the injury is causally connected to the employee's work, ie the causal connection test.[46]

Mental-mental claims are divided into two classes, determined according to the type of mental stimulus that causes the mental disability. The first class is where a sudden work-related stimulus causes the mental disability; these are generally referred to as cases of "acute stress". In the second class, the "gradual" or chronic stress cases, the mental disability is caused by gradual work-related stress that develops over time.[47] This classification is well captured in the ECA, and for the purposes of our analysis we revisit the provision of section 8. Sections 8(1)(a) and (b) provide that compensation will be awarded where the mental stress is:

a. an acute reaction to a sudden and unexpected traumatic event arising out of or in the course of the employee's employment; or
b. diagnosed by an accredited medical practitioner as a mental or physical condition amounting to mental stress out of the nature of work or the occurrence of any event in the course of employment.

The above conditions are disjunctive, as opposed to conjunctive, by the use of "or". That is to say that a mental stress claim can be successfully proved through either (a) or (b) of section 8(1).

41 JR Martin "A proposal to reform the North Carolina Workers' Compensation Act to address mental-mental claims" (1997) 32 *Wake Forest Law Review* 193 at 196, cited in ND Riley "Mental-mental claims: Placing limitation on recovery under workers' compensation for day-to-day frustration" (2000) 65/4 *Missouri Law Review* 1023 at 1032.

42 A Larson "Mental and nervous injury in workmen's compensation" (1970) 23/6 *Vanderbilt Law Review* 1243.

43 *Indemnity Insurance Co of North America v Loftus* [1961] 120 SE 2d 656.

44 *Sparks v Tulane Medical Center, Hospital & Clinic* [1989] 546 So 2d 138, 146. See also *Bailey v American General Insurance Co* [1955] 154 Texas 430, SW 2d.

45 *Wade v Anchorage Schott District* [1987] 741 p 2d 634.

46 In *Crochiere v Board of Education* [1993] 630 A 3d 1027, the court enthused that "this court has never hypothesized that mental injuries alone could not be the object of compensation provided it was actually causally connected to the employee's work".

47 See WC Carmody "The logical recognition of gradual stress disability under Oklahoma's Workers Compensation Law" (1988) 23/3 *Tulsa Law Review* 461 at 463.

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Acute reaction

There is no definition of "acute reaction" by the ECA under section 8(1)(a), but perspectives from other jurisdictions provide a good guide towards appreciating the import of that phrase. The policy guideline of the British Columbia Workers' Compensation Board defines an acute reaction as "meeting with crisis – instantly"; the reaction is typically but not necessarily immediate.[48] Section 2 of the Newfoundland Workplace Health, Safety and Compensation Act is similarly worded to section 8(1)(a) of the ECA and provides that "mental stress which develops as a result of a traumatic event is considered an acute reaction, even though the reaction may be delayed for days or even weeks. Delayed acute reaction is not the same as a gradual onset of mental stress."[49] It follows that an acute reaction is a mental response that occurs rapidly and is typically severe. Thus, where mental stress disability is a rapid response to a work-related traumatic event, it may qualify as an acute reaction.

Examples of acute reaction include severe emotional shock or fear and may be the result of seeing someone die or threatened with death, seeing someone seriously injured, or experiencing a personal assault or other violent crime. Basically, the reaction must be to a work-related traumatic event; where it is otherwise, benefits may be denied.

Sudden and unexpected traumatic event

The requirement that the mental stress be an acute reaction to "a sudden and unexpected traumatic event" requires that the mental injury results from a sudden, as opposed to a gradual, stimulus. It follows therefore that it is the sudden and unexpected traumatic event that should arise out of or in the course of the employment and not the acute reaction. The ECA is silent on the meaning of a "sudden and unexpected traumatic event", but the Newfoundland Workplace Health, Safety and Compensation Commission policy states that "a sudden and unexpected traumatic event is one which is considered uncommon with respect to inherent risks of the occupation and is usually horrific, or has elements of actual or potential violence".[50]

Accordingly, the nature of the employee's employment determines what event can be regarded as "sudden and unexpected". What may be considered as sudden and unexpected for a nurse may not be so for a police officer, having regard to the peculiar risks of their respective jobs. Thus, in determining when an event is sudden and unexpected, one has to consider the hazards inherent in the work and the issue has to be determined on an individual basis.[51] The usualness of the event in question in the nature of the work enables the courts and compensation tribunals to determine whether an event is sudden and unexpected. To that effect, interpersonal conflicts, particularly with superiors, colleagues, subordinates or clients, are seen as usual standard workplace events. Such situations do not generally constitute sudden and unexpected events unless they go beyond the usual scope of work relations where, for example, they generate unusual, unacceptable behaviour such as aggressive and / or dangerous behaviour.[52]

The next requirement is the issue of a traumatic event. The ECA fails to state when an event can be considered traumatic, but the British Columbia workers' compensation policy defines a "traumatic event" as "an emotionally shocking event, which is generally unusual and distinct from the duties and interpersonal relations of a worker's employment".[53] Similarly, Alberta's Workmen's

48 Work Safe BC, "Policy item C3-13.00: Rehabilitation services and claim manual, Vol. II", available at: <https://www.worksafebc.com/en/forms-resources#sort=Relevancy&f:topic-facet=[Law%20and%20Policy]&f:language-facet=[English]> (last accessed 28 July 2022).

49 Newfoundland Workplace Health, Safety and Compensation Act, 1998, sec 2.

50 Ibid.

51 Ibid. See *Payes v Workers' Compensation Appeal Board* [2013] Pa Lexis 2588. Cf *Brown & Root Construction Co v Duckworth* [1985] 475 2d 813, cited in Skoppek "Stress claim", above at note 10 at 181, and *Simon v RHH Steel Laundry* [1953] 25 NJ Super 505 A2d 445.

52 See Quebec Act Respecting Industrial Accidents and Occupational Diseases, sec 2.

53 "Policy Item C3-13.00", above at note 48.

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Compensation Policy defines a traumatic event as a direct personal experience of an event that is sudden, frightening or shocking, of a specific time and place, and involving actual or threatened death or serious injury to oneself or others or a threat to one's physical integrity.[54] In most cases, the worker must have suffered or witnessed the "traumatic event" first hand, and in all cases, the traumatic event must be clearly objectively identifiable, and sudden and unexpected in the course of the worker's employment.[55] This implies that an event is traumatic when it is outside the normal work experiences of an employee and also if an average employee considers it to be so.

The foregoing leads to the issue of measuring a traumatic event under objective or subjective standards. If the event is found to be objectively traumatic, that is, it would be considered traumatic to a reasonable person, then a subjective standard should be used to assess the worker's reaction to that event, that is, whether the worker in question had an acute reaction to that event. That could perhaps be labelled an objective-subjective standard.

Unlike the Atlanta Workmen's Compensation Policy, section 8(1)(a) of the ECA has no requirement that the employee must experience the traumatic event first hand. However, even where the first-hand provision is done away with, the existence of proximity to the horrific event satisfies the condition of direct connection between the event and the employee, which is sufficient to secure a stress claim. This implies that the employee need not have experienced or suffered the sudden and traumatic event him- or herself; it is sufficient if s/he has an acute reaction to another employee's work-related traumatic event.[56]

It also appears that since the traumatic event, from the description assigned to it, must be clearly objective and identifiable, it means that a hallucinated or unfounded perception which did not in fact occur may not qualify as a "sudden and unexpected traumatic event" under the ECA. This is due to the fact that the wording of section 8(1)(a) suggests that the traumatic event must have actually occurred.[57] In this regard, the Supreme Court of Michigan, in *Gardner v Van Buren Public Schools*, stated that "no longer can imaginary events form the basis of a compensable mental disability claim. A claimant must prove that actual employment events occurred as a matter of objective fact."[58]

It is unclear whether mental stress resulting from a cumulative series of events will attract compensation under the ECA. The issue becomes knotty where an employee experiences a series of work-related events which, though individually non-traumatic, become traumatic when considered together. The British Columbia Workers Compensation Amendment Act 2011 came close to solving the problem in its section 5(1)(1)(a),[59] but fell short because of its wording that the events envisaged must be individually traumatic, severally and not when put together. As such, the claim will likely not fall under this section; at best, the several events will be considered as leading to gradual mental stress, thus bringing the claim under section 8(1)(a) of the ECA, which covers gradual mental stress cases. This notwithstanding, we posit that nothing in the ECA prevents an employee who suffers mental stress resulting from a series of events from receiving compensation. The only challenge is that between the first event and the triggering event may be several other non-work stressors which contribute to the mental disability.

54 Alberta Workmen's Compensation Policy, available at: <https://www.wcb.ab.ca/assets/pdfs/public/policy/manual/printable_pdfs/complete_policy_manual.pdf> (last accessed 28 July 2022).

55 *Children's Aid Society of Cape Breton-Victoria v Nova Scotia (Workers' Compensation Appeals Tribunal) (WCAT)* [2005] N & J No 75.

56 See *International Harvester v Labour & Industry Review Commission* [1983] 16 WIS 2d 298.

57 The Michigan workers' compensation statute is more explicit in this regard. It provides that "*mental disabilities will be compensable when arising out of actual events of employment not unfounded perception thereof*" (emphasis added). See Michigan's Workers' Disability Compensation Act at 418-301(2), cited in Skoppek "Stress claim", above at note 10.

58 [1994] 445 Mich 23.

59 The section provides that a worker will have to demonstrate that the mental stress is a reaction to "one or more traumatic events arising out of and in the course of the worker's employment" to be compensable.

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The benefit of the traumatic event test is that it not only eliminates the possibility of the filing of fraudulent claims, but it also takes care of the need to prove causation. Requiring the mental stress to be caused by a sudden and unexpected traumatic event provides courts with a more definitive standard to determine mental stress claims.[60]

Arising out of the nature of work

Section 8(1)(b) of the ECA shows that where mental stress results from the nature of an employee's work, it will most likely be due to a gradual process which culminates in mental disability. Gradual stress claims have posed serious problems for many courts because they are significantly different from conventional workers' compensation. Previously, courts relied upon the existence of a traumatic precipitating event and a physically evident liability in order to establish that the injury was both genuine and work-related.[61] In a gradual-stress case, however, such indicia are absent, and the courts have been forced to fashion a new test with which to determine whether a gradual mental stress injury is work-related and thus compensable. It was probably due to this difficulty that there is the requirement for a diagnosis by an "accredited medical practitioner",[62] and subsequently, such cases are subjected to specialists' inquiry by a medical board.[63]

Despite the fact that gradual stress claims are generally affected by judicial concern for "genuineness" in different jurisdictions, the influential decision by the Michigan Supreme Court in *Carter v General Motors* has blazed a trail in that direction.[64] Prior to that decision, case law in Michigan had firmly established the compensability of both physical injuries due to sudden mental stimuli and mental disabilities due to physical injuries, however minor, but not gradual stress claims. However, *Carter* was a revolutionary step toward greater compensability: not only did the court accept the concept of compensable mental disability due to mental stimuli (the so-called "mental-mental" cases), it was also the first state court to accept the concept of compensable mental disability arising out of gradual workplace stress. The court therefore accepted that mental disability could ensue from routine rather than extraordinary work stress, and from chronic as opposed to acute stress. Based on such groundbreaking cases, the stage was set for various states to address the issue of compensability for gradual stress disability.[65] In *Plesner v British Columbia Hydro and Power Authority*, the British Columbia Court of Appeal held that an attempt to exclude a gradual stress claim from the provision of employees' compensation expressly breached the equality provision of the Canadian Charter of Rights and Freedoms.[66] Other cases which have allowed such claims include *Freman's Fund Insurance Co v Industrial Commission*,[67] *Rackley v County of Rensselaer*,[68] *Martin v Rhode Island Public Transit Authority*,[69] *Ross v City of Asbury Park*,[70] and

60 Riley "Mental-mental claims", above at note 41 at 1033.

61 GM Troost "Workers' compensation and gradual stress in the workplace" (1985) 133/4 *University of Pennsylvania Law Review* 847 at 848.

62 ECA, sec 73, defines an "accredited medical practitioner" as a registered medical practitioner or specialist accredited by the Social Insurance Trust Fund Management Board.

63 ECA, sec 8(3).

64 [1960] 361 Michigan 577.

65 See SED Short "The compensability of chronic stress: A policy dilemma for Ontario workers compensation board" (1995) 21/2 *Canadian Public Policy* 219 at 22.

66 [2009] BCCA 188. The Supreme Court of Canada has also deprecated an attempt to restrict gradual stress claims as being discriminatory and a violation of the principle of equality; see *Nova Scotia v Martin* [2003] SCC No 54 and *Nova Scotia v Laseur* [2003] SCC 514.

67 [1978] 199 Arizona 51.

68 [1988] 141 AD 2d 232.

69 [1986] 506 A 2d 1365.

70 [2009] Nos A-0379-0813 (App Div), reported in "Employee entitled to workers compensation for mental stress resulting from hostile work environment", available at: <https://ogletree.com/insights/employee-entitled-to-workers-compensation-for-mental-stress-resulting-from-hostile-work-environment/> (last accessed 12 August 2022).

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Rizzo v Kean University.[71] These cases may not be decided differently under section 8(1)(b) ECA as contemplated by the lawmakers.

Changes in work or working conditions

Under section 8(2) of the ECA, benefits may be awarded:

> "[w]here the mental stress is caused as a result of the decision of the employer to change the work, the working conditions or work organization, in such a way as to unfairly exceed the work ability and capacity of the employee thereby leading to mental stress."

It appears that the above provision in the ECA has not received approval in almost all jurisdictions. The wording of section 8(2) suggests that the decision to change the work or working conditions must emanate from the employer or management, not from anyone else. This implies that compensation may not be awarded where an employee voluntarily and *suo motu* changes their work pattern or where employees rearrange their work conditions. This is significant in that even though there is an inherent requirement that the change is work-related, it is peculiar to changes effected by management only. It implies that it affects mental stress which arises from, or occurs in the course of, complying with the decision of management on a work pattern or condition. This departs from the mental stress claims envisaged in section 8(1)(a), where mental stress may result from factors unconnected with management.

For any claim under section 8(2) to succeed, the claimant must prove in addition that the organization's decision was such as to exceed his or her work capacity. Also, it follows that the change must be either permanent or last for a long time to affect the mental state of the employee. It is not impossible that a very temporary change may raise questions as to the source or the possibility of the alleged mental stress; this is without prejudice to the fact that some temporary changes are strong enough to cause disability. Atilola and Ige have rightly submitted that section 8(2) may ground a gradual stress claim.[72] This position tends to support the argument that the new work or working conditions should not be too short-lived to sustain a mental stress claim.

Carter v General Motors Corp shows that the determination of whether an employee's capacity is unfairly exceeded is on an individual employee basis.[73] This approach is rather subjective, as it is dependent on the individual capacity of each employee and not the capacity of an average employee. It implies that under this approach, the nature of new work or a new working condition will be weighed against the personal ability or capacity of the particular employee involved, taking into consideration any disposition or inability the employee has. This subjective approach finds support in the decision in *Jane Doe v South Carolina Department of Disabilities and Special Needs*.[74]

The objective approach under this heading would be where the determination of the change in work or working conditions of an employee is considered from the position of an average employee, as against the subjective approach based on the individual employee; the objective approach offers the possibility of assessing whether it was the new work or working conditions that actually led to the mental stress. The limitation of this approach is that it may exclude an employee with pre-existing disabilities, even where the new conditions of work exacerbate the pre-existing condition. Under section 8(2), therefore, a change in work patterns and / or working conditions that is unreasonable or discriminatory may be unfair. The reasonableness of the decision may go to prove or disprove unfairness.

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71 *Rizzo v Kean University* [2014] NJ super unpub Lexis 1358.

72 O Atilola and O Ige "Global best practices in mental health in the workplace: Focus on the Nigerian setting" (2013) 7/1 *Labour Law Review* 61 at 47.

73 Above at note 64. This case is a typical illustration of a change in work or working conditions.

74 [2008] 660 SE 2d 260.

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Standards for assessing mental stress claims

The causal relationship between employment stress and a resulting disability presents one of the most complex challenges in workers' compensation laws. Concerns about issues such as a fear of fraud, proof of causation and the subjectivity involved in mental injuries have resulted in jurisdictions adopting different standards for determining the compensability of mental stress claims; we now turn our attention to these standards.

Arising out of or in the course of employment

Evident in the provision of the ECA is the recurrent fact that compensation for disability must "arise out of or in the course of employment";[75] this is a departure from the repealed WCA. Both phrases, however, operate alternatively, no longer conjunctively, to ground a claim under the ECA. Also, both terms are neither practically nor theoretically synonymous.[76] Nonetheless, the terms "arising out of" and "in the course of" are generally taken together to form a single standard of compensability known as "work-connection" or "work-relatedness".[77]

The phrase "arising out of" envisages a causal relationship between the employment requirements and the act engaged in at the time the injury occurred. An injury "arises out of" the employment when two elements are satisfied: first, the injury resulted from a risk reasonably incidental to the employment; and second, a causal connection exists between the employment and the resulting injury. While both of these elements comprise the "causal relationship", the former element mandates the injury to be a foreseeable consequence of that employment.[78] Similarly, the Ohio Supreme Court in *Armstrong v John R Jurgensen Co* stated that the term "arises from" contemplates a causal connection between the mental condition and the claimant's compensable physical injury.[79]

"In the course of employment" refers to the time, place and circumstances of the injury; an injury occurs in the course of employment when it occurs within the spatial and temporal boundaries of employment.[80] Thus, in determining when an event arises in the course of the employee's employment, one may have to determine whether the event "happened at a time and place and during an activity consistent with, and reasonably incidental to the obligation and expectation of the workers' employment".[81] The general view is that the course of employment begins when the employee arrives at their place of work and / or does something reasonably incidental to their employment.[82]

Both terms, "arising out of" and "in the course of employment", do not carry equal weight. Practically, if the injury arises out of the employment, the injury also arises in the course of employment; however, the opposite is not necessarily true.[83] For an injury to have arisen out of the employment, the injury must be causally related to the employment. However, a determination that the injury arose "in the course of employment" only indicates that the injury occurred while the employee was working; it does not, however, demonstrate that the injury resulted from employment.[84] Incidentally, the potential problems inherent in these dual requirements of work

75 ECA, secs 7, 8, 10 and 11.

76 See WCA, sec 3(1). With regards to the repealed WCA, Uvieghara posits that "there is a greater acceptance of the view that the phrase 'arising out of and in the course of employment' has two arms and that both arms must be satisfied for a claim to succeed". EE Uvieghara *Labour Law* (2001, Malthouse Press) at 25.

77 Riley "Mental-mental claims", above at note 41 at 1033.

78 *Norton v EA Coven Construction Co* [1964] 391 p 2d 785, 788. See also *Novak v MCA Lister* [1956] 301 p 2d 234.

79 Above at note 16.

80 Carmody "The logical recognition", above at note 47 at 468.

81 Work Safe BC "Policy Item C3-13.00", above at note 48.

82 GG Otuturu "Employer's liability for personal injuries under the Workmen's Compensation Act" (2007) 1/4 *Labour Law Review* 1 at 5; *Moore v Manchester Lines Ltd* [1910] A C 498; *Smith v Elder Dempster Lines Ltd* [1944] 17 NLR 145.

83 Carmody "The logical recognition", above at note 47 at 469.

84 Ibid.

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connection are readily apparent. The nature of mental stress disabilities, especially those caused by gradual stress disability, precludes easy categorization of their cause and existence. Such facts as where, when and how are not likely to be easily proved.

It therefore remains extremely difficult for an employee to prove that normal work-related stress caused the mental injury, because every employee is faced with similar stress in the course of employment. The courts have developed two approaches to determine the compensability of work-related mental stress claims. First is the subjective causal nexus test adopted by Michigan in *Deizel v Difcolaboratories*.[85] This approach allows compensation if the claimant "factually establish[es] that [he] honestly perceives that his disability is connected to his work or employment". This standard essentially allows an employee to recover even if they mistakenly believe their mental injury was caused by work-related stress.[86] Notwithstanding the above legal position, such a standard (or approach) undoubtedly represents the worst nightmare for courts in most jurisdictions, the fear that the granting of such compensation will lead to a flood of fraudulent claims.[87] Second, the "objective causal nexus" approach allows compensation if the employee can show through objective proof that their working conditions were stressful and also a substantial contributing factor to their mental injury.[88]

The extraordinary / unusual stress standard

There has been no uniform guideline for determining what qualifies as unusual and extraordinary because of the fact-specific nature of workers' compensation claims.[89] Under this heading, the employee must establish that their injury is extraordinary and unusual if it is of greater magnitude than the day-to-day mental stress and tension all employees usually experience.[90] This test was first articulated in the landmark case *School District No 1 v Department of Industry, Labour & Human Relations*.[91] The claimant, a high school guidance counsellor, alleged an acute anxiety reaction after discovering a note submitted by a student requesting her removal from the staff.[92] The Wisconsin Supreme Court gave a classic description of the test:

> "Mental injury non-traumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strains and tensions which all employees must experience. Only if the 'fortuitous event, unexpected and unforeseen' can be said to be out of the ordinary from the countless emotional strains and differences that the employees encountered without serious mental injury will liability … be found."[93]

In line with this opinion, the Wyoming Supreme Court in *Graves v Utah Power & Light* found that the most rational approach in determining whether a worker is subject to extraordinary stress is to

85 [1978] 403 Mich 1, 268 NW 2d 1. Here the court ruled that compensation should be awarded even if there is only a strictly subjective causal nexus between the trauma and the mental injury.

86 Ibid.

87 This was demonstrated in *Bentley v Associated Spring Company* [1984] 133 Mich App 15 at 20–21, where a Michigan court observed that "in view of the financial gain – sometimes very substantial – any person who files a claim based on a psychiatric disorder will have strong motives to lie about his perception. The question then becomes whether that perception is 'honest' … Under this loose standard for recovery, Michigan employers are nearly becoming general health insurers for psychiatric disabilities. This is an alarming possibility." See Troost "Workers' compensation", above at note 61 at 849.

88 See generally Riley "Mental-mental claims", above at note 41 at 1032–34.

89 Larson *Workers' Compensation Law*, above at note 28, cited in Riley "Mental-mental claims", above at note 41 at 1030.

90 *County of Washington v LIRC* [2013] Wisc-App Lexis 26.

91 [1974] 62 Wis 2d 370 NW 2d 373. The court affirmed *School District No 1* and extended the test to allow compensation for gradual, unusual stress in *Swiss Colony Inc v Dept of Industry, Labour and Human Relations* [1976] 72 Wis 2d 46.

92 Id at 377–78. See also *Shealy v Aiken County* [2000] 535 SE 2d 438.

93 Ibid.

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compare their stress with the day-to-day stress generally encountered by workers in the same or similar jobs regardless of their employers.[94]

In fact, the stress must be shown to be unusual for benefits to be awarded. In *Jeanes Hospital v Workmen's Compensation Appeal Board*,[95] a nurse who witnessed the collapse of a co-worker who later died of a brain aneurysm was denied benefits on grounds that "mental-mental" injury is compensable only when it arises from abnormal working conditions. The death of a co-worker due to natural causes, while certainly traumatic, was not so abnormal as to support an award of benefits. Similarly, in Vermont, a claimant seeking mental stress benefits for work-related disability had to show that his stresses at work "were significantly greater than the stress levels affecting co-employees".[96] Alberta's policy also provides that benefits would be awarded for work-related disability where "the work-related events are excessive or unusual in comparison to the normal pressures and tensions experienced by the average worker in a similar employment".[97]

The "unusual stress" test was adopted by several jurisdictions in order to reduce the likelihood of fraudulent claims to mental stress. This is usually achieved by requiring objective factors and eliminating the claimant's subjective reaction to the job.[98] The challenge, however, is finding a criterion for determining when stress is extraordinary and unusual – that is, determining the proper group of employees and / or working conditions to be compared with the claimant's. There are three possible comparison standards that have been developed by various jurisdictions to determine compensation of mental-mental claims requiring proof of unusual and extraordinary stress. They are:

- Comparing the employee's stress to that of all other workers in the workforce:[99] "average worker" may be taken to mean either those doing exactly the same job or simply any employed individual. Obvious anomalies result from this distinction: a worker in generally low-stress employment may qualify for compensation by establishing greater relative stress levels than among other employees, yet a worker in acknowledged high-stress employment, though more stressed than the first worker, may fail to receive compensation.[100]
- Comparing the employee's stress to that of other employees' stress in the same classification for the same employer:[101] here, an employee exposed to the same work environment or classification as the other employees but who avers mental injury due to greater work-related stress may not receive compensation. This is because mental injuries are more difficult to verify than physical injuries because the claimant's description of his or her condition is often the sole basis for a physician's diagnosis. It follows, then, that for such an employee to succeed in establishing mental injuries caused by "extraordinary and unusual" work stress, expert opinion may be sought for.
- Comparing the employee's stress to other workers in the same or similar job regardless of their employer:[102] this test has the ability to prevent an employer from placing excessive stress on all their employees by considering the stress experienced by those holding similar jobs with other employees.[103]

94 [1986] 713 P 2d 187.

95 [1991] Pa Commw Lexis 308 59a A 2d.

96 *Bedini v Frost* [1996] 678 A 2d 893; *Hoer Schengen v Von Hoffman Corporation* [2012] Mo WCLR Lexis 119 713 P 2d 187.

97 Alberta WCB "Policies & Information Manual, Policy 03-01, Part 1.1.0", available at: <https://www.wcb.ab.ca/about-wcb/policy-manual> (last accessed 28 July 2022).

98 Riley "Mental-mental claims", above at note 41 at 1035.

99 For example, *Caron v Marie School Administrative District No 27* [1991] 594 A 2d 560.

100 See Short "The compensability", above at note 65 at 223.

101 For example, *Williams v State Department of Revenue (938)* [1997] P 2d 1065.

102 *Powell v State of Missouri Department of Correction* [2004] 152 S W3d 363. See generally Riley "Mental-mental claims", above at note 41 at 1035–44.

103 *Graves v Utah Power & Light Company* [1986] 713 P 2d 187 at 193.

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The extraordinary / unusual stress standard is in many ways a compromise doctrine. The employees' compensation scheme's objective is to provide adequate benefits to injured workers, thereby enabling them either to return to gainful employment or to stay away. Equally as important, though, is society's interest in preserving its economic structure and preventing the creation of a health insurance system. It is the balancing of these two interests that the standard seeks to achieve.

The doctrine of predominant cause

Under this doctrine, the claimant must prove that employment conditions when compared to non-employment conditions were the "major contributing cause" of the mental disorder.[104] This standard does not require that the injury be caused or aggravated solely by work conditions, but the claimant must show that the stress at work outweighed the stress experienced outside work.[105] Alberta's policy defines predominant cause as the prevailing, strongest, chief or main cause of the chronic stress.[106]

The British Columbia Workers Compensation Amendment Act in section 5(1c)(ii)(a)(ii) provides that a worker is entitled to compensation only if the mental disorder "is predominantly caused by a significant work-related stressor including bullying and harassment or a cumulative series of significant work-related stressors, arising out of and in the course of the worker's employment".[107] The draft policy directs that predominant cause means that the significant work-related stressor or an accumulative series of the significant work-related stressors were the primary or main cause of the mental disorder.[108]

Deciding whether the work-related stressors were the predominant cause requires consideration of other non-work-related stressors in a worker's life and the role of the different stressors in causing the mental disorder.[109] In most cases, a psychological assessment will provide important evidence with respect to identifying and discussing the relative impact of different stressors in causing the diagnosed mental disorder. The work-related stressor(s) need not be the sole cause; nor is it necessary that the work-related stressor(s) outweigh all other stressors combined. It may be that the work-related stressor was still the primary cause of the mental disorder even though the worker had a number of other stressors which, when considered together, were also significant in causing the mental disability.[110] In Australia, the determination of whether or not a mental injury is compensable is primarily based on the establishment of a causal link between employment and the injury (or disease), subject to any specific legislative exclusions.[111] In the Australian legislators' conception, mental injuries are no different to physical injuries in this regard. Though in practice the nature of mental injuries is more difficult to determine, they tried to distinguish personal injury from disease injury. Personal injury arises out of or in the course of employment, while disease injury means (a) a disease that is contracted by a worker in the course of employment, but only if the employment was the main contributing factor to contracting the disease, and (b) the aggravation, acceleration, exacerbation or deterioration of any disease in the course of employment, suggesting that the employment is the main contributing factor. The ECA is regrettably silent on this.

104 Troost "Workers' compensation", above at note 61 at 852; *McGarrah v SAIF*, above at note 35 at 170.

105 Troost, id at 853.

106 Alberta WCB "Policies & Information Manual", above at note 97 at 4.

107 Work Safe BC "Policy Item C3-13.00", above at note 48 at 6.

108 Ibid.

109 Ibid.

110 Ibid.

111 A McInerney and D Gregory "Stress and mental injuries – how to compensate?" (paper presented to the Actuaries Institute Injuries Schemes seminar, Gold Coast, 10–12 November 2013).

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Pre-existing mental or psychological condition(s)

Generally, workers' compensation laws cover injuries and occupational diseases that are either caused or aggravated by work-related conditions. Any worker with a pre-existing or latent condition is referred to as an "egg-shell skull" worker.[112] Under this principle, a worker predisposed to mental reaction from stress should not be denied compensation any more than a worker predisposed to certain physical injuries. The fact that an average worker might not experience any ill effect from the same stress is immaterial. Thus in *Wolfe v Subley, Lindsey & Curr Co*, the New York Court of Appeal stated that:

> "There is nothing in the nature of a stress or shock situation which ordains physical as opposed to psychological injury. The determinative factor is the particular vulnerability of an individual by virtue of his physical make-up. In a given situation, one person may be susceptible to a heart attack while another may suffer a depressive reaction. In either case, the result is the same; the individual is incapable of functioning properly because of an accident and should be compensated under the Workmen's Compensation Laws."[113]

However, in all disputed workers' compensation cases, there is a burden on the worker to prove that circumstances related to the employment caused the injury.

It should be noted, however, that the unusual stress test challenges the traditional doctrine that the employer must take the employee as they find them.[114] Instructively, under the ECA, pre-existing mental disabilities aggravated by work-related injury or stress are not excluded from compensation. Thus a claimant who suffers mental stress disability resulting from events and / or conditions which an average employee can cope with may also recover compensation.

With regard to the measure of compensation, the procedure in Alberta is that if a work-related injury aggravates a pre-existing psychological condition, compensation will be awarded only for the disability directly attributable to the workplace aggravation.[115] Remarkably, it appears that Nigeria's compensation law in this regard is tailored towards Alberta's approach, as can be seen from section 7(5) of the ECA, which allows compensation in cases of aggravation of pre-existing injury "only for the proportion of the disability following the [work-related] personal injury … that may reasonably be attributed to the [work-related] personal injury". It also provides a direction on how to determine the degree of contributory mental stress emanating from work when it provides that "the measure of the disability attributable to the personal injury or disease shall … be the amount of the difference between the employee's disability before and disability after the occurrence of the personal injury". In effect, the foregoing will not be defeated by the liability-evading provisions of section 9(4)(b) of the ECA, which provides that neither an employee nor their dependants shall be entitled to compensation from disability or death unless the employee was free from the disease and any complicating disease before being first exposed to the agent causing the disease in the workplace.

Claims arising from personnel decisions

Mental stress claims may arise from personnel decisions. In *Sally v Contra County*, a "personnel action" was held to be:

> "[c]onduct by management including such things as done by one who has authority to review, criticize, demote or discipline an employee. Personnel action or decision may include transfers,

112 Larson *Workers' Compensation Law*, above at note 28. The "egg-shell skull" principle means that the employer takes the employee as they find them.

113 [1975] 36 NY 2d 505, 510; [1975] 330 NE 2d 603.

114 Short "The compensability", above at note 65 at 223.

115 Alberta WCB "Policies & Information Manual", above at note 97.

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demotions, layoffs or performance evaluations and can include warnings, supervisions and termination."[116]

In some jurisdictions, such claims are not compensable.[117] Section 5(1)(1)(c) of the British Columbia Workers Compensation Amendment Act expressly states that a worker is entitled to compensation only if the mental disorder is not caused by a decision of the worker's employer relating to the worker's employment, including a decision to change the work to be performed or the working conditions, to discipline the worker or to terminate the worker's employment. Not every action or decision by management will be construed as a "personnel action". In *County of Butter v WCAB*, the Workmen's Compensation Appeal Board held that memoranda from a supervisor to an employee did not constitute personnel actions because they did not suggest that the applicant was being disciplined, nor they did carry a threat of discipline.[118] In *Squilla v Workmen's Compensation Appeal Board*, workers' compensation benefits were denied to a patrol officer who claimed mental injury after being reprimanded for unsatisfactory performance.[119]

The ECA is silent on this issue of whether mental stress claims arising from personnel decisions are compensable. The Act, however, provides that mental stress is compensable where it is as a result of the decision of the employer to change the working conditions of the work organization in such a way as to unfairly exceed the capacity and ability of the employee.[120] This implies that ordinarily, mental stress disability caused by a personnel decision is not compensable under the ECA except where it is *unfair* to the employee, all things being equal. The unfairness of a personnel decision is where such a decision is made without compliance with legal rules and due process, such as unreasonable and discriminatory decisions and decisions lacking in good faith. According to the court in *Larch v Contra Costa County*, personnel action must be "objectively reasonable";[121] this implies that the decision must be reasonable and honest to an average person to meet the requirement of good faith. Thus where mental stress results from a lawful, non-discriminatory personnel decision and / or action made in good faith, the mental stress claim will be defeated.[122] To successfully sustain a mental stress claim based on this defence, it must be shown that the good faith personnel decision resulted in mental disability of the employee.[123] The California compensation laws require that the psychiatric injury was substantially caused by a lawful, non-discriminatory personnel decision and / or action made in good faith; the substantial cause was defined as 35 to 40 per cent of the mental injury.[124]

In fairness to the employer, they should not be penalized for merely demanding that the employee conscientiously performs his or her job for optimal results. We therefore submit that the law should not penalize employers for adjusting their workforces to the demands of an open market, since such situations are generally beyond employers' control. Employers must often regulate employee performance and respond to market forces by taking actions disfavoured by the employee.[125]

116 [1998] 63 CCC 831.

117 See *Knight v Audobon Savings Bank* [2012] A-0173-1171 (App Div), unreported.

118 [2001] 65 CCC 1064.

119 [1991] 606 A 2d 539.

120 ECA, sec 8(2).

121 [1998] 63 California Compensation Cases 831 at 835.

122 *Dunkerly v Concare* [2012] PCAPC 132. See also *County of San Bernardino v WCAB (McCoy)* [2012] California Compensation Cases 219 77 (unpublished), and *Taraghimo v Department of Correction* [1977] 55 Comm App 19.

123 *County of Sacramento v Workers Compensation Appeal Board* [2013] Cal Reptr 3d.

124 Ibid.

125 AV Mastumotu "Reforming of the reform: Mental stress claims under California's workers' compensation system" (1994) 27/4 *Loyola of Los Angeles Law Review* 1327 at 1361.

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Determining the appropriate standard

In choosing the appropriate standard, one must focus on two considerations: first, the purpose of workers' compensation laws and second, the factors that have influenced courts in their approach to mental stress claims. Thus the purpose of a workers' compensation system is to provide broad, no-fault coverage to all victims of all work-related injuries.[126] The rationale behind this is one of risk-spreading and cost distribution: the economic burden of injuries within the workplace is a part of the cost of production, and is therefore a business expense that should be borne by the employers, who can shift the cost to the consumer.[127]

Any standard chosen, however, should be able to address the issues of causation and fraudulent claims and at the same time protect the "egg-shell skull" plaintiff. For most jurisdictions, the objective test is more appropriate than the unusual stress test for determining whether a mental stress disability is compensable, for two basic reasons:

a. the objective test is more consistent with the policies of comprehensive coverage that animate workers' compensation states; and
b. the unusual stress test is founded on a misguided view of causation which will often deny compensation to claimants whose injuries are in fact work-related.[128]

The unusual stress test also violates the fundamental premise in workers' compensation law that the employer takes the employee as they find them.[129] In Nigeria, where the intention of the legislature indicates the readiness to cater for all work-related disabilities, a less stringent standard, the work-relatedness test, is adopted.

Conclusion

An analysis of judicial decisions reveals that the major reason that has limited compensation for mental stress disability has to do with the genuineness of the claim. Courts usually justify the denial of compensation for purely mental injuries on the grounds that they are easier to feign than physical injuries, and more so because of their purely subjective nature. This justification, however, is unsubstantiated. Thus, to operate in an unbiased manner, workers' compensation laws must serve as a potential source of protection for all employees, regardless of the manner in which their injuries develop.[130] Also, a predisposition for or previous history of mental disability should not prejudice a claim for job-related stress.

We are of the view that the work-relatedness test, combined with the doctrine of predominant cause, is a fundamental basis for mental stress compensation in Nigeria. Instructively, the very nature of the "arising out of or in the course of employment" test presupposes that the stress results largely from the employee's employment, not some other way(s). It follows, therefore, that the doctrine of predominant cause should be considered an inherent component of this test; it will help to eliminate mental stress claims that do not arise from or in the course of employment.

Conflicts of interest. None

126 Troost "Workers' compensation", above at note 61 at 855.

127 Ibid.

128 Carmody "The logical recognition", above at note 47 at 466. See also *Fax v Alacom, Inc* [1986] 718 p 2d 977; *McGarrah v SAIF*, above at note 35; *Breeden v Workmen's Compensation Commn* [1981] 285 SE 2d 398, 490.

129 Troost "Workers' compensation", above at note 61 at 860.

130 Carmody "The logical recognition", above at note 47 at 491.

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