Disease, Not Accident: Recognition of Occupational Stress Under the Workmen's Compensation Laws

I. INTRODUCTION

Occupational stress[1] is a widespread problem.[2] Despite the growing incidence of stress-related claims, administrative state workmen's compensation boards as well as the courts have been

1. Stress can be defined as the response of the body to any demand made upon it. J. STELLMAN & S. DAUM, WORK IS DANGEROUS TO YOUR HEALTH 77 (1973). From a biological perspective, stress has been viewed as stereotyped physiological "strain" reactions in the organism when it is exposed to various environmental stimuli called "stressors" which require adjustment to the external environment. "Stressors" can be defined as changes in or pressures and demands for adjustment to the environment. LENNART LEVI, PREVENTING WORK STRESS 27 (1981). When the human body is subjected to stress, a series of physiological reactions occur. The changes can be analogized to a "fight or flight" reaction in lower animals. Adrenaline is released into the bloodstream, causing an increase in pulse rate, blood pressure and rate of breathing. Glucose and fats flow into the blood for extra energy needed to meet the crisis at hand. J. STELLMAN & S. DAUM, *supra*, at 77-78.

Stress is caused by a variety of conditions which are present in the work environment. For example, "the rate of work for repetitive tasks can be a source of stress." *Id.* at 79. Even work at a somewhat slower rate, however, can cause emotional stress if it "requires full attention and yet is totally boring, monotonous, and meaningless." *Id.* at 80.

Work schedules that demand adjustments in workers' sleeping habits can also cause stress. Shift work has been shown to cause "sleep loss and digestive disturbances. Many night workers have trouble sleeping during the day." *Id.* at 84. Even permanent night workers get less deep sleep than do workers on normal schedules, *id.* at 84-85, while irregular shift work has been shown to cause the greatest amount of physical, mental and social problems. LENNART LEVI, *supra*, at 42.

Office automation has been shown to create stress. NIOSH, U.S. DEP'T OF HEALTH & HUMAN SERVICES, HEALTH CONSEQUENCES OF VIDEO VIEWING: SAN FRANCISCO STUDY (Feb. 1981). Other sources of stress can include fear of injury from dangerous chemicals, acci-

slow to recognize them as legitimate work-related disabilities.

dents and near-accidents, job or financial insecurity, J. STELLMAN & S. DAUM, *supra*, at 87, and noise. *Id.* at 79.

> Fatigue is closely related to stress. . . . General fatigue is a more psychological form of fatigue. It leads to a decreased willingness to work. General fatique is caused by accumulation of all the various stresses that a worker experiences in the course of a day. Examples of the stresses that cause fatigue . . . include monotony; long working hours; mental and physical exertion at work; environmental conditions; climate, light, and noise; responsibility; worries and conflict.

Id. at 80-81.

Making stress claims compensable might seem to weight the scales too heavily in favor of executives, who typically carry a good deal of responsibility and are under considerable pressure from higher-ups to accomplish the larger corporate objectives, such as turning a profit. It might be thought that the average industrial worker or typist is under less real pressure since he only has to worry about whether his own contribution is competently made, not over whether the enterprise as a whole is successful. Research indicates, however, that the most dangerous stress reactions, deaths due to cardiovascular or cerebrovascular disease, correlate positively with working conditions that impose demands and responsibility on a worker coupled with lack of control over the working environment. Karasek, Baker, Marxer, Ahlban & Theorell, *Job Decision Latitude, Job Demands, and Cardiovascular Disease: A Prospective Study of Swedish Men*, AM. J. PUBLIC HEALTH (July 1981). Examples of such working conditions can be seen among telephone and switchboard operators:

> I had one gentleman the other day and he wanted an outside call. I asked his name and room number, which we have to charge to his room. And he says, 'What's it to you?' I said, 'I'm sorry, sir, this is our policy.' And he gets a little hostile. But you just take it with a grain of salt and you just keep on working. Inside you and in your head you get mad. But you still have to be nice when the next call comes in. There's no way to let it out.

STUDS TERKEL, WORKING 61 (Ballantine paperback ed. 1974).

assembly line workers:

> I stand in one spot, about two-or-three-feet area, all night. The only time a person stops is when the line stops . . . .

Id. at 221.

> It don't stop. It just goes and goes and goes. I bet there's men who have lived and died out there, never seen the end of that line. And they never will—because it's endless. It's like a serpent. It's just all body, no tail. It can do things to you . . . .

Id. at 222.

> I don't like the pressure, the intimidation. How would you like to go up to someone and say, 'I would like to go to the bathroom?' If the foreman doesn't like you, he'll make you hold it, just ignore you. Should I leave this job to go to the bathroom I risk being fired . . . .

Id.

> Oh, yeah, the foreman's got somebody knuckling down to him, putting the screws to him. But a foreman is still free to go to the bathroom, go get a cup of coffee . . . .

Id. at 223.

> I don't eat lunch at work. I may grab a candy bar, that's enough. I wouldn't be able to hold it down. The tension your body is put under by the speed of the line . . . .

Id. at 225.

> A job should be a job, not a death sentence.

Id. at 226.

and long distance truckdrivers:

Thus, claimants under the Workmen's Compensation system[3]

> The average workingman, he figures to work eight hours and come home. We have a sixteen-hour day . . . .

Id. at 281.

> You're fighting to maintain your speed every moment you're in the truck.
>
> The minute you climb into that truck, the adrenaline starts pumping. If you want to have a thrill, there's no comparison, not even a jet plane, to climbing on a steeltruck and going out there on the Dan Ryan Expressway. You'll swear you'll never be able to get out the other end of that thing without an accident. There's thousands of cars and thousands of trucks and you're shifting like a maniac and you're braking and accelerating and the object is to try to move with the traffic and try to keep from running all over those crazy fools who are trying to get under your wheels. You have to be superalert all the time . . . .

Id. at 283-84.

> There's a lot of stomach trouble in this business, tension. Fellas that can't eat anything. Alka-Seltzer and everything . . . . There has been different people I've worked with that I've seen come apart, couldn't handle it anymore . . . .

Id. at 284.

> It's such a competitive business that you dare not open your mouth because your company will be penalized freight—and you get it in the neck.

Id. at 286.

A moderate amount of stress is an ordinary ingredient of life. But if the stress is repeated, continuous, or of long duration, various illnesses can result. J. STELLMAN & S. DAUM, *supra*, at 78. It is important to note that workplace stress reactions vary from person to person. A physically, mentally or socially disabling reaction can occur in those persons with the least capacity to withstand stressor exposure by lowering their resistance to disease or aggravating pre-existing neurotic tendencies. In contrast, to the thicker-skinned, the stressor may be perceived as little more than a transitory irritation. LENNART LEVI, *supra*, at 61.

2. Ivancevich, Matteson & Richards, *Special Report: Who's Liable for Stress on the Job*, 63 Harv. Bus. Rev. 60 (Mar.-Apr. 1985); 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 41.88 (1987).

This Note deals primarily with repetitive and cumulative instances of stress endemic to a particular job, enterprise or industry; rather than with sudden and extraordinary shocks and frights. Also, it should be noted that stressful stimuli may lead to either a "mental" injury such as a neurosis or to a "physical" injury such as a heart attack. An exhaustive discussion, however, of the line between "mental" and "physical" disabilities is beyond the scope of this Note, since the Note's subject is primarily the stressful stimuli and not the resultant injury.

3. Each of the fifty states has a workers' compensation law. U.S. CHAMBER OF COMMERCE, ANALYSIS OF WORKMEN'S COMPENSATION LAWS vii (1983). There is also a Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-93 (1982 & Supp. IV 1986) and a Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (1982 & Supp. III 1985) In 1980, 88%, or 79.1 million workers, were covered by these laws. U.S. CHAMBER OF COMMERCE, *supra*, at 1.

The typical act may be summarized as follows. The central principle is that an employee is automatically entitled to benefits when he suffers a "personal injury by accident arising out of and in the course of employment." 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 1.10 (1987). While the right to compensation can be determined in the first instance by a workmen's compensation board or a state court, a board makes the initial determination in the majority of states. Comment, 70 YALE L.J. 1129, 1130 n.6 (1961). The negligence and fault of both the employer and the worker are "largely immaterial" to

have found it difficult to secure compensation for stress-related diseases and injuries.[4] Courts have often relied upon the traditional workmen's compensation "accidental injury" analysis in adjudicating stress claims, rather than on an occupational disease analysis.[5] In the "accidental" analysis, an arbitrary distinction is made between "physical" and "mental" stimuli.[6] The classification of stress-related stimuli as "mental" prevents claims involving those stimuli from being compensated as readily as those involving "physical" stimuli, because mental stimuli are held to a higher standard of "unusualness"[7] than are physical stimuli. This Note argues that the distinction between "mental" and "physical" stressors should be abolished and that stress-related injuries should be treated by the courts as occupational diseases.

the success of the worker's claim. 1 A. LARSON, *supra*, § 1.10. The benefits paid are usually from one-half to two-thirds of the employee's average weekly wages and, in addition, cover hospital and medical expenses. *Id.* In case of death, benefits are paid to the worker's dependents. *Id.*

In return for these "modest but assured benefits," the employee and his dependents give up the right to sue for common law tort damages for injuries which are covered by the insurance. *Id.* The employer is required to procure insurance either through private insurance, state fund insurance or regulated self-insurance. Comment, *supra*, at 1130. The employer is encouraged to take an interest in the safety and rehabilitation of his employees through a premium structure which provides a monetary incentive to better his "experience rating." U.S. CHAMBER OF COMMERCE, *supra*, at vii; *cf.* Comment, *supra*, at 1130 n.10. The National Council on Compensation Insurance collects "accident" experience and works with the states on determining insurance rates. U.S. CHAMBER OF COMMERCE, *supra*, at 2.

4. "The early symptoms of a chronic stress reaction may not be symptoms of a specific disease. They can be indecision, reduced appetite, loss of weight, irregular bowel movements, headache, backache, skin rashes, insomnia, nervousness, tremors, poor memory and irritability." J. STELLMAN & S. DAUM, *supra* note 1, at 78. In addition, feelings of anxiety, depression, uneasiness, apathy, alienation and hypochondria may also occur. LENNART LEVI, *supra* note 1, at 72. But these warning symptoms may never appear, and "chronic stress can lead directly to actual disease." J. STELLMAN & S. DAUM, *supra* note 1, at 78-79.

Examples of diseases caused by stress are: ulcers, migraines, asthma, ulcerative colitis, and coronary heart disease. Coronary artery disease is the most common cause of death in this country. *Id.* at 79.

5. 1B A. LARSON, *supra* note 2, § 38.65 (frequently, the issue in compensation of emotional-stress claims is whether or not the injury was accidental). All but nine states require that an injury, as opposed to occupational disease, have an accidental character in order to be compensable. *Id.* at § 37.10. Also, only six of the states have recognized the possibility of compensating stress claims as occupational diseases. *See infra* notes 61-63 and accompanying text. It should be noted that some of the jurisdictions (e.g., Texas) which do use the occupational disease analysis for repetitive stressful trauma nevertheless refuse to compensate injuries resulting from such trauma. *See infra* notes 29-31 and accompanying text.

6. *See infra* notes 8-10, 62, 64, 67 and accompanying text.

7. *See infra* text accompanying notes 62-68.

Part II of this Note discusses the division of workplace stimuli into the "mental" and "physical" categories, in both the accident and occupational disease contexts. This part also offers three reasons for the judicial characterization of job-related stress as "mental" stimuli: fears that the workmen's compensation system will be turned into a "general health insurance" measure, the difficulty of proof of causation and the danger of employee malingering. Part III examines various courts' treatment of claims for compensation of disabilities induced by occupational stress. These cases illustrate the courts' tendency to blame the claimant for his own disability when stress is involved. As will be discussed below, when a court characterizes a stimulus as "mental" it is often drawing the conclusion that it is internally- or self-imposed, while a characterization of a stimulus as "physical" implies that it is externally- or job-imposed.

While Part III deals with mental stimuli under both the accidental injury and occupational disease analyses, Part IV delineates the accidental analysis, which has been the most frequent approach to adjudication of stress claims. This Note argues that because of its "unusualness" and time-definiteness requirements, and the fact that stressful or mental stimuli are held to a higher standard of unusualness than physical stimuli, the "accidental analysis" is a poor way to treat stress-related claims. The occupational disease analysis is a more suitable mechanism for compensating stress-related claims. Part V discusses the "average worker" test, used by some jurisdictions in cases where stressful stimuli have caused a "mental" injury, and shows that the average worker test in practice limits comparison of the claimant's stress to a selection of workers from the claimant's workplace and fails to compare the enterprise as a whole with other enterprises, or to compare the industry involved with other industries. Part VI explains how occupational stress would fit into the occupational disease definition, and Part VII concludes that uniform compensation of stress claims as occupational diseases would better comport with the no-fault principle embodied in the workmen's compensation system, and would better fufill the rehabilitative and remedial purposes of the system.

II. Judicial Classification of Stress as "Mental Stimuli"

In analyzing disabilities both as accidents and as occupational diseases, courts and commentators have generally divided the

"stimuli" present in the workplace into two categories.[8] "Physical" stimuli are those which involve some traumatic contact with the body, a tangible effect on the body or physical exertion.[9] "Mental" stimuli consist primarily of working conditions such as long work hours, too much responsibility, shiftwork and the threat of job loss.[10] The classification of stimuli as "mental"

8. Professor Larson, for example, established this division in his treatise in order to define which stimuli lead to compensable "personal injuries" in the various jurisdictions. *See* 1B A. LARSON, *supra* note 2, § 42.20; *see infra* notes 9-10.

9. The facts in the following cases fell into the "physical" category: Bracke v. Baza'r, Inc., 78 Or. App. 128, 714 P.2d 1090, 1093-94 (1986) (the "physical condition" of meat wrapper's asthma led to depression); Fruehauf Corp. v. Prater, 360 So. 2d 999, 1000, 1001 (Ala. App. 1978), *writ denied*, 360 So. 2d 1003 (1978) (physical injury from blast furnace explosion caused susceptibility of burned area to injury and infection, disfigurement and "psychiatric consequences").

10. The facts in the cases summarized below illustrate the scope of the "mental" category. Amererican Nat'l Red Cross v. Hagen, 327 F.2d 559, 560 (7th Cir. 1964) (a Red Cross employee who suffered "accumulated disturbance" in the work environment, including taking over the duties of his immediate supervisor in addition to his own duties, personnel problems and being subject to call 24 hours a day was suffering from "abnormal stress"); Lamb v. Workmen's Compensation Appeals Board, 11 Cal. 3d 274, 278-79, 282, 520 P.2d 978, 981, 983, 113 Cal. Rptr. 162, 164, 165, 167 (1974) (it was "emotional stress" when an engineer was affected by the " 'demands of exacting employment, involving customer time schedules, precision work and the risk of loss of expensive materials . . . .' "); Luneau v. Hartford Accident & Indemnity Ins. Co., 493 So. 2d 857, 860 (La. App. 1986), *cert. denied*, 496 So. 2d 1047 (1986) (contract details were deemed "stress factors"); Burns v. General Motors Corporation, 151 Mich. App. 520, 523, 525, 528, 391 N.W.2d 396, 397-99 (1986) (when plaintiff, following 27 years of work for his employer and an accident, was switched to a new job as a scrap reduction foreman, a "huge inventory loss," estimated at twelve million dollars, in the scrap reduction account for the previous year heightened the pressure on him to complete the "impending" annual inventory. While plaintiff was not directly responsible for the previous loss, he was responible for investigating and attempting to solve the problem. The pressures on plaintiff were termed "mental stress" by the court); Egeland v. City of Minneapolis, 344 N.W.2d 597, 599, 601, 604 (Minn. 1984) (the court termed it "mental trauma" when it could find no "specific stressful incidents" during claimant's work as a police officer, while the claimant had begun work as a "tramp police officer" with monthly rotating eight-hour shifts, was assigned daily without advance knowledge of whether he would be walking the beat or patrolling in a car, and without knowing who his officer-partner would be. Also bothering claimant was "the gung ho attitude of younger patrolmen, the derogatory attitude of the public towards police officers and the political battles within the department"); Ryan v. Connor, 28 Ohio St. 3d 406, 407, 503 N.E.2d 1379, 1380-81 (1986) (when a worker thought he was to be offered a promotion and instead got apparently mandatory early retirement, he was deemed to be suffering from "emotional stress"); Henley v. Roadway Express, 699 S.W.2d 150, 154 (Tenn. 1985) (while the Tennessee Supreme Court did not say explicitly that "mental stimuli" were involved, the precedents the court cites as authority discuss "mental stimulus," "mental strain" and "emotional stress"); *see also infra* notes 52-53 and accompanying text; Aetna Cas. & Surety Co. v. Burris, 600 S.W.2d 402, 406 (Tex. Civ. App. 1979) (truck-driver was suffering from " . . . repetitious mental traumatic activities"); *see also infra* notes 29, 32-35 and accompanying text; Transportation Ins. Co. v. Maksyn, 580 S.W.2d 334,

rather than "physical" makes recovery more difficult under present workmen's compensation laws.[11] Professor Larson, the author of the leading treatise on workmen's compensation law, characterizes such a method of categorization as "only a rough expedient adopted in order to sort out an almost infinite variety of subtle conditons and relationships . . . ."[12] In reality, the courts' approach seems to revolve around whether the judge thinks that the "stimuli" are internally- or self-imposed, or externally- or job-imposed. Under this analysis, "mental" stimuli generally become the responsibility of the individual employee, since they are internally imposed.[13] The distinction between "internal" and "external" will be further discussed in Part III.

335, 338-39 (Tex. 1979) (the troubles afflicting Maksyn were termed "mental stimuli," "mental activities" and "repetitious mental traumatic activities." According to dictum in that case, the latter three terms would generally be exemplified by "worry, anxiety, tension, pressure and overwork"); *see also infra* notes 47-49 and accompanying text; Jones v. District of Columbia Department of Employment Services, 519 A.2d 704, 705, 708-09 (D.C. 1987) (the "continuous and immediate threat of job loss" when a worker was caught by his supervisor with an 80 proof bottle of whiskey while at work and was immediately suspended for five days to determine whether he would be fired from his position as a heavy equipment operator after 35 years of employment was designated an "emotional stressor").

11. *See infra* notes 62-68 and accompanying text. Recovery is more difficult primarily because mental stimuli must be more "unusual" than physical stimuli to lead to a compensable injury under the accidental analysis. In Jones v. Dist. of Columbia Dep't of Employment Services, 519 A.2d 704 (D.C. 1987), *citing* 1B A. LARSON, *supra* note 2, §§ 38.65, 38.65(d), the court notes that when physical stress leads to a heart attack, the plaintiff need prove only that the employment caused the injury, while when emotional stress leads to a heart attack, there is a question whether an "accidental injury" has taken place, over and above the requirement of proving causation. *Id.* at 707. However, that court asserted that the test ought to be "employment causation" in both the physical and mental categories. *Id.* at 708. The court in Ryan v. Connor, 28 Ohio St. 3d 406, 503 N.E.2d 1379 (1980) admitted that "courts of other jurisdictions generally have not treated claims for stress-related injuries in the same fashion as claims for physical-contact injuries . . . . In that the causation of a physical-contact injury usually is more readily discernible than that of a stress-related injury, there is a reasonable basis for making this distinction." *Id.* at 409, 503 N.E.2d at 1382. This statement, however, seemed to contradict the court's assertion that it did not believe that stress-related injuries were any "less real or devastating to injured workers and their families or that stress related injuries should be given less credence." *Id.*

Recovery is made particularly difficult when the "mental stimuli" are gradual and sustained. 1B A. LARSON, *supra* note 2, § 42.21(c).

12. 1B A. LARSON, *supra* note 2, § 41.21. Professor Larson admits that the line between mental and physical stimuli is indistinct. For example, where emotional stress or strain takes the form of overwork, especially when the overwork is exacerbated by a special deadline or crisis, *see infra* note 60, the line between "emotional strain" and "physical exertion" blurs. 1B A. LARSON, *supra* note 2, § 38.65(d).

13. *See infra* notes 29-55 and accompanying text.

The rationale behind this blame-seeking analysis seems to stem in part from judicial concerns about the possibility of the workmen's compensation system being turned into a general health insurance measure.[14] They are worried about the ability of claimants to get money for the treatment of an ailment which really arose out of the "day-to-day emotional strain and tension which all employees must experience."[15]

Another problem is the enhanced difficulty of proving causation in the context of stimuli which do not involve physical impact or exertion. The assumption that the causal link between the work environment and the stress is vague is not necessarily true. Judges seem to think that because mental stimuli are somehow amorphous and intangible, their existence cannot be proven. The testimony of other workers, supervisors and employers who are present in the workplace can prove much about working conditions.[16] A change in working schedules giving rise to depres-

14. School Dist. #1 v. Dep't of Indus., Labor & Human Relations, 62 Wis. 2d 370, 375-76, 215 N.W.2d 373, 376 (1974) Since some courts see employment stress as a phenomenon present in all employments, to compensate reactions to it would be to require the workmen's compensation system to shoulder the burden of providing for a condition which every member of society must face if he is to pursue gainful employment. To compensate stress reactions, therefore, would be to condone a sort of health insurance. *See* Seitz v. L & R Indus., Inc., 437 A.2d 1345 (R.I. 1981):

> The courts are reluctant to deny compensation for genuine disability arising out of psychic injury. However, since screening of claims is such a difficult process, the courts recognize the burden that may be placed upon commerce and industry by allowing compensation for neurotic reaction to the ordinary everyday stresses that are found in most areas of employment. Indeed, it is a rare situation in which some adverse interpersonal relations among employees are not encountered from time to time. Employers and managers must admonish their subordinates and correct perceived shortcomings. The stress of competitive enterprise is ever present and attendant upon all types of commercial and industrial activity.

See also Comment, *supra* note 3, at 1143 (1961).

15. *School Dist. #1*, 62 Wis. 2d at 376, 215 N.W.2d at 377.

16. For example, the testimony of other employees in the workplace has been used to determine whether stressful stimuli were unusual for the "average employee." Swiss Colony v. Dep't of Indus., Labor & Human Relations, 72 Wis. 2d 46, 52, 240 N.W.2d 128, 131-32. *See also infra* notes 85-87 and accompanying text. Also, excessive stress can be objectively detected by evaluating the workplace behavior of the employees as a whole. For example, on-the-job responses to stress can take the form of active behaviors, e.g., grievances, strikes, high turnover, and passive behaviors, e.g., low motivation and absenteeism. LENNART LEVI, *supra* note 1, at 78. The testimony of workers and employers can be utilized to describe these mass responses as well as the stressful stimuli bearing on a particular worker. Thus, stress reactions are susceptible of proof by stronger stuff than the subjective response of only one or two workers. "The actual occurrence of an alleged stimulus should be relatively easy to ascertain, regardless of whether it involves physical impact or not." Comment, *supra* note 3, at 1137-38.

sive tendencies may, therefore, be easier to trace causally than, for example, the synergistic relationship involved between asbestos work and cigarette smoking in silicosis cases.[17] Silicosis, however, has been accepted generally as an occupational disease while disease caused by mental stimuli has not.[18]

Judges assume that they are especially vulnerable to false claims for compensation arising from mental stimuli where the disability involved is mental rather than physical. As one court noted, "[c]laims for mental injury under the Workmen's Compensation Act should be examined with caution and carefulness because of the danger in such cases of malingering."[19] Unfortunately, the courts and compensation board of most states have not attempted to determine whether or not an applicant has suffered an injury because of his employment as a question of fact.[20] Instead, they have turned a question of fact into legal rules requiring employees to make a showing of "unusualness"[21] over and above that which is required for "physically" caused workplace injuries.[22]

17. *See* Comment, *supra* note 3, at 1137 (footnotes omitted):

> [T]he requirement of a physical impact cannot be justified as a safeguard to ensure that there is a cause-in-fact relationship between injury and employment. Non-physical factors can precipitate a neurotic disturbance as readily as physical factors, perhaps even more readily. Moreover, the presence of a physical impact does not make the fact of cause any easier to establish.

18. 1B A. LARSON, *supra* note 2, § 41.42.

19. *School Dist. #1*, 62 Wis. 2d at 376, 215 N.W.2d at 377 (quoting Johnson v. Industrial Comm'n, 5 Wis. 2d 584, 589, 93 N.W.2d 439, 443 (1958)). *See Seitz*, 437 A.2d at 1349-50:

> Great care must be taken in order to avoid the creation of voluntary "retirement" programs that may be seized upon by an employee at an early age if he or she is willing . . . to give up active employment and assert a neurotic inability to continue. It is all very well to say that the adversary system will expose the difference between the genuine neurotic and the malingerer. We have great fears that neither the science of psychiatry nor the adversary judicial process is equal to this task on the type of claim here presented.

20. *School Dist. #1*, 62 Wis. 2d at 376, 215 N.W.2d at 377.

21. *See infra* notes 59-68 and accompanying text. For example, in claims where repetitive stressful stimuli caused a physical injury, some showing that the stress was "unusual" for the average employee or "unusual" when compared with the stress of everyday life is often required.

22. *Id. See also* 1B A. LARSON, *supra* note 2, § 38.10. But commentators have disagreed with the extra showing of causation required of claimants where mental disabilities and mental stimuli are involved.

> The separate category reserved for 'physical' injuries has little support in psychiatric theory, which regards man as an integrated being. The rule is sometimes rationalized, however, by appeal to administrative considerations. It is contended, for example, that the 'physical' injury requirement will guarantee the genuiness of the claim. But use of this rule as a protective device places a heavier burden of proof on

Some courts support their hostility to mental stimuli claims by citing the former reluctance of judges in tort suits to allow claims of mental injury owing to negligence where no physical impact was involved.[23] These courts fail to notice that compensation law is based on a different principle than the common law. Compensation laws were enacted by state legislatures "for the purpose of ameliorating the economic plight of an employee injured in the course of and on account of his employment . . . by imposing upon industry the obligation to pay to him weekly payments at rates based upon his wages . . . ."[24] To this end, the common law defenses of contributory negligence, fellow servant and assumption of risk were abolished to accommodate the system of liability without fault.[25] This relieved the worker of the burden of proving the fault of the employer. That burden had previously resulted in inadequate recoveries under the common law.[26] In contrast, the tort law embodies no social goal of relieving the plaintiff of the

> those suffering from mental disturbances without any basis for such a distinction. In fact, conscious simulation of the often complex patterns of psychoneurotic reactions may be easier to detect than certain feigned 'physical' injuries such as whiplash or back injury. While detection of falsified claims may be made difficult if the testimony of medical witnesses is partial or perjured, this danger seems no less present in cases where there has been a physical impact or injury.

Comment, *supra* note 3, at 1137, *cited in Seitz*, 437 A.2d at 1353-54 (Kelleher, J., dissenting). The dissenter in *Seitz* elaborated further:

> I am aware of the concern that claims involving mentally disabled workers will encourage malingering, sham, and outright fraud, but these fears do not justify the denial of a genuine claim. Many assume that mental injuries, because of their very nature, are more difficult to substantiate and are, therefore, less genuine than physical injuries, but modern legal and medical theory fails to lend credence to that assumption.

Id. at 1353. *See infra* notes 62-74 and accompanying text. *See also* Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961), the leading New York decision eliminating the requirement of a physical impact in negligence cases under the tort law:

> [T]he question of proof in individual situations should not be the arbitrary basis on which to bar all actions. . . . In the difficult cases, we must look to the quality and genuineness of proof, and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court . . . to weed out the dishonest claims.

Id. at 242, 176 N.E.2d at 731-32, 219 N.Y.S.2d at 38.

23. *School Dist. #1*, 62 Wis. 2d at 376-77, 215 N.W.2d at 377. *See* Comment, *supra* note 3, at 1137 and *see infra* note 63.

24. Carter v. General Motors, 361 Mich. 577, 589, 106 N.W.2d 105, 111 (1960); *see also Seitz*, 437 A.2d 1345, 1352 (Kelleher, J., dissenting): "An overriding objective of workers' compensation legislation is to impose upon the employer the burden of caring for the casualties occurring in its employment by preventing an employee who has suffered a job-related loss of earning capacity from becoming a public charge."

25. Comment, *supra* note 3, at 1129.

26. *Id.*

burden of proof. In relying on private tort cases to establish a precedent for the search for something "physical" in workmen's compensation cases,[27] judges fail to recognize the rehabilitative purpose for which the compensation law was enacted.[28] Also, the judges who use the designation "mental stimuli" to embody their conclusions that the stimuli were internally imposed are looking to attach blame to the worker in a system where fault is not meant to be at issue.

III. "Mental Stimuli" under Occupational Disease and Accident Law

The case of *Aetna Casualty & Surety Co. v. Burris*[29] illustrates judicial use of the "mental stimuli" category in the context of the Texas occupational disease statute. In 1971, the statute was amended so that occupational diseases occurring as the result of repetitious *mental* traumatic activities are no longer compensated.[30] Only diseases resulting from repetitive *physical* stimuli now merit awards.[31]

The *Burris* court denied compensation to a steel trucker who was suffering from hypertension, depressive reaction, vision problems, migraine headaches and acute gastritis.[32] His family physician testified at trial that these conditions had been caused by "tension, fatigue and some depressive aspects . . . because of his hours and the time he was putting in and the responsibility that he was carrying."[33] The truckdriver himself complained of stress-related job conditions: long hours, long trips too close to each other, not being able to rest or sleep, not having time to eat,

27. Larson, *Mental and Nervous Injury in Workmen's Compensation*, 23 Vand. L. Rev. 1243 (1970).

28. *See Seitz*, 437 A.2d at 1352-53 (citations omitted):

> In the past, we have stressed that even though the term 'injury' does not have the same meaing whenever it appears in the [Rhode Island] compensation act, it usually refers to incapacity for work. We have continually stressed that compensation is not paid for the injury but for the impairment of earning capacity. An employer takes its workers as it finds them, and when the employee aggravates an existing condition and the result is an incapacity for work, the employee is entitled to compensation for such incapacity.

29. 600 S.W.2d 402 (Tex. Civ. App. 1980).

30. Tex. Rev. Civ. Stat. Ann. art. 8306 (Vernon 1988).

31. *Id.*

32. *Burris*, 600 S.W.2d at 404.

33. *Id.* at 405.

the pressure of time tables and "the stress and strain of delays and the conditions at the loading sites."[34]

The court characterized such factors as "repetitious mental traumatic activities,"[35] drawing a line between "mental" and "physical." Since the prevailing judicial attitude is that "physical exertion" constitutes "physical stimuli,"[36] it would seem that the physical exertions enumerated above would be physical stimuli. But the court somehow found that they fell into the category of "mental stimuli." Driving requires movement of the arms. Also, in this case, where a heavy Mack truck was involved, turning took great physical effort, and unusual physical exertion on Burris's part was required to tie the loads of steel down.[37] His doctor, an expert witness at the trial, testified that the vision problems stemmed from "the fatigue, [and] stress of driving."[38]

The presence of these traditional "physical stimuli" did not seem important to the court's analysis. Instead, its opinion apparently turned on its determination that the stimuli were self-imposed and not job-imposed. For example, Burris conceded that he was not "compelled" to drive long hours, but that "he believed that if he did not do so, his employer would penalize him by giving him less work."[39] Significant weight was probably accorded to his doctor's assertion that his labile hypertension would not be a problem if he did not work long hours in the future.[40] These factors made it possible for the court to see Burris's illness as under his own control. The court seemed to be hypothesizing that since Burris himself had made the decision to work long hours to get extra work, whatever "stimuli" resulted were self-imposed and therefore "mental." Thus, the mental/physical distinction depended not on any inherent quality of the stimuli, but on the court's determination that the stimuli were internally, and not externally, imposed.

The court did not consider the possibility that driving long hours to get enough work might have been a necessary and unique condition of maintaining a livable wage as an interstate

34. *Id.*
35. *Id.* at 406.
36. *See supra* note 9 and accompanying text.
37. *Burris*, 600 S.W.2d at 406.
38. *Id.* at 405.
39. *Id.*
40. *Id.* at 406.

truckdriver. If, in fact, such difficult working conditions are endemic to such an occupation (just as working with asbestos is a necessary condition of being an asbestos worker), they should be considered "peculiar to the employment"[41] and stress reactions to them should be compensated as "occupational diseases."[42] The long hours and tight schedules should be seen as externally, not internally, imposed.

Certainly, no one forced Burris to be a truckdriver. No one, however, forces cotton workers to work with cotton. But if, prior to the promulgation of OSHA, a cotton worker had refused to work in the presence of cotton dust, he would have been fired. Analogously, if Burris refused to work the long hours, he would not earn enough money. If he couldn't earn enough money, he would have to quit and find a job which did pay adequately. Just as working with cotton or asbestos is a condition peculiar to certain occupations, working long hours was peculiar to Burris's occupation of truckdriving. The law of occupational disease is that if a particular hazard is peculiar to an occupation or exists in an increased degree in that occupation, as opposed to employment generally, it should be compensated.[43] Thus, instead of dismissing Burris's claim outright, the court should have made a factual inquiry into whether long hours were in fact required as either a condition of keeping one's job or of earning a living wage in the steel trucking industry. If Burris was driving long hours merely for the sake of adding to his accumulated wealth, it could be said that long hours were not a condition of maintaining himself in this industry and denying compensation would be justifiable. In that case it could reasonably be said by the court that the stress Burris experienced was an "ordinary disease[] of life to

41. 1B A. LARSON, *supra* note 2, § 41.10.

42. *Id.* Of course, a court could hold the worker accountable for his choice of a particularly stressful employment. Some decisions have reached this amazing result. For example, in Egeland v. City of Minneapolis, 344 N.W.2d 597 (Minn. 1984), the court admitted that police work was more stressful than most other occupations. The claimant complained that the "mental traumas" of rotating shifts and the customary necessity of officiating at "unpalatable" horror brawls and domestic disputes caused his mental injury. The court left it up to the legislature to change its law that mental injuries caused by mental stimuli were not compensable, referring to Minn. Stat. 176.011, subd. 15 (1982). *Id.* at 604-05. The court, however, might have reached a more desirable result by broadening the category of "physical trauma" to include rotating shifts. This rule, where recovery is predicated upon a showing that the stress must be unusual with respect to the claimant's normal working conditions, is discussed further later in this Note. *See infra* note 67.

43. 1B A. LARSON, *supra* note 2, § 41.10.

which the general public is exposed."[44] Since anyone can consciously and wilfully choose to make himself work hard solely for the purpose of enriching himself, self-imposed stress is an "ordinary disease" and not compensable. If, however, Burris exposed himself to stress because his job *required it*, he should be compensated for his injuries.

Although judges might shy away from such factual determinations, claiming that they are not sure where the line between externally and internally imposed stressful stimuli should be drawn, compensation boards and those courts who hear the claim in the first instance[45] could ascertain whether the worker in question is earning an amount significantly higher than the average rate of pay within a certain industry. The boards in particular have the advantage of being widely distributed geographically and possessing the "expertise and superior knowledge of industrial demands, limitations and requirements."[46] In addition to payroll evidence, boards could scrutinize the testimony of other employees and supervisory personnel, and examine the work rules of the enterprise in order to ascertain whether the stress was self- or job-imposed.

The *Burris* court's characterization of the plaintiff's working conditions as "mental stimuli" followed the Texas precedent set in *Transportation Insurance Co. v. Maksyn*.[47] There, an advertising service manager's job required him to work long hours and to work late at night.[48] He was even given extra work to complete as the result of a trainee's failure.[49] Here again, the court classified the externally imposed, demanding elements of Maksyn's work

44. *Burris*, 600 S.W.2d at 406; *see generally* 1B A.LARSON, *supra* note 2, § 41.33.

45. While a workmen's compensation claim can be determined by a compensation board or by a state court in the first instance, usually a compensation board makes the first determination. *See supra* note 3.

46. Sanyo Mfg. Corp. v. Leisure, 12 Ark. App. 274, 277, 675 S.W.2d 841, 843 (1984).

47. 580 S.W.2d 334 (Tex. 1979). The case stated the rules that repetitious mental traumatic activity cannot constitute occupational disease, *id.* at 337, and that "[a] disabling mental condition brought about by the gradual buildup of emotional stress over a period of time and not by an unexpected injury causing event is not compensable unless accompanied by physical stress or exertion." *Id.* at 338 (*citing* Ayer v. Industrial Comm'n, 531 P.2d 208 (Ariz. Ct. App. 1975)).

48. *Id.* at 335. His work was to eliminate errors in the newspaper. "[A]ll of the newspaper work is pressure work," Maksyn testified. *Id.* The court noted that his job focused exclusively on "problems." *Id.*

49. *Id.*

environment as "mental stimuli."[50] This may have been done because mental processes were involved in completing his tasks; his job did not demand physical exertion. Or it may have been that the court decided that such conditions were simply necessary to this type of job, and thus could not be seen as supplying the "accidental" element of "unusualness."[51] The distinction between a manual laborer lifting a heavy item and Maksyn staying up all night, however, doesn't make sense. Both are externally imposed conditions of the working environment.

The requirement that an employee work the "third shift" from 12 midnight to 8:30 A.M., despite his persistent requests for employment during another time period has also been classified as a "mental stimulus."[52] The claimant in *Henley v. Roadway Express* had difficulty getting to sleep at home during the daylight hours.[53] The sleep deprivation caused a depressive neurosis and disabled the claimant.[54] Co-workers and management admitted that the shift change had been imposed by management and that the claimant tried persistently, but unsuccessfully, to change the arrangement. Apparently, the fact that the claimant's problems resulted from his being unable to sleep during non-working hours was the basis for the characterization of the stimuli as "mental."[55] The court's focus on the non-working hours enabled it to blame Henley, rather than his employer, for his disability.[56]

50. A case relying heavily on the Maksyn precedent refused an award of compensation in a case which, unlike Burris and Maksyn, did not involve overwork. In University of Texas System v. Schieffer, 588 S.W.2d 602 (Tex. Civ. App. 1979), the claimant's supervisor created a stressful office atmosphere by speaking to her in a loud and gruff way, sometimes yelling at her, and confusing her with contradictory instructions. The case considered only the issue of compensability for repetitive mental trauma as an occupational disease, but the court implied that an accident analysis also would have been improper, since no physical force or exertion accompanied the emotional stress. *Id.* at 603-04, 607.

51. *See supra* notes 8-10 and accompanying text.

52. Henley v. Roadway Express, 699 S.W.2d 150, 151, 155 (Tenn. 1985). The court decided that Henley's mental disorder was compensable neither as an accidental injury nor as an occupational disease. The disorder did not arise out of and in the course of employment, because the injury was neither caused by a hazard incident to Henley's employment nor was the plaintiff performing a duty he was employed to do at the time and place of the injury.

53. *Henley*, 699 S.W.2d at 155.

54. *Id.* at 150.

55. The court apparently felt that Henley's disability resulted from his own "inability to discipline his personal life." *Id.* at 155.

56. Very few states treat stress-related claims as occupational diseases. *See infra* note 82 and accompanying text. Thus, most stress claims are treated as "accidental injuries."

But, it was misleading to term not getting enough sleep a "mental stimulus," since the reduction of the claimant's sleep here was a job-imposed condition.

As long as mental stimuli are externally imposed by the work environment, there is no reason to treat physical injuries thus caused differently than those caused by physical stimuli. The central focus should be a factual determination that the work environment, not some subjective drive on the part of the employee, caused the injury.

IV. STRESS-RELATED INJURIES AS "ACCIDENTS"

Stress claims include claims where a "mental" stimulus[57] leads to either physical disability such as a heart attack, or a mental one such as a neurosis. In evaluating the accident analysis with respect to stress claims, both types will be considered in this part in relation to the case of a "physical" stimulus leading to a physical disability.

Stress claims have often been characterized by courts as "accidents" rather than "diseases."[58] The term "accident" means an "unlooked for mishap or an untoward event which is not expected or designed."[59] The indispensable ingredient of an accident is "unexpectedness,"[60] but most jurisdictions also enforce a

57. *See supra* note 10.

58. Only six states have recognized the possibility of compensating stress claims as occupational diseases. *See infra* note 82. All but nine of the fifty states require that an injury, as opposed to an occupational disease, be accidental in character. 1B A. LARSON, *supra* note 2, § 37.10.

59. Fenton v. Thorley & Co., [1903] A.C. 443, 448. *See* 1B A. LARSON, *supra* note 2, § 37.00. BLACK'S LAW DICTIONARY: (5th ed. 1979) defines an "accident" for workmen's compensation purposes as follows: "A befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; chance; contingency; often, an undesigned and unforeseen occurrence of an afflictive or unfortunate character; casualty; mishap; as, to die by an accident."

Professor Larson admits that the accident requirement is based at least in part on a utilitarian concern. The requirements of unexpectedness and time-definiteness work to ensure that no state will be forced to compensate a worker for disabilities "not really caused in any susbstantial degree" by the employment. 1B A. LARSON, *supra*, § 38.81. Thus, the "accident" requirement collapses to a rigorous standard of proof of causation. *See supra* notes 19-22 and accompanying text.

60. 1B A. LARSON, *supra* note 2, § 37.20. This requirement can be met in stress cases in one of two ways: either by means of a sudden fright or shock; or overwork. Overwork is most successful, however, when a definite occurrence which the court can pinpoint as the cause, is involved. Examples might be an emergency or crisis beyond the call of ordinary day-to-day duties, or a special deadline which must be met. 1B A. LARSON, *supra* note 2, § 38.65(d). It should be noted that while a deadline might be the immediate cause of a

requirement that there be some single event or incident to which the injury is traceable.[61]

In the several states which make compensation awards for mental disabilities occasioned by repetitive mental stimuli, claims are often not awarded compensation unless it can be proven that the stimuli were "unusual" for the average worker.[62] Stress which is "unusual" for a particular worker, who might have pre-

disability, the effects of on-the-job stress might have been building up for years, leading to the "straw that broke the camel's back." *See* University of Texas System v. Schieffer, 588 S.W.2d 602, 603 (Tex. Civ. App. 1979), where claimant was suffering from a mental disability. She testified that during her final encounter with a gruff, loud supervisor, he spoke in a "yelling, screaming type manner, and it was sort of like there was straws and straws and straws and this was the final straw—." Of course, the "unexpectedness" or "unusualness" can refer to either the cause of the injury or to the injury itself. 1B A. Larson, *supra* note 2, § 37.20.

61. 1B A. Larson, *supra* note 2, § 37.20: Definiteness of time, place and occasion or cause are required in most jurisdictions. The cause of an injury or the injury itself can supply the requisite "definiteness." *Id.* § 39.00. But when both cause and result are difficult to locate in time, as where prolonged stress leads to a protracted deterioriation or breakdown, the claimant's case is frequently unsuccessful. *Id.* § 39.20. In the leading English case of Fenton v. Thorley, [1903] A.C. 443, a worker's employment regularly required him to lift heavy sacks of flour, over a period of years. One day, while lifting one of the sacks, he experienced a severe pain in the chest. The testimony of medical experts later established that the claimant had had a weak heart, and the strain of lifting caused his collapse. This was a case where the injury itself was "unexpected" while the cause of the injury was not. Some jurisdictions are more willing to accept usual conditions or exertions as legitimate causes of an accident if a definite injury was produced. 1B A. Larson, *supra* note 2, § 38.81.

62. 1B A. Larson, *supra* note 2, § 42.23(b). There are ten states using the "average worker test:" Arizona, Arkansas, Colorado, Maine, Massachusetts, New York, Rhode Island, Washington, Wisconsin and Wyoming. Although the enunciated test in Wisconsin is in order for non-traumatically caused mental injury to be compensable in a workmen's compensation case, the injury "must have resulted from a situation of greater dimensions than the day-to day mental stress and tensions which all employees must experience," *School Dist. #1*, 62 Wis. 2d at 376, 215 N.W.2d at 376, in practice, the method of proving that the mental stresses were greater than average seems to hinge on the testimony of other workers and objective evidence concerning the situations of other workers in the same enterprise. *See Swiss Colony*, 72 Wis.2d at 51-52, 240 N.W.2d at 131 (1974). Thus, the employee really needs to show not only that he has experienced stress greater than that which "all employees must experience," *School Dist. #1*, 62 Wis.2d at 376, 215 N.W.2d at 376, but that his stress is greater than that experienced by a similarly situated worker in the same place of employment. *Cf.* Comment, supra note 3, at 1138, noting belief of psychiatrists either that there may be "no correlation between the intensity of [a] trauma and the resultant neurosis, or that the seriousness of the neurosis varies inversely with the severity of the triggering event."

It should be noted that the cases which apply the "average worker" test, thereby determining that no element of "accident" is involved, establish that the disability cannot be a compensable "personal injury" for that overwhelming majority of jurisdictions which require that an "injury," as opposed to an occupational disease, must have some element of accident. 1B A. Larson, *supra* note 2, § 37.10.

existing neurotic tendencies, or stress which is "unusually" excessive in a particular industry compared with other industries, will not be compensated. In other states, the characteristic of repetitiveness in the stressful stimuli, e.g., daily deadlines, precludes compensation.[63] In these states, only a mental injury coming on the heels of a sudden and "unusual" shock is compensated.[64]

Where repetitive "mental stimuli" have caused a physical injury, the accident analysis usually requires some showing that the stress was "unusual."[65] While frequently the cases which have decided this issue do not define explicitly what is meant by their requirement of unusualness,[66] many states seem to require that the mental stimuli be objectively hazardous or excessive for the stress-enduring capacity of the average employee or that the emo-

63. E.g., Texas, *see supra* note 47. This frequently happens on the basis that such disabilities cannot be "accidental" injuries, and often because they do not fall into the category of "personal injury" as defined by the state statute. 1B A. LARSON, *supra* note 2, § 38.65. "[I]t is difficult to compare holdings in the various jurisdictions because of the variation among the statutory provisions. Some statutes require accidental injuries. Other statutes . . . require 'personal injury' without necessity of an accident." Seitz v. L & R Indus., Inc., 437 A.2d 1345, 1347-48 (R.I. 1981).

Although the Seitz case purportedly involved a "personal injury" issue alone, elements of the accident analysis crept into the court's discussion. Claimant, a secretary, had a neurotic reaction to a change in her office situation. The company was sold and moved to a new location and conditions there were "confusing and abnormal . . . . the employee sought to perform duties as office manager and secretary . . . but was also required to do janitorial and cleaning work . . . ." *Id.* at 1346. In the new location, the roof was leaking. Her authority as office manager was not recognized, and she had "difficulties in interpersonal relations with other employees . . . ." *Id.* The court admitted that the testimony presented revealed a "stressful period" for the claimant, but found that the stimuli involved "did not exceed the intensity of stimuli encountered by thousands of other employees and management personnel every day." *Id.* at 1351. It stated that a "more dramatically stressful stimulus should be established." *Id.* The elements of unusualness and time-definiteness or drama sought by the court smack of the accident analysis. (The court pointed out that it was interpreting "personal injury" in the legal context in which those words were first adopted. *Id.* at 1351-52 n.7.) *See also* Jose v. Equifax, Inc. 556 S.W.2d 82 (Tenn. 1977); Verdugo v. Industrial Comm'n of Arizona, 114 Ariz. 477, 561 P.2d 1249 (ARIZ. CT. App. 1977), *cert. denied*, Verdugo v. Industrial Comm'n of Arizona, 434 U.S. 863 (1977).

64. Larson names six states in this category. 1B A. LARSON, *supra* note 2, § 42.23(b). The claimant has an easier time proving causation when the mental stimulus is "time-definite." In an oft-cited Tennessee case, Jose v. Equifax, Inc., 556 S.W.2d 82, 83-84, the claimant alleged that an enormous amount of pressure led to his psychiatric illness. The court refused to award compensation, because the Tennessee statute required injury by "accident." It noted in dictum that "[w]e are of the opinion that a mental stimulus, such as fright, shock or even excessive, unexpected anxiety could amount to an 'accident' sufficient to justify an award for a mental or nervous disorder." *Id.* at 84.

65. 1B A. LARSON, *supra* note 2, § 38.65(d).

66. *Id.*

tional strain be greater than that which the particular employee encounters in his everyday working life.[67]

67. Professor Larson offers the following three categories:
(1) unusual compared with *the employee's* normal strains
(2) unusual compared with the strains of *employment life generally*
(3) unusual with respect to the wear and tear of *everyday non-employment life.*
1B A. LARSON, *supra* note 2, § 38.65(d).

The first standard is the most stringent, placing the burden on the claimant to prove that his injury resulted from an incident extraordinary to his normal working experience. This would imply that, no matter how stressful his job, e.g., being an air traffic controller, he would have to make a showing that there was an extraordinary event causing his "accidental injury." The second would allow the claimant to recover for disabilities due to stresses normal to his everyday employment, as long as they were greater than those of other workers generally, or of workers in his place of employment, *see Swiss Colony*, discussed *infra* notes 83-87 and accompanying text. This is the "average worker" test. The third test is the least stringent, requiring only a showing that the disability was caused by a stress which may be low-grade enough to be present in any or all employments, as long as it is greater than that of non-employment life.

Sometimes language is found in compensation opinions which illustrates that the contours of these tests are not always clear. An example is Bill Gover Ford Co. v. Roniger, 426 P.2d 701 (Okla. 1967), where the claimant had been required suddenly, after three years of relative tranquillity, to assume the six-hour-per-day bookkeeping duties which had previously been done by the boss's wife. The court stated that the performance of additional duties led to a "strain, a different strain," *id.* at 705, which would seem to satisfy test (1), but also said that the claimant was performing her duties in "[t]he usual and customary manner . . . ." which would seem to preclude a finding of compensability under test (1). *Id.* at 703. Unfortunately, the court never indicated what test it purported to be using. The court found that the claimant's heart condition was compensable.

The cases which follow represent examples of the three tests applied. (The courts in these cases did not necessarily specify expressly which definition of "unusual" they purported to be using.)

(1) Some cases denying an award of compensation in this category seem hard indeed. In Florida, the claimant, a parole officer, had a troublesome parolee, who came to claimant's house one night and fired four shots into the living room. While none of the bullets struck claimant or his wife, seven days later the officer's boss was killed, presumably by the same parolee. Claimant had a heart attack fourteen days after the parolee had fired into his house. Compensation was denied on the theory that no "unusual exertion" or "identifiable event" was involved. *Id.* at 1203. Russell v. State Dep't of Corrections, 464 So. 2d 1202, 1203 (Fla. App. 1984), *review denied*, 472 So. 2d 1182 (1985). A fireman was awarded compensation for mental-stress-induced injury when he worked at the site of a severe fire, where a fence around the endangered apartments prevented the firefighters from combatting the blaze effectively, there was a manpower shortage, extreme cold and loss of life occurred. Clearly, this was a more stressful fire to fight than usual for this fireman. City of Tulsa v. State Industrial Court, 434 P.2d 203, 204 (Okla. 1967).

(2) Job loss is rarely found to be a stress peculiar to an occupation. Anxiety over job loss, with no accompanying stress, has failed to lead to compensable disabilities in "the great majority of cases . . . . [in] a private enterprise system, the possibility of job loss is a normal and expected feature of employment life, as is the attendant insecurity and worry." 1B A. LARSON, *supra* note 2, § 38.65(d); *See* Kern v. Ideal Basic Industries, 101 N.M. 801, 689 P.2d 1272 (N.M. Ct. App. 1984), *cert. denied*, 102 N.M. 7, 690 P.2d 450 (1984) (an employee did not receive compensation for his mental breakdown as a result of his termi-

In contrast, where the claim asserts that "physical stimuli" led to physical injury, it is generally required only that the effect, not

nation after fifteen years on the job); *see also* Smith & Sanders, Inc. v. Peery, 473 So. 2d 423, 426 (Miss. 1985) ("In an economic system such as ours, layoffs . . . cannot in our opinion be characterized as untoward or unusual occurrences").

But see Rega v. Kaiser Aluminum & Chemical Corp., 475 A.2d 213, 216-17 (R.I. 1984) (when a worker was fired with one hour's notice after twenty-five years of faithful service and nine months before his pension benefits accrued; then rehired in a matter of months and told that he would have to "start from scratch" to earn his pension, these mental stimuli were deemed to "exceed[] the intensity of stimuli encountered by thousands of other employees and management personnel every day").

Some decisions are hard to categorize because something that happens to the claimant may be unusual to both the claimant's work experience and to the average worker (thereby satisfying both tests 1 and 2). "[W]here the employer . . . deliberately created a heightened expectation of advancement in a particular worker and then triggers a reaction by doing something the worker could reasonably perceive as a betrayal" it was deemed an extraordinary occurrence, and not the worry over promotion which is an integral part of any job experience. Brown & Root Const. Co. v. Duckworth, 475 So. 2d 813, 815-16 (Miss. 1985).

Some work environments are much more stressful than others. *See* Bell Telephone Co. of Pa. v. W.C.A.B. (DeMay), 87 Pa. Commw. 558, 487 A.2d 1053 (1985), where a telephone company had engineered a system in which two phone repair clerks only were available on each shift to answer calls, and one of them had to answer each incoming call within twenty seconds of the first ring. "If the . . . pickup was late, a loud buzzer would sound." *Id.* at 560, 487 A.2d at 1054. A clinical psychologist's study of the workplace found that the incidence of supervisor harassment and public humiliation of employees was frequent. *Id.* at 562, 487 A.2d at 1055. The court found these working conditions to be abnormal. *Id.* at 565, 487 A.2d at 1056. Only one of the two plaintiffs in this case won. *See also* Poulos v. Pete's Drive-In, 284 S.C. 264, 266, 325 S.E.2d 583, 584 (S.C. CT. APP. 1985), where an award was sustained on a finding of "unexpected strain and unusual conditions in employment," *id.* at 266, 325 S.E.2d at 584, where a Polish immigrant took a job in a drive-in restaurant as cashier. He was supposed to work from 9 A.M. to 5 P.M. and have only counter and cash register duties. Within months, however, he was leaving home at 6 A.M. and coming home from work at 6 P.M. *Id.* at 265, 325 S.E.2d at 584. While at work, he was doing the cooking chores as well as his originally assigned tasks, and his employer criticized and ridiculed his appearance. *Id.* It would have been difficult for a court applying test (1) to grant an award in such a case, since the claimant had not been working very long before the changes in his workday took place. Thus, stress that is highly unusual to the workforce generally may not be strange to a new laborer or one that is used to hardship.

But see Mayes v. United States Fidelity & Guar. Co., 672 S.W.2d 773 (Tenn. 1984). Claimant, the owner of his own construction company, *id.* at 773, suffered a loss of four key personnel . His bonding company was putting pressure on him to make deadlines. *Id.* at 774. Although the court admitted that these stresses caused his acute anxiety reaction, *id.* at 774, 775, it stated that "these experiences fall into the category of the usual stress and strains encountered in the operation of a contracting business." *Id.* at 775. Thus, these conditions were not unusual enough to constitute an "injury by accident."

(3) Mooney v. Benson Management Co., 466 A.2d 1209 (Del. Super. 1983) (even though claimant was an "easily excitable individual," he needed to prove only that his pressure-filled job had a "cumulative detrimental effect on his physical condition" in the form of his heart attack. Thus, the test was merely one of employment causation.); Luneau

the cause of the injury, be accidental in nature. The effect need merely be the "unexpected result of routine performance of the claimant's duties."[68] Most disabilities would qualify as unusual since it is unlikely that claimant would have continued to work in the face of a strong probability of being injured. Therefore, physical stimuli leading to physical injury claims achieve a preferred status for compensation purposes because only the injury need be shown to have been unexpected, not the cause of the injury.

The courts' use of the "accident" analysis is not conducive to compensation for stress reactions.[69] Stress may build up by repetition over an extended period of time, thereby failing to satisfy the requirement that the cause occur as a sudden shock.[70] Also, stressful conditions may be endemic to a particular trade, industry or workplace, and therefore not "unusual."[71] Stressful claims would fit more naturally under the "occupational disease" defini-

v. Hartford Accident & Indemnity Ins. Co., 493 So. 2d 857, 859 (La. App. 1986), *cert. denied*, 496 So. 2d 1047 (La. 1986) (in order to make a prima facie showing that an accident arose out of the employment, the claimant had only to show that his activities entailed a strain greater than that experienced in a non-work situation); State Accident Ins. Fund Corp. v. Carter, 73 Or. App. 416, 698 P.2d 1037, 1038 (1985) (the issue was employment causation where the claimant, a state senator as well as head of the workmen's compensation department, was accused of having received favors from a vendor of rehabilitative services. The stress of a grand jury investigation was held to have caused exacerbation of the claimant's MS condition).

68. 1B A. LARSON, *supra* note 2, § 38.00. The phrase "routine performance of claimant's duties" requires merely a showing of employment causation—that such performance be at least more strenuous than that demanded by general non-employment life.

Where routine exertion causes a breakage or herniation, the overwhelming majority of states award compensation. *Id.* § 38.20-23. Where routine exertion causes a more generalized injury, a substantial majority of jurisdictions accept the injury as accidental and compensable. *Id.* § 38.30. Where routine exertion in involved in a heart case, three to one jurisdictions provide compensation awards. *Id.* § 38.31(a). States which award compensation for usual exertion claims in heart attack cases usually do the same for back injuries. *Id.* § 38.32(a), (b).

69. For example, where psychoneurotic reactions are involved, the accident analysis will lead to "arbitrary results." Comment, *supra* note 3, at 1139 and n.81. Also, because "the permanence and severity of a psychoneurotic reaction does not depend on the occurrence of an accident," the accident requirement does not contribute evidence that a psychoneurosis actually occurred. *Id.* at 1140.

70. *See* McMahon v. Anaconda Co., 678 P.2d 661, 663 (Mont. 1984) (where claimant's ailments are gradual in onset, the injury is excluded from the definition of accidental injury).

71. *But see* 1B A. LARSON, *supra* note 2, § 38.83(b) (eight states do provide compensation for mental injury due to "usual" job stress, or that stress endemic to a particular position or industry).

tion.[72] An occupational disease is defined as a disease arising out of exposure to harmful conditions of employment, when these conditions are present in an increased degree when compared with employment generally.[73] Courts do not require, as they do under the accident analysis, that the stimuli which cause occupational diseases be "unexpected," nor that they be sudden or dramatic, since they are recognized as an inherent hazard of continued exposure to conditions of the particular employment.[74]

Originally, defining an injury as an occupational disease meant that there could be no compensation.[75] Occupational diseases were viewed as resulting from the effect of conditions which neither science nor industry could eliminate from the workplace.[76] The workmen's compensation system was created to relieve the worker of the burden of proving that the employer had been at fault.[77] The employer could not be at fault in cases where neither science nor industry had solved the problem of harmful working conditions.[78] Therefore, where the employer was not at fault occupational diseases could play no part in the compensation system as originally conceptualized.[79] All states now, however, provide general compensation insurance for occupational diseases.[80] Thus, if stress claims were recognized uniformly as

72. It has been conceded by one commentator that it is only when all the traditional elements of a finding of "accident" are missing; i.e., unusualness in cause and effect and time-definiteness in cause and effect; that "one sees the typical occupational disease." 1B A. LARSON, *supra* note 2, § 37.20.

73. *See infra* note 91 and accompanying text.

74. Occupational diseases, on the other hand, are viewed as caused by exposure to "*routine* harmful conditions" of a specific occupation. 1B A. LARSON, *supra* note 2, §§ 37.30, 41.31 (emphasis added).

75. 1B A. LARSON, *supra* note 2, § 41.31.

76. 1B A. LARSON, *supra* note 2, §§ 41.20, 41.31; Goldberg v. 954 Marcy Corporation, 276 N.Y. 313, 318-19, 12 N.E.2d 311, 313 (1938); Harman v. Republic Aviation Corporation, 298 N.Y. 285, 289, 82 N.E.2d 785, 786 (1948).

77. U.S. Chamber of Commerce, *supra* note 3, at vii.

78. 1B A. LARSON, *supra* note 2, § 41.20.

79. Clearly, no technology-forcing role was envisioned for the workmen's compensation system.

80. U.S. CHAMBER OF COMMERCE, *supra* note 3, at 10-12. In addition, the District of Columbia, Guam, Puerto Rico, American Samoa, the U.S. Virgin Islands, the Federal Employees' Compensation Act, and the Longshore and Harbor Workers' Compensation Act provide this coverage. The schedule of compensation awards is the same as for accidents. *Id.*

However, most states do not provide compensation awards for disease that is "an ordinary disease of life" or which is not "peculiar to or characteristic of" the employee's occupation. *Id.* at 2.

occupational diseases instead of "injuries" the accident analysis of such claims could be eliminated.[81] Only six states, however, have embraced the idea of compensating mental reactions to repetitive stress as occupational diseases.[82]

81. *But see* Comment, *supra* note 3, at 1131 n.17, discussing possibility of classifying psychoneuroses as reactions, rather than as diseases.

82. Montana: McMahon v. Anaconda Co., 678 P.2d 661, 662, 664 (Mont. 1984). Claimant was exposed to chemical compounds in his work at a refinery, which led to throat and lung problems as well as resulting in aggravation of psychological problems. "We specifically hold that disablement under the Occupational Disease Act includes inability to work in the normal labor market by reason of a psychological disorder stemming from an occupational disease." Also, whether claimant's fears were rational or not was immaterial; the question was whether claimant was in fact disabled.

Oregon: In re Compensation of James, 290 Or. 343, 624 P.2d 565 (1981), *on remand* 51 Or. App. 201, 624 P.2d 644 (1981), *later appeal* 61 Or. App. 30, 655 P.2d 620 (1982). "We are of the opinion that claimant's mental illness, neuroses, is an occupational disease. It was not unexpected in the sense that she had a history of developing neuroses in response to criticism which caused her stress. The neuroses developed gradually rather than suddenly." *Id.* at 348, 624 P.2d at 568. There, the question was whether claimant was disabled, not whether the average worker would have been disabled. *Id.* at 347, 624 P.2d at 567.

Washington: Dep't of Labor and Indus. v. Kinville, 35 Wash. App. 80, 664 P.2d 1311 (1983). Mental disease due to stress could be compensated if plaintiff could show that "her job environment exposed her to a greater risk of developing the mental condition than employment generally or non-employment life." *Id.* at 88, 664 P.2d at 1316.

In two of the states, Georgia and Ohio, the courts merely remanded the cases with instructions to consider their possible compensability as occupational diseases. Georgia: Sawyer v. Pacific Indem. Co., 141 Ga. App. 298, 233 S.E.2d 227 (1977). Ohio: Allen v. Goodyear Aerospace, 13 Ohio App. 3d 190, 468 N.E.2d 779 (1984) (situational stress, labile hypertension and functional gastrointestinal distress were compensable non-scheduled occupational diseases brought on by harassment of supervisor); *but see* Mull v. Jeep Corp., 13 Ohio App. 3d 426, 428, 469 N.E.2d 923, 925 (1983) ("[W]hile stress and strain may be a factor contributing to a heart attack, all of us are exposed to varying degrees of stress and strain; both at work and at home").

Also, physical reactions to prolonged stress have occasionally been treated as occupational diseases. *See* IML Freight, Inc. v. Industrial Comm'n, 676 P.2d 1205 (Colo. App. 1983) (the court said that the claimant, a freight truckdriver, had a compensable occupational disease brought on by the stress of four months of 105-hour workweeks, eventuating in a stroke); State Accident Ins. Fund v. McCabe, 74 Or. App. 195, 702 P.2d 436 (1985) (where the chief executive officer of a union worked six to seven day weeks, frequently worked sixteen hours a day, and was disturbed by rumors of financial irregularities in the union. The work stress led to a high blood pressure condition, which in turn weakened the walls of a preexisting aneurysm and caused it to burst, leading to severe disablement. An act of sexual intercourse, however, was the immediate cause of the rupture. This was held a compensable occupational disease); *but see* Hennige v. Fairview Fire Dist., 99 A.D. 2d 158, 472 N.Y.S. 2d 204 (1984) (an occupational disease is not compensable if the injured employee was especially vulnerable to the hazard).

States that have explicitly rejected the occupational disease concept for stress-related claims are Georgia Transportation Ins. Co. v. Maksyn, *see supra* notes 47-50 and accompanying text), and New Mexico (Marable v. Singer Business Machines, 92 N.M. 261, 586 P.2d 1092 (N.M. Ct. App. 1978). The New Mexico case states the rigorous requirement that the

V. THE "ACCIDENT" ANALYSIS IN PRACTICE

One incarnation of the "unusualness" requirement is called the "average employee" test. This test has achieved popularity among the courts in states that do compensate mental disabilities resulting from repetitive stressful stimuli under the accident analysis. This test requires that the claimant show that he was subjected to more stress and strain than the "average employee," or that the stress he experienced was unusual with respect to the strains of employment life generally.[83] This requirement implies an element of "unexpectedness;" i.e., the employee did not embark upon this particular occcupation with the expectation that she would be subjected to such a degree of stress.

Such "unusual job stress" was found in the case of *Swiss Colony v. Dep't of ILHR*[84] where a seasonal-business purchasing agent was placed under a new supervisor after a period of about nine years on the job.[85] The length of service provided by the employee prior to the appearance of the new supervisor and the fact that the new supervisor was not in place when the claimant originally interviewed for the job provide the requisite "unexpectedness." But the stressful stimuli occasioned by the new supervisor were also found to be "unusual." The new supervisor "was negative, brusque, and belittling, especially to women, and . . . he challenged and belittled any decision that [she] would make."[86] Other employees in the claimant's workplace testified that the purchasing agent's job was "unusually nerve-racking and subjected her to far greater pressures and tensions than those experienced by the average employee."[87] The case shows that a court using the "average employee" test tends to rely upon the testimonial evidence provided by other employees at the enterprise involved to make its comparison. A true "average employee" test, however, would

occupational disease be caused by a "process" unique to the employment. *Id.* at 262-63, 586 P.2d at 1091-92. Thus, for example, lifting heavy objects is not a condition peculiar to the employment because other kinds of employment involve the lifting of heavy objects. *Id.* at 263, 586 P.2d at 1092. Also, the female plaintiff's depression, caused by harassment of male employees, is not linked with the "process" used by the employment, and is not compensable. *Id.*

83. *Swiss Colony*, 72 Wis. 2d at 46, 240 N.W.2d at 130; *see supra* note 67 and accompanying text.

84. *Id.* at 49, 52, 240 N.W.2d at 131.

85. *Id.*

86. *Id.* at 52, 240 N.W.2d at 131.

87. *Id.*

make a comparison using the evidence provided by "average" employees across the broad spectrum of all industries and occupations. Also, accepting the testimony of neighboring workers rather than making a bona fide effort to investigate their work situations objectively could result in a less accurate survey. Testimonial evidence supplied by proximately located workers might be tainted with dislike or envy.

This method of ascertaining "unusual" stress may not be adequate in all instances. Suppose there is a working environment where no two employees perform substantially the same duties. An employee claiming that he is subject to stress has no way of showing that he is being subjected to stress in a degree greater than "the average employee," or that his stress is different from the "countless emotional strains and differences that [other similarly situated] employees encounter daily . . . ."[88] This will be especially true for management employees near the top of the hierarchical corporate structure; or for those near the bottom, such as a janitor or the only secretary in an office. If such an employee has been subjected to stress, there will be no other employees within the organization or enterprise to which the court may compare his stress level. Lacking such a comparison, the court is likely to discount the possibly extraordinary strains and pressures of the employee's work environment as a natural incident of his occupation and, not finding the "unusualness" necessary to the accident analysis, deny compensation.[89] As one court has held, there can be no finding of an accident where the stress was a "disease resulting from the ordinary and generally recognized risks incident to a particular employment, and usually from working therein over a somewhat extended period."[90]

The "average employee" test in practice does not take into account the possibility that workers at an individual enterprise could be subject to an inordinate degree of stress; e.g., tight work deadlines, the need to work long hours to make a decent wage, constant harassment and supervison by management. The "average" test also bypasses the argument that workers in an entire occupation could be subject to extraordinary stress which might lead to neuroses or physical ailments, by terming stress a condition resulting from the very nature of their employment, and thus

88. *School Dist. #1*, 62 Wis.2d at 378, 215 N.W.2d at 377.
89. *School Dist. #1*, 62 Wis.2d 370, 215 N.W.2d 373.
90. Goldberg v. 954 Marcy Corp., 276 N.Y. 313, 315, 12 N.E.2d 311, 313 (1938).

lacking in "unusualness." The levels of stress prevailing in other enterprises and industries must be considered in order to determine whether the stress experienced by the claimant is "unusual" compared to the stress of employment generally.

VI. POTENTIAL BENEFITS OF THE "OCCUPATIONAL DISEASE" ANALYSIS

The term "occupational disease," to review, is defined as "any disease arising out of exposure to harmful conditions of the employment, when these conditions are present in a peculiar or increased degree by comparison with employment generally."[91] Diseases resulting from "physically" hazardous conditions of employment to which all employees engaged in a particular occupation or "process" of work are subject, have been widely compensated as occupational diseases, even where these conditions are neither unusual nor unexpected.[92] Because stress can inhere in a particular job category, workplace or industry, the nature of stress reactions makes them more suitably compensated as occupational diseases than as accidents. The occupational disease analysis, consequently, would provide a more equitable compensation remedy for injuries resulting from excessively stressful conditions than the accident analysis.

The use of an occupational disease standard to deal with stress-related claims would allow injuries that are due to "mental stimuli" to be treated on the same basis as are injuries owing to "physical stimuli." Analyzing stress-related injuries as accidents means that mental and physical injuries resulting from "mental stress" will only sometimes be compensated if the claimant was pre-disposed to the injury. Since the stress must be "unusual" as to the worker's normal employment life or to the average worker, a claimant with a pre-existing neurotic condition or a latent disease who was disabled as a result of a work-related stress that would not have disabled an average employee will not get an award. But if "unusualness" were not a requirement, the claimant would need to prove only that the conditions of his employment caused the injury, and that the stress involved was greater

91. 1B A. LARSON, *supra* note 2, § 41.00.

92. *Id.* § 41.80; U.S. CHAMBER OF COMMERCE, *supra* note 3, at vii (asbestosis, byssinosis, black lung disease).

than that of everyday non-employment life.[93] Injuries caused by physical stimuli are thus treated under "accident" law; normally the claimant need not show more than that his customary employment duties caused the injury, and that these duties were more strenuous than those encountered in everyday life.[94] Occupational disease law generally holds that "when distinctive employment hazards act upon . . . preexisting conditions to produce a disabling disease, the result is an occupational disease."[95] If stress were examined as an occupational disease, the claimant would need to show only that the injury was caused by the employment, and that the employment-related stress was greater than that of everyday non-employment life. The stress present in the workplace would not be required to be disabling to the average worker or with respect to a worker's normal stress in order for a claimant to recover. Consequently, occupational disease treatment of stress-related claims would result in compensation commensurate with that awarded to claims of disabilities resulting from physical stimuli where an accident analysis is applied.

Occupational disease claims are subject to an extra requirement not involved in accident claims. An occupational disease may not be "an ordinary disease of life."[96] There are two ways in which an occupational disease may be distinguished from an "ordinary disease of life." The harmful conditions of employment

93. In the case of psychoneurotic injury, however, it may be difficult even for psychiatrists to estimate the probability that the injury would have occurred outside the employment. Comment, *supra* note 3, at 1142, 1143. Thus, it may be best in stress-related cases to require simply that there be a showing of a substantially higher level of stress in the employment than outside it, and to infer causation. This would enable courts and experts to avoid struggles with "the complex etiology" of these disorders. *Id.* at 1142. *See* Smith v. Fremont Contract Carriers, Inc. 218 Neb. 652, 662, 358 N.W.2d 211, 218-19 (Neb. 1984), drawing inference that since highway accident led to a high level of stress, thus causing a substantial increase in the claimant's blood pressure, the accident amounted to a greater strain than that found in non-employment life.

94. *See supra* note 68 and accompanying text.

95. 1B A. LARSON, *supra* note 2, §§ 41.00, 41.63.

96. *See* Matter of Compensation of James, 290 Or. 343, 624 P.2d 565 (Or. 1980) "If [an] off-the-job condition or exposure is a condition substantially the same as that on the job when viewed as a cause of the particular kind of disease claimed as an 'occupational disease,' it precludes the claim . . . ." *Id.* at 350, 624 P.2d at 569. In that case, the claimant's confrontations with her supervisor were a stress to which she was not ordinarily subjected or exposed other than during her regular employment.

must be distinctive either in kind,[97] or present in greater degree[98] than in everyday life or in employment generally.

A hazardous job condition may be found to be present in greater degree than in everyday life and employment generally even where the resulting disability could also have been contracted by a person in the course of non-employment life. For example, where the repeated strain of doing heavy lifting and repetitive work is part of the job in a factory, resulting tenosynovitis has been held to be a compensable occupational disease even though people who do not work in factories and the general public may also contract tenosynovitis.[99] The disease is compensable because heavy lifting is a strain of a greater degree than that presented in everyday life and employment generally. Thus far, in physical stimuli cases, courts have ruled that the reaction itself may be one which is occasioned in some people as a result of normal everyday life as long as "there is a recognizable link between the nature of the job performed and an increased risk in contracting the occupational disease in question."[100]

97. Some examples of hazards encountered in the workplace which differ in kind from those found outside it are "unusual germs, poisons, chemicals, fumes, dusts, germs, spores . . . ." 1B A. LARSON, *supra* note 2, § 41.33(a). But where a worker contracts an infectious disease from another employee at the place of employment, this is not a compensable occupational disease, because the risk of contracting illnesses in the workplace is not different in kind from the risk present outside it. Paider v. Park East Movers, 19 N.Y.2d 373, 227 N.E.2d 40, 280 N.Y.S.2d 140 (1967) (quoting Matter of Harman v. Republic Aviation Corp., 298 N.Y. 285, 290, 82 N.E.2d 785, 787 (1948)). "Claimant's disease resulted not from the ordinary and generally recognized hazards incident to a particular employment, but rather from the general risks common to every individual regardless of the employment in which he is engaged." *Id.* at 379, 227 N.E.2d at 43, 280 N.Y.S.2d at 144. *But see* dissenting opinion in Paider: closely confined and poorly ventilated truck cab encouraged transmission of the disease. *Id.* at 383-84, 227 N.E.2d at 45, 280 N.Y.S.2d at 147-48.

98. Goldberg v. 954 Marcy Corp., 276 N.Y. 313, 12 N.E. 311 (1938). *But see* Marable v. Singer Business Machines, 92 N.M. 261, 586 P.2d 1090 (N.M. Ct. App. 1978).

99. Sanyo Mfg. Corp. v. Leisure, 12 Ark. App. 274, 276, 279-80, 675 S.W.2d 842, 844 (1984). *See* Lumley v. Dancy Const. Co., 77 N.C. App. 114, 339 S.E.2d 9 (1986), where defendants argued that adventital scarring of the ulnar arteries, brought on by holding a jackhammmer in place for prolonged periods, was not "peculiar" to the plaintiff's occupation of carpenter's helper. The court, in finding for plaintiff, cited Booker v. Duke Medical Center, 297 N.C. 458, 256 S.E.2d 189 (1979):

> The phrase, 'peculiar to the occupation,' is not here used in the sense that the disease must be one which originates exclusively from the particular kind of employment in which the employee is engaged, but rather in the sense that the conditions of that employment must result in a hazard which distinguishes it in character from the general run of occupations . . . .

Id. citing Le Lenko v. Wilson H. Lee Co., 128 Conn. 499, 503, 24 A.2d 253, 255 (1942)).

100. Sanyo Mfg. Corp. v. Leisure, 12 Ark. App. at 279, 675 S.W.2d at 844.

The "mental stimuli" concept fits neatly within the "greater degree" category of occupational disease analysis: stress can be present in the workplace in a much greater degree than outside it, even though it is present both at work and in the non-work environment. Consequently, as long as stress-related reactions are occasioned by stimuli present to a greater degree than that present outside the workplace, the reactions should be classsified as compensable "occupational diseases." Of course, in some cases, judges could be justified in determining that stress in the workplace was not present to any excessive degree; and thus that a reaction to it was only a non-compensable "ordinary disease of life."

Courts should not be too hasty, in examining claims for on-the-job stress reactions, to accept the "ordinary disease of life" defense to discount employment stress factors as stimuli that are present in an equivalent degree in everyday life, merely because *symptoms* of employment stress manifest themselves outside the workplace as well as within it.[101] Since people who are subject to stress on the job sometimes bring frustration and hostility home with them, negative social behavior can result during non-working hours.[102] Examples of such symptoms are alcohol dependency and divorce.[103]

Also, where a domestic quarrel or drug overdose, for instance, brought on by employment stress causes some stress reaction actually occurring *outside* the work environment, the claimant should be given the chance to show that the substantial cause was tension and strain from the job. If he does so, an award should be made.[104] If the court does not take a careful look at the facts, a

101. Outside the workplace, workers experiencing stress sometimes turn to alcohol and drugs. J. STELLMAN & S. DAUM, *supra* note 1, at 90-92. Others exhibit risk-taking behavior within the work environment and without it. Some react with violent or antisocial behavior. However, just because some stress reactions are manifested outside the working environment does not mean that their cause is confined to a worker's personal life. LENNART LEVI, *supra* note 1, at 75-76.

102. LENNART LEVI, *supra* note 1, at 75.

103. *Id.*

104. *See* State Accident Ins. Fund Corp. v. McCabe, 74 Or. App. 195, 702 P.2d 436 (1985) (award was made for claimant's disability resulting from an aneurysm rupture which occurred during sexual intercourse, because it had been the stress and strain of long hours and rumors of financial corruption that led to the weakening of the arterial walls). *See also* Comment, supra note 3, at 1144, noting superfluity of the requirement that an injury occur during working hours and in the workplace, as long as causality is shown by the "arising out of" requirement.

decision could be reached that a heart attack directly resulting from a marital quarrel, for example, was due merely to an ordinary stress-producing event of life, without taking into account the stress accumulated from the occupation. Both a pre-disposition to a severe mental reaction from such an event and the onset of the fight itself, however, could be caused indirectly and substantially by a stressful occupation.[105] As a result, the simple fact that an acute stress reaction may be observed outside the job environment does not necessarily mean that the stressors did not originate in the workplace. Thus, where symptoms of stress are evident outside the work environment, or where a stress-related injury occurs outside employment, the stress involved should not necessarily be regarded as "an ordinary disease of life."

Wider compensation for stress-related claims would provide an incentive for employers' efforts to reduce stress in the workplace. The present state of affairs provides the employer with no incentive to work on reducing stresses that are hard to detect, or to create a more bearable or pleasant working environment. The "unusualness" requirement of the accident analysis generally means that an employee will not be given an award for stress unless it is induced by a source that was relatively easy for the employer to remove, such as a supervisor prone to harass his underlings. As long as disabilities resulting from stressful conditions which may be seen as "peculiar"[106] to certain occupations go uncompensated, the employer has no financial incentive to eliminate them.

VII. CONCLUSION

This Note argues that the accident analysis is not an appropriate framework for adjudicating the stress-related claims of employees. Under the accident analysis typically employed by the courts, an arbitrary distinction is drawn between "physical" and "mental" stimuli. Sometimes the distinction appears to be twisted in order to blame the claimant for the stressful stimuli

105. LENNART LEVI, *supra* note 1, at 75.

106. 1B A. LARSON, *supra* note 2, § 41.10. An occupational disease is one "which results from the nature of the employment, and by nature is meant . . . conditions to which all employees of a class are subject, and which produce the disease as a natural incident of a particular occupation, and attach to that occupation a hazard which distinguishes it from the usual run of occupations and is in excess of the hazard attending employment in general." *See also* Goldberg v. 954 Marcy Corp., 276 N.Y. at 319, 12 N.E. at 313.

present in his workplace. The classification of a stimulus as mental prevents a worker's claim from being compensated as readily as a claim involving a physical stimulus. Mental stimuli are generally required to be "unusual" for the average worker or for the particular employee's normal work stress. Physical stimuli, in contrast, need only be "unusual" when compared with non-employment life. Since a high degree of stress is endemic to certain occupations and industries, and since stress builds up gradually over time, occupational stress would be more naturally and fairly treated as an occupational disease than as an accident under the workmen's compensation laws.

It is feared that the heavy incidence of occupational stress in particular industries or areas would open the "floodgates to numerous fraudulent claims," overwhelming the compensation system.[107] The availability of testimonial[108] and objective[109] proof, however, should dispel worry about fraud. Also, the use of the occupational disease analysis for stress claims will not turn the workmen's compensation system into a "general health insurance measure," because that analysis requires that the stress of employment be *greater than* the stresses of everyday non-employment life.

Uniformity in recognizing the "mental stimuli" of stress as an occupational disease would spread the burden among the states. Uniformity would enable employers to pass costs of increased insurance on to consumers more readily, as all other employers would be raising prices similarly.[110] Thus, a particular employer, such as a telephone company, who found it necessary to subject his employees to a considerable degree of stress and strain as a condition of working for him, would not go out of business in compensating their claims.

107. *School Dist. #1*, 62 Wis.2d at 374, 215 N.W.2d at 377.

108. *See supra* note 87 and accompanying text.

109. *See supra* notes 16, 46 and accompanying text.

110. Furthermore, imposition of higher rate costs on the employer could be justified in terms of the humanitarian purposes of shifting the risk, as between two innocent parties, to the one who can best bear or distribute the cost. Whether such increased costs constitute an actual burden upon the employer, or whether he can pass the cost on to consumers, suppliers, or employees, depends on a variety of factors, such as the employer's monopoly position, growth rate, stage of development, degree of competition between similar industries and their comparative accident costs, and the flexibility of output, demand, and resource supply. Comment, *supra* note 3, at 1143.

Finally, the even-handed, uniform treatment of mental stimuli and physical stimuli claims would also better fulfill the rehabilitative and remedial goals of the workmen's compensation system, and would abolish the tendency reminiscent of tort law to blame the worker, contrary to the no-fault principle of the system, for stressful stimuli induced by the work environment.

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