Workers' Compensation and High Stress Occupations: Application of Wisconsin's Unusual Stress Test to Law Enforcement Post-Traumatic Stress Disorder

Lee Anne Neumann

Follow this and additional works at: http://scholarship.law.marquette.edu/mulr

Part of the Law Commons

Repository Citation
Available at: http://scholarship.law.marquette.edu/mulr/vol77/iss1/7

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obriens@marquette.edu.
WORKERS' COMPENSATION AND HIGH STRESS OCCUPATIONS: APPLICATION OF WISCONSIN'S UNUSUAL STRESS TEST TO LAW ENFORCEMENT POST-TRAUMATIC STRESS DISORDER

I. INTRODUCTION

In May 1990, a police officer on duty in Port Washington, Wisconsin, found himself confronted with a situation uncommon to a small community. He was called to a scene involving a 17-year-old who threatened several officers with a knife. As the youth lunged toward him, the officer pulled his gun, shot, and wounded the youth. Following this incident, the officer was unable to work and engaged in "uncharacteristic behavior" including using "white powder which he believed to be cocaine," firing a gun into a basement wall, and exposing himself to a video camera at a local carwash. Diagnosed with a mental disability known as Post-Traumatic Stress Disorder (PTSD), the officer has been off-duty since the incident and has filed a claim for lifetime disability benefits. The city of Port Washington is contesting the case.

The risk of violent encounters in the area of law enforcement is all too common in today's crime-filled society. In fact, the case described above may even be deemed "routine" in a high crime district. However, in the small-town environment of rural Wisconsin, a shooting is anything but routine.

When confronted with a life-threatening situation, many officers develop stress-related mental conditions that often render them incapable of performing their jobs. Less than twenty years ago, an employee's chance of success in gaining workers' compensation benefits for a mental illness was slim. Recently, however, many courts have recognized

2. Id.
3. Id. at B2.
4. Id. at B1.
8. Id. at 447.
mental illness, absent a physical component, as a compensable injury.\textsuperscript{10} This has resulted in an explosion of work-related stress claims nationwide.\textsuperscript{11}

Although mental illnesses have gained greater recognition in recent years, they are still treated with skepticism.\textsuperscript{12} A diagnosis of the mind, unlike an examination of a physical condition of the body, is often criticized as being less than an "exact science."\textsuperscript{13} This criticism has been most recently directed toward PTSD.\textsuperscript{14} Due to its classification as a distinct clinical entity and its accompanying objective criteria, attorneys

cases date from 1971 or later." \textit{Id.} The exceptions include: Butler v. District Parking Management Co., 363 F.2d 682 (D.C. Cir. 1966) (involving schizophrenic reaction after 20 years as a parking lot attendant); American Nat'l Red Cross v. Hagen, 327 F.2d 559 (7th Cir. 1964) (awarding benefits to claimant who developed schizophrenia due to the stress he endured at Red Cross); Carter v. General Motors Corp., 106 N.W.2d 105 (Mich. 1960) (awarding benefits to employee for mental injuries caused by foreman's harassment). It should be noted that "workers' compensation," instead of "worker's compensation" or "workmen's compensation," will be used throughout this article, unless otherwise specified by the source.

\textit{Id.} \textsuperscript{11} § 42.25(a). Larson notes that in California, where the most liberal approach to compensation for mental injuries has been adopted, the number of stress cases increased from 1282 in 1980 to 6812 in 1986. \textit{Id.} A study published by the California Workers' Compensation Institute in 1988 indicated that the actual number of claims may be 10 times higher and that they may account for 17% of all lost-time injuries. \textit{Id.} \textsuperscript{10} \textit{Id.}; \textit{see also Peter S. Barth, Workers' Compensation for Mental Stress Cases, 8 BEHAV. SCI. & L. 349, 358 (1990); Thomas S. Cook, Workers' Compensation and Stress Claims: Remedial Intent and Restrictive Application, 62 NOTRE DAME L. REV. 879, 895 (1987); Eric H. Marcus, The Anatomy of Litigation Involving Mental Distress, TRAUMA, Aug. 1988, at 13; Fred J. Pompeani, Mental Stress and Ohio Workers' Compensation: When Is a Stress-Related Condition Compensable?, 40 CLEV. ST. L. REV. 35, 36 (1992); Derik R. Girdwood, Comment, \textit{Can I Collect Workers' Compensation Benefits If My Job Drives Me Crazy?}, 1992 DET. C.L. REV. 591, 596; Victoria L. Ruhga, Comment, Mental Stress and Workers' Compensation in Nebraska, 69 NEB. L. REV. 842, 843 n.3 (1990); Nancy Blodgett, Legal Relief from Tension: Work-Induced Stress Spurs Workers' Comp Claims, A.B.A. J., Oct. 1, 1986, at 17, 17 (indicating that stress claims represented only 4.7% of the nation's occupational disease cases in 1980, but more than doubled in the following three years); Lawrence P. Postal & Mary W. Adelman, \textit{Stress Claims in the Workplace}, For Def., Aug. 1990, at 5, 5.

See Cook, supra note 11, at 880.


have used its versatility in a variety of contexts. As PTSD claims increase, the controversy surrounding its validity continues to divide both legal and medical communities.

In addition to the academic debate, tax-paying citizens often express discontent with the toll workers' compensation claims exact on the community. Addressing these concerns, courts throughout the nation have constructed schemes to limit the splurge of stress-related claims. Wisconsin's adoption of the "unusual stress" test is one such limit. Under this approach, an employee's mental condition resulting from either a single incident or gradual environmental exposure is compensable only if the stressor producing the condition is "unusual." Thus, the diagnosis of any mental disease, including PTSD, will not be compensable unless it arises from unusual circumstances.

A problem arises in assessing PTSD, which by definition is a condition brought about by an event "outside the range of usual human experience and that would be markedly distressing to almost anyone." Under this definition, compensation of all verifiable work-related PTSD claims would seem to be allowed, particularly those resulting from law enforcement activities. In spite of PTSD's medical definition, however, the stressor producing the illness must still meet the legal test of "unusualness." Courts continually grapple with the meaning of unusual.


15. See Michael M. Duran, Comment, Nothing New: Unwrapping the Packaging of Post-Traumatic Stress Disorder, 33 LOY. L. REV. 1076, 1077 (1988); see also Eric H. Marcus, Post-Traumatic Stress Disorder: Facts and Myths, TRAUMA, Dec. 1990, at 49, 51 (discussing other contexts in which PTSD occurs, such as rape).


17. Mann & Neece, supra note 7, at 452.

18. See School Dist. No. 1 v. Department of Indus., Labor & Human Relations, 62 Wis. 2d 370, 215 N.W.2d 373 (1974). In School District No. 1, the court set forth the following test: [M]ental injury nontraumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience. Only if the "fortuitous event unexpected and unforeseen" can be said to be so out of the ordinary from the countless emotional strains and differences that employees encounter daily without serious mental injury will liability under ch. 102, Stats., be found.

Id. at 377-78, 215 N.W.2d at 377.


21. See Jenson, 161 Wis. 2d at 268, 468 N.W.2d at 7. The court stated:
the environmental stressor compared to the stressors of everyday life, or simply those stressors arising within that particular occupation? Wisconsin case law provides only a partial answer. The stress is to be compared to employees within the same occupation.22 This response leaves several questions unanswered. How are employees in unusually stressful occupations, such as law enforcement, to be compensated for mental illness? Further, how are employees within the same high stress occupation, but employed in entirely different environments, to be compensated? For example, should a police officer employed in a small town with relatively few violent crimes be compared to a police officer in a large city inundated with violent crime?

These are the most recent issues confronting courts nationwide. Due to the relatively few workers' compensation cases dealing primarily with police stress, much confusion exists as to whether police personnel may be compensated for stress-related injuries.23 Applying Wisconsin's unusual stress test to situations where high stress is “normal” could result in an elimination of valid claims. Thus, although the courts have recently clarified the unusual stress test to determine that the comparison be within the particular occupation, the test needs further adaptation to address the compensability of mental disability in high stress occupations.

This Comment will address the prevalence of stress in law enforcement professions and the increased exposure to violent environmental stressors in those professions. Specifically, the discussion will focus on the significant growth of PTSD claims in public safety professions. An analysis of the recent development of the unusual stress test in Wisconsin's workers' compensation system will also be addressed. Finally, a proposal, as applied to law enforcement related PTSD cases, will be presented that clarifies the meaning of “unusual” in the context of high stress occupations.

The injury must be an egregious one that is to be tested not by the severity of the distress or disabling manifestations but by the severity or traumatizing likelihood of the particular causative circumstances of employment. It is not an 'injury' no matter how disabling unless it arises from unusual occupational stresses.

Id.

22. See Probst v. Labor & Indus. Review Comm'n, 153 Wis. 2d 185, 191, 450 N.W.2d 478, 480 (Ct. App. 1989). The court's holding, although not clearly stated, indicated that the Commission was correct in comparing the employee's situation with that of other "similarly situated" employees, rather than focusing on the nature and magnitude of the stresses and strains endured by the claimant alone. Id.

23. Mann & Neece, supra note 7, at 448.
II. STRESS ARISING IN LAW ENFORCEMENT OCCUPATIONS

Recently, stress in the workplace has become the object of considerable attention, both from the perspective of the employer and the laborer. The media's devotion to the issue has resulted in its recognition as a nationwide problem. Experts cite several reasons for the increase in workplace stress, not the least of which includes the increased complications of contemporary life. Advances in technology leading to a faster-paced society, the decline in family support systems, and the recent augmentation of domestic and community violence serve as additional burdens on today's worker. However, regardless of the causes of workplace stress, its effects are frequently devastating.

Nowhere is this more true than in the area of law enforcement. Police work is widely recognized by the courts and the legislature as inherently more stressful than most occupations. This is evidenced by provisions within disability statutes creating a presumption of work-relatedness in cases of physical injuries, such as heart attacks. Although studies indicate that police officers are trained to respond nonemotionally to dangerous environmental stressors,

---


25. See id.

26. Ruhga, supra note 11, at 843. Reasons for the increase in mental stress claims include: (1) the inherent difficulty arising in contemporary life and the prevalence of industrialized workplaces, (2) the efforts of industrial psychologists to increase the awareness of stress at work, (3) the increase in two-wage earner families, (4) the advances in medical technology allowing us to better understand mental injuries, and (5) the disappearance of the stigma associated with mental illness. Id.; see also Blodgett, supra note 11, at 17 (indicating that contemporary life is more stressful).

27. See Blodgett, supra note 11, at 17; Ruhga, supra note 11, at 843.

28. See Pompeani, supra note 11, at 36 (indicating that mental injuries are often more harmful than physical injuries).


30. Norvell et al., supra note 29, at 75. Job stress has been implicated as the cause of several physical illnesses in police officers, including "cardiovascular diseases, digestive dysfunctions (for example, ulcers, colitis, indigestion), hemorrhoids, headaches, and hypertension." Id. Studies conducted among professional occupations revealed that law enforcement personnel rank highest in heart disease and have an increased risk of mortality for cancer. Id.

reality reveals that mental illness is pervasive among law enforcement officers.32

The adverse consequences of such mental diseases on an officer's well-being include an increased number of divorces, disruption of family life, alcoholism, and suicide.33 Stress may manifest itself in virtually any type of physical disorder as well, including "every ailment from headaches and sinus attacks to shrinking thalmuses, spastic colons, and grinding teeth."34 Further, the societal effect of mental stress is demonstrated in performance anxieties, excessive aggression, police malpractice, and increased citizen complaints.35

In addition to the complications of contemporary life, which are problematic in any profession, several environmental stressors unique to police work are implicated as triggers to the onset of an officer's mental illness. Law enforcement officers engage in a continual battle between freedom and domination by societal controls.36 Employed in a profession continually monitored by the media and inundated with strict legal restrictions, police officers often perceive their job challenges as insurmountable.37 Psychologists indicate that the probability of failure on the force is high because "many crimes are never solved, many criminals not apprehended, and many cases plea bargained or dismissed in court."38 Media images emphasizing the strength, heroic efforts, and power of police officers often result in the suppression of an officer's emotional releases that are necessary to confront traumatic events.39

32. See Mann & Neece, supra note 7, at 448. Based on a 1980 study of the 130 most common jobs in Tennessee, police officers developed mental illness more frequently than employees in other occupations. Id.

33. John P. Crank & Michael Caldero, The Production of Occupational Stress in Medium-Sized Police Agencies: A Survey of Line Officers in Eight Municipal Departments, 19 J. CRIM. JUST. 339, 339 (1991); W. Clinton Terry III, Police Stress: The Empirical Evidence, 9 J. POLICE SCI. & ADMIN. 61, 67 (1981); see also Mann & Neece, supra note 7, at 448 (discussing the suicide rate of police officers in Tennessee). For a discussion of the prevalence of suicide in law enforcement officers, see John M. Violanti, Stress Patterns in Police Work: A Longitudinal Study, 11 J. POLICE SCI. & ADMIN. 211, 211 (1983) (survey indicates that among professional occupations, such as lawyers, physicians, and professors, police officers ranked twice as high in the number of suicides). A 1976 study of New York police officers revealed that in one year, 1500 police officers required psychiatric care for stress problems and that police compensation claims were six times the rate of other occupations. Id.

34. Crank & Caldero, supra note 33, at 339 (citation omitted).

35. Terry, supra note 33, at 67.

36. Violanti, supra note 33, at 211.

37. Id.

38. Id. at 211-12.

Although every law enforcement officer is confronted with these stressors, the manifestation of a mental illness will vary in form and magnitude depending on the social and psychological attributes of the individual.\(^4\) Regardless of the subjectivity of mental illness, discussions of police stress have focused on four general categories of stressors: (1) external, (2) internal, (3) task-related, and (4) individual.\(^4\) External stressors include disillusionment with the justice system as a whole, particularly the perceived leniency of court decisions, negative media coverage, and disapproval of decisions arising out of government and administrative bodies.\(^4\) Internal stressors encompass departmental problems, ranging from poor police training and below-average equipment to unclear reward incentives and career development guidelines.\(^4\) Task-related stressors include traditional problems erroneously viewed as the most frequent source of stress on the job, such as fear, danger of physical harm, exposure to the violence, and unmanageable work loads.\(^4\) Individual stressors embrace an officer’s personal fears regarding individual performance and success.\(^4\)

Interestingly, contrary to the widely held notion that the majority of police stress arises out of exposure to a dangerous environment, studies reveal that the most frequent source of an officer’s stress arises from internal departmental decisions, not task-related or “street” stress.\(^4\) This result can be attributed to the desensitization and emotional detachment officers develop as a coping mechanism.\(^4\) Police officers view violence and death in a different light than most individuals, and thus, danger is considered part of the everyday job.\(^4\)

Whereas organizational stressors occur as the most “frequent” source of stress, those events continually described as “most stressful” include task-related stressors such as violent situations and the use of force.\(^4\) Experiencing the violent death of a partner, being dismissed from duty,
taking a life in the line of duty, shooting someone in the line of duty, and coping with the suicide of an officer who is a close friend are routinely ranked as the most stressful events encountered by law enforcement officers.\textsuperscript{50} Considering the nature of the most stressful law enforcement situations, the likelihood of police officers developing a mental illness may be greater than in most occupations.\textsuperscript{51}

The recent flood of cases across the country evincing mental illness due to task-related stressors is a clear indication of the toll environmental stress has taken on the public safety profession. Issues involving the dismissal of officers for engaging in criminal conduct have arisen in several states. In Pennsylvania, two dismissals of Philadelphia police officers were changed to medical discharges due to work-related insanity.\textsuperscript{52} In the 1986 case \textit{Civil Service Commission v. Dillon},\textsuperscript{53} the officer, a paranoid schizophrenic, was medically discharged after he shot and wounded two people.\textsuperscript{54} One year later, the Commonwealth Court of Pennsylvania decided \textit{Perry v. Philadelphia Civil Service Commission}.\textsuperscript{55} A police officer, suffering from mental illness due to job stress, threatened to kill the police commissioner.\textsuperscript{56} The \textit{Perry} court determined the case to be similar to \textit{Dillon} and awarded medical benefits.\textsuperscript{57}

The Colorado Court of Appeals recognized the implications of mental illness due to task-related stressors in \textit{City of Aurora v. Industrial Commission}.\textsuperscript{58} There, a police officer was awarded workers' compensation for PTSD due to his work as an undercover narcotics agent.\textsuperscript{59} The officer testified that the danger he endured during every narcotics transaction, which often forced him to sample the drugs he was buying, resulted in the use of drugs while off-duty and the eventual development of a mental illness.\textsuperscript{60}

\textsuperscript{50} James D. Sewell, \textit{The Development of a Critical Life Events Scale for Law Enforcement}, 11 J. POLICE SCI. & ADMIN. 109, 113 (1983); see also Mann & Neece, \textit{supra} note 7, at 449 (indicating that fatal shooting incidents and being called to the scene of a battered child rank as extremely stressful).

\textsuperscript{51} See Mann & Neece, \textit{supra} note 7, at 449.


\textsuperscript{54} \textit{Id.} at 870.


\textsuperscript{56} \textit{Id.} at 617.

\textsuperscript{57} \textit{Id.} at 618.

\textsuperscript{58} 710 P.2d 1122 (Colo. Ct. App. 1985).

\textsuperscript{59} \textit{Id.} at 1124.

\textsuperscript{60} \textit{Id.} at 1122-23.
Many states have recognized the compensability of mental disabilities arising from occupational dangers, regardless of whether the illness led to the commission of a crime. In 1988, in one of New York's most publicized police cases, an officer was granted compensation for stress-related mental illness arising from his work as an undercover investigator and decoy. He participated in over 1500 arrests during his sixteen-year career and had numerous dangerous encounters with drug dealers, including one encounter in which he was forced to inject heroin at gunpoint.

Recently, Pennsylvania courts have given the issue of PTSD claims a substantial amount of consideration. In 1987, in *Globe Security Systems Co. v. Workmen's Compensation Appeal Board*, a liquor store security guard's widow was awarded workers' compensation benefits after her husband shot a robbery suspect, suffered an immediate psychotic episode, and then shot himself. Three years later, in *City of Scranton v. Workmen's Compensation Appeal Board*, the court awarded benefits to a widow of a police officer who committed suicide as a result of the stress arising out of his assignment to investigate a serial killer. In 1991, the Commonwealth Court of Pennsylvania decided *Squilla v. Workmen's Compensation Appeal Board*. In *Squilla*, a police officer was reprimanded, both orally and in a department report, for his unsatisfactory performance. After the reprimand, the officer developed a mental disability. Although the court conceded that his illness was work-related, it denied benefits because the departmental stressors were not unusual for "that kind of job." *Squilla* varies from previous cases because the claim involved organizational, rather than task-related stressors.

---

61. See Bale, supra note 6, at 415 (citing *After Mental Collapse, Officer Sues for Pension*, N.Y. Times, Sept. 3, 1988, at 28).
62. Id.
65. Id. at 546.
67. Id. at 856.
69. Id. at 540.
70. Id. at 541.
71. Id. at 543.
Although Wisconsin courts are likely to face similar cases in upcoming years, there has been only one published case concerning the mental disability of a police officer caused by stress of employment.\(^{72}\) In *Village of Random Lake v. Labor & Industry Review Commission*,\(^{73}\) the court of appeals considered the case of a one-man police department. The officer, required to work up to eighty or ninety hours per week, filed a claim for disability benefits due to chronic depression and anxiety disorder.\(^{74}\) Although the court did not decide whether the officer’s situation warranted compensation, it remanded the case with instructions to apply the appropriate unusual stress standard when deciding the police officer’s case.\(^{75}\)

The studies involving police stress and the recent flood of mental disability cases, particularly those involving PTSD, indicate that stress in law enforcement is increasing. In light of this evidence and the probability of facing similar decisions, Wisconsin courts require a clear understanding of the stress endured by law enforcement officers and of the unique aspects of the frequently occurring mental illness, PTSD.

III. The Development of PTSD in Law Enforcement Officers

A. History and Recognition of PTSD

PTSD is a psychological disturbance that originates in response to an event that is "outside the range of usual human experience and that would be markedly distressing to almost anyone."\(^{76}\) The overwhelming encounter usually involves a serious threat or harm to one’s life or physical integrity.\(^{77}\) The American Psychiatric Association specifically recognized PTSD as a distinct clinical entity in 1980 and incorporated its diagnostic criteria in the *Diagnostic and Statistical Manual of Mental Dis-

---

\(^{72}\) Although only one published decision exists, in 1991 the Labor and Industry Review Commission did decide this issue at the administrative level. *See* Nelis v. City of Racine Police Dep’t, No. 81-068636, 1991 WL 477077 (Wis. Labor Ind. Review Comm’n, May 6, 1991). In *Nelis*, a police officer applied for disability benefits after developing post-traumatic stress disorder as a result of the physical injuries and assaults he incurred on the job. *Id.* at *3.* The Labor & Industry Review Commission affirmed the decision of the Administrative Law Judge awarding the applicant duty disability benefits for his work-related injury. *Id.* at *1-2.*

\(^{73}\) 141 Wis. 2d 559, 415 N.W.2d 577 (Ct. App. 1987).

\(^{74}\) *Id.* at 561-62, 415 N.W.2d at 578.

\(^{75}\) *Id.* at 565, 415 N.W.2d at 580. The court did not address the merits of the case, but held that Wisconsin’s unusual stress test for worker’s compensation cases applied to duty disability pension cases as well. *Id.*


\(^{77}\) *Id.*
orders (DSM-III-R). This official recognition resulted in an explosion of publicity, both favorable and negative, regarding the concept of trauma and stress.

The discovery of PTSD arose from studies of victims of war, particularly Vietnam veterans. Commonly known as "shell shock," soldiers re-experienced the trauma of combat well after the war was over, some suffering its effects for the rest of their lives. Postwar America witnessed the reality of psychological trauma as manifested in the nervous condition of returning veterans, including flashbacks of the war, nightmares, paralysis, stammering, and general irritableness. Due to the consciousness-raising efforts of veteran groups, the medical community acknowledged PTSD as a new category of mental disorders that could be found throughout society.

PTSD, "the only psychiatric disorder defined in part by an environmental event," is estimated to occur in one-third to one-half of all civilians exposed to life-threatening trauma. Although almost "any environmentally-induced trauma which poses a realistic threat to life or physical integrity can precipitate PTSD," those events frequently pro-

---

78. See C.B. Scrignar, Post-Traumatic Stress Disorder: Diagnosis, Treatment, and Legal Issues 1, 7-9 (2d ed. 1988). In 1974, a committee on Anxiety and Dissociative Disorders worked together for several years to decide on a system of classification for anxiety disorders. Id. at 7-8. In 1980, PTSD was included as a distinct category in the third edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R). Id. at 8; see also April Harlton, Comment, The Compensability of Post-Traumatic Stress Disorder Under Oklahoma Workers' Compensation Laws, 25 Tulsa L.J. 815, 818 n.29 (1990) (indicating that the DSM-III-R is recognized as a primary source for psychiatric diagnosis).

79. Scrignar, supra note 78, at 1.
82. Id. at 22-23. Herman quotes the writing of a survivor of the First World War: Shell Shock. How many a brief bombardment had its long-delayed after-effect in the minds of these survivors, many of whom had looked at their companions and laughed while inferno did its best to destroy them. Not then was their evil hour; but now; now in the sweating suffocation of nightmare, in the paralysis of limbs, in the stammering of dislocated speech. Worst of all, in the disintegration of those qualities through which they had been so gallant and selfless and uncomplaining—this, in the finer types of men, was the unspeakable tragedy of shell-shock . . . .

Id. at 23.
83. Id. at 27-28.
86. Scrignar, supra note 78, at 60.
ducing trauma include car accidents, industrial accidents, the ingestion or absorption of chemical substances, criminal or sexual assaults, terrorism, natural or man-made disasters, and disaster site rescues. Despite its ubiquity, PTSD only preserves its validity if specific criteria, as determined by the American Psychiatric Association, are used in the assessment of cases.

B. Characteristics of PTSD in Law Enforcement Officers

The DSM-III-R outlines objective characteristics for evaluating both the environmental stressor and the symptoms it produces. These crite-

87. See id. at 42-60; Kiev, supra note 84, at 62.
88. DSM-III-R, supra note 20, at 250-51. The DSM-III-R sets forth the following criteria for PTSD:

A. The person has experienced an event that is outside the range of usual human experience and that would be markedly distressing to almost anyone, e.g., serious threat or harm to one’s life or physical integrity; serious threat or harm to one’s children, spouse, or other close relatives and friends; sudden destruction of one’s home or community or seeing another person who has recently been, or is being seriously injured or killed as a result of an accident or physical violence.

B. The traumatic event is persistently re-experienced in at least one of the following ways:
(1) recurrent and intrusive distressing recollections of the event (in young children, repetitive play in which themes or aspects of the trauma are experienced)
(2) recurrent distressing dreams of the event
(3) sudden acting or feeling as if the traumatic event were reoccurring (includes a sense of reliving the experience, illusions, hallucinations, and dissociative [flashback] episodes, even those that occur upon awakening or when intoxicated)
(4) intense psychological distress at exposure to events that symbolize or resemble an aspect of the traumatic event, including anniversaries of the trauma

C. Persistent avoidance of stimuli associated with the trauma or numbing of general responsiveness (not present before the trauma), as indicated by at least three of the following:
(1) efforts to avoid thoughts or feelings associated with the trauma
(2) efforts to avoid activities or situations that arouse recollections of the trauma
(3) inability to recall an important aspect of the trauma (psychogenic amnesia)
(4) markedly diminished interest in significant activities (in young children, loss of recently acquired developmental skills such as toilet training or language skills)
(5) feeling of detachment or estrangement from others
(6) restricted range of affect, e.g., unable to have loving feelings
(7) sense of foreshortened future, e.g., child does not expect to have a career, marriage, or children, or a long life

D. Persistent symptoms of increased arousal (not present before the trauma) as indicated by at least two of the following:
(1) difficulty falling or staying asleep
(2) irritability or outbursts of anger
(3) difficulty concentrating
(4) hypervigilance
(5) exaggerated startle response
ria aid attorneys and psychiatrists in assessing PTSD cases. In determining a case's validity, the criteria may be categorized into three general sources constituting a diagnosis of the illness: the environment, the perception, and the physical reaction.

First, a stressor producing PTSD in its victim arises from the environment. The law enforcement officer, often exposed to dramatic environmental stressors, is particularly susceptible to PTSD. Stressful events such as being shot at, shooting or killing someone in the line of duty, seeing a partner killed, and being physically threatened or having the officer's family physically threatened, are classified as environmental stressors capable of producing PTSD.

After the traumatic event, a mental image of the situation is perceived in the mind of the officer. This "imprint" results in visual images, flashbacks, dreams, and sudden actions, such as hallucinations or illusions, in response to the event as if it were recurring. This widely known "flashback" phenomena distinguishes PTSD from other anxiety disorders. In addition to flashbacks, law enforcement officers also suffer feelings of "isolation and alienation from fellow officers," experience "suspiciousness and mistrust of the public," and often become "overly cautious in police situations that were once routine."

---

(6) physiologic reactivity upon exposure to events that symbolize or resemble an aspect of the traumatic event (e.g., a woman who was raped in an elevator breaks out in a sweat when entering any elevator)

E. Duration of the disturbance (symptoms in B, C, and D) of at least one month.

Id.

89. Harlton, supra note 78, at 818-19.
90. See SCRIGNAR, supra note 78, at 16-32. Scrignar refers to the three categories as the "Three E's": Environment, Encephalic Events, and Endogenous Processes. Id. at 16; see also Duran, supra note 15, at 1080.
91. SCRIGNAR, supra note 78, at 16.
92. See Mann & Neece, supra note 7, at 449-50.
93. Id. In a 1986 study, 53 police officers were questioned about stressful on-the-job experiences. Id. at 449.

Of these 53 officers, 60% reported one or more event that was highly stressful . . . . Of these, 32% reported being exposed to three or more violent stressors. Post-traumatic stress disorder was diagnosed in 26% of the officers due to their encounters with violence. The percentage reporting PTSD was much higher for those who had encountered more than one violent stressor.

Id. at 449-50; see also Sewell, supra note 50 and accompanying text.
94. Kiev, supra note 84, at 62.
95. SCRIGNAR, supra note 78, at 18.
96. Id.
97. Mann & Neece, supra note 7, at 449.
The final factor of PTSD includes a change in the officer's internal body functioning. Nervousness, hypervigilance, nausea, dizziness, trembling, diarrhea, and physical discomfort often arise in the PTSD victim.

These symptoms, if occurring longer than one month, further evidence PTSD. A police officer's need for self-control often results in a lack of early treatment of PTSD, and thus, the symptoms continue long after the event occurred. After the stressful event, the officer may strive to perform well in future situations. PTSD symptoms often occur weeks after the initial event because "future stressful events build on top of the earlier traumatic stress that was not appropriately managed at that time." Further, re-exposing an officer to the same environment in which the stressor occurred often results in the development of common symptoms of PTSD, such as hyperalertness or exaggerated startle responses.

Although the DSM-III-R sets forth a structured set of objective criteria to facilitate evaluation of the illness, misuse and lack of adherence to the manual in the courtroom presents a continuing problem. To ensure a valid PTSD diagnosis, several detection measures are available through advances in the fields of medicine and psychiatry.

C. Detection of PTSD

Due to its relatively new introduction into the world of psychiatric illnesses, critics of PTSD often claim the DSM-III-R contains a lack of "valid diagnostic ratings." Lawyers may be tempted to use the DSM-III-R charts as a "checklist," ignoring that the manual was designed for clinical research and not necessarily to ensure that all legal requirements for mental disease are met. Further, when the DSM-III-R is in the hands of inexperienced individuals, "the apparent ease at arriving at a

98. SCRIGNAR, supra note 78, at 20-21. Scrignar describes the change in internal body functioning as endogenous events. Id. at 20. The anxiety the victim feels precipitates the uncomfortable feelings. Id.
99. Id.; see also Kiev, supra note 84, at 62.
100. See DSM-III-R, supra note 20, at 250-51.
101. See Mann & Neece, supra note 7, at 450.
102. Id.
103. Id.
104. See Sparr & Boehnlein, supra note 14, at 283, 290.
105. Harlton, supra note 78, at 820.
106. Sparr & Boehnlein, supra note 14, at 291.
107. See id. at 290.
diagnosis gives a false sense of security." Therefore, the use of experienced expert witnesses may aid in the interpretation of the relevant categories.

Psychological testing has been developed in an attempt to objectify the individual’s feelings. The Minnesota Multiphasic Personality Inventory Test is one such test that may detect fraudulent claims. A newer test, known as the “Impact of Event Scale,” is an examination of the victim’s feelings and a method to determine the severity of the illness. Other recently developed tests are designed to measure the validity or exaggeration of the individual’s symptoms.

Regardless of an objective set of criteria or psychological testing, the issue of causation continues to haunt medical and legal personnel. Debates rage among plaintiffs’ and defendants’ attorneys regarding the establishment of a causal connection between the mental disorder and the work-related stressor. In order to determine that other events, such as those associated with personal or family life are not causative of the illness, a showing that “a specific event occurred at work immediately preceding the manifestation of mental harm” serves to establish the requisite cause.

A valid diagnosis of PTSD and the establishment of a work-related cause is only half of an officer’s battle. In order to gain compensation for a mental illness in Wisconsin, the employee must meet the unusual stress test as well.

108. Id. at 291.
110. Harlton, supra note 78, at 820.
111. See Marcus, supra note 15, at 52-53.
112. See Harlton, supra note 78, at 821.
113. Id.
114. See infra notes 145-90 and accompanying text. Although Wisconsin recognizes PTSD as a compensable injury, no published case has analyzed the illness in the context of police work, or any other unusually stressful environment. See Miller Brewing Co. v. Labor & Indus. Review Comm’n, 173 Wis. 2d 700, 495 N.W.2d 660 (1993) (Where employee’s co-workers intentionally harassed him by making unexpected noises, the Wisconsin Supreme Court affirmed an order of the Labor and Industry Review Commission to award benefits for the aggravation of his pre-existing post-traumatic stress disorder he developed as a result of military service in Vietnam.), aff’d 166 Wis. 2d 830, 480 N.W.2d 532 (Ct. App. 1992).
IV. COMPENSATION OF MENTAL INJURIES IN WISCONSIN’S WORKERS’ COMPENSATION SYSTEM

A. Overview of Workers’ Compensation and Mental Injury

The workers’ compensation system arose out of an effort to provide medical and cash benefits for employees suffering from injuries incurred during the course of employment.\(^{115}\) Differing in two respects from the conventional damage suit, workers’ compensation actions eliminate fault on the part of the employer and grant payments according to a schedule based on the employee’s injury, rather than on damages inherent to the traditional personal injury lawsuit.\(^{116}\) In Wisconsin, as in most states, an employer is liable for the employee’s injury if, at the time the employee suffers an injury, the employee is performing job-related tasks.\(^{117}\) Provided that the injury arose by accident,\(^{118}\) employees are compensated for their injuries as well as loss of wage-earning ability.\(^{119}\) An employee’s remedy is exclusive, however, because an additional action in tort against the employer is prohibited.\(^{120}\) Thus, the burden of paying an employee’s benefits is placed on the employer because the employer is in the best position to absorb the financial responsibility by ultimately passing the cost on to consumers.

---

115. 1B Larson, supra note 9, § 1.00; see also Girdwood, supra note 11, at 593.
116. See 1B Larson, supra note 9, § 1.10.
117. See Wis. Stat. § 102.03(1) (1991-92). The statute lists the conditions for liability: Liability under this chapter shall exist against an employer only where the following conditions occur:
   (a) Where the employe sustains an injury.
   (b) Where, at the time of the injury, both the employer and employe are subject to the provisions of this chapter.
   (c) 1. Where, at the time of the injury, the employe is performing service growing out of and incidental to his or her employment.

Id.

118. Wis. Stat. § 102.01(2)(c) (1991-92) requires that the injury be caused by accident. The statute defines “injury” as:
   [M]ental or physical harm to an employe caused by accident or disease, and also means damage to or destruction of artificial members, dental appliances, teeth, hearing aids and eyeglasses, but, in the case of hearing aids or eyeglasses, only if such damage or destruction resulted from accident which also caused personal injury entitling the employe to compensation therefor either for disability or treatment.

Id.

120. See Wis. Stat. § 102.03(2) (1991-92), which states in part, “Where such conditions exist the right to the recovery of compensation under this chapter shall be the exclusive remedy against the employer, any other employe of the same employer and the worker’s compensation insurance carrier.”
The most recent workers' compensation litigation surrounds claims for psychological and mental disability caused by job-related stress. Stress claims are traditionally divided into three categories: mental-physical, physical-mental, and mental-mental. In a mental-physical claim, the worker alleges that a work-related mental stimulus, such as a sudden fright, results in a physical injury. A physical-mental claim involves a physical injury that results in a prolonged disability due to the employee's emotional stress surrounding the trauma. Both mental-physical and physical-mental claims are uniformly held to be compensable. However, mental-mental cases, also known as "stress claims," continue to divide workers' compensation courts nationwide. In these cases, workplace stress produces a mental illness, such as PTSD. Unlike mental illnesses arising from a physical trauma, or physical injuries resulting from a mental stimulus, mental injuries absent a physical component continually fight for recognition.

The recent deluge of cases flooding the system necessitates treating stress claims with apprehension. Stress cases raise several societal problems. First, the possibility of feigning an injury is often greater in the context of psychological injuries than in physical injury cases. Malingers, those who feign injuries in order to avoid their employment responsibilities, present a danger to their employers, the workers' compensation system, and society as a whole. Second, the inherent suspicion as to the validity of psychological diagnosis is justified since many methods of detection and evaluation are relatively new. Third, considering that no two individuals maintain the same emotional strength, attempts to objectify an inherently subjective reaction will always present a problem. Finally, there is the long-standing fear of creating a life

121. See 1B Larson, supra note 9, § 42.25(a) ("The most lively development in compensation law in the last 15 years has been the explosion of 'stress claims.'").
122. Id. Larson states, "The cases may be thought of, for convenience, in three groups: mental stimulus causing physical injury; physical trauma causing nervous injury; and mental stimulus causing nervous injury." Id. § 42.20.
123. Id. § 42.21(a), 42.21(b).
124. Id. § 42.22(a).
125. Id. §§ 42.21(b), 42.22(a).
126. Id. § 42.25(a).
127. See id. § 42.23.
128. See supra note 11 and accompanying text.
130. See Marcus, supra note 11, at 34.
131. See supra notes 110-11 and accompanying text.
132. See Pompeani, supra note 11, at 51.
and health insurance system out of the Worker’s Compensation Act. The central conflict underlying each of these arguments is the struggle between two important competing interests: the judiciary’s recognition of legislative intent to liberally construe compensation statutes and the public’s desire to impose limits on their application.

In light of these competing considerations, different states have created schemes designed to separate the valid from the fraudulent claims. States generally fall into four different categories regarding their analysis of mental-mental cases. The first category consists of states presently denying liability for any mental injury case caused solely by stress. In these jurisdictions, a mental injury absent a physical cause or result is not compensated.

Second, “sudden stimulus” states offer narrow compensability by recognizing a mental-mental claim only if the cause of the mental injury is surprising and unanticipated. If the employee can link a sudden or frightening event to the development of a mental illness, compensation benefits will be awarded.

A third test, offering the broadest coverage, compensates psychological illnesses in virtually the same manner as physical injuries. Commonly regarded as the “causation” test, it affords compensation to an employee, regardless of the circumstances surrounding the injury, as

133. See Bale, supra note 6, at 410; Cook, supra note 11, at 879.
134. See Cook, supra note 11, at 879.
135. 1B LARSON, supra note 9, § 42.25(b). Larson sets forth four categories of coverage for mental injuries:

*Group One:* mental stimulus producing mental injury is compensable even if gradual, and even if the stress is not unusual by comparison with that of ordinary life or employment.

*Group Two:* “mental-mental” cases are compensable even if gradual, but only if the stress is unusual.

*Group Three:* “mental-mental” cases are compensable, but only if the stimulus is sudden.

*Group Four:* “mental-mental” cases are never compensable, whether gradual or sudden; there must be some physical component in the injury.

Id.

136. Id. § 42.25(d). Eight states have ruled out compensability for any type of mental injury: Florida, Georgia, Kansas, Minnesota, Montana, New Mexico, Ohio, and Oklahoma. Id.

137. Id. § 42.25(e). Eight states, Illinois, Louisiana, Maryland, Mississippi, Tennessee, Texas, Virginia, and Washington, adhere to the sudden stimulus test. Id.

138. See id. § 42.25(g).

139. See, e.g., George W. Dawes, Eligibility for Worker’s Compensation in Cases of Non-traumatic Mental Injury: The Development of the Unusual Stress Test in Wisconsin, 1987 Wis. L. Rev. 363, 364.
long as the work-related stress caused the mental illness. Injuries resulting from long-term stress or ordinary pressures are compensated.

The final test, as developed in Wisconsin, is the unusual stress test. The unusual stress test embraces a middle position between the limited sudden stimulus test and the broad causation test. An injury resulting from either gradual stress or a specific event will be compensated only when the stressor is unusual. The factors defining "unusual" vary from state to state.

Although a forerunner in the development of this seemingly straightforward test, Wisconsin has yet to determine the impact of the unusual stress test in high stress occupations. The meaning of "unusual" is fraught with confusion and complications. A workable standard that clarifies the term is necessary to resolve the interpretative problems inherent in the courts and the legislature. Before proposing a revised test, a background of Wisconsin's case law is necessary to evaluate its current interpretation.

B. The Development of the Unusual Stress Test in Wisconsin

In 1974, the Wisconsin Supreme Court first articulated the unusual stress test in the landmark case School District No. 1 v. Department of Industry, Labor & Human Relations. The claimant, a high school guidance counselor, alleged an acute anxiety reaction after discovering a note submitted by the students requesting her removal from the staff. Conceding that Wisconsin recognizes mental injuries, the court embarked on an analysis of whether her injury met the "accident" requirement. In defining accident in terms of whether "the cause was of an accidental character or if the effect was the unexpected result of routine performance of the claimant's duties," the court expressly stated that "accident" does not encompass every event that occurs during the time the employee is performing services related to his or her employment.

140. 1B Larson, supra note 9, § 42.25(g).
141. See Dawes, supra note 139, at 365.
142. 1B Larson, supra note 9, § 42.25(f). Larson commends Wisconsin for maintaining a straightforward approach to dealing with unusual stress cases arising from gradual stress. Id. § 42.23(b).
143. See id. § 42.25(f).
144. See supra note 114.
146. Id. at 371, 215 N.W.2d at 374.
147. Id. at 373-74, 215 N.W.2d at 375-76.
148. Id. at 375, 215 N.W.2d at 376 (emphasis omitted).
To prevent opening the "floodgates" to fraudulent claims, the court constructed the present standard: "[M]ental injury nontraumatically caused must have resulted from a situation of greater dimensions than the day-to-day emotional strain and tension which all employees must experience." Although holding that the receipt of a request recommending her dismissal was not out of the ordinary from the strains employees encounter daily, the court stated that it did not intend to close the door to legitimate situations in which compensation may be warranted.

Even though the court's analysis recognized mental claims, a direct distinction between mental and physical injuries was not drawn. Thus, two interpretations arose out of this initial test. One view encompassed the idea that the test was that of a reasonable person: whether a hypothetical average worker without a pre-existing condition would be affected by the unusual circumstances. However, as evidenced by later cases, another view emerged that interpreted the standard as requiring only "out-of-the-ordinary" stress as compared to that particular worker's life. According to this latter view, if an employee contributes a personal risk such as a pre-existing mental condition, the circumstances must be unusual to that employee's situation to increase the risk of developing the illness. It was not until fifteen years later that this more subjective view was rejected, and the reasonable person interpretation explicitly adopted.

149. Id. at 377, 215 N.W.2d at 377.
150. Id. at 377-78, 215 N.W.2d at 377.
151. Id. at 378, 215 N.W.2d at 377-78.
152. See Sersland, supra note 13, at 772-74. An unusual stress test based on the reasonable person, or average worker, requires that the stress be of such a degree to cause mental injury in an average worker. Id. at 773. Often criticized as a departure from the traditional workers' compensation principle that the employer takes the employee "as is," it is based on how the stress affects a hypothetical worker, not the individual claimant. Id.
153. Id. In this subjective view, the test does not involve an average worker standard. Id. Rather, this interpretation questions whether the stress endured by the employee was unusual for that employee's personal job situation. Id. This view is in keeping with conventional workers' compensation principles because if job stress aggravates an employee's predisposition to mental illness, the injury would be compensated. Id. A traditional example involving physical injuries includes "idiopathic fall cases," where an employee falls and hurts himself because of some nonoccupational ailment such as epilepsy. Id. at 774. Most states require that an added risk of employment exists, "such as placing him [the employee] on a height or near moving machinery," in order to award compensation. Id.
154. See Jensen v. Employers Mut. Casualty Co., 161 Wis. 2d 253, 268, 468 N.W.2d 1, 7 (1991). The Jensen court analyzed the unusual stress test by stating, "It is in a sense an objective test—would a person of ordinary sensibilities be emotionally injured or mentally distressed in the absence of the unusual circumstances." Id.
The Wisconsin Supreme Court affirmed School District No. 1 and extended the test to allow compensation for gradual, unusual stress in Swiss Colony, Inc. v. Department of Industry, Labor & Human Relations. The employee, working for a mail-order cheese company, became inundated with pressure attributable to the critical and berating attitude of her supervisor, the deadlines for purchases and deliveries, and the unusually long hours. She eventually suffered a schizophrenic mental breakdown. In assessing her injury, the court refused to analyze mental injury cases in the same way as physical injuries that develop over a protracted period of time. Although her injury resulted from gradual, long-term stress, the court held that it was compensable because it arose out of unusual circumstances as compared to other employees. Swiss Colony's holdings that mental injuries may not be analyzed in the same manner as physical injuries and that the stress must be compared to other employees reveals the court's belief that the standard is one of a reasonable person. Swiss Colony implicitly rejected a subjective interpretation of the test.

The Wisconsin Legislature reacted to the expansion of the test to include gradual stress by codifying it within the Wisconsin Worker's Compensation Act. In an attempt to define unusualness, the legislature amended the definition of "injury" several times during the 1980s. In 1981, an injury included emotional stress arising from conditions "beyond those common to daily life." This change seemed to broaden the School District No. 1 standard by comparing the stress endured by an employee to the strains of everyday life, rather than the strains other employees experience. In 1984, another attempt to clarify the language was made by modifying the statutory language to define injury as

155. 72 Wis. 2d 46, 240 N.W.2d 128 (1976).
156. Id. at 51-53, 240 N.W.2d at 130-31.
157. Id. at 50, 240 N.W.2d at 130.
158. Id. at 54, 240 N.W.2d at 131-32. The circuit court determined that School District No. 1 was not applicable to this case because the stress arose gradually. Id. Rather, the court held that mental illness arising from gradual stress is identical to an occupational disease. Id. The Wisconsin Supreme Court rejected this contention, and held that physical injuries cannot be analyzed in the same way as mental injuries. Id. at 55, 240 N.W.2d at 131-32. The court held that School District No. 1 applies to specific events precipitating mental injuries as well as injuries resulting from gradual stress. Id. Thus, compensation for mental injuries will only be awarded if the stress is out of the ordinary. Id.
159. Id. at 51, 240 N.W.2d at 130.
161. Id.
162. Dawes, supra note 139, at 368. Stresses common to daily life include pressures "involved in social, recreational, consumer, and family activities." Id. at 368 n.32.
mental stress arising from conditions "beyond those common to occupational or nonoccupational life." However, this definition contributed little to the effort to create a workable solution and actually resulted in additional confusion. Thus, in 1988 the legislature removed all reference to the unusual stress test, thereby leaving in effect the School District No. 1 standard and the interpretation of its language to the courts.

As the legislature attempted to define unusualness, the courts moved further from School District No. 1 by focusing on the individual employee's predisposition to illness and the employee's personal situation, rather than focusing on the unusualness of the circumstances within that occupation. In *International Harvester v. Labor & Industry Review Commission*, an employee developed schizophrenia after witnessing a co-worker's accident. The co-worker, a close friend of the claimant's, was splashed with molten metal and severely burned. After the co-worker died a few days later, the claimant became unable to function and felt responsible for the tragedy. Although the court conceded that witnessing an accident at work is often a common experience, this accident was deemed unique because the deceased was the co-worker's close friend, and he felt responsible for the death. Thus, in order to restrict the possibility of limitless claims arising from witnessing an accident, the court believed that compensation in these cases should be awarded only for those who were "active participants in the tragedy" and would feel some responsibility for it. Rather than focusing on the objective stress of the job, the court held that the employee's subjective reaction to the occurrence merited a finding of "unusualness." Departing from the *Swiss Colony* approach that physical injuries and mental injuries are distinct, the court reasoned that people who have predispositions to mental illnesses should be compensated in the same

164. See S. Res. 457, 88th Leg. (1987) (enacted). This Wisconsin Senate Bill evinces the confusion that resulted from the statutory definition of mental injury as including the phrase "if it arises from exposure to conditions or circumstances beyond those common to occupational or nonoccupational life." *Id.* The analysis by the Legislative Reference Bureau indicated that "this language is ambiguous and has resulted in conflicting court interpretations as to the comparison to be made. Therefore, this ambiguous language is deleted." *Id.*
166. 116 Wis. 2d 298, 341 N.W.2d 721 (Ct. App. 1983).
167. *Id.* at 300, 341 N.W.2d at 722-23.
168. *Id.* at 301, 341 N.W.2d at 723.
169. *Id.* at 303, 341 N.W.2d at 724.
170. *Id.*
171. *Id.*
way as those with predispositions to physical injuries. Understandably, this language resulted in court confusion as to whether the test encompassed the reasonable person view or a more subjective view.

Prior to 1989, two issues remained unanswered: whether the test embraced a reasonable person standard, and if so, whether the comparison was to reasonable people across the broad spectrum of industries, or simply to a reasonable person within the employee's particular occupation. In Probst v. Labor & Industry Review Commission, an owner of a building-supply company experienced anxiety and panic attacks when the business developed financial problems. At the workers' compensation hearing, the administrative law judge (A.L.J.) rejected an approach that considered the nature of the stress the employee alone experienced and determined that the appropriate test was to compare the stress to employees "similarly situated." On appeal, the employee argued that the test is a subjective one and that the stress was unique to her own business. However, the court of appeals adhered to a reasonable person standard. Because financial problems are common in small businesses, especially in construction industries, her claim for benefits was rejected.

The Probst court affirmed the A.L.J.'s decision and held that only by measuring an employee's stress with that of other employees in the same occupation, will it be possible to determine if the event is unusual. However, in affirming the decision, the court relied on the School District No. 1 language, but never explicitly modified it to incorporate the "similarly situated" interpretation.

172. Id. at 303-04, 341 N.W.2d at 724. The court recognized that the purpose of the Workers' Compensation Act is to compensate employees for injuries and charge the loss to the cost of production. Id. The court compared an employee's injury to the breakdown of a machine and stated: "Some people may break down . . . most may not. Whether the employer is blameless for this preconditioned vulnerability is not important. The employer is equally blameless when a machine breaks down. A misfortune of the industry is part of the burden of running a business, whether to machine or person." Id. at 304, 341 N.W.2d at 724. Thus, the court drew no distinction between compensation for physical or mental injuries and held that compensation should be granted regardless of an employee's preconditioned vulnerability to mental illness.

173. See S. Res. 457, supra note 164; Dawes, supra note 139, at 370-71; see also Probst v. Labor & Indus. Review Comm'n, 153 Wis. 2d 185, 189, 450 N.W.2d 478, 479 (Ct. App. 1989) (An employee argued that the stress she experienced was unique to her in her business.).

174. 153 Wis. 2d 185, 450 N.W.2d 478 (Ct. App. 1989).

175. Id. at 188-89, 450 N.W.2d at 479.

176. Id. at 191, 450 N.W.2d at 480.

177. Id. at 189, 450 N.W.2d at 479.

178. Id. at 191, 450 N.W.2d at 480.

179. Id. at 190-91, 450 N.W.2d at 480.
The most recent clarification of the test arose in the 1991 case Jenson v. Employers Mutual Casualty Co.\textsuperscript{180} Although the primary issue concerned whether an intentional action may be covered under Wisconsin's Worker's Compensation Act, the court addressed the School District No. 1 standard for mental injuries.\textsuperscript{181} In Jenson, a village clerk-treasurer alleged mental distress as a result of the village president's degrading verbal attacks upon her work performance.\textsuperscript{182} The court held that the harassment fell within the purview of the statute defining mental injury.\textsuperscript{183} In clarifying "injury," the court stated that the test is an objective one that measures the severity of the specific circumstances of the job, and not the severity of the distress experienced.\textsuperscript{184} "It is not an 'injury' no matter how disabling unless it arises from unusual occupational stresses."\textsuperscript{185} Jenson, unlike its predecessors, clearly stated that the unusual stress test embraces a reasonable person standard: "It is in a sense an objective test—would a person of ordinary sensibilities be emotionally injured or mentally distressed in the absence of the unusual circumstances."\textsuperscript{186}

Although Jenson utilized the most straightforward language in interpreting the unusual stress test, several problems remain. The current standard is one of a reasonable person within the employee's occupational context. However, in arriving at this clarification, the courts continue to uphold the language found in School District No. 1 that refers to stress "all employees must experience." The confusion as to the standard will continue to haunt Wisconsin courts until this language is explicitly modified to incorporate stress in the context of similarly situated employees.

Further, the unusual stress test is often criticized as merely providing a "badge of reliability," rather than reliability based on factual inquiries.\textsuperscript{187} It is difficult to determine whether the employment was actually the cause of the mental illness, considering that multiple occupational and nonoccupational factors often combine to cause the disability.\textsuperscript{188} Relying on the testimony of co-workers to describe the employment situ-

\textsuperscript{180} 161 Wis. 2d 253, 468 N.W.2d 1 (1991).
\textsuperscript{181} Id. at 268-69, 468 N.W.2d at 7-8.
\textsuperscript{182} Id. at 257-58, 468 N.W.2d at 2-3.
\textsuperscript{183} Id. at 264, 468 N.W.2d at 8.
\textsuperscript{184} Id. at 268, 468 N.W.2d at 7.
\textsuperscript{185} Id.
\textsuperscript{186} Id.
\textsuperscript{187} Sersland, supra note 13, at 783.
\textsuperscript{188} See id.
ation may result in inaccurate testimony prompted by dislike of the claimant. However, abandoning this unusual stress threshold would eliminate the causation test and provide no way to sift out work-related from nonwork claims. In order to alleviate the above hazards, an effort to combine independent investigations of the workplace and the testimony of co-workers is necessary to substantiate a claim for mental injury.

Finally, the application of the unusual stress test to high stress occupations may result in an elimination of genuine claims. When an entire occupation is subject to unusual stress, the stress endured by a claimant may be ordinary as compared to others within the same occupation. This issue has arisen in other states, but is an issue of first impression in Wisconsin. A proposal must be developed to address the compensability of high stress occupations under the unusual stress test.

C. A Proposal for Clarification of the Unusual Stress Test

To clarify Wisconsin's unusual stress test, two steps may be taken. First, the reasonable person standard as applied to similarly situated employees should be explicitly recognized by the courts. This would entail a modification of the School District No. 1 language. Second, when confronted with a high stress claim, the court should set forth a separate standard to ensure that valid claims are not eliminated for a lack of un-


190. See infra note 191 and accompanying text for examples of states addressing this issue. Wisconsin has never specifically addressed the problem of the compensability of high stress occupations in workers' compensation. The only published case concerning police officer mental stress is Village of Random Lake v. Labor & Indus. Review Comm'n, 141 Wis. 2d 559, 415 N.W.2d 577 (Ct. App. 1987). Although the court determined that the officer's claim for mental injury must be analyzed under the unusual stress test, it remanded the case to the Labor & Industry Review Commission, and therefore no decision on the merits of the case was reached. Id. at 565-67, 415 N.W.2d at 580. Although the issue was briefly addressed by the Labor & Industry Review Commission in Nelis v. City of Racine Police Dept., No. 81-068636, 1991 WL 477077 (Wis. Labor Ind. Review Comm'n, May 6, 1991), the Commission determined the injury to be linked to the employee's physical injuries, thereby removing it from the category of nontraumatic mental injuries. Id. at *3. The Commission stated:

As the stress was directly linked to various physical injuries, it is not necessary to make a finding that the level of stress he sustained while on duty was more than that ordinarily found in police work. While each may have been within the definition of ordinary police work, the number and severity of the episodes overwhelmed his normal coping mechanism to cause his present stress disorder.

Id. Although the opinion seems to depart from Wisconsin's objective analysis of unusual stress, because the Commission applied a traumatic injury analysis, the language is merely dicta. Further, the case is unpublished and of no precedential value.
usualness and that the door is not opened to excessive fraudulent claims.

Two states utilizing tests akin to Wisconsin’s unusual stress test have effectively addressed these considerations in the area of high stress occupations. Arizona, the first state to address the issue, and Pennsylvania, the state with the most recently developed law on the issue, apply similar objective approaches to compensation. 191

In 1978, the Arizona Supreme Court first addressed the issue of whether a highway patrolman could recover benefits for a mental injury in *Sloss v. Industrial Commission.* 192 The patrolman developed chronic anxiety due to job-related stress. 193 In denying benefits based on the fact that the patrolman was not subjected to unusual stress, the court determined that the stress is measured within the occupation, and not the stress within the general population. “[T]he stresses to which the applicant was exposed in his employment were the same as, and no greater than, those imposed upon all other Highway Patrolmen in the same type of duty.” 194

With the explicit adoption of language akin to the *Sloss* interpretation or to the “similarly situated” language of *Probst*, 195 Wisconsin’s unusual stress standard would be substantially clearer. Thus, the test would encompass the initial *School District No. 1* language coupled with an additional component to clarify the meaning of “unusual.”

When analyzing workers’ compensation cases in the realm of high stress occupations, the distinction becomes less clear. Attempts to provide a solution range from an elimination of high stress claims due to the lack of unusualness, 196 to a legislative enactment that would carve out a


193. *Id.* at 304.

194. *Id.* at 304-05.


By holding that a high stress work environment is, in and of itself, a sufficient work related abnormality, the majority creates a dangerous precedent. Many types of jobs
preemption of work-relatedness in these cases. However, recent developments in Pennsylvania present the most logical, middle-ground approach to compensating mental injuries within high stress occupations.

In 1990, the Pennsylvania Commonwealth Court faced the issue of whether a police officer’s stress resulted from exposure to “abnormal working conditions” in *City of Scranton v. Workmen’s Compensation Appeal Board*. The widow of a police officer alleged that her husband’s unusually stressful working conditions caused his depression and eventual self-inflicted death. No dispute arose as to whether the officer suffered from depression, rather the inquiry focused upon whether the conditions were indeed abnormal.

Pennsylvania’s abnormal working condition test holds that the mental injury “itself must have resulted from the claimant’s objective reaction to ‘abnormal working conditions.’” The City of Scranton argued that the widow could not meet this test because high stress is normal in police work. In rejecting this reasoning, the court adopted language from a dissenting opinion of a previous case to alleviate the problem in high stress occupations. The court noted that many jobs by their nature are high stress, and for these occupations high stress is normal. Noted examples included an air traffic controller, a school teacher in a ghetto area, or a police officer. To combat a finding of work-relatedness in all high stress claims, the court held that:

> [F]or a high stress working environment to constitute a legally sufficient abnormal working condition, there must be a finding either that claimant’s work performance (as distinguished from the mere job description) was unusually stressful for that kind of a job

---

197. See, e.g., Girdwood, *supra* note 11, at 627.
199. *Id.* at 853.
200. *Id.* at 854.
202. *Id.* at 855.
205. *Id.*
or a finding that an unusual event occurred making the job more stressful than it had been.\textsuperscript{206}

In this case, the police officer was assigned to investigate a serial killer.\textsuperscript{207} Prior to this killing spree, the city had not encountered a significant number of murders.\textsuperscript{208} In addition to the responsibility of investigating every case, the officer bore the pressure of solving the crimes, both from the police department and the community.\textsuperscript{209} Finding that these responsibilities clearly became unusually stressful conditions for the type of work he was assigned to perform, the court held that he was exposed to abnormal working conditions and compensation was granted.\textsuperscript{210}

One year later, the opposite result was reached in \textit{Squilla v. Workmen's Compensation Appeal Board}.\textsuperscript{211} In this case the commonwealth court denied benefits to a patrol officer who claimed mental injury after being reprimanded for unsatisfactory performance.\textsuperscript{212} Applying the \textit{Scranton} test, the court stated that proper administration and regimentation are necessary in the officer's occupation.\textsuperscript{213} Further, this type of discipline was normal for that kind of job.\textsuperscript{214}

The straightforward approach set forth in \textit{Scranton} allows compensation of valid claims arising from gradual stress or a single event, provided that the stress is unusual for that particular job. This resolves the question of whether a police officer in a small town with little crime should be compared to a police officer in a large city inundated with crime. The comparison is within the context of the work involved and focuses on the job description.\textsuperscript{215} In \textit{Scranton}, the officer was employed in a small town with relatively few crimes.\textsuperscript{216} An intense investigation of a serial killer is objectively unusual for that police department. If the officer was assigned to a homicide unit in a large city, murder investigations would not only be expected by the city, but the employee would be aware of the implications of the job prior to accepting it. That is not to say that if an

\begin{itemize}
\item \textsuperscript{206} \textit{Id.} at 856.
\item \textsuperscript{207} \textit{Id.} at 857.
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.}
\item \textsuperscript{210} \textit{Id.} at 858-59.
\item \textsuperscript{211} 606 A.2d 539 (Pa. Commw. Ct. 1991).
\item \textsuperscript{212} \textit{Id.} at 543.
\item \textsuperscript{213} \textit{Id.}
\item \textsuperscript{214} \textit{Id.}
\item \textsuperscript{216} \textit{Id.}
officer employed in a homicide unit were to become inundated with a
greater volume of stressful cases or responsibilities, as compared to the
officer's co-workers, that compensation would not be warranted. The
crucial element of the test includes the language "work performance . . .
[that is] unusually stressful for that kind of a job." Rather than elimin-
nating all high stress claims as "normal" or presuming a high stress envi-
ronment to be a work-related abnormality, this test serves as an
appropriate middle ground between two uncompromising positions.

Combining a clarified School District No. 1 test with the Scranton
standard for high stress occupations would serve to provide Wisconsin
with a workable test designed to compensate genuine claims and to re-
ject feigned illnesses and fraudulent claims.

V. COMPENSATION OF LAW ENFORCEMENT PTSD UNDER A
MODIFIED UNUSUAL STRESS TEST

Evidence demonstrating the recent increase in police stress and
the frequent development of PTSD in officers indicates that courts
across the nation will soon be facing these issues in the realm of workers'
compensation. Wisconsin has yet to address the compensation of PTSD
within a high stress working environment. Therefore, a method of analy-
zizing such cases is necessary to adhere to a modified unusual stress test.

Although PTSD is defined as a condition caused by an event
"outside the range of usual human experience," the development of
the mental illness does not automatically satisfy the unusual stress test.
A mental injury of any kind, regardless of its definition, will not be com-
penated unless it arises from stresses that are unusual for that occupa-
tional context. Merely because PTSD arises from an event uncommon
to most people, an award of compensation is not ensured, and a test
must be applied to determine if the event is unusual for that occupation.
An event precipitating PTSD may be common for certain kinds of jobs,
particularly those of law enforcement officers. Thus, once the claim-
ant is diagnosed with PTSD, a determination of work-relatedness must
be made. The use of the modified unusual stress test will aid in this
inquiry.

217. See id. at 856.
218. See supra notes 31-34 and accompanying text.
219. See supra notes 91-92 and accompanying text.
220. DSM-III-R, supra note 20, at 250.
221. Mann & Neece, supra note 7, at 452.
222. Id.
To effectively examine a police officer’s PTSD claim, a three-step process should be employed. First, PTSD must be proved. Although the *Diagnostic and Statistical Manual of Mental Disorders*²²³ provides a definition and framework of symptoms, only through an inquiry into the circumstances surrounding the officer’s life will a valid diagnosis result.²²⁴ Factors within the individual’s personal life may obscure the diagnosis.²²⁵ For example, a police officer suffering family problems may develop symptoms of anxiety or depression, some of which are markedly similar to PTSD.²²⁶ To combat a “checklist” approach to diagnosing PTSD,²²⁷ the use of detection testing combined with expert testimony will help to validate a psychiatrist’s diagnosis of PTSD.

Second, the causation barrier must be crossed.²²⁸ Considering that psychiatric injuries are inherently subjective, the possibility of an injury arising from stresses other than those within the occupation is inevitable. An examination of exactly when the officer manifested symptoms of mental harm serves to determine if a work-related event precipitated the illness.²²⁹

The inquiry does not end at causation, however, because regardless of an initial showing of work-relatedness, a final threshold of unusualness is needed to validate the causal relation.²³⁰ The modified unusual stress test facilitates the process. In the case of a law enforcement officer who develops PTSD after a duty-related event, the officer’s stress must not be a subjective reaction to a normal occurrence. The only way to objectify an inherently subjective injury is to compare the stress of the officer with the stress endured by other officers in the same type of job.²³¹ If, for example, a work-related shooting arose in a small town with few crimes, the officer’s chances for compensation are greater. Prior to taking the job, the officer was not under the expectation that the stress would rise to such a level.

²²⁵. Id. at 18-19.
²²⁶. Id. at 18.
²²⁸. See *supra* notes 111-12 and accompanying text.
However, utilizing an example of an officer assigned to a drug or gang unit in a large city where shootings frequently occur, the officer's possibility of compensation is less likely. The officer, who is highly screened for such a job, was aware of the job description prior to commencing his or her duties. Again, the test should not be used to eliminate valid claims, especially those arising from situations in which an officer performs work that is uncharacteristic for that kind of job. Although it can be argued that this approach loses sight of the premise underlying the workers' compensation system, which is to take the employee "as is" with any pre-existing disposition to injury, Wisconsin rejects an approach that analyzes physical and mental injuries in the same manner. Thus, while the "as is" doctrine may apply to physical injuries, Wisconsin has decided that mental injuries must cross an additional threshold of unusualness. This threshold is the only reasonable way to ensure that the element of work-relatedness is established.

VI. Conclusion

The explosion of occupational stress strikes this nation with great force, leaving in its wake a plethora of legal claims. Work-related stress claims tend to burden industries, the workers' compensation system, and society as a whole, with problems incapable of adequate resolution.

In the area of law enforcement, the stress is of a different kind and magnitude than that endured by the majority of this country's workers. The effect of the continual danger encountered by police officers daily is incomprehensible to the average employee. Yet, most agree that protecting citizens from an increasingly violent society is vital. In recognizing the value of law enforcement occupations, compensation should certainly be available to those suffering from the inevitable rise in mental illness. The workers' compensation system is designed to provide benefits to injured employees, thereby enabling them to return to gainful employment. Equally as important, though, is society's interest in preserving its economic structure and preventing the creation of a health insurance system. It is the balancing of these two interests that must be addressed when proposing any method to evaluate stress cases.

232. See Sersland, supra note 13, at 773.
234. See 1B Larson, supra note 9, § 1.00.
In light of these compelling considerations, a modified unusual stress test serves to satisfy both ideals.

Lee Anne Neumann