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**SEAK'S 25TH ANNUAL NATIONAL WORKERS' COMPENSATION
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PSYCHIATRIC CLAIMS: INVESTIGATION AND PROOF

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I. INTRODUCTION

One of the more interesting aspects of workers' compensation practice is that it exposes the practitioner to such a variety of workplace situations and alleged work-related physical and/or mental conditions. Workers' compensation "mental" claims are particularly interesting, because the manner in which the human psyche reacts to the world is so compelling and because there are often numerous non-work-related explanations for the employee's condition that have to be investigated and discovered.

Below, I have attempted to address the role that the workers' compensation practitioner should assume in litigating a mental injury claim under the Workers' Compensation Act, including the legal principles that should be considered, the practical steps that should be taken to effectively address the claim and the manner in which the medicine underlying the typical claim should be analyzed.

II. THE ROLE OF THE WORKERS' COMPENSATION PRACTITIONER IN LITIGATING A WORKERS' COMPENSATION MENTAL CLAIM

When dealing with a mental claim, the workers' compensation practitioner must be particularly skilled in presenting either the claimant's case or the defendant's case in a manner that takes into consideration the more intangible aspects of mental illness.

For our discussion, we will assume that a workers' compensation claim has been made - that the employer has made a preliminary decision to deny the claim, and that the matter will be adjudicated before a workers' compensation judge.

III. THE THREE STEPS THAT SHOULD BE TAKEN IN ORDER TO SUCCESSFULLY LITIGATE A WORKERS' COMPENSATION MENTAL CLAIM

Below, I have set forth what I feel are three important prerequisites for effectively representing the interests of the employer or the employee in a litigated workers' compensation psychiatric claim:

1. "Know the Law" - Although in the general legal community, many do not consider workers' compensation law to be particularly complex, in many respects, nothing could be further from the truth. In fact, workers' compensation law is a very technical area that can prompt a ruling in a case on the turn of a seemingly innocuous fact. Indeed, a misunderstanding of the workers' compensation law can cause the unwitting practitioner to either take inappropriate action or fail to take appropriate action, thereby dooming the position of his or her client.

There are **three** (3) types of mental injury claims that workers' compensation practitioners must address on a fairly regular basis:

(1) The "**physical-mental**" claim, where a work-related physical injury causes the employee to experience the development of emotional symptoms such as a severe depression resulting from a prolonged period of physical disability or perhaps a post-traumatic stress disorder resulting from a life-threatening physical injury.

(2) The "**mental-physical**" claim, where the stress of the employees' job results in the development of physical symptoms, e.g., following an intense period of stress, the employee suffers a myocardial infarction or bouts of disabling angina; and

(3) The "**mental-mental**" claim, where the stress of the employee's job results in the development of a pure psychological or psychiatric disorder.

In terms of burden of proof, the “physical-mental” and mental-physical¹ claims generally require that the claimant meet the same standard normally associated with the typical workers’ compensation injury claim, namely the existence of an employment relationship during which the employee suffers an injury in the course of employment and caused by or arising out of employment.

In most jurisdictions, however, a heightened burden of proof² exists for the employee seeking workers compensation benefits on the basis of the more intangible “mental-mental” injury.³ Indeed, in most jurisdictions, the claimant must not only establish that the alleged mental injury occurred in the course of employment and was related to his or her employment, but must **also** demonstrate that the alleged mental injury resulted from **objective** stress, **and** that the stress was **peculiar** to the specific work place.⁴

The standard set forth in the New Mexico Workers’ Compensation Act, which is reflective of the approach of the majority of jurisdictions in the United States – although it is somewhat unique in the fact that it is a **legislative**, rather than a common law regime – requires that the claimant establish the existence mental stress based upon work events generally outside of worker’s usual experience, such that it would evoke significant symptoms of distress in another worker, under similar circumstances.

¹ As noted below, in my jurisdiction, Pennsylvania, a claimant pursuing benefits on the basis of an alleged “mental-physical” injury must meet the same burden of proof normally associated with the pure “mental-mental” claim.

² As described below, an effort to challenge the heightened burden or dual standard applied to physical injuries versus mental injuries in Pennsylvania as violating the Equal Protection Clause of the U. S. Constitution has failed. See Pate v. Workmen’s Compensation Appeal Board (Boeing Vertol Company) 104 Pa. Cmwlth. 481, 522 A.2d 166 (1987) *appeal denied*, 517 Pa. 611, 536 A.2d 1335, cert. denied, 484 U.S. 1064, 108 S.Ct. 1025, 98 L. Ed.2d 989 (1988).

³ In a number of states such as Alabama, Connecticut, Florida, Kansas, Louisiana, Nebraska, Oklahoma and Kentucky the pure “mental-mental” injury does not exist. Rather, in the foregoing states, the employee must demonstrate the existence of some type of physical injury in order to recover benefits for emotional or mental stress under the Workers’ Compensation Act.

⁴The terminology used for describing the peculiar working condition at issue varies from state to state. i.e., Texas uses the term “unusual”; Iowa utilizes the language “mental injury caused by workplace stress of greater magnitude than day-to-day mental stress. . .”. As noted below, in Pennsylvania, the claimant asserting either a “mental-mental” or “mental-physical” injury claim must meet a heightened burden of proof in establishing, more than a subjective reaction to normal working conditions, but an exposure to abnormal working conditions on an objective basis, considered in relationship to the specific employment at issue.

The New Mexico statute also provides that the mental injury will **not** be compensable if it results from a disciplinary action, a corrective action,

a job evaluation or the cessation of the employee's employment with the employer.⁵

Still, the statute in New Mexico is consistent with the general rule that a stressful work situation must be viewed in the context of the claimant's particular job environment.

Similarly, in Wisconsin, a "mental-mental" claim must be viewed in the context of the particular employment that the claimant occupies in order to determine whether the employee has met the requirement of showing an "exposure to job stress well beyond the common in the particular occupational setting."⁶

In Pennsylvania, the jurisdiction where our practice is based, there is a well-defined body of case law that reflects a more conventional approach to the "mental-mental" workers' compensation claim.

In Indiana, unlike most jurisdictions, no special or heightened burden of proof⁷ exists for the worker alleging a mental injury.

Because the Pennsylvania common law is rather mature and, for the most part, typical of other jurisdictions, I have included a detailed review of how Pennsylvania courts treat the pure "mental-mental" claim.

The Pennsylvania Supreme Court has ruled that in the context of a "mental-mental" claim - and since 2000, a "mental-physical" claim - the degree of proof demanded of the claimant is heightened. Martin v. Ketchum, Inc., 523 Pa. 509, 568 A.2d 159 (1990); North Huntingdon Township v. Workmen's Compensation Appeal Board (Noble), 165 Pa. Cmwlth. 33, 644 A.2d 227, *appeal denied* 539 Pa. 659, 651 A.2d 545 (1994).

The Court has adopted the generally accepted approach of requiring that the worker seeking to establish a "mental-mental" claim, demonstrate, on an objective basis, that he or

⁵ See New Mexico Statute Annotated, Sections 52-1-24. See also, The Labor Code of Texas, Section 408.006 which makes clear that a mental injury arising from legitimate personnel action such as a transfer, promotion, demotion or termination is not compensable under the Act.

⁶ Id.

⁷ In 2000, the Pennsylvania Supreme Court effectively eliminated the practical distinction between "mental-mental" injuries and "mental-physical" injuries by now requiring that a worker suffering from a physical condition brought about by work stress demonstrate an exposure to "abnormal working conditions." See Davis v. Workers' Compensation Appeal Board (Swarthmore Borough), 561 Pa. 462, 751 A.2d 168 (2000).

she has been exposed to “abnormal working conditions,” meaning that an employee’s **subjective** reaction to **normal** working conditions, as defined by the nature of the worker’s employment, will not be sufficient to establish a compensable claim. Martin v. Ketchum, Inc., supra., Thomas v. Workmen’s Compensation Appeal Board (Atlantic Refining Company), 55 Pa. Cmwlth. 449, 423 A.2d 784 (1980); Hirschberg v. Workmen’s Compensation Appeal Board (Department of Transportation), 81 Pa. Cmwlth. 579, 474 A.2d 82 (1984); Bell Telephone Company of Pennsylvania v. Workmen’s Compensation Appeal Board (DeMay), 87 Pa. Cmwlth. 558, 487 A.2d 1053 (1985)(Concurring Opinion Judge Doyle); Leo v. Workmen’s Compensation Appeal Board (Borough of Charleroi), 114 Pa. Cmwlth. 6, 537 A.2d 399 (1988).

Whether an individual has been exposed to abnormal working conditions is a mixed question of law and fact, fully reviewable on appeal. Squilla v Workmen’s Compensation Appeal Board (Marple Township), 146 Pa. Cmwlth. 23, 606 A.2d 539 (1992).

In order to be considered “abnormal” in Pennsylvania the objective employment event or events at issue must be considered in the context of the employment position that the claimant occupies. Antus v. Workmen’s Compensation Appeal Board (Sawhill Tubular Division, Cyclops Industries, Inc.), 155 Pa. Cmwlth. 576, 625 A.2d 760 (1993) *affirmed per curium*, 536 Pa. 267, 639 A.2d 20 (1994).

For example, where the claimant’s job is inherently stressful, the workers’ compensation judge must assess his or her working conditions by comparing them to those of other similarly employed individuals, e.g., firemen, police officers, emergency room personnel. Linskey v. Workmen’s Compensation Appeal Board (City of Philadelphia), 699 A.2d 818 (Pa. Cmwlth. 1997) (fire/rescue worker finds, in response to a call, a man who has committed suicide by hanging – deemed **not** an abnormal working condition); Clowes v. Workmen’s Compensation Appeal Board (City of Pittsburgh), 162 Pa. Cmwlth. 538, 639 A.2d 944 (1994) (Pittsburgh homicide detective required to investigate crime scenes, interview families and attend autopsies – deemed **not** an abnormal working condition); Cadden v.

Workmen's Compensation Appeal Board (City of Philadelphia), 135 Pa. Cmwlth. 195, 579

A.2d 1378 (1990) *petition for allowance denied*, 527 Pa. 652, 593 A.2d 424 (1991).

The Commonwealth Court of Pennsylvania has ruled, however, that where the employee's work exposure is more stressful than would normally be expected or anticipated – even in the context of an inherently stressful job – the claim will be deemed compensable provided the employee establishes all of the other elements necessary to support an award.

City of Scranton v. Workmen's Compensation Appeal Board (Hart), 136 Pa. Cmwlth. 483, 583

A.2d 852 (1990) (Scranton homicide detective, faced with highly publicized and unusual epidemic of murders perpetrated by serial killer and others, required to travel extensively out-of-town for trials, required to present evidence to grand juries, required to become involved in scientific experiments while at the same time, continuing to perform regular job duties – deemed a drastic increase in responsibilities sufficient to constitute an abnormal working condition).

Generally, the claimant bears the burden of presenting evidence **corroborating** his or her workplace perceptions in order to establish the objective element of the abnormal working conditions test. Wilson v. Workmen's Compensation Appeal Board (Appeal of Aluminum Co. of America), 542 Pa. 614, 669 A.2d 338 (1996); Andracki v. Workmen's Compensation Appeal Board (Allied Eastern States Maintenance), 96 Pa. Cmwlth. 613, 508 A.2d 624 (1986). Corroboration of claimant's work perceptions will not always be required, however, where it would be impossible to do so – where a supervisor inappropriately abuses an employee in a closed office with no witnesses present – or where it would encourage employers to engage in inappropriate behavior behind closed doors. See Archer v. Workmen's Compensation Appeal Board (General Motors), 138 Pa. Cmwlth. 309, 587 A.2d 901 (1991).

Finally, the Pennsylvania Supreme Court has ruled that in order to meet his or her burden of proof in a “mental-mental” claim, the employee bears the burden of presenting unequivocal medical evidence establishing that his or her psychiatric disability resulted from

his or her exposure to abnormal working conditions. Romanies v. Workers' Compensation Appeal Board (Borough of Leesport), 537 Pa. 440, 644 A.2d 1164 (1994).

A. Practice Note: Examples of "Abnormal" Working Conditions:

1. Employers' false accusation that employee embezzled money, during investigation of billing irregularities arising out of medical practice. Miller v. Workers' Compensation Appeal Board (New Wilmington Family Practice), 724 A.2d 971 (Pa. Cmwlth. 1999);

2. Employee singled out for public criticism by supervisor, while co-workers **not** subjected to similar treatment. McDonough v. Workmen's Compensation Appeal Board (Dept. of Transportation), 80 Pa. Cmwlth. 1, 470 A.2d 1099 (1991); See also Archer v. Workmen's Compensation Appeal Board (General Motors), 138 Pa. Cmwlth. 309, 587 A.2d 901 (1991) (employee subject to harassment as many as twenty times per week, including inappropriate and unjustified disciplinary action);

3. An unusually dramatic change in work conditions such as pressure to solve numerous murders committed by serial killer and other unrelated murders in smaller community, requiring police detective to engage in unusual level of investigative and prosecutorial activity. See City of Scranton v. Workmen's Compensation Appeal Board (Hart), 136 Pa. Cmwlth. 483, 583 A.2d 852 (1990);

4. A near encounter with serious bodily injury - claimant nearly killed by rolling coke car in steel plant resulting in post traumatic stress disorder diagnosis. Monessen, Inc. v. Workers' Compensation Appeal Board (Marsh), 158 Pa. Cmwlth. 502, 631 A.2d 1119 (1993);

5. A seemingly normal working condition – the altering of an employee’s work schedule – administered by the employer in blatant disregard for the exacerbating effect that such a modification might have upon the employee’s pre-existing emotional condition. Zink v. Workers’ Compensation Appeal Board (Graphic Packaging, Inc.), 828 A.2d 456 (Pa. Cmwlth. 2003).

B. Practice Note: Examples of “Normal Working Conditions”:

1. Harassment with profanity by supervisors in context of workplace where use of profanity and rough interaction is common. Philadelphia Newspapers, Inc. v. Workmen’s Compensation Appeal Board (Guaracino), 544 Pa. 203, 675 A.2d 1213 (1996);

2. Change in job duties from prestigious position to more menial job. Wilson v. Workmen’s Compensation Appeal Board (Alcoa). 542 Pa. 614, 669 A.2d 338 (1996);

3. Employee’s concerns over potential loss of workers’ compensation benefits during litigation over extent of work-related physical injury. Gulick v. Workmen’s Compensation Appeal Board (Pepsi-Cola Operating Company), 711 A.2d 585 (Pa. Cmwlth. 1998).

4. Loss of job due to modernization of workplace. Kemp v. Workmen’s Compensation Appeal Board (Eklund Electric Co., Inc.), 121 Pa. Cmwlth. 23, 549 A.2d 1365 (1988).

5. An attorney’s heavy caseload coupled with lack of secretarial help. (Moonblatt v. Workmen’s Compensation Appeal Board (City of Philadelphia), 55 Pa. Cmwlth. 128, 481 A.2d 374 (1984).

6. Application of union contract requiring employee to work a different shift. Andracki v. Workmen’s Compensation Appeal Board, supra.

7. Being taken to task for poor workmanship, even where work is tedious and painstaking – employee repeatedly criticized for failure to properly install military helicopter circuit wiring. Pate v. Workmen’s Compensation Appeal Board (Boeing Vertol Co.), 104 Pa. Cmwlth. 481, 552 A.2d 166 (1987), *appeal denied*, 517 Pa. 611, 536 A.2d 1335, *cert. denied*, 484 U.S. 1064, 108 S. Ct. 1025, 98 L. Ed.2d 989 (1988)(claimant’s challenge of “abnormal working condition” standard of proof as violation of Equal Protection Clause of U.S. Constitution fails).

2. “Know the Facts.” It has been said that what separates the exceptional lawyer from the everyday lawyer, is not simply his or her knowledge of the law – though that is obviously very important. What truly separates lawyers is how they develop, and ultimately how they present, the facts of the particular claim. For example, everybody knows that an injury occurring in the course of employment is generally compensable under the typical Workers’ Compensation Act. What many lawyers fail to consider, and what many lawyers fail to investigate, are the circumstances surrounding, and leading up to, the occurrence of the mental injury at issue. The lawyer who explores and analyzes those circumstances has a distinct advantage over the lawyer who does nothing more than address the basic allegations underlying the claim. A proper development of the facts, including the events leading up to the claim, ultimately allows both claimant’s counsel and defense counsel to provide the workers’ compensation judge with the full flavor of the parties’ dispute.

A. Investigating the “Mental-Mental” Workers’ Compensation Claim

A thorough investigation of the circumstances surrounding the filing of a claim for workers’ compensation benefits is perhaps most important in the context of a “mental-mental” claim. Why? Because there are so many causes for psychological or psychiatric conditions.

In an interview he gave many years ago, where he was recounting the eventual break-up of the Beatles, John Lennon explained how he found himself at that time attributing his personal feelings of unhappiness to his work with Paul McCartney, George Harrison and Ringo Starr. He remembered thinking “it’s because of you Ringo, the way you played the tambourine on that song, that’s why my life is so miserable!!” In retrospect, Lennon understood that it was not Ringo’s tambourine-playing that was causing his unhappiness, but, just as with many of us, he instinctively blamed his work for the feelings of despair that he was experiencing at the time.

Unfortunately, John Lennon was right – work is such an important part of our lives, that we often attribute whatever unhappiness or frustration or feelings of insecurity that we are experiencing to our job or our supervisor or our co-employees.

There are, of course, many reasons why people experience unhappiness or depression or feelings of insecurity or imbalance:

1. Family Situations

- a parent and a child do not talk to each other;
- a spouse has left a marriage;
- a wife is physically incapable of having a child;
- a spouse is abusive, physically and emotionally;
- a spouse is drug dependent or alcohol dependent;
- a spouse has had an extramarital affair;
- a parent suffers from Alzheimer’s requiring that the son or daughter institutionalize him or her;

- an adult experiences for the first time memories of abuse inflicted years earlier by a parent or other family member;
- a parent's child is killed or physically harmed;
- a parent's child suffers from a dysfunctional condition as Attention Deficit Disorder or Schizophrenia or becomes drug dependent or has encounters with law enforcement.

2. Self-Induced Depression

- the individual experiences anger/frustration over his or her lack of achievement, e.g. failing to land job promotion or having never attended college;
- the individual is inherently self-driven due to family expectations or unrealistic self-expectations;
- an individual experiences frustration/anger over his or her confrontation with middle age;
- the individual suffers from an unrelated psychiatric condition causing compulsion at work resulting in an inability to perform;
- the individual experiences delusions of grandeur causing profound employee dissatisfaction with job;

3. Other Causes

- seemingly unrelated non-work-related psychiatric conditions such as “histrionic personality syndrome” resulting indirectly in workers’ compensation claim;
- false claim.

B. Presenting a Case to Judge from the Proper Perspective

Once the facts have been investigated, it is the responsibility of the attorney to present them to the workers’ compensation judge from the proper perspective.

Below are two perspectives of the same case:

Perspective No. 1

(a) Claimant, who worked for a long distance provider, was assigned to a newly formed unit responsible for trouble shooting and maintaining difficult accounts.

(b) Though not officially a supervisor, claimant was given responsibility for training new employees and for monitoring a team of telephone service providers.

(c) Claimant performed her job well and without difficulty. In fact, the manager of her field operation provided her with an opportunity to receive training at Penn State University in order to further develop her skills.

Perspective No. 2

(a) Following her receipt of a harsh annual evaluation while assigned to the company’s Customer Service Department, claimant applied for a new position in the company’s Trouble Shooting Department.

(b) Although claimant was provided what was, in essence, a team leader position in the new department, she was notified that the company would be hiring a full-time manager for the department at some point in the future.

(c) While working as one of two team leaders for the department, claimant regularly came to work late and left work early. She also regularly engaged in personal telephone calls and had a tendency to spread gossip throughout the department. She also developed a rivalry with the other team leader assigned to the department, which made working in the department rather tense.

(d) Following a reorganization of the unit to which claimant was assigned, a new manager was hired by the company, who, almost immediately following her hiring, began to severely criticize claimant's work performance, openly chastised her in front of other employees, and even threw objects at her while yelling at her with profanity.

(e) As a result of the new manager's behavior, claimant developed chest pain and severe depression that prevented her from continuing to work.

(d) When it was announced that the company would be interviewing and hiring a manager for the department, claimant made it known that she had an interest in the position.

(e) Instead of hiring claimant as the new department manager, the company hired a young woman from outside the company who, in contrast to claimant, had a college degree and a post-graduate degree and who had managerial experience in running trouble shooting operations.

(f) From the moment she began her work for the company, the department's new manager was confronted with claimant's belligerent attitude, a series of temper tantrums and her continued failure to maintain appropriate work hours. In an effort to improve the department's performance, the new manager instituted strict guidelines for all employees, including claimant and regularly counseled claimant on the difficulties that she was having within the unit.

(g) Claimant ultimately complained of chest pain and left work alleging a psychiatric disability.

Faced with conflicting expert psychiatric evidence, the workers' compensation judge guided simply by Perspective No. 1 will, considering the humanitarian purposes underlying the Act, typically defer to the claimant's expert and grant disability benefits either on an indefinite basis or for a limited period of time.

On the other hand, the workers' compensation judge guided by Perspective No. 2, will, perhaps, conclude that the alleged work injury did **not** actually occur, but was prompted by the employee's dissatisfaction with her failure to obtain the promotion that she was seeking and the

resentment she was perhaps feeling over the company's decision to hire a younger and more qualified woman to handle the position that she desired/expected.

There are two basic fundamental rules that an attorney must remember in order to help the workers' compensation judge view the client's position with the proper perspective.

WHAT TO DO:

- (a) Investigate the facts by interviewing co-workers and managers and by reviewing company records and personnel files.
- (b) Tell the client's story chronologically, **from his or her vantage point.**

3. "Know the Medical Issues" - As noted, the workers' compensation practitioner is typically called upon to address a wide range of physical and mental injuries attributed to the workplace. Although a precise understanding of all possible medical issues would be asking too much of any lawyer, a basic understanding of certain medical/physical conditions or, at least, the willingness on the part of the practitioner to fully investigate the symptomatology associated with certain medical/psychiatric conditions oftentimes separates the adequate lawyer from the truly extraordinary lawyer. Indeed, the medically-prepared lawyer can present the development of the symptomatology in a manner that will foster a more accurate assessment of the claim's validity.

There are certain steps that the lawyer can take to properly analyze the development of symptomatology.

WHAT TO DO.

- (a) Obtain from the employee a HIPAA approved authorization form allowing access to his or her medical/psychiatric records;

- (b) Request documentation from all panel physicians consulted by the employee;
- (c) Review the employee's past medical history by consulting dispensary records or by obtaining records from the employee's family doctor;
- (d) Analyze in detail all previously diagnosed psychiatric conditions through authoritative sources such as the Diagnostic Statistical Manual and
- (e) Retain the services of a psychiatrist or psychologist as an expert consultant.

IV. CONCLUSION

Although there are many problems inherent in the typical workers' compensation scheme, I remain convinced that through appropriate litigation, a proper and fair result can be achieved. The ability of the assigned attorney to effectively investigate and present the position of the claimant or the employer can be enhanced through a strong familiarity with the relevant law, a solid understanding of the relevant psychiatric condition at issue and through a strategic presentation of all the facts surrounding the claim from a perspective that will allow the workers' compensation judge to fully and fairly assess the validity of the claim.