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# PENNSYLVANIA'S MENTAL LAPSE: A HISTORY OF PENNSYLVANIA'S TREATMENT OF MENTAL DISABILITIES CAUSED BY MENTAL STRESS IN WORKERS' COMPENSATION

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**PENNSYLVANIA'S MENTAL LAPSE:**
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## I. Introduction

A police officer takes a leave of absence after seeing two fellow officers shot on duty.[1] A woman is directed by her psychologist not to return to work after being subjected to repeated unwanted sexual advances from a supervisor.[2] A food delivery worker misses work after being robbed at gunpoint multiple times in a six-month period.[3] These are all instances in which anyone would have compassion for the individual feeling mental anguish. Most of us would certainly understand the need for them to take some time off from work for their mental health. But should their mental injury be compensable under the Pennsylvania Workers' Compensation Act? And if so, what must they prove to be compensated? Mental injury caused by a mental stimulus[4] is recognized in Pennsylvania as compensable under the Workers' Compensation Act, but numerous issues arise that make such mental-mental injuries difficult to prove in Pennsylvania courts. To put it bluntly (as the Pennsylvania Supreme Court has), courts are concerned that compensating mental-mental injuries could lead to workers abusing the system when they have no real mental injury or the stress they are under is typical in the profession they chose.[5] The requirements imposed by Pennsylvania courts to avoid this problem have erected difficult burdens of proof for workers suffering from mental distress caused by events experienced in their employment.

This essay will review the evolution of Pennsylvania case law on the compensability of mental-mental injuries. Attention will be given in particular to the Pennsylvania Supreme Court's 2013 decision in *Payes v. W.C.A.B. (Commonwealth PA State Police)*, a potential momentum-shifting case making it easier for workers with mental-mental injuries to be

[1] *See* Rydzewski v. W.C.A.B. (City of Philadelphia), 767 A.2d 13 (Pa. Commw. Ct. 2001) (holding a police officer could not recover for mental injuries after responding to a scene in which two fellow officers were shot and seriously wounded).

[2] *See* Heath v. W.C.A.B. (Pa. Bd. of Prob. & Parole), 867 A.2d 776 (Pa. Commw. Ct. 2005) (holding a female parole agent could not recover after missing work due to doctor-diagnosed severe stress brought on by one of her supervisors making repeated romantic advances).

[3] *See* Kennelty v. W.C.A.B. (Schwan's Home Serv., Inc.), 934 A.2d 692 (Pa. 2007) (determining that the workers' compensation judge's factual determinations must be deferred to and therefore the food delivery person's workers' compensation claim must be denied despite the abnormal working condition of being repeatedly robbed at gunpoint).

[4] Mental injuries as a result of mental stimuli are commonly referred to by courts using shorthand as "mental-mental injuries." A mental-mental injury is a category of compensation under the Act "whereby a mental or psychic condition is caused by a psychic stimulus." Payes v. W.C.A.B. (Commw. PA State Police), 79 A.3d 543, 550 (Pa. 2013).

[5] *Payes*, 79 A.2d at 551; Panyko v. W.C.A.B., 888 A.2d 724, 732 (Pa. 2005).

compensated.[6] Finally, this essay will take a look forward at how advocates for workers should proceed in making claims for psychiatric injuries caused by on-the-job stress.[7]

## II. Pennsylvania's Historical Approach to Mental Injuries Caused by Mental Stimuli

A mental-mental workers' compensation claim differs from claims involving physical injuries or physical stimuli in that Pennsylvania law requires a greater burden of proof for mental-mental claims. It was not until 1972 that mental injuries were at all compensable. From there, the Pennsylvania courts have established various requirements on this unique type of workers' compensation claim. The elevated burden for workers' mental-mental claims still exists, but a recent Pennsylvania Supreme Court case has indicated that Pennsylvania courts may be lightening that burden and are more willing to defer to the factual findings of the workers' compensation judge (WCJ).

### A. Overcoming a Substantial Burden: Pennsylvania Case Law 1979–2013

Judicial recognition of compensating what would become known as mental-mental injuries began in 1979 with *University of Pittsburgh v. W.C.A.B.*[8] The Commonwealth Court's holding to compensate mental injuries stemmed from its interpretation of the 1972 Amendments to the Workmen's Compensation Act in which the legislature changed the definition of the term "injury" and "personal injury."[9] Prior to the 1972 Amendments, the legislature defined "injury" as requiring "violence to the physical structure of the body." The 1972 Amendments deleted that requirement and merely stated that the terms "injury" and "personal injury" would mean "an injury to an employe, regardless of his previous physical condition, arising in the course of … employment."[10] To the Commonwealth Court, the deletion of the "violence to the physical structure of the body" requirement meant "that work-related mental illness can be a compensable injury under the Act."[11]

*University of Pittsburgh* offered a somewhat promising start for workers with psychiatric disabilities hopeful to receive compensation. The case involved a medical doctor employed by the University of Pittsburgh in an administrative role with extensive responsibilities that required coordinating various departments.[12] Tragically, the doctor was so overwhelmed with stress that he sought psychiatric help, which led to his superiors placing him on an indefinite leave of absence (with full pay). Five days after his leave of absence began, the doctor committed

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[6] *See* Section II.B, *infra*, for a detailed review of *Payes*.

[7] *See* Part III, *infra*.

[8] University of Pittsburgh v. W.C.A.B., 405 A.2d 1048 (Pa. Commw. Ct. 1979).

[9] *Id.* at 1050.

[10] *Id.*

[11] *Id.* at 1051.

[12] *Id.* at 1049.

suicide.[13] His widow then sought death benefits, which were awarded by the WCJ and affirmed by the W.C.A.B. and Commonwealth Court. The WCJ had found credible the medical testimony offered by claimant that the deceased doctor was suffering from a psychotic depressive reaction "which was caused by the impossible situation found in his work."[14] Important to the Commonwealth Court was the medical opinion that the deceased doctor's mental stress was caused by "working conditions peculiar to his employment" that put him in a "state of frenzy."[15]

*University of Pittsburgh* was noteworthy for its recognition of the compensability of mental-mental injuries, but its impact on how such cases would be decided was short-lived.[16] It did not take long before Pennsylvania courts began to place additional requirements on claimants seeking to succeed on claims of psychiatric injuries caused by mental stimuli. Only a year after *University of Pittsburgh*, the Commonwealth Court decided *Thomas v. W.C.A.B*,[17] which proved to be a far more impactful decision on future mental-mental cases.[18] The claimant in *Thomas* argued that he was debilitated and rendered unable to work due to nervousness and stress caused by witnessing several refinery fires at his job over the course of six years, including one in which he was partially physically injured and witnessed a fellow worker die.[19] While the claimant was distressed by these incidents, the actual event that led to his nervous breakdown immediately preceding his filing a workers' compensation claim was a news report of a serious fire at another refinery.[20]

*Thomas* denied claimant compensation because it was unclear that he had sustained a work-related injury.[21] The Commonwealth Court explained that the claimant did not present evidence that a "distinct psychiatric injury" occurred to prompt his filing for workers' compensation.[22] According to the Commonwealth Court, psychiatric injuries were "highly subjective" and required "the occurrence of the injury and its cause" be "adequately pinpointed"

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[13] *Id.*

[14] *Id.*

[15] *Id.* at 1050.

[16] Martin v. Ketchum, Inc., 568 A.2d 159, 165 n.3 (Pa. 1990), noted that some of the earlier mental-mental cases decided by the Commonwealth Court in which benefits were awarded were incompatible with the standard as espoused in *Martin*. Specifically, some of the earlier cases, including *University of Pittsburgh*, did not include an abnormal working conditions requirement. Although no cases were specifically referenced as incompatible, *University of Pittsburgh* was discussed in the text of *Martin*. *See* Lilley v. W.C.A.B. (York Int'l Corp.), 616 A.2d 91, 95 n.1 (Pa. Commw. Ct. 1992) (noting that *Martin* abrogated *University of Pittsburgh* and the "irrational frenzy test" was replaced by a "chain-of-causation" test).

[17] Thomas v. W.C.A.B., 423 A.2d 784 (Pa. Commw. Ct. 1980).

[18] *See Martin*, 568 A.2d at 168 (Larsen, J., dissenting) (referring to *Thomas* as the "seminal case" regarding claims of mental injury).

[19] *Thomas*, 423 A.2d at 785–86.

[20] *Id.* at 787.

[21] *Id.*

[22] *Id.*

or else claimant would fail.[23] *Thomas* found that the claimant had not offered adequate evidence to establish that a work-related injury—rather than merely an overreaction to a news report—had occurred. Instead, the court believed the claimant had a "subjective reaction" to "normal working conditions," which is not compensable.[24] From *Thomas*, it became clear that claimants would have to be highly specific in their offers of proof of a work-related injury in that the Commonwealth Court would view psychological injuries with suspicion.

The trend continued four years later in *Hirschberg v. W.C.A.B. (Department of Transportation)*.[25] *Hirschberg*'s contribution to the mental-mental claim case law was its emphasis on rejecting subjective reactions by claimants and requiring evidence of "actual, and not merely perceived or imagined, employment events."[26] From *Hirschberg* and *Thomas*, later courts derived a requirement that the working conditions that caused the mental injury must have been abnormal in order for the injury to be compensable.[27] The "abnormal working conditions" requirement has proven to be one of the most onerous for injured workers pursuing a claim for mental disability as a result of mental stimuli.

*Hirschberg* involved an employee for the Pennsylvania Department of Transportation who suffered from preexisting neurosis and made a claim for disabling stress due to what he perceived as his supervisors mistreating him.[28] The fact that claimant's condition predated his employment was not the death knell to his claim. The Commonwealth Court properly noted that exacerbation of a preexisting condition is compensable under the Act.[29] What made the claimant's mental distress noncompensable was the lack of a causal connection between his mental state and the actions of his superiors who he claimed mistreated him. Repeating the language of *Thomas*, *Hirschberg* considered mental injuries to be "highly subjective" and therefore must be supported by "unequivocal medical testimony" in order to establish a causal connection between the injury and claimant's employment.[30] The claimant in *Hirschberg* typified the subjective injuries that the Commonwealth was seeking to exclude from the realm of compensable injuries: he asserted exacerbation of his mental ailments based on his "honest, albeit mistaken, *perception* of job-related harassment."[31] "Employing the subjective standard

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[23] *Id.*

[24] *Id.* at 788.

[25] Hirschberg v. W.C.A.B. (Dep't of Transp.), 474 A.2d 82 (Pa. Commw. Ct. 1984).

[26] *Id.* at 85.

[27] *See Martin*, 568 A.2d 159 (citing *Thomas* and *Hirschberg* in deciding to adopt the abnormal working conditions standard, despite the fact that neither case specifically mentioned "abnormal working conditions").

[28] *Hirschberg*, 474 A.2d at 84.

[29] *Id.*

[30] *Id.*

[31] *Id.* (emphasis in original).

urged by claimant, an individual could recover benefits absent actual, stressful work-related incidents."[32]

In a separate decision involving the Department of Transportation in the same year as *Hirschberg*, workers suffering from mental ailments found some reprieve. Unlike the claimant in *Hirschberg*, the claimant in *McDonough v. W.C.A.B. (Commonwealth, Department of Transportation)* was found to have actually been publicly berated by his supervisor over a period of eight years, which resulted in acute anxiety.[33] Importantly, the claimant presented evidence from co-workers that corroborated his version of events in which he was belittled and medical evidence that he had developed a panic disorder as a direct response to his public remonstrations.[34] The WCJ had actually made a factual finding that claimant's injuries were merely subjective reactions to normal working conditions.[35] However, the Commonwealth Court—in a departure from its trend at the time—disregarded those factual findings against the claimant and held that he had presented enough evidence that it was in error for the WCJ to have refused him compensation.[36] *McDonough* also served to demonstrate that long-term mental deterioration can be compensable.[37] Notably, to support its holding, *McDonough* cited to *University of Pittsburgh*—a case that had not received the same sort of deference in *Thomas* and *Hirschberg*.

It is entirely possible—if not likely—that the claimant in *McDonough* simply benefited from worker-friendly personnel who made up the three-judge panel that reviewed his case. One of the three judges in *McDonough* had also been part of the majority in employer-friendly *Hirschberg*; that same judge dissented in worker-friendly *McDonough*.[38] In reversing the decision of the WCJ and W.C.A.B. and ignoring the factual findings against the worker, *McDonough* was a prominent outlier in a trend of cases making successful mental-mental claims ever more difficult.[39]

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[32] *Id.*

[33] McDonough v. W.C.A.B. (Commonwealth, Dept. of Transp.), 470 A.2d 1099 (Pa. Commw. Ct. 1984).

[34] *Id.* at 1100–01.

[35] *Id.* at 1101.

[36] *See id.* At 1101–02 (explaining that claimant's medical expert's repeated expressed opinion that claimant's injuries were the result of his employment constituted the "test of unequivocal medical testimony").

[37] *Id.*

[38] Judge MacPhail heard both cases. He was part of the unanimous majority in *Hirschberg* and was the lone dissenter in *McDonough*.

[39] *McDonough* was not the lone case in this period that found a claimant's mental-mental claim to be compensable. *See* Bevilacqua v. W.C.A.B. (J. Bevilacqua Sons, Inc.), 475 A.2d 959 (Pa. Commw. Ct. 1984) (holding a worker who encountered increased responsibility on a new job was owed benefits when mental disability resulted); Allegheny Ludlum Steel Corp. v. W.C.A.B. (Fisher), 498 A.2d 3 (Pa. Commw. Ct. 1985) (awarding compensation to a worker who had increased paperwork while losing an assistant).

In the year after *McDonough*, the Commonwealth Court continued to cite to *Thomas* and *Hirschberg* to deny claimants recovery on mental-mental claims.[40] "[T]he degree of proof in [cases involving mental and nervous disabilities resulting from work-related stress] is quite high."[41] The *Hammerle* claimant's psychiatric injuries were undisputed, but the Commonwealth Court denied compensation because "Hammerle presented no evidence that his working conditions were abnormal, nor that any specific employment event, other than the every day [sic] stress of his job, precipitated his psychiatric disability."[42] Hammerle's argument that a subjective standard should be used to evaluate his working conditions was once again disposed of by the court in the interest of limiting compensation to instances in which conditions are out of the ordinary and claimant's reaction is objectively reasonable.[43] By 1985, it appeared to firmly be the law of Pennsylvania that to be compensated for a psychiatric injury resulting from work-related stress, a claimant must show working conditions were abnormal (as corroborated by co-workers) and provide unequivocal medical evidence of a real disability that can be linked with precision to a particular time or event at work. However, the Pennsylvania Supreme Court had yet to officially weigh in.

The Pennsylvania Supreme Court did so in 1990, making the uphill battle for claimants even more difficult by firmly adopting the abnormal working conditions requirement.[44] *Martin v. Ketchum, Inc.*, affirmed a Commonwealth Court decision that reversed the W.C.A.B. and WCJ's determination that the claimant was entitled to death benefits as the result of her husband killing himself after substantial work-related stress.[45] The Pennsylvania Supreme Court took the appeal to resolve the issue of the proper standard to be applied to claims of mental disability.[46]

In regard to the abnormal working conditions rule that the *Martin* majority perceived to be pervasive in Commonwealth Court decisions at the time, *Martin* explained that the rule was meant to distinguish between actual work-related stress and subjective reactions to normal working conditions.[47] A claimant cannot rely on his own account of his working environment to show that his psychiatric injury was work-related; therefore, a showing of how his injury is something other than a subjective reaction to normal working conditions is required.[48] According to the Pennsylvania Supreme Court, "[a]bandoning the distinction between normal and abnormal

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[40] *See* Hammerle v. W.C.A.B. (Dep't of Agric., Bur. of Dog Law Enforcement), 490 A.2d 494 (Pa. Commw. Ct. 1985) (denying compensation to a worker who suffered psychiatric injuries as a result of what he claimed was a job with requirements that were too demanding).

[41] *Id.* at 496.

[42] *Id.*

[43] *Id.* (citing *Thomas*, 423 A.2d at 788).

[44] Martin v. Ketchum, Inc., 568 A.2d 159 (Pa. 1990).

[45] *Id.* at 163.

[46] *Id.*

[47] *Id.* at 165.

[48] *Id.* at 164–65 (quoting Russella v. W.C.A.B. (Nat'l Foam Sys., Inc.), 497 A.2d 290 (Pa. Commw. Ct. 1985)).

working conditions, as the [claimant] urges us to do, would eliminate the element of causation. … Under the Appellant's theory, a claimant would have to establish only that the employee suffered from a mental illness while employed and that the illness was a condition created or aggravated by that employee's perception of the conditions of his employment." [49] *Martin* entrenched the abnormal working conditions requirement in Pennsylvania law as a means to ensure a claimant pleading a psychiatric injury adequately shows causation without subjectivity.

Justice Larsen's dissenting opinion in *Martin* represents the alternate route that could have been Pennsylvania law. In a stirring dissent, Justice Larsen criticizes the Commonwealth Court decisions of the 1980s and the majority in *Martin* for limiting the class of people who can recover under the Workers' Compensation Act by adopting the abnormal working conditions requirement. "The Act makes *no* distinction between mental and physical disabilities, yet the majority exhibits an unarticulated but palpable bias against claims of *mental* disability as contrasted with physical disability."[50] Further, Justice Larsen points out that *Thomas* and *Hirschberg* do not actually adopt an abnormal working conditions requirement, but rather merely adopt an objective standard to determine whether the events triggering the psychiatric injury were actually work-related (as opposed to wild exaggeration in the claimant's head, as in *Hirschberg*).[51] In reviewing the case law, Justice Larsen posits "that [the] Commonwealth Court initially and properly approached 'subjective' mental disability claims by emphasizing the distinction between actual and imagined workplace stresses as a way to pinpoint causation."[52] The abnormal working conditions rule was the result of questionable case law and the *Martin* majority's misreading of earlier Commonwealth cases.[53] However, Justice Larsen did not carry the day, and subsequent Pennsylvania cases were decided in accordance with the majority's requirements.

Four years after *Martin*, the Pennsylvania Supreme Court granted allocatur on another mental-mental case to fine-tune the requirements in such cases. *Romanies v. W.C.A.B. (Borough of Leesport)* involved a police chief's claim for workers' compensation as a result of a psychological injury arising from the town mayor's harassing phone calls placing additional pressures on the police chief.[54] While it was undisputed that claimant suffered a psychiatric injury, it was unclear whether that injury stemmed solely from the abnormal working conditions—namely, the harassing phone calls. The Supreme Court reversed the Commonwealth Court, which granted compensation, because "there was no medical evidence presented that the harassing phone calls alone caused or were a substantial contributing factor in causing

[49] *Id.* at 165.

[50] *Id.* at 168 (Larsen, J., dissenting) (emphasis in original).

[51] *Id.*

[52] *Id.* at 169.

[53] *See id.* at 170 ("the 'abnormal working conditions' rule has had a murky genesis, to say the least").

[54] Romanies v. W.C.A.B. (Borough of Leesport), 644 A.2d 1164 (Pa. 1994).

Appellee's psychological injury."[55] The requirement for medical testimony established in *Romanies* indicated that a claimant's medical testimony must be sufficiently specific as to expressly identify the exact cause, or substantial contributing factors, of the injury.

Although the Pennsylvania Supreme Court's next mental-mental case did not place any new burdens on injured workers, *Wilson v. W.C.A.B. (Aluminum Co. of America)* would prove to be immensely important.[56] *Wilson* held that whether the supposed cause of a claimant's injury was an abnormal working condition was solely a question of law.[57] While a holding concerning a procedural matter such as an appellate court's standard of review may not appear groundbreaking, the implications of this decision meant that the Commonwealth Court could essentially disregard the WCJ's factual findings and review the case *de novo*. *Wilson* acknowledged that the determination, while a question of law, was highly fact-sensitive, but also rejected Commonwealth Court decisions that had described the abnormal working condition as a mixed question of fact and law.

A decade after *Martin*, the Pennsylvania Supreme Court revisited the requirements for mental-mental cases and reinforced its prior holding, if not going further to make mental-mental claims more difficult to prove.[58] *Davis* v. *W.C.A.B. (Swarthmore Borough)* explained that employment—like life in general—inherently has a degree of uncertainty, and a claimant's psychic injuries that come as a result of these "ordinary vicissitudes" are not compensable.[59] Whether a job condition is abnormal must be determined in the context of the specific employment.[60] In other words, events that cause a police officer psychiatric injuries must be judged by how other police officers would react to a situation as opposed to how an average person would react. Further, in reinforcing *Wilson*, *Davis* described the abnormal working conditions determination of the WCJ as "fully reviewable," thus diminishing the importance of the WCJ's factual findings.[61]

It is worth noting that *Davis* involved a claimant whose psychic injuries from nonphysical stimuli at work manifested themselves in part in physical injuries.[62] The Pennsylvania Supreme Court, however, still categorized *Davis* as a mental-mental case, reasoning that the claimant's psychic injury was not transformed into a physical injury because

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[55] *Id.* at 1167.

[56] Wilson v. W.C.A.B. (Aluminum Co. of Am.), 669 A.2d 338 (Pa. 1996).

[57] *Id.* at 343. In addition to the standard of review question, *Wilson* held that the loss of a job was not an abnormal working condition. *Id.* at 345. The Pennsylvania Supreme Court also rejected the contention that any change at all in the status quo of employment could be considered abnormal and thus compensable. *Id.* at 344.

[58] Davis v. W.C.A.B. (Swarthmore Borough), 751 A.2d 168 (Pa. 2000).

[59] *Id.* at 177.

[60] *Id.* (quoting *Wilson*, 669 A.2d at 343).

[61] *Id.* at 174.

[62] *Id.* at 172.

of physical symptoms.[63] The distinction is not merely semantics, as explained in *Panyko v. W.C.A.B. (U.S. Airways)*.[64] Where work experiences produce a purely physical injury, as opposed to a mental injury that has some physical symptoms, the Pennsylvania Supreme Court demands a different burden of proof.[65] The abnormal working conditions rule does not apply if stressful work conditions cause a claimant to have a purely physical injury, such as a heart attack.[66] Therefore, a claimant who can classify his or her injuries as primarily physical, as opposed to mental, is more likely to receive compensation because he or she need not show the working conditions that caused the injury were abnormal. This distinction in rules means a claimant who has a heart attack is likely to receive compensation, whereas a claimant who has post-traumatic stress disorder is unlikely to receive compensation.

The abnormal working conditions standard and the propensity for appellate courts to find against workers produced some especially strange results. One such example was dealt with in a *per curiam* opinion of the Pennsylvania Supreme Court in 2007. In *Kennelty v. W.C.A.B. (Schwan's Home Service, Inc.)*, the Pennsylvania Supreme Court reversed the Commonwealth Court, which had granted the worker benefits by reversing the WCJ.[67] The Supreme Court held that the Commonwealth Court was bound by the credibility determinations of the WCJ in its determination of abnormal working conditions.[68] Such a holding seems to disregard the holding in *Daniels* that abnormal working conditions are solely a question of law. But that is not why *Kennelty* is noteworthy. *Kennelty* is noteworthy because it demonstrates some of the extreme working conditions that were not found to have satisfied the abnormal working conditions rule.

The claimant in *Kennelty* was a food delivery person who was robbed multiple times at gunpoint over a six-month period.[69] In denying claimant benefits by reversing the Commonwealth Court, who had reversed the WCJ, the Pennsylvania Supreme Court wrote:

> The WCJ determined that the testimony of the employees of Schwan's Home Service, Inc., was credible to the extent they testified that the frequency of occurrences of work-related incidents experienced by Petitioner was normal for their specific

[63] *Id.* at 177.

[64] Panyko v. W.C.A.B. (U.S. Airways), 888 A.2d 724 (Pa. 2005).

[65] Such cases are known as mental-physical injuries because it is a physical injury caused by mental stimuli. Mental-physical cases are largely beyond the scope of this essay.

[66] *See Panyko*, 888 A.2d at 731–32 (holding that a worker who suffered a heart attack while meeting with his supervisor was not required to show his working conditions were abnormal because his physical injury was objectively verifiable).

[67] Kennelty v. W.C.A.B. (Schwan's Home Serv., Inc.), 934 A.2d 692 (Pa. 2007).

[68] *Id.* at 692.

[69] *Id.* (Saylor, J., concurring).

> industry; the Commonwealth Court is not free to disturb this credibility determination based on competent evidence.[70]

In his concurrence, Justice Saylor supported the Commonwealth Court's "refusal to accept that the experience of a food delivery person of multiple incidents of robbery at gunpoint over a six-month period can be characterized as anything other than an abnormal working condition."[71] The abnormal working conditions standard became so difficult to overcome that not even multiple robberies at gunpoint was sufficient to overcome it.

However, the Pennsylvania Supreme Court did not always use *Martin* and its progeny to deny benefits to workers. In 2007, the court held that sexually harassing comments from a miner's superior constituted abnormal working conditions.[72] *RAG* still held that the question of abnormal working conditions was a question of law and thus fully reviewable on appeal, but the court admonished the Commonwealth Court for ruling against the worker and overturning the WCJ's determination of abnormal working conditions.[73] The Commonwealth Court's error, according to the Supreme Court, was not limiting its review to determining whether the WCJ's factual findings were supported by the record and instead focusing on testimony disregarded by the WCJ.[74] While *RAG* did not offer any substantial changes to the mental-mental case law, it did show that the Pennsylvania Supreme Court was willing to find injuries compensable within the *Martin* framework.[75] In that sense, *RAG* may be seen as a precursor for a more substantial decision from the court six years later.

B. A Victory for Injured Workers: *Payes v. W.C.A.B. (Commonwealth PA State Police)*

While *Martin* and its progeny and the abnormal working conditions rule remain the controlling law for mental-mental cases in Pennsylvania, *Payes v. W.C.A.B. (Commonwealth PA*

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[70] *Id.* (majority opinion).

[71] *Id.* at 692–93 (Saylor, J., concurring).

[72] RAG (Cyprus) Emerald Res., L.P. v. W.C.A.B. (Hopton), 912 A.2d 1278 (Pa. 2007).

[73] *Id.* at 1286.

[74] *Id.*

[75] *RAG*'s discussion of the abnormal working condition rule summarized the position of the court post-*Martin*:

> In classifying working conditions as normal or abnormal, we do not employ a bright line test or a generalized standard, but instead, consider the specific work environment of the claimant; for we recognize that what may be normal for a police officer will not be normal for an office worker. *See Wilson*, 669 A.2d at 343. Consequently, we deny compensation for injuries resulting from events that are expected in the relevant working environment, whether it is an office worker's change in job title or responsibility, *see id*. at 344, or a police officer's involvement in life-threatening situations, *see Davis*, 751 A.2d 168. Additionally, we do not expect employers to provide emotionally sanitized working conditions. "In assessing whether work conditions are abnormal, we must recognize that the work environment is a microcosm of society. It is not a shelter from rude behavior, obscene language, incivility, or stress." *Philadelphia Newspapers, Inc. v. W.C.A.B. (Guaracino)*, 675 A.2d 1213, 1219 (1996).

*Id.* at 1288.

*State Police)* gave some hope to injured workers.[76] Most significantly in *Payes*, the court held that the determination of the WCJ concerning abnormal working conditions should not be disturbed except where arbitrary and capricious, and that a claimant's highly stressful occupation cannot serve as the sole rationale to deny benefits.[77]

*Payes* involved a state trooper who was on duty traveling along Interstate 81 to his barracks in the early hours of the morning when a mentally disturbed woman dressed in all black flung herself in front of the trooper's car. It was later apparent that the woman was attempting suicide by launching herself at claimant's vehicle. After striking the woman with his vehicle, the claimant attempted to resuscitate the woman but was unsuccessful. Claimant was permitted to be off work for approximately a month but upon his return to work he was overcome with feelings of anxiousness and stress rendering him unable to perform his work as a trooper.[78]

While the WCJ granted claimant benefits, the W.C.A.B. reversed that determination. The W.C.A.B. was then affirmed by the Commonwealth Court.[79] In part, the Commonwealth Court found that claimant had not been subjected to abnormal working conditions because as a police officer he was expected to deal with traumatic and violent situations.[80] The Supreme Court took special umbrage with this portion of the Commonwealth Court's decision. Only the incident that actually occurred should be considered when determining the abnormality of the circumstance; supposed analogous events (a police officer having to shoot and kill someone or giving CPR to an automobile accident victim) are not to be considered.[81]

*Payes* placed particular emphasis—literally, by putting the terms in bold—on the determination of abnormal working conditions being "**highly fact-sensitive**."[82] Determining whether a worker was subjected to abnormal working conditions is a mixed question of law and fact.[83] "The more fact intensive the inquiry, the more deference a reviewing court should give to the findings below."[84] As a result, the W.C.A.B. and Commonwealth Court will need to grant the proper deference to the WCJ's factual findings or else risk being overturned. No longer can appellate courts conduct a *de novo* review to deprive a worker of compensation by finding the circumstances were not out of the ordinary.

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[76] Payes v. W.C.A.B. (Commw. PA State Police), 79 A.3d 543 (Pa. 2013).

[77] *Id.* at 555–56.

[78] *Id.* at 545–46.

[79] *Id.* at 547–48.

[80] *Id.* at 548.

[81] *Id.* at 553–54.

[82] *Id.* at 549 n.3, 552.

[83] *Id.* at 549.

[84] *Id.* at 549 n.3 (citation omitted).

The *Payes* decision is not a minor one, and its effects have already begun to be felt. In light of its decision in *Payes*, the Pennsylvania Supreme Court reversed and remanded a Commonwealth Court decision that denied compensation to a liquor store employee who was robbed at gunpoint and thereafter suffered mental injuries preventing the employee from working.[85] Applying the *Payes* decision, the Commonwealth Court reversed its earlier decision and deferred to the findings of fact of the WCJ, who had concluded being robbed at gunpoint was an abnormal working condition for a liquor store employee and therefore the mental injuries originating from that incident were compensable under the Act.[86]

Because WCJs' factual findings are now owed greater deference, WCJs are less likely to be overturned. With this knowledge, WCJs may begin to find more workers were subjected to abnormal working conditions because the Commonwealth Court cannot review such a determination *de novo* and deny workers compensation under the heavy fist of *Martin*.

## III. The Approach of Advocates for Pennsylvania Workers

Even in light of *Payes*, the claimants' bar still must overcome significant barriers to compensation before the WCJ. Attorneys for workers must show through objective evidence that an actual mental injury was incurred as a result of abnormal working conditions that can be identified. The workers' injuries must be more than a subjective reaction to ordinary duties or requirements of the job that they have chosen. Evidence of a singular extraordinary event is more likely to be successful as opposed to vague stressors that cannot be pinpointed to a particular incident. Advocates should be mindful that unlike some workers' compensation claims, a mental-mental case will require more evidence of injury than is typically required.[87] Claimants who are engaged in highly stressful professions that are known to deal with traumatic events have a more difficult time showing abnormal working conditions because this analysis is job-specific: what are considered abnormal working conditions for an accountant may be considered normal for a police officer.

Although *Payes* has eased the burden for workers' compensation practitioners, it was not such a significant holding as to make mental-mental cases easy victories.[88] In fact, nearly the opposite is true: mental-mental claims continue to be very difficult to prove and should be pursued only in circumstances in which the lawyer believes he or she can show that the client

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[85] *Kochanowicz v. W.C.A.B. (PA Liquor Control Bd.)*, 85 A.3d 480 (Pa. 2014) (per curiam).

[86] *Kochanowicz v. W.C.A.B. (PA Liquor Control Bd.)*, 2014 WL 7403464 (Pa. Commw. Ct. Dec. 30, 2014).

[87] "Medical evidence should be tailored to directly relate an injured worker's psychological condition to a specific incident." Christian Petrucci, *Court Takes a Step Back on Proving Abnormal Working Conditions*, THE LEGAL INTELLIGENCER, Dec. 11, 2014. Advocates should be aware that a psychologist's general statements concerning the cause of a claimant's injuries will not be sufficient. *Id.*; *see also* Frog, Switch & Mfg. Co. v. W.C.A.B. (Johnson), No. 149 C.D. 2014 (Pa. Commw. Ct. Dec. 4, 2014) (finding a claimant's medical testimony insufficient).

[88] In addition to still applying the abnormal working conditions rule, advocates should be wary of the Pennsylvania Supreme Court limiting the effects of *Payes* in a subsequent decision. The majority opinion in *Payes* was written by Justice McCaffery, who is no longer on the bench, while then–Chief Justice Castille and Justice Eakin filed dissenting opinions.

was the victim of objectively abnormal working conditions for the client's profession and the lawyer has unequivocal medical documentation of the client's psychiatric injuries that are linked to those abnormal working conditions. What has changed is that the factual findings of the WCJ are of utmost importance. The emphasis the *Payes* court placed on those factual findings indicates that the W.C.A.B. and Commonwealth Court will be limited in their ability to overturn a decision granting compensation to a worker presenting a mental-mental claim.[89] Only where the WCJ has made a decision granting compensation that is "arbitrary and capricious" will the WCJ's factual findings be overturned.[90] Even though establishing an abnormal working condition is still a question of law, the Supreme Court has indicated that appellate courts should not disturb a WCJ's decision on this matter except in rare situations because "psychic injury cases are **highly fact-sensitive**."[91]

## IV. Conclusion

For nearly the entirety of the history of mental-mental claims in Pennsylvania, workers have faced an intense uphill battle. The abnormal working conditions rule and the specificity of medical evidence linking the injury to work-related causes continue to be prohibitive to most claims of mental injury caused by mental stimuli. However, the Pennsylvania Supreme Court's recent decision in *Payes* offers claimants some hope that if they receive compensation from the WCJ, they will likely not have their award overturned. Appellate courts must grant deference to the highly fact-specific determination of abnormal working conditions. It remains unseen whether *Payes* will pave the way for more successful mental-mental claims.

[89] *Payes*, 79 A.3d at 552.

[90] *Id.* (quoting *RAG*, 912 A2d. at 1284 n.6).

[91] *Id.* (emphasis in original).