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Aya V. Matsumoto

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REFORMING THE REFORM: MENTAL STRESS CLAIMS UNDER CALIFORNIA'S WORKERS' COMPENSATION SYSTEM

I. INTRODUCTION

*California has been a pretty friendly state if you're a worker looking to cheat the system.*¹

This statement is widely perceived to be an accurate description of workers' compensation law in California. Legislators, the public, and involved parties decry rampant abuses in the system.² An area of particular disdain involves the "mental stress" claim, whereby a worker receives compensation after suffering disabling mental or emotional³ job stress.⁴

1. Mark Lacter, *Work Comp Half-Step*, L.A. DAILY J., July 27, 1993, at 6.

2. See CAL. LAB. CODE § 3208.3 note (West Supp. 1994) (Historical and Statutory Notes) (letter from Gov. Pete Wilson to California Assembly (July 16, 1993)); Lacter, *supra* note 1, at 6 (stating that "[w]orkers' compensation remains a scandal of immense proportions" and fraud causes "cynicism" towards all claims and overall system); Dan Walters, *Work Comp Overhaul*, L.A. DAILY J., July 21, 1993, at 6 (discussing reforms to "scandalously inefficient and expensive workers' compensation system").

3. In actuality, stress itself is not a mental disorder within the meaning of the California Workers' Compensation statute. See HERBERT LASKY, GUIDELINES FOR HANDLING PSYCHIATRIC ISSUES IN WORKERS' COMPENSATION CASES 56 (1988). Thus, if an employee seeks workers' compensation claiming stress, the employee must show that the stress caused a disabling mental injury, as defined by relevant statutory provisions, and that the disabling mental injury is attributable to employment rather than "non-industrial factors." *Id.*

Mental injuries in stress claims bear numerous labels. For example, stress claim injuries are often termed a neurosis or a mental, emotional, psychic, psychiatric, psychological, or psychoneurotic injury. See 1 WARREN L. HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKERS' COMPENSATION § 4.69 (2d ed. rev. 1993); 1 STANFORD D. HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW PRACTICE § 10.24 (4th ed. 1991); 1B ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.20 (1993). This Comment uses the term "mental stress" for consistency.

4. See Paul Lees-Haley, *Unintentionally Fraudulent Claims for Stress Disorders*, 55 DEF. COUNS. J. 194, 194 (1988) ("Numerous individuals unintentionally are behaving in a fashion calculated to increase erroneous diagnoses of stress disorders."); Rebecca Kuzins, *Ex-Judge Requests Compensation for Job-Related Stress*, L.A. DAILY J., Dec. 5, 1985, at 1 (detailing stress claim filed by former judge claiming aggravation of heart problems due to "acrimonious relationship with another judge" about which claimant's physician stated that, after one particularly upsetting incident, claimant "decided to play golf that afternoon to help him unwind"); Lawrence P. Postol & Mary W. Adelman, *Stress Claims in the Workplace*, FOR DEF., Aug. 1990, at 5, 6 (discussing category of stress claims that are "easily and frequently feigned or are caused by factors other than the work injury").

Differences exist among the states' workers' compensation statutes for compensating various types of mental stress injuries.⁵ A number of states limit compensation for mental injury claims by requiring an "unusual" level of stress—greater than everyday, ordinary workplace stress.⁶

5. The three mental injury categories generally recognized are (1) "physical-mental" claims in which a compensable physical injury leads to a mental disorder, (2) "mental-physical" claims in which an initial mental stress produces a physical injury, and (3) "mental-mental" claims in which mental stress leads to mental injury. Peter S. Barth, *Workers' Compensation for Mental Stress Cases*, 8 BEHAVIORAL SCI. & L. 349, 351-56 (1990); see 1 HANNA, *supra* note 3, § 4.69[1], at 4-96; George D. Bussey, *Mental "Stress" Claims and Workers' Compensation: The Problems and Suggestions for Change*, 43 FED'N INS. CORP. COUNS. Q. 99, 103-04 (1990).

An example of a physical-mental injury is a claim filed for a mental injury resulting from a physical event, such as a worker who fell from a ladder and now suffers from fear of climbing. Donald C. Dilworth, *Stress Problems Increase as Workplace Changes*, TRIAL, Feb. 1991, at 11, 11. The mental-physical category includes claims that attribute physical disorders, such as heart attacks or ulcers, to mental stress. *Id.* at 11-12. The mental-mental claim, which is the focus of this Comment, does not assert that a physical injury either caused or resulted from a corresponding mental injury. Instead, "[m]ental-mental claims allege that psychological experiences like workplace stress . . . can lead to depression, behavior problems, and chemical dependencies." *Id.* at 12.

The mental-mental classification contains four subgroups: (1) sudden, extreme mental stress; (2) sudden, acute, but more or less "normal" stress; (3) chronic, excessive stress (some states require "unusual or extraordinary" stress rather than regular everyday life or work stress); and (4) chronic exposure to usual mental stress. Bussey, *supra*, at 104-11. For example, a worker who fainted and required hospitalization after viewing a coworker's severed hand experienced sudden, extreme mental stress. *Id.* at 104. A delinquent youth facility worker's serious emotional reaction—with visible shaking and perspiring—to a threat on the worker's life after a riot at the facility demonstrates sudden, acute, but more or less "normal" stress. *Id.* at 106. An unexpected event such as sexual molestation at work is an example of "unusual or extraordinary" stress. *Id.* at 107-08. Normal, everyday stress connected with work comprises chronic exposure to usual mental stress. See *id.* at 104, 111.

Traditionally, tort law and workers' compensation statutes denied recovery for claims of emotional distress unaccompanied by physical injury. Marc A. Antonetti, *Labor Law: Workers' Compensation Statutes and the Recovery of Emotional Distress Damages in the Absence of Physical Injury*, 1990 ANN. SURV. AM. L. 671, 671-72. Courts tend to deny tort recovery for "mental disturbance" alone unless the case demonstrates an "especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 361-62 (5th ed. 1984). Negligent telegraph messages of a death and negligent mishandling of corpses are narrow exceptions to the general rule against recovery for mental injury alone. *Id.* at 362.

Tort law further allows damages for mental injury accompanying physical impact (upon plaintiff's person) with temporal considerations of immediateness. *Id.* at 362-63. Disregarding the impact requirement, many courts now consider an "objective physical manifestation" or a physical illness or injury authenticating the mental injury sufficient to support tort recovery; however, "there is still considerable confusion . . . as to just what conditions or symptoms should be deemed to qualify as the requisite 'injury,' 'illness,' or other physical consequence." *Id.* at 364.

6. Bussey, *supra* note 5, at 107 (citing Jimmy P. Mann & John Neece, *Workers' Compensation for Law Enforcement Related Post Traumatic Stress Disorder*, 8 BEHAVIORAL SCI. &

Other states further restrict compensation by not recognizing mental stress injuries allegedly caused by extreme and sudden mental stress.⁷

California is among a small minority of states permitting compensation for mental stress injury without a showing of a "sudden or extraordinary event" that triggered the injury.⁸ Furthermore, California does not require a corresponding physically manifested injury, but instead recognizes and compensates purely psychological stress claims.⁹ Commentators state that California maintains a "generous" compensation standard for mental stress injuries,¹⁰ and California workers exceed the national average for filing workers' compensation claims in several categories.¹¹

L., 447, 456 app. (1990), and stating that 13 states require unusual chronic stress for compensability).

7. *Id.* at 105; see *supra* note 5 (describing sudden, extreme mental stress category).

8. Rita Maroney McPeake, *Workers' Compensation Law*, in *MANAGING THE PRIVATE LAW LIBRARY* 1992, at 401, 412 (PLI Pat., Copyrights, Trademarks, & Literary Prop. Course Handbook Series No. 335, 1992); see Bill Leonard, *Thinly Veiled Workers' Compensation Reform*, L.A. DAILY J., Aug. 23, 1991, at SD1.

Cumulative injuries—injuries that develop over time—are "well established" as compensable claims under workers' compensation and constitute a "significant part of workers' compensation litigation." Donald T. DeCarlo & Martin Minkowitz, *Workers' Compensation and Employers' Liability Law: Recent Developments*, 26 TORT & INS. L.J. 444, 447-48 (1991). Categorized as a repetitive motion injury (RMI), McPeake, *supra*, at 409, carpal tunnel syndrome—physical injury resulting from "continuous computer keyboarding" or the "'wringing' motions made by supermarket checkout clerks"—is an example of a cumulative injury, see *id.* at 409, 411, 415.

In California, an injury is defined as

either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment.

The date of a cumulative injury shall be the date determined under Section 5412.

CAL. LAB. CODE § 3208.1 (West 1989); see McPeake, *supra*, at 411. Unlike California, some states exclude compensation for cumulative injuries due to several troublesome factors: the speculative or remote character of a cumulative injury, the problems in verifying workplace causation, and the subjectivity of the symptoms. *Id.* at 411-12.

As further specified in California Labor Code § 3208, a compensable disability needs to arise from the worker's job: "'Injury' includes any injury or disease arising out of the employment" See 1 HANNA, *supra* note 3, § 4.01[2][a], at 4-13.

Moreover, to be compensable, an injury must be work related. Section 3600(a) of the California Labor Code requires that the disabling injury arise out of and occur in the course of the employment: "Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person . . . shall, without regard to negligence, exist against an employer for any injury sustained by his or her employees arising out of and in the course of the employment" See *id.* § 4.03[2], at 4-24 to 4-26.

9. See 1 HANNA, *supra* note 3, § 4.01[2][a], at 4-13 to 4-15; 1B LARSON, *supra* note 3, § 42.25(a), at 7-957 to 7-958.

10. Barth, *supra* note 5, at 358; see 1B LARSON, *supra* note 3, § 42.25(a), at 7-958; see also *supra* note 5 (discussing mental-mental classification).

11. See McPeake, *supra* note 8, at 414. Overall and in specific categories, California exceeds nationwide averages in filing workers' compensation claims: "California workers file

Indeed, for the period between 1979 and 1988, California experienced a 700% increase in workers' compensation claims for mental injuries.¹² Moreover, statutory amendments designed to quantify mental injury thresholds for determining compensability may not have achieved the intended effect of increasing the requisite standard of proof for psychiatric claims.¹³ One commentator suggests that the initial "pre-reform" law required an employee to prove the mental injury claim's elements, including causation, by a preponderance of the evidence, which is generally considered to be a fifty-one percent standard.¹⁴ Following the 1989 California workers' compensation reform, that commentator maintains that an employee needed to show that a lesser standard of only ten percent of actual employment events caused the mental injury.¹⁵ The 1993 reform required that actual events of employment be "predominant" as to all causes combined to establish a compensable mental stress injury, unless the injury arose from a violent act or exposure to a violent act, in which case the event must be a "substantial"—thirty-five to forty percent—cause of the injury.¹⁶

The fact that employers and insurers frequently contest stress claims¹⁷ exacerbates the problem because litigation expenses siphon money away from legitimately injured workers by diverting funds to pay

claims more frequently than workers in other states. . . . The incidence of workers' compensation claims . . . is 22% higher than the national average." *Id.* On lost-time claims, California's rate is 57% higher than the national average, and "[t]he frequency of claims for permanent partial disability . . . is 129% higher than the national average." *Id.*

12. Barth, *supra* note 5, at 358; McPeake, *supra* note 8, at 412; *see also* Georgia-Pacific Corp. v. Workers' Compensation Appeals Bd., 144 Cal. App. 3d 72, 79 n.1, 192 Cal. Rptr. 643, 647 n.1 (1983) (describing need for adequate medical reports in light of "mushrooming" workers' compensation mental injury claims); 1B LARSON, *supra* note 3, § 42.25(a), at 7-958 (indicating jump in number of stress claims filed—from 1282 in 1980, to 4236 in 1984, to 6812 in 1986).

In contrast, claims for nonstress injuries increased only 25% over the past decade. McPeake, *supra* note 8, at 412.

13. Jules L. Greenberg, *Causation and Threshold Determinations in Workers' Compensation Psychiatric Stress Claims: Back to the Future?*, 20 W. ST. U. L. REV. 111, 124 (1992).

14. *Id.* at 124-25 (citing Richard H. Jordan, *Personnel Actions, "Stress" Claims, and the Exclusive Remedy Rule*, WORKERS' COMPENSATION Q., Summer 1991, at 1, 16).

15. *Id.*

16. *See infra* notes 137-38 and accompanying text.

17. 1B LARSON, *supra* note 3, § 42.25(a), at 7-958 (describing typical stress claim as "characterized by absence of physical injury, little time off work, low medical treatment costs, insignificant retraining costs, but a lot of litigation"). Defending mental stress claims can be expensive. McPeake, *supra* note 8, at 413. Further, the litigation necessarily involves associated costs:

Even if the claim is ultimately denied, doctors providing forensic medical/legal evaluation must be paid by employers' insurers. At an average cost approaching \$13,200, mental stress claims were a \$460 million problem in 1988. . . . In 1990 the average litigation cost was \$7,030 per [mental] stress case.

for medical and legal costs.¹⁸ Moreover, despite the fact that California's workers' compensation system is among the largest and most expensive systems in the nation,¹⁹ California has ranked among the lowest in compensation benefits paid to workers.²⁰

Of the three generally recognized mental stress categories—"physical-mental," "mental-physical," and "mental-mental"—the mental-mental category is considered the broadest classification.²¹ A plaintiff, in presenting a mental-mental claim, generally alleges that some form of mental stress has caused mental injury.²² California is in the minority of jurisdictions to allow compensation for this type of claim,²³ and concern over compensating mental-mental claims has led to significant but incomplete statutory reform.²⁴

This Comment explores the background and development of mental stress claims in Part II. Part III discusses California's statutory and case law involving workers' compensation and mental stress. Part IV examines the effectiveness of judicial and legislative responses to the issues raised by compensating mental stress injuries. Finally, Part V suggests a proposal for further statutory reform that addresses the difficulties

Id.

Thus, even though mental stress claims comprise a relatively small percentage of overall claims, the dramatic increase in claims filed and the tendency toward litigation can strain the system. *Id.* at 412-15. "At the extreme, [mental stress claims] could swamp a state's compensation program, administratively or economically." Barth, *supra* note 5, at 349. Moreover, workers' compensation benefit and treatment costs are "ultimately [placed] on the consumer"; that is, the employer's expenses are "passed on in the cost of the product" to the consuming public. 1 LARSON, *supra* note 3, § 1.00, at 1-1.

18. See John G. Kilgour, *Workers' Compensation Problems and Solutions: The California Experience*, 43 LAB. L.J. 84, 94 (1992) ("All legal and medical costs . . . add considerably to the cost of workers' compensation without contributing to its objectives."); McPeake, *supra* note 8, at 418.

19. A minor dispute exists as to California's exact ranking; however, California's system consistently ranks as one of the most expensive state programs in the nation. See Kilgour, *supra* note 18, at 84 (California has "most costly workers' compensation program in the United States" and approximate total cost of national workers' compensation program "in 1988 was \$43 billion and rising fast"); McPeake, *supra* note 8, at 414 (California has "third most costly" workers' compensation program at \$10.4 billion).

20. Kilgour, *supra* note 18, at 86 (ranking California 47 out of 50 state programs for maximum weekly benefit based on 1988 data); McPeake, *supra* note 8, at 414 ("California benefit levels . . . ranked 47th in the country."). Professor Kilgour believed that California's workers' compensation benefits were "embarrassingly low," and that California "placed last in real terms" due to the state's high cost of living. Kilgour, *supra* note 18, at 86.

21. For a description of each mental stress claim category, see *supra* note 5.

22. See *supra* note 5.

23. See *supra* notes 8-9 and accompanying text; see also *supra* note 5 (describing mental-mental category).

24. See *infra* parts III.A.2, III.B.

of compensating mental stress in California workers' compensation claims.²⁵

II. BACKGROUND: TROUBLE FOR THE WORKERS' COMPENSATION ACT—THE MENTAL STRESS CLAIM

A. Overview of Workers' Compensation

1. Workers' compensation goals

States have enacted workers' compensation statutes to assure an income to employees who have suffered disabling injuries caused by work events, to provide treatment and rehabilitation for those injuries, and to facilitate a return to work.²⁶ Statutes such as California Labor Code section 3202 require that the provisions of workers' compensation law be construed liberally for the purpose of extending benefits to injured workers.²⁷ Workers' compensation laws, however, were "not intended to be a form of unemployment insurance."²⁸ Workers' compensation is not the only recourse for a disabled worker; other programs providing compensation to the disabled include (1) State Disability Insurance (SDI),²⁹ (2) Social Security Disability³⁰ benefits, as opposed to Social Security Retire-

25. Workers' compensation law is complex; thus, a number of issues are beyond the scope of this Comment. Specifically, this Comment does not address causation, compensatory rates, insurability, or other provisions.

26. See McPeake, *supra* note 8, at 404, 407. California's Constitution grants the state legislature "plenary power" to establish and enforce a comprehensive workers' compensation system. CAL. CONST. art. XIV, § 4.

27. See CAL. LAB. CODE § 3202 (West 1989).

28. Antonetti, *supra* note 5, at 690; see also ELMER H. BLAIR, REFERENCE GUIDE TO WORKMEN'S COMPENSATION 1-2 (1974) ("[T]he philosophy of these laws is not to impose upon employers an obligation to provide employees with . . . blanket coverage for any and all . . . injuries or diseases whenever or wherever received.")

Indeed, although intended to be distinct from social insurance programs, such as Social Security or public aid, one view is that liberal judicial interpretation of workers' compensation statutes might be a "disguised form of social insurance for workers." Bussey, *supra* note 5, at 101; see also 82 AM. JUR. 2D *Workers' Compensation* § 1 (1992) ("Workers' compensation is not insurance in the technical sense . . . nor is it a substitute for disability or old-age pensions, or for general health or accident insurance.") (footnote omitted).

29. CAL. UNEMP. INS. CODE §§ 2601-2612 (West 1986 & Supp. 1994). Section 2601 states that the purpose of this disability compensation is to "compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom." *Id.* § 2601. Thus, a worker in California who suffers disability from a nonindustrially caused injury may still receive compensation from disability insurance. A more complete discussion of SDI is beyond the scope of this Comment.

30. 42 U.S.C. § 423 (1988 & Supp. IV 1992). Section 423(a) details the benefits provided by the federal disability insurance program. The program "functions like an insurance plan" and imposes certain requirements to qualify for disability benefits. KENNETH J. FORRESTER, SOCIAL SECURITY DISABILITY PRACTICE § 105.1, at 1-8.7 (Tina Fife ed., 1987). For example,

ment benefits, and (3) Supplemental Security Income (SSI).³¹ Thus, if a disabling injury does not arise from the worker's employment, the disabled worker may still pursue benefits through other programs.³²

The workers' compensation arrangement is essentially a bargain between the employee and the employer:

Under the compensation scheme, the employee relinquishes the potential of a greater recovery available under tort theories for the relatively swift and certain payment for medical treatment, disability indemnity, and rehabilitation benefits available for industrially related injuries without proving fault. The employer assumes liability for industrial personal injury or death, without regard to fault, in exchange for limitations on the amount of that liability.³³

In short, the injured worker trades the possibility of a larger monetary award for a swift and virtually guaranteed recovery from the employer.³⁴

the "claimant must have 1) contributed to the program (paid FICA taxes) over a sufficiently long period during his lifetime to be 'fully insured' and 2) contributed to the program recently enough to have 'disability insured status.' Contributions are counted in 'work quarters' which have minimum earnings requirements." *Id.* A more complete discussion of Social Security Disability benefits is also beyond the scope of this Comment.

31. 42 U.S.C. §§ 1381-1382 (1988 & Supp. IV 1992). Section 1381 of the Social Security Act states the Act's purpose as "establishing a national program to provide supplemental security income to individuals who . . . are . . . disabled." *Id.* § 1381. The program limits eligibility to receive benefits based on assets and income; SSI functions as "a federal welfare program for the disabled." FORRESTER, *supra* note 30, § 105.2, at 1-8.8. A more detailed discussion of SSI is beyond the scope of this Comment.

32. Recent commentary suggests that employees who have filed mental stress claims that are not compensable under California's recent reforms "may resort to the Americans with Disabilities Act, which requires employers to make 'reasonable accommodations' for any physical or mental disability, work-related or not." Aurora Mackey, *Redressing Stress Without Workers' Comp: Plaintiffs May Start Turning to the Americans with Disabilities Act*, CAL. LAW., Feb. 1994, at 19, 19; see also Howard J. Stevens & Lloyd C. Loomis, *Americans with Disabilities Act and Workers' Compensation*, L.A. LAW., Feb. 1994, at 26, 52 (discussing "reasonable accommodation" under prior act as including "provision of a less stressful work environment").

33. 1 HANNA, *supra* note 3, § 4.01[3], at 4-16; see McPeake, *supra* note 8, at 403.

34. *Civil Damages*, 19 CAL. WORKERS' COMPENSATION REP. 27, 28 (1991); see McPeake, *supra* note 8, at 403. Of course, this assumes that the worker suffers a *compensable* injury; otherwise, there is no recovery. See CAL. LAB. CODE § 3600(a) (West Supp. 1994).

Injuries for mental suffering or physical pain that do not hinder the employee's earning ability are not compensable under workers' compensation. 1 HANNA, *supra* note 3, § 4.01[1], at 4-13; 2A LARSON, *supra* note 3, § 65.51(c), at 12-73 to 12-75. Such injuries are not compensable because the primary goal of workers' compensation is to compensate a worker for the "diminished ability to compete in the open labor market, and not to compensate for every work-related injury." 1 HANNA, *supra* note 3, § 4.01[1], at 4-12 to 4-13 (citing *Livitsanos v. Superior Court*, 2 Cal. 4th 744, 828 P.2d 1195, 7 Cal. Rptr. 2d 808 (1992)).

2. The sole remedy for a worker injured on the job

Workers' compensation functions as an "exclusive remedy" by precluding an employee from civil recovery against an employer and co-workers for injuries arising out of or in the course of employment.³⁵ This means that if an employee's emotional distress injuries arise from the employment relationship, the Workers' Compensation Act preempts tort recovery against the employer for such injuries, whether or not physical injuries accompany the emotional distress injuries.³⁶ This preemption of tort recovery for emotional distress injuries also includes claims for intentionally inflicted emotional distress.³⁷

35. The statute bars the employee, as well as any dependents, from pursuing remedies outside of workers' compensation if the employee suffered a compensable injury. The pertinent section is California Labor Code § 3602(a):

(a) Where the conditions of compensation set forth in Section 3600 concur, the right to recover such compensation is, except as specifically provided in this section and Sections 3706 and 4558, the sole and exclusive remedy of the employee or his or her dependents against the employer, and the fact that either the employee or the employer also occupied another or dual capacity prior to, or at the time of, the employee's industrial injury shall not permit the employee or his or her dependents to bring an action at law for damages against the employer.

CAL. LAB. CODE § 3602(a) (West 1989).

36. *Livitsanos v. Superior Court*, 2 Cal. 4th 744, 747, 828 P.2d 1195, 1197, 7 Cal. Rptr. 2d 808, 810 (1992) (holding that exclusive remedy provision barred actions for intentional and negligent infliction of emotional distress filed by discharged worker against employer-owner and employer's company). In *Livitsanos*, the court criticized a prior case, *Renteria v. County of Orange*, 82 Cal. App. 3d 833, 147 Cal. Rptr. 447 (1978), for holding that an employee could file a civil action for intentional infliction of emotional distress against an employer because the nonphysical injury caused by emotional distress fell outside the scope of workers' compensation law, and was thus not compensable. *Livitsanos*, 2 Cal. 4th at 754, 828 P.2d at 1202, 7 Cal. Rptr. 2d at 815. Thus, because the *Renteria* plaintiff's injury was not compensable under workers' compensation, the plaintiff escaped the exclusivity provision and could pursue a civil suit. *Id.* The *Livitsanos* court characterized the *Renteria* court's distinction between a physical and emotional injury as a "glaring anomaly." *Id.* at 752, 828 P.2d at 1200, 7 Cal. Rptr. 2d at 813.

37. *Cole v. Fair Oaks Fire Protection Dist.*, 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987) (holding that workers' compensation exclusive remedy provisions barred intentional infliction of emotional distress cause of action by firefighter who suffered total and permanent mental and physical disability; exclusive remedy also barred employee's spouse's claims for intentional infliction of emotional distress and loss of consortium). *Cole* involved a firefighter who, after becoming a union representative, claimed harassment, demotions, and unfair treatment from fire department management. *Id.* at 152, 729 P.2d at 744, 233 Cal. Rptr. at 309-10. The *Cole* court found that the exclusive remedy provision barred a civil action regardless of the characterization of the workplace actions as outrageous and unfair. *Id.* at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315.

There are exceptions. The exclusive remedy provision of the Workers' Compensation Act does not preclude tort recovery by employees discharged in violation of fundamental public policy. *See Gantt v. Sentry Ins.*, 1 Cal. 4th 1083, 824 P.2d 680, 4 Cal. Rptr. 2d 874 (1992)

B. *The Development of the Mental Injury Stress Claim*

*If casualty claims were rated on the New York Stock Exchange, stress disorders would be a growth stock to watch.*³⁸

1. Riding the stress claim tide

As if the floodgates had opened, claims for mental stress injuries have inundated workers' compensation systems.³⁹ While physical injuries caused by industrial accidents dominated the first half of the twentieth century,⁴⁰ the American Psychological Association has predicted that stress-related injuries "will be the most pervasive occupational diseases of the 21st century."⁴¹ In fact, mental disorders currently rank among the top ten work-related injuries and illnesses in the nation.⁴²

(finding that exclusive remedy provision does not preempt claim by employee constructively discharged for supporting coworker's sexual harassment charges).

Similarly, an employee subjected to sexual harassment could recover both under workers' compensation for disability from emotional distress and under the employer's separate liability in a civil action for employment discrimination. *See Meninga v. Raley's, Inc.*, 216 Cal. App. 3d 79, 86, 264 Cal. Rptr. 319, 323 (1989) (treating case as addressing two separate wrongs, thus allowing recovery under workers' compensation and employer's civil liability for employment discrimination).

Likewise, a state employee could recover in tort for emotional distress suffered as a result of retaliation for statutorily protected "whistle-blowing." *See Shoemaker v. Myers*, 52 Cal. 3d 1, 22-23, 801 P.2d 1054, 1067, 276 Cal. Rptr. 303, 316 (1992). Whistle-blowing statutes protect the employee from retaliatory actions, such as demotions or terminations, taken by government employers after the employee reports illegal or improper activity to regulatory authorities. *See, e.g.*, CAL. GOV'T CODE §§ 53296-53298 (West Supp. 1994).

38. *Lees-Haley*, *supra* note 4, at 194.

39. *See* 1B LARSON, *supra* note 3, § 42.25(a), at 7-957; Herbert Lasky, *Psychiatry and California Workers' Compensation Laws: A Threat and a Challenge*, 17 CAL. W. L. REV. 1, 1 (1980).

40. *See Dilworth*, *supra* note 5, at 11.

41. Donald C. Dilworth, *Psychologists Seek Ways to Reduce Workplace Stress*, TRIAL, Jan. 1991, at 14, 14 (providing information from American Psychological Association).

Interestingly, despite the recent proliferation of stress claims and the specter of stress-related injuries projected for the future, commentators suggest that workers' compensation schemes did not originally contemplate compensating mental stress injuries. *See Antonetti*, *supra* note 5, at 671-72 ("Recently, workers have begun to seek compensation for mental and emotional injuries caused in the workplace Neither workers' compensation statutes nor tort law traditionally allowed for recovery of emotional distress damages in such cases."); Barth, *supra* note 5, at 349 ("For a number of reasons, workers' compensation systems are finding some growth in claims for stress related disorders Although it seems likely that the originators of compensation programs did not have such conditions in mind when these systems were first developed, claims for these disorders are becoming routine"); Lees-Haley, *supra* note 4, at 194 ("Stress has become a widely recognized reality of modern life. The leap to blaming an insurer for all of the consequences of modern life, however, was not contemplated when . . . workers' compensation legislation [was] written.").

42. Dilworth, *supra* note 5, at 11 (citing J. Donald Millar, director of National Institute for Occupational Safety and Health).

Several factors have contributed to the increase in stress claims.⁴³ For example, changes in attitude toward mental illnesses have made mental illness less stigmatizing, and consequently have made the filing of mental injury claims more socially acceptable.⁴⁴ Additionally, the news and popular media have increased awareness of mental injuries in general.⁴⁵ "By now workers everywhere have heard conversations about how stressful their jobs are."⁴⁶ Finally, workers file more stress-related claims concurrently with claims for other injuries,⁴⁷ and thus insurance companies may recommend that employers "pay off" questionable stress claims rather than proceed with expensive and protracted litigation.⁴⁸

2. Good intentions but unintended results

Although the goal of compensating a physically or mentally disabled worker is sound, certain difficulties arise in compensating workers for mental injuries.⁴⁹ These difficulties arise principally from the mental-mental claim category,⁵⁰ recognized in California. At least three problems appear intrinsic to mental-mental claims.⁵¹ The first problem is

43. Barth, *supra* note 5, at 349 ("For a number of reasons, workers' compensation systems are finding some growth in claims for stress related disorders . . .").

44. See Gail Appleson, *Stress on Stress*, 69 A.B.A. J. 142, 142 (1983) (discussing statement of Merton Marks, attorney who writes and lectures on stress claim defense, that "[t]here is less reluctance socially to file a claim [for psychiatric injury]. It used to be a dark secret. But the attitude toward mental illness has changed . . .").

45. See Lees-Haley, *supra* note 4, at 194.

46. *Id.* The author, a practicing psychologist, further states that magazines advise readers "on how to cope with stress resulting from everything from computer programming to home-making." *Id.* Stress management courses at large corporations also provide a "thriving business" for psychologists and management consultants. *Id.*

47. See Postol & Adelman, *supra* note 4, at 5; see also McPeake, *supra* note 8, at 412 (stating that California worker may combine physical and mental injuries in workers' compensation claim).

48. See Thomas D. Elias, *Work Comp Clash*, L.A. DAILY J., Mar. 3, 1992, at 6. A related issue is the inadequate defense of stress claims. For example, if the employer's defense fails for insufficient preparation when challenging a stress claim, then the result can encourage other workers to file similar claims. Postol & Adelman, *supra* note 4, at 5. The employer must make certain its employees know that the employer will contest false stress claims and use all legal and medical channels available to "identify and deny frivolous claims." *Id.*

49. In the past workers' compensation claims largely focused on physical injuries, such as mangled or severed body parts. Dilworth, *supra* note 5, at 11 (citing John Kamp, insurance company psychologist involved with loss-control program, addressing workplace stress). Recent worker injuries, however, tend to be more psychological and subjective. *Id.* Thus, a worker claiming a stress injury poses the difficulty of assessing a largely subjective claim. *Id.* at 11-12. On the other hand, a visibly bleeding wound or an X-ray confirming a broken bone provides objective means for verifying a claimed physical injury.

50. Antonetti, *supra* note 5, at 672; see *supra* note 5 (defining and discussing mental-mental claims).

51. See Antonetti, *supra* note 5, at 672.

the substantial subjectivity of a claimed mental injury because workers' reactions to similar situations may vary significantly.⁵² Second, the claim's focus depends on the mentally injured worker's perception of surrounding events.⁵³ Finally, it is difficult to determine whether work-related stress as opposed to personal stress caused the injury.⁵⁴

Indeed, these factors contribute to the continuous susceptibility to fraud or malingering in a mental-mental injury claim.⁵⁵ A news article reported that even the highest official of a California labor union stated that the "system fosters abuse."⁵⁶ Moreover, advertising by physicians and attorneys which invites dissatisfied workers to file stress claims has been criticized as fostering fraud.⁵⁷ Some attorneys and physicians involved in high-volume workers' compensation practices assert a stress disability for virtually every applicant.⁵⁸ Additionally, some practitioners employ recruiters to encourage workers to file claims in order to generate numerous medical charges for insurance billings.⁵⁹

52. See *id.*; Dilworth, *supra* note 5, at 11-12.

53. Antonetti, *supra* note 5, at 672. "Thus, mentally imbalanced claimants may have distorted or incorrect perceptions" regarding events involving the injury. *Id.*

54. Although designed to compensate for injuries caused by a worker's job, "[t]he fact that an employee has significant stressors in his private life will not necessarily defeat his industrial stress claim." McPeake, *supra* note 8, at 412.

55. David P. Gontar, *The Noncompensability of Psychologically Induced Mental Disorders in Louisiana's Worker's Compensation Law*, 34 LOY. L. REV. 311, 313 (1988) ("Malingering and fakery remain ever-present possibilities."); see McPeake, *supra* note 8, at 413 ("Psychiatric stress claims make the system vulnerable to abuse.").

56. Elias, *supra* note 48, at 6 (discussing statement of John Henning, California Labor Federation official); see David S. David, *Special Report: Physician Speaks Out on Compensation Reform; Urges Legislature and Governor to Convene Committee of Experts*, 20 CAL. WORKERS' COMPENSATION REP. 319, 350 (1992) (stating that "a lot of abuses have crept into every part" of workers' compensation system).

57. See McPeake, *supra* note 8, at 413 ("Advertisements encourage workers who don't like their job or find their boss too demanding to file workers' compensation claims, regardless of whether there is any real injury."); Dan Walters, *Work Comp Sideshow*, L.A. DAILY J., Apr. 27, 1992, at 6.

58. McPeake, *supra* note 8, at 413. The term used to refer to such operations is workers' compensation "mills." See *id.*

59. *Id.*; see David, *supra* note 56, at 350 (noting "obscene" bills caused by referrals for multiple testing and consultations by various medical specialists); Andrea Ford, *Nine Held in \$50-Million Workers' Comp Fraud Case*, L.A. TIMES, July 21, 1993, at A1 (reporting arrest of Beverly Hills, California, physician who masterminded workers' compensation fraud ring by recruiting laid-off workers to file false claims and accomplices to conduct "battery of unnecessary, overpriced tests" at clinics controlled by physician to "run up millions in phony bills"); *On Stress Claims . . . De-Stress the Economy*, L.A. DAILY J., Apr. 3, 1992, at 6 (*Orange County Register* editorial) (describing "hustler's paradise" where recruiters seek coconspirators from unemployment lines at California state employment offices to participate in workers' compensation fraud schemes); *On Crooked Doctors . . . Work Comp Rackets*, L.A. DAILY J., Mar. 3, 1992, at 6 (*Sacramento Bee* editorial) (discussing study of workers' compensation medical and

Workers' compensation fraud is a "\$1 billion problem in the state," according to one estimate.⁶⁰ In response, the California legislature created the Workers' Compensation Insurance Fraud Reporting Act,⁶¹ and the State Insurance Commissioner formed a fraud investigation unit to help curb workers' compensation fraud.⁶² Additionally, the legislature undertook steps to establish a minimum three million dollar annual fund for investigation and prosecution of workers' compensation fraud.⁶³

III. GUIDING CALIFORNIA DOWN THE STRESS CLAIM PATH: JUDICIAL ACTION AND LEGISLATIVE RESPONSE

Although other states specifically exclude mental claims or specific mental injury categories from compensability under their workers' com-

psychiatric claim referrals and estimating that unnecessary treatment or testing costs system \$356 million per year).

The legislature recently addressed the problem of employing "runners" or "cappers"—recruiters hired to procure workers to file workers' compensation claims—in its 1993 workers' compensation reforms. For example, California Insurance Code § 1871.7 imposes civil penalties ranging from \$5000 to \$10,000, plus treble the amount of any submitted claim, plus any additional penalties, upon an attorney if the attorney employs anyone to recruit clients to file workers' compensation claims. CAL. INS. CODE § 1871.7 (West Supp. 1994); see 1993 *Workers' Compensation Legislation*, 21 CAL. WORKERS' COMPENSATION REP. 253, 253-54 (1993). The new legislation similarly punishes medical professionals who use recruiters to find patients requiring services related to workers' compensation injuries. *Id.* at 255.

60. Martin Berg, *Help for DA with Comp Fraud*, L.A. DAILY J., May 14, 1993, at 2.

61. CAL. INS. CODE §§ 1877-1877.5 (West 1993 & Supp. 1994).

62. McPeake, *supra* note 8, at 416.

63. *Californians for Compensation Reform Elects New Chairman, Unveils 1992 Reform Packages*, 20 CAL. WORKERS' COMPENSATION REP. 104, 104-05 (1992) ("Sixteen new investigators have been hired specifically to investigate suspected workers' compensation fraud, and the unit will target the professionals—doctors, attorneys, and other medical care workers involved in fraud."); Halle Jordan, *Funds Sought to Fight Comp Fraud*, L.A. DAILY J., June 17, 1992, at 3. Despite the seemingly large sum of \$3 million, prosecutors stated that "at least three times" that sum was necessary to fight workers' compensation fraud. *Id.*; see McPeake, *supra* note 8, at 416-17. An assistant head deputy of the Los Angeles District Attorney's fraud division stated that "[t]he funding is very welcome, but it is like trying to melt an iceberg with a can of Sterno." Jordan, *supra*, at 3.

Recent budget problems, however, have threatened the continued existence of some of these special fraud units. Andrea Ford, *Fraud Prosecutors to Be Moved in Budget Fight*, L.A. TIMES, Mar. 1, 1994, at B1.

pensation statutes,⁶⁴ California recognizes all categories, including mental-mental claims.⁶⁵

One perspective is that compensating mental-mental claims fulfills the main goal of workers' compensation laws: compensating disabled workers.⁶⁶ While some mental stress claims are valid and should receive compensation, problems arise in identifying legitimate mental-mental claims.⁶⁷ Allowing a broad, subjective standard permits greater compensation of mental-mental claims.⁶⁸ Conversely, a narrow standard that limits recovery to mental injury caused by sudden events diminishes compensation of mental-mental claims.⁶⁹ In determining which standard to adopt, a state must balance the interests of business—which prefers a narrow standard to restrict potential employer liability and reduce workers' compensation costs—against increased compensation to workers—who prefer broad standards that expand employer liability.⁷⁰ California restricted its liberal policy of compensation for all categories of mental injury claims by requiring that actual events of employment, rather than

64. Some states have statutes that, impliedly or expressly, limit the meaning of "injury" to encompass a physical injury but not a solely mental injury. Antonetti, *supra* note 5, at 674-75; see, e.g., ARIZ. REV. STAT. ANN. § 23-1043.01(B) (1983) (recovery for mental-mental claim prohibited unless caused by "some unexpected, unusual or extraordinary stress related to the employment"); IDAHO CODE § 72-102(15)(c) (Supp. 1993) (injury "shall be construed to include only an injury caused by an accident, which results in violence to the physical structure of the body"); MONT. CODE ANN. § 39-71-119(3)(a) (1993) (injury "does not mean a physical or mental condition arising from . . . emotional or mental stress").

65. California has recognized this "most liberal category of compensation" (mental-mental claims) for over a decade. 1B LARSON, *supra* note 3, § 42.25(a), at 7-957 to 7-958.

To establish compensability for a mental injury claim in California, the mental disorder must either cause disability or require medical treatment, and the diagnosis of the mental disorder must be pursuant to specified standards:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2, or until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

CAL. LAB. CODE § 3208.3(a) (West Supp. 1994).

66. Antonetti, *supra* note 5, at 696.

67. For a discussion of difficulties surrounding mental-mental claims, see *supra* notes 49-55 and accompanying text.

68. See Antonetti, *supra* note 5, at 696-97. Using a "strictly subjective" standard to determine compensation greatly expands employer liability: A mental-mental claimant could receive compensation if the particular worker believed work events caused the injury, regardless of whether or not the employment actually caused the injury.

69. *Id.*

70. See *id.*

perceived events, cause the injury.⁷¹ Even though broad standards of compensation further the original intent of compensating injured workers, the potential for abusing the system through unfounded claims and fraudulent influences appears sufficient to justify restrictions on mental stress claims.⁷²

A. *Setting the Stage for Reform*

1. The *Albertson's* decision

In 1982 the California Court of Appeal decided a landmark case concerning mental stress claims. *Albertson's, Inc. v. Workers' Compensation Appeals Board*⁷³ involved an employee who claimed mental disability due to a *subjective* belief that she was a victim of harassment at work.⁷⁴ The court allowed the claim, finding a compensable injury based on "an honest misperception of job harassment which interacts with a preexisting psychiatric condition" causing job stress.⁷⁵

a. *facts of the case*

Claimant Judith Bradley, a cake decorator at Albertson's, alleged harassment after a new manager began supervising the bakery department.⁷⁶ Initially, Bradley filed a union grievance over a reduction of hours in her work schedule.⁷⁷ Soon afterwards, Albertson's laid off Bradley, despite her protests of seniority over another employee recently transferred to that store from another store.⁷⁸ Approximately ten days later, the store recognized its error regarding seniority, recalled Bradley, and laid off the other employee; Bradley, however, suffered serious financial difficulties and considered filing for bankruptcy during the lay-off period.⁷⁹

71. See *infra* note 109 and accompanying text.

72. See Bussey, *supra* note 5, at 102 (discussing limits on workers' compensation coverage and stating that "in the area of mental injury associated with mental stress, there are legitimate reasons to maintain these limitations").

73. 131 Cal. App. 3d 308, 182 Cal. Rptr. 304 (1982). For a discussion of case law concerning causation issues in relation to the *Albertson's* decision, see LASKY, *supra* note 3, §§ 5.1-8, at 49 to 63.

74. *Albertson's*, 131 Cal. App. 3d at 310, 182 Cal. Rptr. at 305.

75. *Id.*

76. *Id.*

77. *Id.* Bradley's schedule changed from a usual 40-hour week to between 20 and 32 hours per week. *Id.*

78. *Id.*

79. *Id.* The store's mistake regarding seniority was that while the other employee had overall seniority with Albertson's, Bradley had seniority at that particular store. *Id.* at 311, 182 Cal. Rptr. at 306.

After Bradley returned to work, she felt harassed and ridiculed by the bakery manager.⁸⁰ Conflicts arose, and Bradley's last working day involved a dispute over her scheduled work hours.⁸¹ When Bradley told the manager that she had a scheduled doctor's appointment, the manager responded angrily, embarrassing Bradley and causing her "difficulty [in] breathing, shaking and nausea."⁸² Bradley also operated a "parttime crystal party business," and three days after the last confrontation, Bradley's supervisor telephoned to inform her that the manager's wife was checking to see whether Bradley was working while on sick leave from the store.⁸³ Suffering an "anxiety attack" from that incident, Bradley required a week's hospitalization.⁸⁴

The medical evidence of Bradley's treating psychiatrist showed an ongoing personality disorder that could "have hypersensitized her to the stressful experiences at work and even colored her perception of those experiences."⁸⁵ Albertson's psychiatric expert testified that while it did not appear that Bradley was actually harassed at work, the expert did not doubt that she "'subjectively perceived job harassment.'"⁸⁶

b. the outcome

In *Albertson's*, the workers' compensation judge found a compensable injury to Bradley's "psyche."⁸⁷ Subsequently, the Workers' Compensation Appeals Board denied reconsideration.⁸⁸ The Board found that sufficient evidence supported the "'judge's conclusion that the employment played an active role in the development of the psychological condition,'" as opposed to being a "'mere passive element that a nonindustrial condition happened to have focused on'" or an "'after the fact rationalization.'"⁸⁹ The appellate court⁹⁰ agreed with the Board's

80. *Id.* at 310-11, 182 Cal. Rptr. at 305. Bradley felt that the manager's attitude changed and that the manager was now "very curt"; Bradley overheard the manager "ridiculing her and talking about 'getting rid' of her." *Id.*

81. *Id.* at 311, 182 Cal. Rptr. at 306.

82. *Id.*, 182 Cal. Rptr. at 305. Bradley's doctor gave her a tranquilizer, and she remained in the doctor's office for four or five hours. *Id.*, 182 Cal. Rptr. at 306.

83. *Id.*

84. *Id.* The incident also triggered a severe stuttering problem. *Id.*

85. *Id.* at 312, 182 Cal. Rptr. at 306 (quoting report of Dr. Robert B. Cahan).

86. *Id.* at 312-13, 182 Cal. Rptr. at 306-07 (quoting testimony of Dr. Alfred P. French).

87. *Id.* at 313, 182 Cal. Rptr. at 307.

88. *Id.*; see CAL. LAB. CODE § 5911 (West 1989) (regarding appeals board reconsideration).

89. *Albertson's*, 131 Cal. App. 3d at 313, 182 Cal. Rptr. at 307 (quoting Workers' Compensation Appeals Board finding).

90. Pursuant to California law, claimants can request review of final judgments of the Workers' Compensation Appeals Board by

finding.⁹¹ Ultimately, the court of appeal held that an employee's claim of cumulative injury to the individual's psyche based on an honest but mistaken belief of job harassment, in combination with a preexisting mental disorder, could cause job stress.⁹²

c. cumulative, subjective stresses and strains

The *Albertson's* court analyzed whether a perception of harassment—rather than actual harassment—was sufficient to meet causal requirements connecting work environment and resultant mental injury.⁹³ The court, looking to variations among individuals, expounded a subjective standard: “[W]hat is stressful to one is not to another.”⁹⁴ The court stated that the disability could result from cumulative, everyday “‘stresses and strains,’”⁹⁵ and that a mental injury was “‘as real and disabling as a physical injury’” to the person who experiences it.⁹⁶ Thus, the individual's subjective perception of job harassment, rather than the

apply[ing] to the [California] Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review, for the purpose of inquiring into and determining the lawfulness of the original order, decision, or award or of the order, decision, or award following reconsideration.

CAL. LAB. CODE § 5950 (West 1989); *see id.* § 5810 (permitting judicial review of appeals board judgments). Certain statutory prerequisites apply, however, before a claimant can obtain judicial review. *Id.* § 5901 (stating that cause of action shall not arise “in any court . . . until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if . . . a petition for reconsideration . . . is granted or denied”).

The Labor Code also defines the scope of judicial review.

The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeals board, whether:

- (a) The appeals board acted without or in excess of its powers.
- (b) The order, decision, or award was procured by fraud.
- (c) The order, decision, or award was unreasonable.
- (d) The order, decision, or award was not supported by substantial evidence.
- (e) If findings of fact are made, such findings of fact support the order, decision, or award under review.

Id. § 5952.

91. *Albertson's*, 131 Cal. App. 3d at 317, 182 Cal. Rptr. at 309.

92. *Id.* at 310, 182 Cal. Rptr. at 305.

93. *Id.* at 313, 182 Cal. Rptr. at 307.

94. *Id.* (citing *Los Angeles Unified Sch. Dist. v. Workers' Compensation Appeals Bd.*, 116 Cal. App. 3d 393, 171 Cal. Rptr. 841 (1981)).

95. *Id.* at 314, 182 Cal. Rptr. at 307 (quoting *Callahan v. Workers' Compensation Appeals Bd.*, 85 Cal. App. 3d 621, 628 n.3, 149 Cal. Rptr. 647, 651 n.3 (1978) (quoting *Baker v. Workmen's Compensation Appeals Bd.*, 18 Cal. App. 3d 852, 861-62, 96 Cal. Rptr. 279, 286 (1971) (citing *Fireman's Fund Indem. Co. v. Industrial Accident Comm'n*, 39 Cal. 2d 831, 250 P.2d 148 (1952))).

96. *Id.* at 314-15, 182 Cal. Rptr. at 307 (quoting *Callahan v. Workers' Compensation Appeals Bd.*, 85 Cal. App. 3d 621, 628 n.3, 149 Cal. Rptr. 647, 651 n.3 (1978) (quoting *Baker v. Workmen's Compensation Appeals Bd.*, 18 Cal. App. 3d 852, 862, 96 Cal. Rptr. 279, 286 (1971))).

existence of actual harassment, was sufficient to establish that stress resulted from the employment.

d. the workers' compensation version of the "eggshell plaintiff"

The court also looked to the fact that a subjective test should apply to stress-related injuries because "[i]ndustry takes the employee as it finds him."⁹⁷ This concept mirrors the "eggshell skull" plaintiff familiar to tort law.⁹⁸ Echoing a subjective principle rather than objectively examining the stress that an employee might normally feel in a particular job, the court felt that the significant inquiry was to measure the stress felt by a particular worker "reacting uniquely to the work environment. His perception of the circumstances (e.g., crowded deadlines, mountains of paper, a too-fast assembly line) is what ultimately determines the amount of stress he feels."⁹⁹ Thus, the perspective is not from an objective viewpoint, but rather from the individual's own perception.¹⁰⁰

e. the actual role of the employment in causing the injury

The *Albertson's* court further justified its decision to affirm Bradley's compensation award by referring to the Board's statement that sufficient evidence existed to find that the "employment played an active role" in

97. *Id.* at 314, 182 Cal. Rptr. at 307 (quoting *Lamb v. Workmen's Compensation Appeals Bd.*, 11 Cal. 3d 274, 282, 520 P.2d 978, 983, 113 Cal. Rptr. 162, 167 (1974) (quoting *Liberty Mut. Ins. Co. v. Industrial Accident Comm'n*, 73 Cal. App. 2d 555, 559, 166 P.2d 908, 911 (1946))).

98. See KEETON ET AL., *supra* note 5, § 43, at 291-92; Bussey, *supra* note 5, at 112-13. The philosophical differences in purposes underlying the tort and workers' compensation legal systems might raise a question of whether the eggshell plaintiff appropriately occupies a place in workers' compensation law. Briefly stated, tort law compensates a plaintiff for wrongful conduct by another party in dereliction of a legal duty; a tort action's "primary purpose is to compensate for the damage suffered, at the expense of the wrongdoer." KEETON ET AL., *supra* note 5, § 2, at 7. The idea of a tort defendant's liability for legal wrongdoing contrasts with the scheme of workers' compensation law, which does not base compensation on fault. See 82 AM. JUR. 2D *Workers' Compensation* § 1 (1992) (stating that "the right to workers' compensation [is not] based upon a theory of damages for a wrong"); 1 LARSON, *supra* note 3, § 1.10, at 1-1 (summarizing typical workers' compensation act and stating that "negligence and fault are largely immaterial"). The notion of wrongdoing integral to a tort is absent under workers' compensation principles.

Thus, one might question whether an employer should bear such broad responsibility for an eggshell employee in a supposedly faultless workers' compensation system. This seems especially relevant since the Americans with Disabilities Act (ADA) precludes an employer from discriminating against prospective employees with disabilities. See 42 U.S.C. § 12112 (Supp. III 1991).

99. *Albertson's*, 131 Cal. App. 3d at 314, 182 Cal. Rptr. at 307-08.

100. *Id.* at 315, 182 Cal. Rptr. at 308 (citing *Deziel v. Difco Lab., Inc.*, 268 N.W.2d 1 (Mich. 1978)).

causing Bradley's mental injury,¹⁰¹ as opposed to "merely provid[ing] a stage for the event."¹⁰² To award compensation, the court needed to find actual industrial causation of the illness.¹⁰³ The court accepted Bradley's assertion that her employment actively affected her mental illness,¹⁰⁴ despite the facts that Bradley's claimed stress resulted from her misperceptions of job harassment and that she had a preexisting mental condition. Thus, the *Albertson's* decision set a liberal standard¹⁰⁵ that allowed workers' compensation for mental injury claims to rest entirely upon the claimant's subjective perception that the employment actively caused the mental injury.

2. The legislature reacts: The 1989 reform

As part of an omnibus workers' compensation reform package in 1989,¹⁰⁶ the California legislature reformed the subjective perception standard established in *Albertson's*¹⁰⁷ by adding section 3208.3 to the California Labor Code.¹⁰⁸ Section 3208.3(b), which governed claims for psychiatric injuries, required that "actual" employment factors¹⁰⁹ consti-

101. *Id.* at 317, 182 Cal. Rptr. at 309 (quoting Workers' Compensation Appeals Board decision).

102. *Id.* at 316, 182 Cal. Rptr. at 309 (quoting *Transactron, Inc. v. Workers' Compensation Appeals Bd.*, 68 Cal. App. 3d 233, 238, 137 Cal. Rptr. 142, 145 (1977)).

103. *Id.* at 310, 182 Cal. Rptr. at 305.

104. The court stated that the record showed that conflicts between Bradley and her supervisor caused her "tremendous distress." *Id.* at 317, 182 Cal. Rptr. at 309.

105. See Bussey, *supra* note 5, at 113.

106. Margolin-Bill Greene Workers' Compensation Reform Act of 1989, ch. 892, § 57, 1989 Cal. Stat. 2983, 3039.

107. See 1 HANNA, *supra* note 3, § 4.69[1], at 4-97 n.8. Hanna states that California Labor Code § 3208.3(b) abrogates the holding of *Albertson's* by requiring that the actual employment events causing the mental injury "must be objectively real job stresses rather than an employee's mistaken, though honest, perception." *Id.* § 4.69[1], at 4-94.

108. The 1989 version states:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (i) of Section 139.2.

(b) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were responsible for at least 10 percent of the total causation from all sources contributing to the psychiatric injury.

(c) It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division.

Act of Sept. 26, 1989, ch. 892, § 25, 1989 Cal. Stat. 2982, 3003 (codified as amended at CAL. LAB. CODE § 3208.3 (West Supp. 1994)).

109. Presumably the legislature intended the "actual events of employment" requirement to exclude subjective, honest misperceptions such as those at issue in *Albertson's*; however, the legislature did not specifically define what constitutes "actual events" in the statute. See 1 HANNA, *supra* note 3, § 4.69[3][b], at 4-20; see also Herbert Lasky, *Did the Workers' Compensation Reform Act of 1989 Change the Rules for Handling Stress Cases? Yes, Says This View.*,

tute at least ten percent of the causation for a compensable mental injury.¹¹⁰ Further, the statute, at that time and presently, requires that the worker establish the claim by a preponderance of the evidence.¹¹¹ In adding these requirements, the legislature intended to set "a new and higher threshold of compensability" for mental injury claims.¹¹² The legislature, however, provided no guidance in defining the previous threshold; thus it is unclear precisely how the standard is to be "higher."¹¹³

B. Reform and Reform Again

*Claims of stress—hard to prove and equally hard to disprove because they usually don't involve physical injuries—are the main focus of most reform efforts.*¹¹⁴

1. Intermediate reforms: Moving in the right direction?

In 1990 and 1991 the legislature amended California Labor Code section 3208.3 to further restrict recovery for workers' compensation mental stress claims.¹¹⁵ Amended section 3208.3 required diagnosis of mental disorders according to recognized psychological standards.¹¹⁶ Additionally, when an employee has worked for an employer for less than six months,¹¹⁷ the legislature limited compensability for mental injury claims to those injuries resulting from "sudden and extraordinary" employment events.¹¹⁸ This provision further precluded recovery for mental stress injuries resulting from "regular and routine" employment actions in claims filed against an employer by a worker employed for less than six months.¹¹⁹

CAL. WORKERS' COMPENSATION ENQUIRER, Sept. 1990, at 8 (discussing 1989 reform and analyzing "actual events" language).

110. See *Review of Selected 1989 California Legislation—Workers' Compensation*, 21 PAC. L.J. 569, 575 (1990).

111. *Id.*

112. See LASKY, *supra* note 3, at 12 (Supp. 1990).

113. See *id.* at 12-13 for a discussion of 10% causation and determination of the compensability "threshold."

114. Elias, *supra* note 48, at 6.

115. See Dilworth, *supra* note 5, at 12.

116. CAL. LAB. CODE § 3208.3(a) (West Supp. 1994).

117. The six months total employment could be either continuous or noncontinuous employment. *Id.* § 3208.3(d).

118. *Id.*

119. Act of July 16, 1991, ch. 115, § 4, 1991 Cal. Stat. (codified as amended at CAL. LAB. CODE § 3208.3 (West Supp. 1994)). This section of the prior statute encompassed such employment actions as discipline, evaluations, transfers, or terminations within its "regular and routine" definition. *Id.*; see Bussey, *supra* note 5, at 115.

a. a standard for diagnosis: DSM-III-R

In an effort to standardize psychiatric evaluation reports, the legislature amended section 3208.3(a) of the California Labor Code to require diagnosis of the mental disorder using the "terminology and criteria" of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised (DSM-III-R)*,¹²⁰ or similar widely approved and accepted diagnostic standards.¹²¹ The *DSM-III-R* is a classification system for diagnosing various mental disorders, with the system divided into five main categories called "axes" (Axis I, Axis II, et cetera).¹²² Axis I deals with the "psychological state"—for example, a posttraumatic stress disorder or a mood disorder such as depression.¹²³ Axis II relates to personality disorders—for example, a diagnosis of a "dependent personality."¹²⁴ Axis III involves diagnoses related to physical illnesses—for example, a lower-back sprain.¹²⁵ Axis I and Axis II diagnoses are mandatory; a mental injury claim requires an Axis III diagnosis when appropriate.¹²⁶

Despite the use of uniform standards such as the *DSM-III-R*, a claim of stress remains largely personal to the individual claimant.¹²⁷ If individuals react differently to the same situation due to their own personal strengths or weaknesses, measuring a worker's job stress is essen-

120. AMERICAN PSYCHIATRIC ASSOCIATION, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* (3d ed. rev. 1987).

121. Act of Sept. 29, 1990, ch. 1550, § 20, 1990 Cal. Stat.

122. The *DSM-III-R* uses a

multiaxial system or categories for diagnosing mental disorders. . . . [T]he examiner [must] provide an Axis I and Axis II diagnosis in all cases and an Axis III diagnosis when appropriate. The five axes of *DSM-III-R* are as follows:

Axis I: Clinical syndromes and specific symptoms of maladaptive behavior.

Axis II: Personality disorders (adults) and specific developmental disorders (children and adolescents).

Axis III: Nonpsychological medical or physical disorders that may be present.

Axis IV: Severity of psychosocial stressors.

Axis V: Level of adaptive functioning (over past few months to one year).

1 HANNA, *supra* note 3, § 4.69[3][c], at 4-100 to 4-101. Additionally, the examiner needs to know the "legal issues defined by Workers' Compensation law and legal standards of evidence and proof." *Id.* at 4-101 (citing CAL. CODE REGS. tit. 8, § 9726 (1990)); see LASKY, *supra* note 3, §§ 2.1-8, at 13 to 26 (discussing *DSM-III-R*).

123. Lasky defines the Axis I classification of a psychological state as "something which has a relatively identifiable time of onset, course, and progression." LASKY, *supra* note 3, § 2.5, at 18-19.

124. *Id.* at 19. Axis II mental disorders differ from Axis I disorders because they "relate to enduring traits which have become or always were maladaptive and have created problems." *Id.*

125. *Id.*

126. 1 HANNA, *supra* note 3, § 4.69[3][c], at 4-100 to 4-101.

127. See Dilworth, *supra* note 5, at 12 (quoting Lois Tetrick, psychologist, Wayne State University, Detroit, that "'stress is a perceptual phenomenon'").

tially a subjective analysis.¹²⁸ To avoid subjectivity in determining causation of mental stress, some states require a showing that the actual work events causing the mental stress would have caused an injury to an ordinary worker under similar circumstances.¹²⁹

b. the six-month provision and personnel actions

In 1991 the legislature also addressed the problems of claims resulting from short-term employment and stress resulting from normal employment actions such as job evaluations or transfers. The legislature amended section 3208.3 of the California Labor Code to require that a claimant complete six months of employment, continuous or noncontinuous, prior to filing a mental injury claim.¹³⁰ Moreover, the Code distinguished between "sudden and extraordinary" and "regular and routine" job events.¹³¹ The legislation considered personnel actions such as discipline, demotions, or terminations as examples of normal employment events.¹³² Thus, a claimant with less than six months of employment could receive compensation for mental injuries due to sudden and extraordinary events, but not for mental injury claims arising from normal employment events.¹³³

128. *See id.*

129. *See infra* notes 148-49 and accompanying text.

130. Amended § 3208.3(d) reads in pertinent part:

(d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition as distinguished from a regular and routine event. As used in this subdivision, a "regular and routine employment event" includes, but is not limited to, a lawful, nondiscriminatory, good faith personnel action, such as discipline, work evaluation, transfer, demotion, layoff, or termination.

Act of July 16, 1991, ch. 115, § 4, 1991 Cal. Stat. (codified as amended at CAL. LAB. CODE § 3208.3 (West Supp. 1994)).

131. *Id.*; *see also supra* note 5 (describing examples of mental-mental categories).

132. The examples listed are not exhaustive, and the job actions must be in good faith and without discrimination to satisfy the statute. Act of July 16, 1991, ch. 115, § 4, 1991 Cal. Stat. (codified as amended at CAL. LAB. CODE § 3208.3 (West Supp. 1994)).

133. *Id.* A California Court of Appeal recently upheld the six-month employment provision against a constitutional challenge alleging violations of equal protection and due process in *Hansen v. Workers' Compensation Appeals Board*, 18 Cal. App. 4th 1179, 23 Cal. Rptr. 2d 30, *review denied*, No. S035505, 1993 Cal. LEXIS 6292, at *1 (Cal. Nov. 23, 1993). The Workers' Compensation Appeals Board did not determine the provision's constitutionality because it lacked "the power to declare a statute unconstitutional." *Id.* at 1182 n.1, 23 Cal. Rptr. 2d at 31 n.1 (citing CAL. CONST. art. III, § 3.5 (prohibiting administrative agency, such as Workers' Compensation Appeals Board, from declaring statute unconstitutional)).

Hansen involved a waitress whose mental injury stress claim was originally denied because she had not worked for her employer for the requisite six months. *Id.* at 1182, 23 Cal.

In *Shoemaker v. Myers*,¹³⁴ the California Supreme Court held that nonconsensual termination of employment is "a normal and inherent part of employment,"¹³⁵ and concluded that a stress injury arising from

Rptr. 2d at 32. Hansen alleged that the six-month requirement was "arbitrary" and violated her constitutional equal protection and due process rights. *Id.* At that time, the statute permitted compensation for mental injuries "related to a physical injury in the workplace or caused by a 'sudden and extraordinary employment condition,'" but denied compensation for mental injuries caused by normal employment events unaccompanied by physical injury. *Id.* at 1183, 23 Cal. Rptr. 2d at 32; see Act of July 16, 1991, ch. 115, § 4, 1991 Cal. Stat. (codified as amended at CAL. LAB. CODE § 3208.3 (West Supp. 1994)). In addressing the appropriate level of constitutional review, the court determined that the distinction drawn to determine compensability of employees' claims—length of employment—did not comprise a "suspect classification" and did not "infringe on any . . . fundamental rights." *Hansen*, 18 Cal. App. 4th at 1183, 23 Cal. Rptr. 2d at 32. Thus, the court applied a "rational basis" test in reviewing Hansen's claim. *Id.*

Under that deferential standard of constitutional review, *id.*, 23 Cal. Rptr. 2d at 32-33, the court found that the six-month provision did not violate either equal protection or due process concerns, *id.* at 1184, 23 Cal. Rptr. 2d at 33. The court supported its decision by examining legislative intent.

It is part of the Legislature's response to increased public concern about the high cost of workers' compensation coverage, limited benefits for injured workers, suspected fraud and widespread abuses in the system, and particularly the proliferation of workers' compensation cases with claims for psychiatric injuries. For years commentators have written critically about problems unique to the disposition of psychiatric claims, notably vagueness in defining the injury and problems of establishing industrial causation and apportionment.

. . . The Legislature's apparent purpose in enacting [this provision] was to limit questionable claims for psychiatric injuries resulting from routine stress during the first six months of employment. Underlying this policy decision is the fact that . . . the new employee is customarily on probation during the first six months of employment. It is during that period when problems between the employee and the employer or supervisor often occur. Those problems often result in disciplinary action, resignation, or termination and lead to claims of psychiatric injury due to stress. Moreover, psychiatric injuries from stress during regular and routine employment are necessarily cumulative injuries that occur over time. Although the imposition of an employment period of six months may seem arbitrary to the employee, we do not find it so arbitrary or irrational as to render the statute unconstitutional on equal protection grounds. Nor does the statute deprive petitioner of due process of law.

Id. at 1183-84, 23 Cal. Rptr. 2d at 33 (citations omitted). Thus, after disposing of the constitutional issues, the court affirmed the denial of Hansen's mental injury stress claim. *Id.* at 1184, 23 Cal. Rptr. 2d at 33.

134. 52 Cal. 3d 1, 801 P.2d 1054, 276 Cal. Rptr. 303 (1990); see also *supra* note 37 (discussing whistle-blowing statute as example of public policy exception to exclusive remedy provision).

135. *Shoemaker*, 52 Cl. 3d at 18, 801 P.2d at 1064, 276 Cal. Rptr. at 313. The California Supreme Court analyzed and rejected dictum in the California Court of Appeal's decision, *Georgia-Pacific Corp. v. Workers' Compensation Appeals Board*, 144 Cal. App. 3d 72, 92 Cal. Rptr. 643 (1983), that mental injury caused by termination was noncompensable because it was not work-related. *Shoemaker*, 52 Cal. 3d at 18, 801 P.2d at 1064, 276 Cal. Rptr. at 313.

The court had previously held in *Cole v. Fair Oaks Fire Protection District*, 43 Cal. 3d 148, 729 P.2d 743, 233 Cal. Rptr. 308 (1987), that such actions as "demotions, promotions, [and] criticism of work practices" constitute a "normal part of the employment relationship." *Id.* at 160, 729 P.2d at 750, 233 Cal. Rptr. at 315. In *Shoemaker*, the court relied on its

the termination was compensable.¹³⁶ The *Shoemaker* decision may have prompted the legislature to preclude benefits for mental injuries sustained in the first six months of employment resulting from a good faith personnel action.

2. The current state of affairs: 1993 reform

Dissatisfaction with prior amendments to California's workers' compensation law induced the legislature to undertake further reform efforts in 1993. On July 16, 1993, the legislature again reformed the "compensable psychiatric disorders" provisions of the workers' compensation statute.¹³⁷

The 1993 legislation enacted a number of significant changes to the procedure for establishing a compensable mental injury claim.¹³⁸ The

holding in *Cole* and stated that "[n]onconsensual termination of an employment relationship is indistinguishable from the kinds of actions enumerated in *Cole*," and thus fell within the scope of workers' compensation. *Shoemaker*, 52 Cal. 3d at 18, 801 P.2d at 1064, 276 Cal. Rptr. at 313.

136. *Shoemaker*, 52 Cal. 3d at 18-20, 801 P.2d at 1064-65, 276 Cal. Rptr. at 313-14. The court held that both physical and mental disabilities "arising from termination of employment" were usually compensable under workers' compensation. *Id.* at 7, 801 P.2d at 1056, 276 Cal. Rptr. at 305.

137. The 1993 workers' compensation reform was a five-bill package that amended, added, or repealed 96 sections of the Labor, Insurance, Penal, Business and Professions, and Unemployment Insurance Codes. See *1993 Workers' Compensation Legislation*, *supra* note 59, at 219. Assembly Bill 119 specifically dealt with amendments and additions to California Labor Code section 3208.3 regarding psychiatric claims. *Id.* at 220. The five bills dealt with various reform areas: A.B. 119 (Brulte) affected psychiatric and post-termination claims; A.B. 1300 (Brown) dealt with reducing fraud; A.B. 110 (Peace) contained multiple changes to the Insurance and Labor Codes; S.B. 484 (Lockyer) concerned appropriations; and S.B. 983 (Greene) regarded collective bargaining agreements. *Id.* at 220-21. Under urgency provisions, these bills took effect on July 16, 1993; however, numerous statutory changes were not operative until after that date. *Id.* at 219.

138. The 1993 amendments to California Labor Code § 3208.3 included:

(b)(1) requiring an employee to establish a compensable mental injury by showing that "actual events of employment were *predominant* as to all causes combined" by a preponderance of the evidence, *id.* § 3208.3(b)(1) (emphasis added);

(b)(2) compensating mental injuries caused by violent acts or exposure to violent acts when it is proven, by a preponderance of the evidence, that "actual events of employment were a *substantial* cause of the injury," *id.* § 3208.3(b)(2) (emphasis added);

(b)(3) defining "substantial cause" as "at least thirty-five to forty percent of the causation from all sources combined," *id.* § 3208.3(b)(3);

(d) retaining the durational provision of six months employment, continuous or noncontinuous, *id.* § 3208.3(d);

(e) not compensating claims after notice of termination or layoff, including voluntary layoff, when the claim is for an injury prior to termination or layoff notice unless shown, by a preponderance of the evidence, that "actual events of employment were predominant as to all causes combined . . . and one or more of the following," *id.* § 3208.3(e): (1) sudden or extraordinary events caused the injury, *id.* § 3208.3(e)(1); (2) employer had notice of the injury

new law requires that actual events of employment be the *predominant* cause and that violent acts or the exposure to violent acts be a *substantial* cause—rather than ten percent of the cause—of the mental injury.¹³⁹ It adds a provision that claims made after termination or layoff are not compensable unless actual events of employment are the predominant cause of the injury *and* (1) sudden or extraordinary events caused the injury, or (2) the employer had notice of the injury prior to the termination or layoff notice, or (3) evidence of treatment prior to the notice appears in the employee's medical records, or (4) a trier of fact finds sexual or racial harassment, or (5) evidence that the date of injury was after the date of termination or layoff notice but was prior to the effective date of termination or layoff.¹⁴⁰ Furthermore, the new law adds a provision denying compensation for mental injuries substantially caused by a lawful, nondiscriminatory, good-faith personnel action.¹⁴¹

The 1993 reform, however, does retain several provisions from the prior law, such as the preponderance of evidence burden of proof, the standardized diagnoses of mental injuries, the six-month employment requirement, and the section indicating the legislature's intent to establish a "new and higher" compensability threshold.¹⁴²

Overall, the 1993 reform combined old and new provisions. The 1993 legislation took effect relatively recently, thus it is difficult to determine the extent to which these changes will be successful in confronting

prior to termination or layoff notice, *id.* § 3208.3(e)(2); (3) evidence of treatment for mental injury prior to termination or layoff notice appears in employee's medical records, *id.* § 3208.3(e)(3); (4) "[u]pon a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial," *id.* § 3208.3(e)(4), and (5) evidence showing the injury date after termination or layoff notice but before the effective termination or layoff date, *id.* § 3208.3(e)(5);

(g) termination or layoff notice not followed within 60 days by termination or layoff is not subject to these provisions, but issuing frequent termination or layoff notices "shall be considered a bad faith personnel action and shall make this subdivision inapplicable to the employee," *id.* § 3208.3(g);

(h) denying compensation for mental injury if the injury was "substantially caused" by a "lawful, nondiscriminatory, good faith personnel action," with the burden of proof falling on the person asserting the issue, *id.* § 3208.3(h); and

(i) when a claimant files a mental injury claim against an employer, "and an application for adjudication of claim is filed by an employer or employee, the division shall provide the employer with information concerning psychiatric injury prevention programs," *id.* § 3208.3(i).

139. 1993 *Workers' Compensation Legislation*, *supra* note 59, at 221-22. Although the legislature declined to identify exactly what "predominant" meant, it defined "substantial" as 35 to 40% causation. *Id.*

140. *See id.*

141. *Id.*

142. *See* CAL. LAB. CODE § 3208.3 (West Supp. 1994).

and curing the problems associated with compensating mental injury stress claims.

IV. CRITIQUE OF EXISTING LAW

A. Problems with "Predominant" Causation

Despite the legislature's latest reform effort, inherent difficulties surrounding compensation of mental stress claims persist. Even though the legislature presumably raised the compensatory threshold, its use of "predominant cause"¹⁴³ may require clarification.¹⁴⁴ While some employers, commentators, and legislators have generally interpreted predominant to mean over fifty percent,¹⁴⁵ the mental injuries measured by such a standard vary by type of disorder and treatment. It seems likely that the debate will revolve around attempts to define standards of predominant causation for specific types of mental injuries under the new law.¹⁴⁶

Although other states' workers' compensation statutes contain similar provisions,¹⁴⁷ those statutes contain restrictions not found in California's law. For example, while Maine's statute requires that the work stress predominantly cause the mental injury, the statute further limits compensation to stress that is "extraordinary and unusual" as compared to stress felt in the course of acting as an "average employee."¹⁴⁸ Similarly, Alaska's statute requires that the stress be "extraordinary and unusual" as measured against individuals in comparable work situations and

143. See *supra* text accompanying note 139.

144. If the statute's use of predominant is ambiguous and not further defined by the legislature, the Workers' Compensation Appeals Board may adopt a rule interpreting the statute. See CAL. LAB. CODE §§ 5302, 5307 (West 1989). If the Board adopts a rule giving a more specific meaning to the phrase "predominant as to all causes combined," the courts should respect and treat that rule as a significant factor in determining the meaning of the phrase. See 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW: CONSTITUTIONAL LAW § 99, at 152-53 (1988) (citing *Mudd v. McColgan*, 30 Cal. 2d 463, 470, 183 P.2d 10, 14 (1947)).

145. See 1993 *Workers' Compensation Legislation*, *supra* note 59, at 222 ("Some commentators and legislators have suggested that 'predominant cause' means more than 50 percent of all combined causes." (emphasis omitted)); Hallye Jordan, *Workers' Comp Vote Anticipated After Consolidation of Proposals*, L.A. DAILY J., June 17, 1993, at 3 (discussing increase in causation standard for mental injuries to predominant level—interpreted as greater than 50% by employers and legislators).

146. By not defining specific terms, the legislature allows interpretation of the meaning of "predominant." See 1993 *Workers' Compensation Legislation*, *supra* note 59, at 222. One such interpretation is that, since the legislature defined "substantial" as 35 to 40%, "it could be inferred . . . that anything more than 40 percent is intended to be viewed as the 'predominant' cause." *Id.*

147. See, e.g., Antonetti, *supra* note 5, at 676 n.37.

148. ME. REV. STAT. ANN. tit. 39-A, § 201(3) (West Supp. 1993). The Maine statute states:

that the work stress be the predominant cause of the mental injury.¹⁴⁹ Both Maine and Alaska deny compensation for mental injuries resulting from good-faith personnel actions.¹⁵⁰ While California's statute employs a similar predominant standard, California limits compensation for mental injuries resulting from personnel actions by denying compensation for mental injuries "substantially" caused by good-faith personnel actions.¹⁵¹

Thus, even if the legislature had quantified the predominant contributory amount, as it did in 1989¹⁵² and in certain provisions of the 1993 reform,¹⁵³ quantification would probably not have solved the problems

3. Mental injury caused by mental stress. Mental injury resulting from work-related stress does not arise out of and in the course of employment unless it is demonstrated by clear and convincing evidence that:

A. The work stress was extraordinary and unusual in comparison to pressures and tensions experienced by the average employee; and

B. The work stress, and not some other source of stress, was the predominant cause of the mental injury.

The amount of work stress shall be measured by objective standards and actual events rather than any misperceptions by the employee.

A mental injury is not considered to arise out of and in the course of employment if it results from any disciplinary action, work evaluation, job transfer, layoff, demotion, termination or any similar action, taken in good faith by the employer.

Id.

The higher standard of proof, the "extraordinary and unusual" requirement, and the average person standard distinguish Maine's statute from California's workers' compensation statute. Interestingly, the language concerning stress measured by actual events rather than an employee's misperception suggests the ghost of the *Albertson's* decision. In that case, a California appellate court affirmed a compensation award based on a *worker's misperception* of job harassment. See *supra* part III.A.1. The California legislature subsequently amended its statute to require that a compensable workers' compensation claim establish that actual employment events caused the disability. See *supra* part III.A.2.

149. ALASKA STAT. § 23.30.265(17) (Supp. 1993). The pertinent part of Alaska's workers' compensation statute states:

"[I]njury" does not include mental injury caused by mental stress unless it is established that (A) the work stress was extraordinary and unusual in comparison to pressures and tensions experienced by individuals in a comparable work environment, and (B) the work stress was the predominant cause of the mental injury; the amount of work stress shall be measured by actual events; a mental injury is not considered to arise out of and in the course of employment if it results from a disciplinary action, work evaluation, job transfer, layoff, demotion, termination, or similar action, taken in good faith by the employer

Id.

While Alaska's statute contains familiar "actual events" language, Alaska's statute differs from both Maine's and California's statutes by not specifically requiring objective measurement standards for the mental injury.

150. *Id.*; ME. REV. STAT. ANN. tit. 39-A, § 201(3).

151. See *supra* note 138. California's reforms also instituted the six-month employment requirement and notice requirements regarding terminations or layoffs. See *supra* parts III.B.1.b, III.B.2.

152. See discussion *supra* part III.A.2.

153. See discussion *supra* part III.B.2.

surrounding mental stress claims. Beyond requiring standardized psychological diagnoses, the legislature provides no clear guidance as to how these threshold measurements should be made.

B. Problems with Layoff and Termination Claims

The legislature has demonstrated its intent to raise compensability thresholds for mental injury claims by increasing the proof requirements: predominant cause, more than fifty percent of cause, versus contributing cause, roughly ten percent of cause. Whether this factorial adjustment achieves the legislature's goals is debatable.¹⁵⁴ Rather than simply increasing causation thresholds, the legislature could have looked to other means to legitimize claims.¹⁵⁵ For example, in order to validate mental stress claims, California might require a stronger showing of causation as well as a more significant causal link between the mental injury and the employment.

In its 1993 reform, the legislature acknowledged concerns surrounding mental injury stress claims filed after termination or layoff by limiting these types of claims. As the economy declines and businesses downsize

154. Thus, while limits are necessary, apportioning causation is problematic. As one commentator noted regarding the 1989 reform: "The 10 percent threshold, though sounding quite specific and definite, will undoubtedly prove difficult to define. There is *no mathematical formula* in the legislation or decisional law for factoring out 10 percent of the causation of a mental disorder." 1 HANNA, *supra* note 3, § 4.02[3][c], at 4-22 (emphasis added); *see also* LASKY, *supra* note 3, at 12 (Supp. 1990) (discussing 10% threshold and stating, "How do you quantify percentage causation? . . . [W]e are unaware of any means by which a mathematical formula could be derived to determine 10% of causation of a mental disorder . . .").

155. Additionally, increasing percentages will not reduce the "dueling doctors" situation regarding conflicting medical reports offered by the employee and the employer. Similar to personal injury litigation involving a battle of expert witnesses, disputed workers' compensation claims involve medical experts for the employee, who find a compensable disability, versus the employer's medical experts, who will find to the contrary. *See* Postol & Adelman, *supra* note 4, at 5.

Moreover, even if both sides agree that a mental disability exists, medical professionals for each party can still dispute the percentage of causation necessary to satisfy thresholds for compensable injuries. *See id.* (regarding "conflicting testimony of opposing medical experts" and "uncertainty inherent in a medical analysis of emotional or psychiatric injuries"); *see also* Power v. Workers' Compensation Appeals Bd., 179 Cal. App. 3d 775, 224 Cal. Rptr. 758 (1986) (involving four psychiatric opinions evaluating correctional officer's workers' compensation claim that job stress caused overeating and resultant obesity; two opinions supported claim, two psychiatrists found no compensable mental injury, and court ultimately denied claim).

The legislature has attempted to address this issue. Recent proposals included provisions to limit the cost and number of medical evaluations. In August 1993 the Administrative Director of the Division of Workers' Compensation promulgated new regulations and established a medical-legal fee schedule for initial medical-legal evaluations. *See 1993 Workers' Compensation Legislation*, *supra* note 59, at 256.

or cease operations, terminated or laid-off workers claim stress injuries.¹⁵⁶ One might question whether compensating this type of mental injury claim fulfills the intended purposes of workers' compensation—to provide treatment and financial assistance to workers disabled through their employment.¹⁵⁷ Indeed, other states deny workers' compensation benefits for mental injuries resulting from terminations or layoffs.¹⁵⁸ Such denials may appear harsh, but the disabled worker is not left without compensation. State unemployment insurance benefits, rather than workers' compensation benefits, are available during the time the worker is unable to find employment.¹⁵⁹ Thus, while the legislature's reforms have addressed several pertinent issues, further efforts are necessary to effectively manage the problems stemming from workers' compensation mental stress claims.

V. PROPOSAL FOR CHANGE

Oregon's workers' compensation statute provides a model for balancing the need to provide benefits for work-disabled employees against fairness to employers. Adopting aspects of the Oregon system could strengthen and improve California's workers' compensation system.

156. Regarding depressed economies,

we go considerably further if we say that economic trauma was within the contemplation of the framers of the workers compensation laws and that they intended that everyone who was laid off from employment and therefore sustained a psychiatric "major depression" . . . was entitled to workers compensation benefits. This country once had a great depression which produced many "major depressions." Professionals in this field know that every time there is a plant closing it is followed by a mass of hearing loss claims, continuous trauma back claims and pulmonary claims (the list is not intended to be comprehensive). We doubt that the framers of the Act intended "major depression" due to job loss because the industry can't meet foreign competition or because the individual employer is simply incompetent, to be considered a workers' compensation injury.

LASKY, *supra* note 3, at 15 (Supp. 1990).

157. *Id.* at 16 (Supp. 1990). "Considering the original purposes of the founders of the workers' compensation laws[,] it does not appear that they include benefits for workers whose injuries stemmed not from the process of producing goods but from being terminated from engaging in their production." *Id.*; see also *supra* part II.A.1 (discussing goals of workers' compensation).

158. See, e.g., ALASKA STAT. § 23.30.265(17) (Supp. 1993); ME. REV. STAT. ANN. tit. 39-A, § 201(3) (West Supp. 1993).

159. The fact that unemployment insurance benefits are limited in duration while workers' compensation benefits continue throughout a worker's disability may influence some claimants to file workers' compensation claims upon becoming unemployed. See discussion *supra* part II.A.1.

A. Oregon's Solution

1. Statutory requirements

Like California, Oregon's workers' compensation system costs were high, and Oregon aimed reform efforts at reducing those costs.¹⁶⁰ The Oregon statute categorizes a mental injury as an occupational disease and restricts compensable mental injuries to those that "require[] medical services or result[] in physical or mental disability."¹⁶¹ Oregon's statute denies compensation for mental disorders that are not caused by objective work conditions, and for mental injuries that result from ordinary working situations or reasonable personnel actions.¹⁶² Additionally, Oregon's statute requires a "generally recognized" standard of diagnosis and clear and convincing evidence that the mental injury arose from the employment.¹⁶³

Despite reluctance to compensate mental injuries before 1980,¹⁶⁴ the Oregon judiciary established requirements similar to California's prior statute. Relying on its prior decision,¹⁶⁵ an Oregon appellate court in *Korter v. EBI Cos.*¹⁶⁶ announced a standard for compensating mental injury: (1) The mental injury did not have to result from an "extraordinary unanticipated event";¹⁶⁷ (2) "usual and ordinary job stress" could

160. James L. Edmunson, *1987 Reforms of Oregon's Workers' Compensation Law*, 24 WIL-LAMETTE L. REV. 321, 322-23 (1988). Oregon's legislature also attempted to balance economic interests through cost savings against possible harm to employees by restricting compensation rights. *Id.* at 338.

161. Oregon's workers' compensation statute states in part:

Any mental disorder which requires medical services or results in physical or mental disability or death.

...

(3) Notwithstanding any other provision of this chapter, a mental disorder is not compensable under this chapter:

(a) Unless the employment conditions producing the mental disorder exist in a real and objective sense.

(b) Unless the employment conditions producing the mental disorder are conditions other than conditions generally inherent in every working situation or reasonable disciplinary, corrective or job performance evaluation actions by the employer, or cessation of employment.

(c) Unless there is a diagnosis of a mental or emotional disorder which is generally recognized in the medical or psychological community.

(d) Unless there is clear and convincing evidence that the mental disorder arose out of and in the course of employment.

OR. REV. STAT. § 656.802(1)(b), (3)(a)-(d) (1991).

162. *Id.*

163. *Id.* § 656.802(3)(c)-(d).

164. *See* Bussey, *supra* note 5, at 109.

165. *See* James v. State Accident Ins. Fund, 605 P.2d 1368 (Or. Ct. App. 1980).

166. 610 P.2d 312 (Or. Ct. App. 1980).

167. *Id.* at 315 (citing *James*, 605 P.2d at 1370-71).

cause a compensable mental injury;¹⁶⁸ and (3) a preexisting mental condition did not preclude compensability if the employee proved that work activity worsened the condition to the extent of disability or need of medical services.¹⁶⁹ One commentator stated that a "deluge of claims" followed the *Korter* decision.¹⁷⁰ In response Oregon's Supreme Court tried to restrict the compensability standards in *James v. State Accident Insurance Fund*.¹⁷¹ Nevertheless, the court's efforts were unsuccessful, and "[d]espite [the compensability restrictions], the number of mental stress claims continued to increase, especially from those working in state agencies."¹⁷² Oregon's legislature responded by amending its workers' compensation statute in 1987.¹⁷³

In comparing Oregon's statute to California's statute, several differences are obvious. First, Oregon excludes disorders produced by events inherent in every work situation.¹⁷⁴ California, however, allows compensation for cumulative mental injuries without requiring extraordinary stress.¹⁷⁵ Second, Oregon does not quantify stress arising from such events as reasonable personnel actions, as does California, but rather bars those claims outright.¹⁷⁶ Finally, Oregon requires an employee to prove that the "mental disorder arose out of and in the course of the claimant's employment" by clear and convincing evidence, rather than by a preponderance of the evidence.¹⁷⁷ In contrast, and despite numerous reform efforts, California's statute has retained a lesser standard of proof.¹⁷⁸ Both states, however, do have similar provisions requiring that objective employment events cause the mental injury.¹⁷⁹

168. *Id.*

169. *Id.*

170. Bussey, *supra* note 5, at 110.

171. 624 P.2d 565 (Or. 1981), *cited in* Bussey, *supra* note 5, at 110.

172. Bussey, *supra* note 5, at 110 (citing Edward M. Colbach, *The Mental-Mental Muddle and Work Comp in Oregon II*, 13 BULL. AM. ACAD. PSYCHIATRY & L. 253, 255 (1985)).

173. *Id.* at 110-11 (describing changes to Oregon statute).

174. OR. REV. STAT. § 656.802(3)(b).

175. *See supra* notes 5-8 and accompanying text.

176. *Id.*

177. Edmunson, *supra* note 160, at 336. James Edmunson suggests that by making stress claims harder to prove, litigation will become more complicated, and that "the highly subjective factors involved" may not allow standardized assessments of mental stress claims. *Id.* at 338. Although, in cases where industrial causation of stress is weak or evidence of nonwork-related causation is strong, doctors or attorneys might be less likely to pursue a marginal claim under a higher standard of proof.

178. *See infra* note 190.

179. *See supra* note 109 for a discussion of California's "actual events" requirement and *supra* note 161 for Oregon's requirements.

2. Judicial interpretation

A review of case law, prior to and after amendment of Oregon's workers' compensation statute, illustrates the efficacy of several provisions of Oregon's statute. Oregon's current law specifies that a compensable mental injury must require medical treatment, as well as diagnosis of a generally recognized mental or emotional disorder.¹⁸⁰ Prior to the effective date of the amended law, two applicants, who otherwise lacked a diagnosed mental or emotional disorder, claimed that job stress exacerbated their preexisting multiple sclerosis conditions and received compensation.¹⁸¹ Three recent Oregon cases illustrate the difference between the initial and the amended law. In one case the court denied compensation to an applicant who claimed that stress exacerbated a preexisting multiple sclerosis condition,¹⁸² and in two others, the court denied compensation to applicants who claimed that job stress caused their medical injuries.¹⁸³

180. OR. REV. STAT. § 656.802(1)(b), (3)(c).

181. *See* State Accident Ins. Fund v. Carter, 698 P.2d 1037, 1038 (Or. Ct. App. 1985); Abbott v. State Accident Ins. Fund, 609 P.2d 396 (Or. Ct. App. 1980). *Carter* involved an Oregon State Senator, also head of the Workers' Compensation Department, who claimed that ethics investigations and corresponding publicity worsened a preexisting multiple sclerosis condition. 698 P.2d at 1038. Although exacerbations are an expected condition of multiple sclerosis and despite contrary medical testimony, the court chose to believe a physician it considered as the more experienced multiple sclerosis expert, and thus affirmed the Board's finding of a compensable claim. *Id.* at 1038-40.

Similarly, the *Abbott* claimant, a legal secretary who had worked for an attorney specializing in workers' compensation cases, alleged a worsening of multiple sclerosis due to stress. 609 P.2d at 397. Again confronted with conflicting medical evidence, the court affirmed the referee's and the Board's findings of compensability based upon the particular expertise of a physician (the same doctor as in *Carter*) who believed stress aggravated multiple sclerosis. *Id.* at 397-98.

182. *Burris v. SAIF Corp.*, 841 P.2d 696 (Or. Ct. App. 1992). Like the *Carter* and *Abbott* claimants, the employee in *Burris* claimed that job stress worsened a multiple sclerosis condition. *Id.* at 697. The court agreed with the Board that a claim for an exacerbated medical condition due to job stress fell under the state's occupational disease definition. *Id.* Accordingly, the court affirmed the Board's denial of compensation because the claimant did not prove that he had a "generally recognized mental disorder" pursuant to § 656.802(3)(c) of the statute. *Id.*

183. In *Mathel v. Josephine County*, 858 P.2d 450 (Or. Ct. App. 1993), the claimant had controlled his hypertension for a number of years. *Id.* at 450. The claimant had a heart attack following two exceptionally stressful workdays. *Id.* Following precedent, the court stated that "any claim that a condition is caused by on-the-job stress must be considered a claim for mental disorder under ORS 656.802." *Id.* at 451 (citing *SAIF Corp. v. Hukari*, 833 P.2d 1307 (Or. Ct. App.), *review denied*, 840 P.2d 709 (Or. 1992)). The court believed that the 1990 amendments to Oregon's statute did not affect its determination on this issue, and denied compensation because *Mathel* did not have a diagnosed mental condition under the statute. *Id.* In amending the statute in 1990, the legislature added minor wording changes and shifted the language from one section into a subsection, but did not alter the provisions regarding com-

Two 1992 Oregon decisions denied compensation for reasonable disciplinary actions consistent with Oregon's amended statute.¹⁸⁴ The first case involved a police dispatcher who alleged that her stress was caused by disciplinary action taken after she failed to dispatch an ambulance.¹⁸⁵ The second case involved a claim found to be noncompensable because the alleged stress resulted from reasonable discipline.¹⁸⁶

pensation for mental injuries. *Id.* One judge dissented, however, believing that the court should overrule *Hukari* and not apply the mental disorder provisions to deny claims for physical conditions caused by job stress, as the legislative history did not support the majority's interpretation concerning "mental disorders." *Id.* at 451-53 (Deits, J., dissenting).

In *Sibley v. City of Phoenix*, 813 P.2d 69 (Or. Ct. App. 1991), a police chief suffered hypertension due to fears about his job security. *Id.* Rather than asserting an occupational disease from exposure to certain hazardous substances or as a mental disorder, *Sibley* claimed that "various stress-causing incidents on the job were a 'series of traumatic events or occurrences'" under the statute. *Id.* at 70. *Sibley* unsuccessfully attempted to persuade the court that "'traumatic event' must be read to encompass emotional trauma, so that his claim, which [was] not compensable under subsection (1)(b) because it [did] not involve a mental disorder," fell within a "catch all" provision. *Id.* (describing claimant's argument that § 856.802(1)(c) is catch-all meant to provide "'general category' of occupational disease"). The court declined to read this provision broadly to include emotional as well as physical traumas. *Id.* In denying the claim, the court concluded that subsection (1)(c) applied to situations involving "'micro-trauma' or 'overuse' syndromes, such as degenerative back conditions, carpal tunnel syndrome[,] and hearing loss, caused by repetitive *physical* trauma or activity." *Id.* at 70-71.

184. OR. REV. STAT. § 656.802(3)(b).

185. *Thrash v. City of Sweet Home*, 825 P.2d 289 (Or. Ct. App. 1992). The claimant, *Thrash*, received a call from a doctor to dispatch an ambulance for an elderly, comatose patient, but failed to do so until a second call from the doctor more than an hour later. *Id.* at 290. Although the patient recovered, *Thrash* apparently felt "great emotional distress" over the incident, largely due to a fear of being seriously disciplined. *Id.* *Thrash* went through a disciplinary hearing that determined she had committed misconduct, and she filed a stress claim a few days later. *Id.* Affirming the referee's findings, *id.* at 289, and in determining the claim's compensability, the Board excluded the disciplinary proceedings from its consideration because the statute does not compensate mental disorders resulting from reasonable discipline. *Id.* at 291. The claimant attempted to argue that the discipline was "unlawful"—and thus unreasonable—but the court affirmed the Board's decision that *Thrash* failed to establish that "her claim arose out of her employment" and denied compensation. *Id.*

186. *SAIF Corp. v. Hukari*, 833 P.2d 1307 (Or. Ct. App.), *review denied*, 840 P.2d 709 (Or. 1992). The claimant alleged that job stress following a misconduct investigation and subsequent reprimand worsened a preexisting medical condition. *Id.* at 1307. The referee concluded that, because the claim properly fell under a physical condition *and not a mental disorder*, claimant had a compensable physical disability claim. *Id.* at 1308. The Board affirmed the referee's decision, although it disagreed with the referee's analysis. *Id.* The Board, characterizing the "flare-up" of claimant's medical condition as a "compensable injury," did not apply the mental disorder provisions. *Id.* Looking to the statutory amendments and legislative intent, the court instead determined that the occupational disease provisions in § 656.802(1)-(2) did apply to the claim. *Id.* at 1308-09. The court distinguished between an independent compensation claim for a stress-caused disability and a treatment claim for a consequential mental condition. *Id.* at 1309. Finding an independent claim, the court denied compensation because the claimant's stress resulted from a reasonable "corrective evaluation" by the employer. *Id.*

As briefly depicted, Oregon courts follow the amended statutory guidelines in awarding workers' compensation benefits; California's legislature could similarly refine the scope of its workers' compensation laws. While such limitations may deny compensation of some claims, the goals of workers' compensation are to provide employees with financial support, rehabilitation and treatment, and to facilitate a return to work when they suffer *industrially caused* injuries.¹⁸⁷ If the mental stress is not caused by employment, a disabled worker can seek compensation through other sources, such as state disability benefits or federal social security programs.¹⁸⁸ Workers' compensation is not designed, nor should it function, as an exhaustive social insurance program providing blanket coverage for any mental stress disability.¹⁸⁹

B. Proposed Solution for California

California's present workers' compensation law should be amended to increase the evidentiary burden to a clear and convincing standard to require a claimant to show a supportable foundation for the stress claim.¹⁹⁰ Additionally, the statute should retain the restrictions regarding mental injuries resulting from personnel actions, such as layoffs or disciplinary actions, as long as employers act reasonably and in good faith.¹⁹¹ Workers' compensation provides subsistence to a person unable to work due to a work-related injury; it is not intended to compensate for a worker's depression resulting from reasonable criticism or unavoidable layoffs.¹⁹²

187. See *supra* part II.A.1.

188. See discussion *supra* part II.A.1.

189. See *supra* note 28 and accompanying text.

190. See *infra* part V.C (detailing proposed amended statute).

In 1992 the legislature considered two competing plans—dubbed the “Republican Plan” and the “Democratic Plan” based on the principal authors’ political party affiliation—aimed at reducing workers’ compensation costs. 1992 *Workers’ Compensation Legislation*, 20 CAL. WORKERS’ COMPENSATION REP. 101, 101 (1992). The Republican Plan, as advanced by Assemblyman Brulte, included a provision requiring clear and convincing evidence to establish compensability of a claimed mental injury. *Id.* Unlike this Comment’s suggested proposal, the Republican Plan further limited compensation of mental injuries to those caused “by an actual, sudden and extraordinary employment event.” *Id.* Additionally, the Republican Plan excluded mental injury claims arising from “a lawful, nondiscriminatory, good faith personnel action,” and immunized employers “under the exclusive remedy rule from civil damages liability for both compensable and noncompensable [mental] injury.” *Id.* (emphasis omitted). The Assembly Committee on Insurance, however, failed to pass the Republican Plan, and thus it did not reach the Senate. 1992 *Workers’ Compensation Legislation*, 20 CAL. WORKERS’ COMPENSATION REP. 158, 158 (1992).

191. See *infra* part V.C (detailing proposed amended statute).

192. See *supra* note 156 and accompanying text.

The perceived exodus of employers from California¹⁹³ and the legislature's struggle at reform suggests that workers' compensation must be fair to employers as well as protective of disabled employees.¹⁹⁴ The legislature can achieve this balance without curtailing the broad range of compensable mental stress injuries by requiring the employee to establish causation of the mental stress injury with clear and convincing evidence rather than with the current preponderance of the evidence standard.

Although a preponderance of the evidence standard is generally applicable in civil cases in California,¹⁹⁵ "constitutional, statutory, or decisional law" can require a higher or lesser standard of proof.¹⁹⁶ The California Supreme Court in *Weiner v. Fleischman*¹⁹⁷ stated that in certain situations, the courts require the weightier clear and convincing standard "because of historical and pervasive . . . skepticism"¹⁹⁸ regarding the validity of certain types of claims. For example, in cases questioning the existence of an oral trust, courts have increased the standard to clear and convincing evidence "because of special concerns that the terms of the trust specify the information needed for courts to deal with the trust."¹⁹⁹

Skepticism and special concerns can also exist when courts hear workers' compensation claims alleging disability due to mental stress. As indicated by the California Law Revision Commission, a problem encountered in proving the terms of an oral trust is the "risk of perjury, particularly by those with something to gain."²⁰⁰ Similarly, one might

193. See CAL. LAB. CODE § 3208.3 note (West Supp. 1994) (Historical and Statutory Notes) (letter from Gov. Pete Wilson to California Assembly stating that California's fraud-ridden workers' compensation system has cost approximately 60,000 jobs per year statewide (July 16, 1993)); Elias, *supra* note 48, at 6.

194. See *supra* part III.

195. See CAL. EVID. CODE § 115 (West 1966) ("Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.").

196. 2 BERNARD S. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 45.1, at 602 (2d ed. Supp. 1990) ("Normally, the burden of proof with respect to a particular fact requires proof by a preponderance of the evidence. But constitutional, statutory, or decisional law is free to establish . . . a heavier or lighter burden of proof . . ."); see 1 B.E. WITKIN, CALIFORNIA EVIDENCE § 157, at 135 (3d ed. 1986) ("[U]nless a greater or lesser burden is imposed by statute or judicial decision, the party with the burden of proof satisfies it by a preponderance of the evidence.").

197. 54 Cal. 3d 476, 816 P.2d 892, 286 Cal. Rptr. 40 (1991).

198. *Id.* at 489, 816 P.2d at 900, 286 Cal. Rptr. at 48.

199. *Id.* The court cited amendments regarding exemplary damages, CAL. CIV. CODE § 3294 (West Supp. 1994), and concerning oral trusts of personal property, CAL. PROB. CODE § 15207 (West 1991).

200. *Recommendation Proposing the Trust Law*, 18 CAL. L. REVISION COMMISSION REP. 501, 525 (1986).

question the authenticity of a mental injury stress claim given the potential for abuse in filing a marginal claim to obtain disability benefits.²⁰¹

In addition to concerns regarding the validity of stress claims, another troublesome aspect of compensating disabling mental stress injuries, particularly mental-mental injuries, is that while many potential causes of mental stress exist,²⁰² sources for compensating mental stress disability are limited. If perceived as the only source of compensation or the most accessible deep pocket entity,²⁰³ workers' compensation becomes the target for remuneration by unethical professionals and claimants.²⁰⁴

The causes of stress in an employee's life are best known to the employee.²⁰⁵ Thus, it is unfair to place the burden of negating nonwork factors as the cause of the employee's mental stress injury on the employer. If other nonwork matters might have caused an employee's stress, the employee can more readily show why those matters are not the predominant cause of the employee's mental stress injury than an employer or insurer can positively show that nonwork matters are a predominant cause of the disability. Given the employee's unique knowledge of stressful matters in the employee's life and the increasing privacy demands upon employers, it is equitable to require that the employee offer clear and convincing proof of the causal link between employment and mental injury disability.

Also, as a matter of fairness, the employer should not be penalized for merely demanding that the employee perform his or her job. The employer is entitled to expect reasonable skill, service in conformity with place of performance, and substantial compliance with lawful directions in the course of service.²⁰⁶ The law should not penalize employers for adjusting their work forces to the demands of an open market, since such situations are generally beyond the employers' control. Employers must often regulate employee performance and respond to market forces by taking actions disfavored by the employee. Such actions include critical evaluations, warnings, suspensions, layoffs, and terminations, all of

201. See *supra* part II.B.2.

202. For example, a worker might experience stress from factors other than work, such as failed relationships, financial problems, or family illnesses. See *supra* note 54 and accompanying text.

203. See CAL. LAB. CODE § 3700 (West Supp. 1994) (mandating that all employers secure workers' compensation for employees).

204. See *supra* notes 55-62 and accompanying text.

205. See Barth, *supra* note 5, at 359 ("Employers are unlikely to know which employees are near a breaking point, nor can they gauge what effect workplace stresses have, in conjunction with other potential sources of impairment.").

206. See CAL. LAB. CODE §§ 2854, 2856-2857 (West 1989).

which are usually stressful to the employee. Alternative resources, such as state disability insurance, can provide compensation for disabilities arising from reasonable, good-faith personnel actions.

Thus, while the suggestions presented herein may not solve all of California's workers' compensation problems, a clear and convincing standard requiring a stronger showing to justify work-related causes of stress would discourage fraud and frivolous claims. Denying workers' compensation mental stress claims following reasonable, good-faith personnel actions, such as terminations due to plant closures, would channel stress-disabled workers into more appropriate programs—unemployment insurance or state disability systems for example. Thus, restrictions contained in the proposal might cause some actions to fail, but legitimately disabled workers with valid claims should still be able to satisfy the higher evidentiary standard. Moreover, other social insurance programs exist to support a disabled worker when the mental injury is not caused by employment.

C. *Proposed Amended Workers' Compensation Law*

A proposed statute could revise California's current law governing compensable mental injuries to reflect these concerns.²⁰⁷ The revised statute, with brackets representing portions of existing law to be removed or replaced, would read:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised*, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

(b)(1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by [a preponderance of the evidence] clear and convincing evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.

(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demon-

207. See CAL. LAB. CODE § 3208.3 (West Supp. 1994).

strate by [a preponderance of the evidence] clear and convincing evidence that actual events of employment were a substantial cause of the injury.

(3) For the purposes of this section, "substantial cause" means at least 35 to 40 percent of the causation from all sources combined.

(c) It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division.

(d) Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition. Nothing in this subdivision shall be construed to authorize an employee, or his or her dependents, to bring an action at law or equity for damages against the employer for a psychiatric injury, where those rights would not exist pursuant to the exclusive remedy doctrine set forth in Section 3602 in the absence of the amendment of this section by the act adding this subdivision.

(e) No compensation shall be paid pursuant to this division for a psychiatric injury if the employment conditions producing the psychiatric injury result from reasonable disciplinary, corrective, or job performance evaluation actions by the employer, or cessation of employment, if such actions are lawful, nondiscriminatory, good-faith personnel actions.²⁰⁸

(f) Where the claim for compensation is filed after notice of termination of employment or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by [a preponderance of the evidence] clear and convincing evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury and one or more of the following conditions exist:

(1) Sudden and extraordinary events of employment were the cause of the injury.

(2) The employer has notice of the psychiatric injury under Chapter 2 (commencing with Section 5400) prior to the notice of termination or layoff.

208. See *infra* text accompanying notes 209-10.

(3) The employee's medical records existing prior to notice of termination or layoff contain evidence of treatment of the psychiatric injury.

(4) Upon a finding of sexual or racial harassment by any trier of fact, whether contractual, administrative, regulatory, or judicial.

(5) Evidence that the date of injury, as specified in Section 5411 or 5412, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.

(g) For purposes of this section, an employee provided notice pursuant to Sections 44948.5, 44949, 44951, 44955, 44955.6, 72411, 87740, and 87743 of the Education Code shall be considered to have been provided a notice of termination or layoff only upon a district's final decision not to reemploy that person.

(h) A notice of termination or layoff that is not followed within 60 days by that termination or layoff shall not be subject to the provisions of this subdivision, and this subdivision shall not apply until receipt of a later notice of termination or layoff. The issuance of frequent notices of termination or layoff to an employee shall be considered a bad faith personnel action and shall make this subdivision inapplicable to the employee.

[(h) No compensation under this division shall be paid by an employer for a psychiatric injury if the injury was substantially caused by a lawful, nondiscriminatory, good-faith personnel action. The burden of proof shall rest with the party asserting the issue.]

(i) When a psychiatric injury claim is filed against an employer, and an application for adjudication of claim is filed by an employer or employee, the division shall provide the employer with information concerning psychiatric injury prevention programs.

Revised section (e) represents portions of Oregon's provision (3)(b),²⁰⁹ combined with a portion of California's statute.²¹⁰ Regarding section (b)(2), the proposal might retain a minimum standard of proof for this provision because a generally recognized traumatic incident lends authentication to the mental injury's causation, unlike a claim for non-specific mental stress.

VI. CONCLUSION

California is one of very few states to allow workers' compensation for mental-mental stress injuries.²¹¹ This liberal standard has given rise

209. See *supra* note 161.

210. See CAL. LAB. CODE § 3208.3(h).

211. See *supra* text accompanying notes 6-8.

to a flood of mental stress injury disability claims,²¹² and distinguishing legitimate from wishful claims appears to consume a disproportionate expense of the workers' compensation system.²¹³ Due to the complexity of the issues involved and the attendant complications discussed above, the problems associated with compensating mental stress claims²¹⁴ are not likely to disappear. Indeed, it is likely that stress-related injuries will become increasingly prevalent.²¹⁵

Although resolving the many problems associated with stress claims might prove difficult, the legislature can begin by realistically addressing the situation. Rather than adding complex formulas to define circumstances for compensating a stress claim, the legislature can impose limitations as necessary, while maintaining a balance of fairness toward both employee and employer. Increasing the evidentiary burden for mental injury stress claims to a clear and convincing standard and exempting stress claims resulting from reasonable, good-faith personnel actions are steps the legislature can take toward managing the stress claim situation. Finally, despite necessary efforts to reduce fraudulent mental stress claims, the state should not lose sight of the underlying purpose of workers' compensation—compensating injured employees—rather than converting workers' compensation into general social insurance.

*Aya V. Matsumoto**

212. *See supra* note 12 and accompanying text.

213. *See supra* notes 17-20 and accompanying text.

214. Postol & Adelman, *supra* note 4, at 5 (discussing "newest workers' compensation nightmare—mental stress claims").

215. *See supra* part II.B.1.

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