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Workmen's Compensation - A Confusing Double Standard for Mental Injuries - Consolidated Freightways v. Drake

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Workmen's Compensation—A Confusing Double Standard for Mental Injuries. *Consolidated Freightways v. Drake,* 678 P.2d 874 (Wyo. 1984).

In January, 1983, Rodney Drake left his job as a truck driver for Consolidated Freightways after suffering a mental breakdown and depression.[1] Drake filed an application for disability benefits under Wyoming's Worker's Compensation Act. Consolidated Freightways filed an objection to the claim, and the matter was tried in the District Court for the First Judicial District of Wyoming. The result was an "Order Granting Benefits" which Consolidated appealed to the Wyoming Supreme Court.[2]

Rodney Drake began working for Consolidated Freightways in Wichita, Kansas, in 1974. He soon held the position of "bid" driver which meant that he worked a fixed schedule with regular days off and drove an assigned route.[3] As a result of a corporate reorganization in 1980, however, Drake and 140 other drivers were relocated.[4] Drake chose to transfer to Cheyenne because he was told he would have an excellent chance of obtaining a bid schedule almost immediately. Since a bid driver's schedule is awarded on the basis of seniority, Drake began working in Cheyenne as an "extra-board" driver. As an extra-board driver, he was on call twenty-four hours a day to take the work that bid drivers could not handle.[5] Drake could be called to work on an hour's notice and was not paid if he did not work. This situation caused turmoil in his private life and made it nearly impossible for him to plan activities with his family.[6]

After working a year as an extra board-driver, with no indication that he would soon obtain a bid driver schedule, Drake began suffering from physical problems and fatigue. He finally filed a grievance through his union and obtained a bid schedule in November, 1982, two years after his move to Cheyenne. But less than three months later, due to a business slowdown, Consolidated reassigned Drake to extra-board duty and he suffered a mental collapse.[7]

In its appeal, Consolidated Freightways argued that most courts are "extremely reluctant" to approve compensation awards for disabling mental injuries brought about by the "gradual buildup of emotional stress over a period of time."[8] Pointing out that Drake's work situation was no different from that of other extra-board drivers, Consolidated urged against compensating mental injuries which are triggered by the same stress situations that other workers tolerate.[9] Consolidated noted that

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1. Consolidated Freightways v. Drake, 678 P.2d 874, 876 (Wyo. 1984).
2. Brief for Employer/Appellant at 1-2, Consolidated Freightways v. Drake, 678 P.2d 874 (Wyo. 1984) [hereinafter Employer's Brief].
3. *Id.* at 2.
4. *Id.*
5. Brief for Appellee at 1, Consolidated Freightways v. Drake, 678 P.2d 874 (Wyo. 1984) [hereinafter Brief for Appellee]; *Consolidated Freightways,* 678 P.2d at 875-76.
6. Brief for Appellee, *supra* note 5, at 1.
7. *Consolidated Freightways,* 678 P.2d at 876.
8. Employer's Brief, *supra* note 2, at 4-5.
9. *Id.* at 7-9.

Drake had suffered previous episodes of emotional instability and questioned whether there was sufficient evidence to prove a causal connection between Drake's breakdown and his job.[10]

The Wyoming Supreme Court, however, affirmed the compensation award. The Supreme Court let stand the lower court's finding that Drake's work situation was more stressful than that of other employees and that his mental collapse was causally related to his job.[11] Observing that Drake's case was one of first impression, the high court surveyed the authorities and trends in other states and held that a "non-traumatically caused mental injury" is compensable under the Wyoming Worker's Compensation Act "if it results from a situation or condition in employment that is of greater magnitude than the day-to-day mental stresses and tensions all employees usually experience."[12]

This holding brings Wyoming into step with the majority of states which recognize as compensable, mental injuries caused by mental stimuli.[13] It also provides a formula for distinguishing genuine mental injuries from fraudulent ones and work-related injuries from those which are not. This progressive step of compensating mental injury is flawed, however, by the court's confusing application of the new formula and by the fact that the formula is inconsistent with established principles of Wyoming worker's compensation law. Before examining these problems, it will be useful to review the way other states have approached this issue.

BACKGROUND

The Policies of Other States and the Influence of Tort Law

Courts in most states have been called upon to decide what status mental injuries have under worker's compensation laws.[14] For convenience, Professor Arthur Larson has divided the cases addressing this issue into three categories: 1) those in which a mental stimulus causes a physical injury; 2) those in which a physical trauma causes a mental injury; and 3) those in which a mental stimulus causes a mental injury.[15] Larson found that courts uniformly award compensation in the first and second categories, in which there is either a physical stimulus or physical injury.[16] A Pennsylvania gas company employee, for example, who was startled

10. *Id.* at 11.
11. *Consolidated Freightways*, 678 P.2d at 877.
12. *Id.* at 877.
13. 1B A. LARSON, WORKMEN'S COMPENSATION LAW § 42.20, at 7-628 (1979).
14. A good introductory survey of these cases can be found at Annot., 97 A.L.R. 3D 161 (1980), and 35 AM. JUR. PROOF OF FACTS, 2D § 1 (1981).
15. 1B A. LARSON, *supra* note 13, at § 42.20, at 7-584.
16. *Id.* § 42.21 at 7-585, § 42.22 at 7-597. In a recent controversial decision, Baker v. Wendy's of Montana, Inc., No. 84-4, (Wyo. Aug. 28, 1984), the Wyoming Supreme Court recognized that nervous injuries caused by *physical trauma* (the second category of mental injury) are also compensable under Wyoming law. In that case, the manager of a Wendy's restaurant was alleged to have inflicted intentional, emotional distress, assault, and battery on two female employees by uttering obscene remarks and touching them in a sexual and offensive manner. The plaintiffs complained of mental anguish and injury caused by mental (obscene remarks) and physical (touching) stimuli and sought to hold Wendy's liable

by a dog (mental stimulus) and suffered a fatal stroke (physical injury) was covered by worker's compensation,[17] as was an Oregon laborer who injured his back (physical trauma) and was subsequently disabled by his hysterical "conversion reaction" (mental injury) to the trauma.[18] There is, however, a split of authority regarding "mental stimulus-mental injury" cases, such as Mr. Drake's. Larson found that a "substantial" number of jurisdictions deny benefits to this third category of injury,[19] but noted that in a "distinct majority" of states, such injuries are compensable.[20]

Those courts which deny compensation in mental stimulus-mental injury situations are often concerned about the potential for fraudulent claims[21] and the "great danger of malingering."[22] They are also concerned that the employer might be forced to pay for injuries which "may or may not be causally related to the employment situation."[23] The first two mental injury categories each contain a physical element which helps to verify the injury and placate these apprehensions.[24] As one court described it, "When a shipping crate falls on a worker breaking a bone or two, the causation and the tangible happening are easily identifiable."[25]

This "old fashioned"[26] physical requirement is a notion borrowed from tort law which for years held that there could be no recovery against a defendant whose negligence produced mental suffering in another unless there was some kind of physical "impact" on the victim.[27] Since worker's compensation was created to avoid tort actions between employer and worker, it was "almost inevitable," as Professor Alexander Manson describes it, "that certain ways of thinking about a tort case of negligence would creep into the new scheme of workmen's compensation."[28] The old tort worry of fraudulent suits for negligent mental injury became the

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for negligence. The court found that their injuries were compensable. Noting that in *Consolidated Freightways* they had held "mental stimulus-mental injuries" to be covered by worker's compensation, the court found that there was no reason why "a physical trauma which causes a nervous injury should *not* be regarded as compensable. . ." *Wendy's*, slip op. at 9 (emphasis in original). The court ruled against the plaintiffs, however, finding that since their injuries arose out of their employment situation and were covered by worker's compensation, the employer (Wendy's) was immune from suit.

17. Hunter v. St. Mary's Natural Gas, 122 Pa. Super. 300, 186 A. 325 (1936).

18. Elliott v. Precision Castparts Corp., 30 Or. App. 399, 567 P.2d 566 (1977).

19. 1B LARSON, *supra* note 13, § 42.23, at 7-628.

20. *Id.* at 7-624.

21. In Seitz v. L & R Industries, Inc., 437 A.2d 1345, 1349 (1981), for example, the Supreme Court of Rhode Island said, "Great care must be taken in order to avoid the creation of voluntary 'retirement' programs that may be seized upon by an employee at an early age if he or she is willing or indeed, even eager to give up active employment and assert a neurotic inability to continue."

22. Townsend v. Maine Bureau of Public Safety, 404 A.2d 1071, (Me. 1979).

23. Erhart v. Great Western Sugar Company, 169 Mont. 375, 379, 546 P.2d 1055, 1057 (1976).

24. 1B LARSON, *supra* note 13, § 42.23, at 7-624.

25. *Erhart*, 169 Mont. at 379, 546 P.2d at 1057.

26. 1B LARSON, *supra* note 13, § 42.23, at 7-624.

27. W. PROSSER, LAW OF TORTS § 54, at 331-33 (4th ed. 1971).

28. Manson, *Workmen's Compensation and Disabling Neurosis*, 11 BUFF. L. REV. 376, 377 (1962).

worker's compensation worry of false claims and malingering.[29] One court recently admitted to "great fears that neither the science of psychiatry nor the adversary judicial process is equal to this task" of distinguishing "genuine neurotics" from "malingerers."[30]

Those courts which do award compensation in mental stimulus-mental injury cases are haunted by the same fears of fraudulent or non-work-related claims and, in the absence of the impact rule, apply a variety of standards to guard against abuses. Some states, for example, compensate injuries caused by a sudden stimulus like an unexpected traumatic psychological shock, but not those caused by a gradual stimulus like prolonged exposure to stress and strain.[31] In *Shope v. Industrial Commission*,[32] an Arizona appeals court denied compensation for a claimant whose anxiety reaction was brought about by a gradual buildup of emotional stress. Granting compensation under such circumstances, the court wrote, would permit "compensation to any disgruntled employee who leaves his job in a huff because of an emotional disturbance."[33]

In the landmark case of *Carter v. General Motors Corp.*,[34] however, the claimant was awarded worker's compensation for an emotional collapse which was precipitated by his job on an assembly line. Though it was not an unusually difficult job, Mr. Carter found that the harder he worked the more he fell behind and finally the stress was too much for him. The Michigan Supreme Court upheld the award, though the injury was not caused by a "single fortuitous event" but arose instead from the "emotional pressures encountered by plaintiff daily in the performance of his work."[35] Larson argues that it is "unsound" to discriminate between sudden and gradual stimuli and observes that most states follow the lead of *Carter* by making no distinction between the two.[36]

In lieu of this distinction between gradual and sudden stimuli, many courts have devised some kind of "causal nexus" test to verify that a mental injury stems primarily from a work-related mental stimulus. The nature of these tests ranges from objective to subjective.[37] Massachusetts, for example, applies a strict objective test insisting that "specific stressful

29. In a classic opinion, the Pennsylvania Supreme Court upheld the need for the "impact rule" in tort law because without it, a "Pandora's box" would be opened creating an avalanche of dubious cases. Bosley v. Andrews, 393 Pa. 161, 168, 142 A.2d 263 (1958). Echoing the Pennsylvania court, an Arizona court of appeals recently refused to award worker's compensation to a claimant whose mental injury was the result of a buildup of stress over a period of years saying to do so "would literally open up Pandora's Box." Shope v. Industrial Commission, 17 Ariz. App. 23, 25, 495 P.2d 148, 150 (1972). In its brief, Consolidated Freightways intoned the same concerns, cautioning the Wyoming Supreme Court against opening "the gates to such a flood of tenuous and imagined claims as to render the compensation statute unworkable." Employer's Brief, *supra* note 2, at 8.

30. Seitz, 437 A.2d at 1349-50.

31. 1B LARSON, *supra* note 13, § 42.23(b), at 7-637 to 7-640.

32. 17 Ariz. App. 23, 495 P.2d 148 (1972).

33. *Id.* at 25, 495 P.2d at 150.

34. 361 Mich. 577, 106 N.W.2d 105 (1960).

35. *Id.* at 581, 106 N.W.2d at 107.

36. 1B LARSON, *supra* note 13, § 42.23(b), at 7-637.

37. *Consolidated Freightways*, 678 P.2d at 876.

work related incidents" be identified as the cause of the injury.[38] New Jersey requires that there be "objective evidence which, when viewed *realistically*" demonstrates that the "alleged work exposure was to a material degree a contributing factor" in the injury.[39] On the other hand, Michigan uses a subjective test which focuses on the claimant's own "perception of reality."[40] There, a causal nexus is said to exist between the job and the mental injury if a claimant "*honestly perceives*" that an injury has been caused by his employment, regardless of the accuracy of that perception.[41]

Perhaps the most popular approach is the conservative formula described by the Supreme Court of Wisconsin in *Swiss Colony, Inc. v. Department of Industry, Labor & Human Relations*.[42] By that formulation, a mental injury is compensable if it "resulted from a situation of greater dimensions than the day-to-day mental stresses and tensions which all employees must experience."[43] Larson hails the Wisconsin approach as "the most straightforward."[44] But the Supreme Court of Maine in *Townsend v. Maine Bureau of Public Safety*[45] noted that these criteria do not allow for the "eggshell,"[46] the person for whom even the normal stress of daily employment proves injurious. Thus, Maine requires only that "clear and convincing evidence" be presented showing that the trauma of employment "predominated in producing the resulting injury."[47] The Maine court added that whatever formula a court devised, it must "navigate between the beacon of a progressive act and the shoals of potentially fraudulent claims coupled with the specter of the employer as universal insurer."[48] In the *Consolidated Freightways* case, the Wyoming Supreme Court attempted to do just that.

ANALYSIS

The New Wyoming Policy

While the Wyoming Supreme Court had never faced the question of whether mental injuries caused by mental stimuli are covered by the state's worker's compensation laws, there were some statutory guidelines and there was judicial precedent to provide direction. The Wyoming Worker's Compensation Act, for example, gives a broad definition of "injury" which includes "any harmful change in the human organism other

38. Camoani's Case, 7 Mass. App. 927, 928, 389 N.E.2d 1028, 1029 (1979).
39. Williams v. Western Electric Co., 178 N.J. Super. 571, 572, 429 A.2d 1063, 1071 (1981) (emphasis in original).
40. Deziel v. Difco Laboratories, Inc., 403 Mich 1, 26, 268 N.W.2d 1, 11; 97 A.L.R. 3D 121 (1978).
41. *Deziel*, 403 Mich. at 26, 268 N.W.2d at 11 (emphasis in original).
42. 72 Wis. 2d 46, 240 N.W.2d 128 (1976).
43. *Id.* at 49, 240 N.W.2d at 130.
44. 1B LARSON, *supra* note 13, § 42.23(b), at 7-639.
45. 404 A.2d 1014 (Me. 1979).
46. *Id.* at 1019.
47. *Id.* at 1019-20.
48. *Id.* at 1019.

than normal aging."[49] This language, the result of a 1975 legislative revision,[50] precludes many of the difficulties encountered in states with statutes that call for "a change in" or "violence to" the "physical structure."[51] To be compensable, of course, the injury must be one "arising out of and in the course of employment."[52] The Wyoming Supreme Court has held, however, that "worker's compensation law should be liberally construed where reasonably possible."[53]

Building on this foundation the court, with little hesitation, found that mental injuries caused by mental stimuli fit the definition of injury and thus come under the shelter of worker's compensation.[54] The real question was how to decide if such injuries arise out of employment.[55]

To answer this, the court relied heavily on Larson and made favorable note of his recommendations. They did not draw a line between gradual and sudden stimuli but instead adopted the Wisconsin approach, making the test a matter of whether or not the stimuli were "of greater magnitude than day-to-day mental stresses and tensions all employees usually experience."[56] The court did not explain why it selected the Wisconsin formula as opposed to the others they considered except to say that the new standard "appropriately balances the interest of the employee and the interest of the employers" and reflects the spirit of Wyoming's worker's compensation law.[57]

Having adopted a policy, the court had merely to apply it to the facts. Noting the trial court's finding that Mr. Drake's injury was caused by a situation more stressful than the daily routine, the court ruled that there was sufficient evidence to support the finding.[58] Justice Cardine, writing for the majority, noted the "yo-yo" effect of first gaining bid status then losing it and described the extra-board duty as a state of "constant confusion, stress and uncertainty."[59] This situation, he wrote, was "sufficiently unexpected and created stresses and pressures outside of the ordinary day-to-day pressures."[60] Responding to Consolidated's argument that there was not sufficient evidence of a causal connection between the in-

49. WYO. STAT. § 27-12-102(xii) (1977).
50. 1975 WYO. SESS. LAWS ch. 149, § 27-311(n).
51. Note, *Recovery for Nervous Injury Resulting from Mental Stimulus Under Workmen's Compensation Laws*, CHI-KENT L. REV. 731-39 (1977). Recently, a Kansas court felt compelled to deny worker's compensation to an employee who had witnessed the grisly death of a fellow employee and who subsequently was unable to work with the machinery. Though he required hospitalization and psychiatric treatment, his disability was not compensable because the Kansas statute requires a "change in the physical structure of the body." Followill v. Emerson Electric Co., 234 Kans. 791, 793, 674 P.2d 1050, 1053 (1984).
52. WYO. STAT. § 27-12-102(xii) (1977).
53. Mor, Inc. v. Haverlock, 566 P.2d 219, 222 (Wyo. 1977).
54. *Consolidated Freightways*, 678 P.2d at 877.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 877-78.
59. *Id.* at 878.
60. *Id.*

jury and the job, the court cited *In re Willey*,[61] where it held that a causal connection is established "when there is a nexus between the injury and some condition, activity, environment or requirement of the employment."[62] The court cited testimony of Mr. Drake's doctor that the claimant's condition was "caused by his work situation" and concluded that there was substantial evidence of a causal nexus.[63]

Dissent

There is a troublesome flaw in the majority's decision, however, which prompted Justice Brown to dissent and Justice Rooney to join him. Though the majority adopted the rule that a claimant can recover for mental injuries if caused by greater stresses than other employees usually experience, it did not point to any evidence that Mr. Drake was "subject to different or greater stresses than his fellow truck drivers."[64] In fact, Mr. Drake testified that he had the same sick leave, vacation time and uncertain working hours as other extra-board drivers for Consolidated.[65] "[T]he majority," complained Justice Brown, "does not correctly apply the rule it adopts to the facts of this case."[66]

An Unclear Standard

The dissent's criticism is meritorious. The majority adopted the rule that the stimulus for a compensable mental injury has to be "of greater magnitude" than the daily pressures "all employees usually experience."[67] If by "all employees" the court means all other employees working the same or similar jobs, then some discussion of the 140 other extra-board drivers who worked for Consolidated would seem appropriate. They would clearly represent the "control group" for the purpose of evaluating Mr. Drake's situation.

It is conceivable that the court did not, by the wording of its rule, mean to limit the standard to similar or fellow employees but meant, instead, to embrace the working world at large. If this was the court's intent, the holding would make more sense, for it seems clear that the extra-board truck driver has an unusually stressful job.

The reasoning of the majority does not shed much light on this problem of interpretation. In evaluating the evidence that Mr. Drake's mental injury was work-related, the court compared his job stresses to those which are a part of "daily life" or those which are "ordinary day-to-day pressures."[68] But in evaluating whether or not Mr. Drake's situation was more stressful than "all employees must experience" the court said only

61. 571 P.2d 248 (1977).
62. *Id.* at 250, *cited in Consolidated Freightways*, 678 P.2d at 879.
63. *Consolidated Freightways*, 678 P.2d at 879.
64. *Id.* (Brown, J., dissenting).
65. *Id.* at 879-80.
66. *Id.*.
67. *Id.* at 877.
68. *Id.* at 877-78.

that it was "a close question."[69] The court relied on the trial court's findings but did not explain them. Rather, citing *Valentine v. Ormsbee Exploration Corp.*,[70] the court declined to interfere with the finding since it was not clearly and manifestly incorrect or "totally against the evidence."[71]

A review of the Wisconsin decisions on which Wyoming's formula is based likewise fails to solve the puzzle of who "all employees" are. In *Swiss Colony*,[72] the Wisconsin Supreme Court considered the situation of a purchasing agent who worked long hours without a vacation and whose supervisor dealt with her in a critical and berating manner. The court made no reference to similarly situated fellow employees, but held that her work stresses were "out of the ordinary."[73] This suggests that a comparison was made with employees in general. In the earlier case of *School District No. 1 v. Department of Industry, Labor, & Human Relations*,[74] the Wisconsin Supreme Court considered the situation of a school teacher who suffered emotional injury when she saw her name on a list prepared by the student council, naming teachers they believed should be fired. The court concluded that "the critical remarks advanced by the students of Brown Deer High School is [sic] but an occurrence encountered by numerous other employees in their day-to-day employment."[75] The implication here was that the court compared the claimant with fellow teachers.

In a recent worker's compensation case, *Baker v. Wendy's of Montana, Inc.*,[76] the Wyoming Supreme Court referred to the decision in *Consolidated* and explained the reasoning. In that case the explanation, however, only adds to the confusion and raises the question of whether the court applied the "all employees" test at all. The court wrote,

> We then held, in Consolidated Freightways, that the facts of that case supported a finding that the non-traumatically induced injury *resulted from a situation of greater dimensions than the worker's day-to-day mental stresses and tensions that were a part of his daily life and therefore his injury was compensable.*[77]

By this account, it appears that the court did not compare Mr. Drake to other workers at all. Rather, the court compared his stress as a bid driver with the stress and pressure of his daily life.

Thus the question of what constitutes the control group for the "all employees" test is open to interpretation and argument, though the ques-

69. *Id.* at 878.
70. 665 P.2d 452 (Wyo. 1983).
71. *Consolidated Freightways*, 678 P.2d at 878. This conclusion by the court is a bit mystifying. Nothing in the record indicates how the trial court reached its decision, but since the "all employees" standard was not adopted until the case reached the supreme court, it is unlikely that the trial judge knew to use that formula. It is surprising that the court did not remand the case for findings consistent with the new rule.
72. 72 Wis. 2d 46, 240 N.W.2d 128 (1976).
73. *Id.* at 49, 240 N.W.2d at 130.
74. 62 Wis. 2d 370, 215 N.W.2d 373 (1974).
75. *Id.* at 378, 215 N.W.2d at 377.
76. No. 84-4 (Wyo. Aug. 28, 1984).
77. *Id.* slip op. at 9 (emphasis added).

tion is a crucial one. In Mr. Drake's case, for example, a finding that "all employees" means his fellow extra-board drivers would most reasonably lead to the conclusion that his situation was no worse than theirs, and hence his injury would not be compensable. On the other hand, if "all employees" means workers in general, a trier of fact could easily find that Mr. Drake's job was more stressful than usual, and he would be eligible for compensation.

A Double Standard

The rule adopted by the Wyoming Supreme Court in *Consolidated Freightways* case poses another problem, however, more troubling than the amorphous "all employees" standard. The new rule is not consistent with prior Wyoming law covering work-related injuries. Though the court opined that *Consolidated Freightways* incorporates "the policy and intent of the Wyoming worker's compensation laws,"[78] the court has, in fact, deviated from the previous cases and has adopted a different and more rigorous standard for mental stimulus-mental injuries than for physical injuries.

As noted, a worker seeking to recover for a mental injury such as Mr. Drake's must show that his situation was more stressful than that of other employees. While this rule may work well for the "vast majority of gradual mental injury cases,"[79] it will not cover those who, as a result of some psychological weakness, suffer a mental injury as a result of normal work day stresses. In short, there is no room for the eggshell. This is in sharp contrast with previous decisions which held that Wyoming's worker's compensation laws protected such persons. In *Exploration Drilling Company v. Guthrie*,[80] for example, the Wyoming Supreme Court noted:

> It is well settled in Wyoming that compensation is not made to rest upon the condition of health of the employee or upon his freedom from liability to injury through a constitutional weakness or latent tendency. Also it matters not, as far as the right to compensation is concerned, whether the weakness or liability to injury has come about by disease or existed from birth.[81]

In the *Consolidated Freightways* decision, the Wyoming Supreme Court either forgot or abandoned the dictates of *Exploration Drilling Company*. As the law now stands, a worker with a history of epilepsy[82] or a congenital predisposition to hernias[83] will be covered by worker's compensation if he suffers an attack of either of those afflictions as a result of his daily work routine, even if the routine is no more demanding or stressful than that of other employees. Yet a worker with a predisposi-

78. 678 P.2d at 877.
79. Townsend v. Maine Bureau of Public Safety, 404 A.2d 1014, 1019 (Me. 1979).
80. 370 P.2d 362 (Wyo. 1962). *Consolidated Freightways* does not appear to overrule *Exploration Drilling* since the latter concerns physical, not mental, injuries.
81. *Id.* at 364.
82. *Id.*
83. *In re* Frihauf, 58 Wyo. 479, 135 P.2d 427 (1943).

tion to depression, which might have its roots in his childhood or even in heredity,[84] will not be covered by worker's compensation if he suffers a mental collapse as a result of his job unless he can show that his stresses were greater than all other employees.[85]

This double standard is incongruous. The Wyoming Supreme Court took a humane and progressive step forward by bringing mental injuries under the umbrella of worker's compensation. In doing so it implicitly acknowledged that mental injuries are as excruciating and debilitating as physical injuries, and rejected the antiquated suspicion that a mental injury is not a real one.

Perhaps the explanation for the harsher standard for mental injuries lies in the pervasive influence tort doctrine has had on this relatively new body of law. Yet despite their common ancestry, tort actions and worker's compensation hearings are quite different. For example, the latter are not governed by rules of evidence or procedure.[86] Nor does the potential for the stigma of a negligence finding hang in the balance in a worker's compensation hearing. More importantly, tort law "does not carry with it the beneficent and remedial character that embodies worker's compensation law."[87] Manson recommends that worker's compensation laws should "be considered as a unitary system and undue extrapolation from the common law doctrines used to establish causal relationships" should be avoided.[88]

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84. Numerous kinds of mental illnesses may have their roots in heredity. There is especially strong evidence of this in manic-depressive psychoses, D. ROSENTHAL, GENETIC THEORY AND ABNORMAL BEHAVIOR, (1970), and schizophrenia. L. Heston, *The Genetics of Schizophrenia and Schizoid Disease*, in 167 SCIENCE, 249-56 (1970).

85. The standard adopted for mental stimulus-mental injuries at first appears consistent with the special standard used for work-related heart attacks and coronary conditions. By the provisions of WYO. STAT. § 27-12-603(b) (1977), coronary conditions "except those directly and solely caused by an injury or disease" are not covered unless there is medical authority establishing a direct causal connection between the condition and the employment "and then only if the causative exertion occurs during the actual period of employment stress *clearly unusual to, or abnormal for, employees in that particular employment.* . . ."(emphasis added).

But this does not tell the whole story. Despite the wording of the statute, the Wyoming Supreme Court has held that the exertion in question "must only be unusual to the employee—it need not necessarily be unusual to others engaged in the same employment." Mor, Inc. v. Haverlock, 566 P.2d 219, 222 (Wyo. 1977). In addition, the court has held that for a worker who has already had one heart attack, even activity that was once normal, becomes "very unusual and abnormal." Wyoming State Treasurer *ex rel.* Wyoming Worker's Compensation Div. v. Schwilke, 649 P.2d 218, 222 (Wyo. 1982). In Yost v. Wyoming State Treasurer *ex. rel* Wyoming Worker's Compensation Div., 654 P.2d 137, 142 (Wyo. 1982), the court held that since the claimant had suffered a previous heart attack, a second one which occurred "while doing what would otherwise be considered his usual work tasks, will be regarded as having satisfied . . . the Wyoming Worker's Compensation statute." Thus even coronary injuries are not held to a standard as strict as the "all employees" rule used for mental stimulus-mental injury cases, and provision is made in coronary cases for the eggshell. Under the "all employees" standard, eggshell mental injury victims have little hope of compensation.

86. Manson, *supra* note 28, at 376 n.8.

87. 1B LARSON, *supra* note 13, § 42.21, at 7-596.

88. Manson, *supra* note 28, at 377.

If this is too much to ask, and if worker's compensation law will continue to be influenced by tort principles, it is certainly worth noting that recent trends in negligent, mental-injury tort cases point to a more relaxed and progressive view of such injuries. In the landmark case of *Dillon v. Legg*,[89] the California Supreme Court allowed a mother to recover for her mental anguish after seeing, from a vantage some distance away, her daughter killed by a negligent driver. Courts in cases like *Dillon* must still insist that the elements of a negligence action, such as foreseeability and proximate cause, be met. But the growing influence of the *Dillon* case[90] indicates that mental injuries in tort law are regarded with far less suspicion than they once were.

An Alternative Approach

In *Williams v. Western Electric Co.*,[91] the Supreme Court of New Jersey, like the Supreme Court of Wyoming, considered the Wisconsin standard of out-of-the-ordinary stress. Yet they rejected it as being inconsistent with New Jersey precedent. New Jersey, as noted earlier, now requires simply that "objective evidence" show that work exposure "was to a material degree a contributing factor" to the mental injury.[92] In *Townsend*, the Supreme Court of Maine likewise considered the Wisconsin standard and, while allowing that there was much to recommend it, modified it to conform with Maine precedent.[93] "Our act," explained the Maine court, "protects even the eggshell."[94] Maine adopted the rule that a claimant *may* offer evidence that his pressures and tensions were unusual or, in the alternative, he may offer "clear and convincing evidence" to show that "ordinary and usual work-related pressures predominated in producing the injury."[95]

Like New Jersey and Maine, Wyoming has a strong and laudable tradition of protecting the eggshell in worker's compensation cases. It is unfortunate that, unlike New Jersey and Maine, Wyoming did not preserve this tradition and incorporate it into a standard of fairness and scrutiny which, when applied to mental injury cases, would produce substantially the same results as are reached in physical injury cases.

CONCLUSION

By extending benefits to mental injuries, the Wyoming Supreme Court has made an enlightened and compassionate improvement in this state's worker's compensation law. But, perhaps due to the influence of conservative tort principles regarding negligent mental injury, the court limited

89. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
90. Comment, *An Expanding Legal Duty: The Recovery of Damages for Mental Anguish by Those Observing Tortious Activity*, 19 AM. BUS. L.J., 214, 219 (1981).
91. 178 N.J. Super. 571, 429 A.2d 1063 (1981).
92. *Id.* at 585, 429 A.2d at 1071.
93. Townsend v. Maine Bureau of Public Safety, 404 A.2d at 1019-20.
94. *Id.* at 1019.
95. *Id.* at 1020.

its extension by drafting a special and more stringent standard for mental injuries than for physical ones. The new standard, though well intended, is unclear, unfair, and out-of-step with prior Wyoming law.

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