Heroes' Compensation: An All-Points Bulletin Calling for Coverage of First Responder-Related PTSD Under the Ohio Workers' Compensation Act

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Studies reveal there is a high prevalence rate of PTSD among first responders—markedly higher than the average employee. First responder-related PTSD has been found to adversely affect the ability of first responders to perform their duties, endangering themselves and society at-large. Yet under current Ohio workers' compensation law, a claimant may only receive workers' compensation benefits for a psychiatric condition that develops as a sequela of a compensable physical injury or occupational disease. Ohio's exclusion of purely psychiatric (mental-mental) claims is problematic because first responders are unable to receive compensation and medical treatment for

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psychiatric conditions, such as PTSD, that are unaccompanied by a compensable injury.

This Comment argues Ohio's restrictive stance regarding mental-mental claims is unjustifiable with respect to first responder-related PTSD. This Comment proposes two ways in which the Ohio General Assembly could amend the Ohio Workers' Compensation Act to provide a narrow exception to Ohio's categorical exclusion of mental-mental claims, where there would be a rebuttable presumption in favor of providing some amount of workers' compensation benefits to first responders diagnosed with PTSD, regardless of an accompanying compensable injury.

I. INTRODUCTION

"*Constant exposure to death and destruction exerts a toll on the mental health of first responders . . . . Both police officers and firefighters are more likely to die by suicide than in the line of duty*."[1]

The polestar of the Ohio Workers' Compensation Act "is the welfare of its work[ers]."[2] Ohio workers' compensation law does, however, place limits on compensability. While claimants can receive compensation for physical injuries and psychiatric conditions that result from a physical injury or occupational disease, they cannot succeed on a claim for a purely psychiatric condition.[3] Current Ohio workers' compensation law differentiates between psychiatric conditions that develop as a sequela of a compensable injury (physical-mental claims)[4] and psychiatric conditions that are purely mental in nature and unaccompanied by a compensable injury (mental-mental claims).[5]

1. MIRIAM HEYMAN ET AL., THE RUDERMAN WHITE PAPER ON MENTAL HEALTH AND SUICIDE OF FIRST RESPONDERS 7 (2018), https://bit.ly/2Lk70Xc.

2. State ex rel. Williams v. Indus. Comm'n, 156 N.E. 101, 103 (Ohio 1927).

3. OHIO REV. CODE ANN. § 4123.01(C)(1) (LexisNexis 2019).

4. *See infra* Section II.C.1.

5. *See infra* Section II.C.1. For a discussion on mental-mental claims, *see infra* Section II.C.3.

Ohio's wholesale exclusion of mental-mental claims is problematic, because law enforcement officers, firefighters, and emergency medical workers (hereinafter collectively referred to as "First Responders") are unable to receive compensation and medical treatment for psychiatric conditions, such as posttraumatic stress disorder ("PTSD"), that are unaccompanied by a compensable injury.[6] Take into consideration the circumstances of former law enforcement officer Omar Delgado.[7]

On the night of June 12, 2016, former Eatonville Police Department Officer Omar Delgado was one of the initial law enforcement officers on the scene of the Pulse nightclub massacre, where a gunman opened fired and took hostages at the club, killing forty-nine people.[8] When the massacre occurred, "it was the deadliest mass shooting in modern U.S. history."[9] Delgado's actions

6. OHIO REV. CODE ANN. § 4123.01(C)(1) (LexisNexis 2019).

7. Omar Delgado was a police officer for the City of Eatonville in Florida. *See* Frances Robles, *Orlando Officers Grapple With Trauma and Red Tape After Massacre*, N.Y. TIMES (Oct. 27, 2016), https://nyti.ms/38mjc3c; Chuck Hadad, *Officer Who Developed PTSD After Pulse Massacre to Lose Job*, CNN (Dec. 7, 2017), https://cnn.it/2sYJ2KF.

8. Dan Corey, *Police Officer With PTSD from Pulse Massacre Loses His Job*, NBC (Dec. 10, 2017), https://nbcnews.to/2PtGTOI. Pulse nightclub is located in Orlando, Florida. *Id.*

9. *Id.* In 2017, the mass shooting at a country music festival in Las Vegas, Nevada, where 58 people were killed, surpassed the Pulse nightclub

during the massacre were nothing short of heroic. He "dragged multiple gunshot victims outside to safety,"[10] and "spent hours inside [the club] while the gunman held hostages in the bathroom and occasionally fired at clubgoers."[11] Delgado will forever be haunted by the harrowing massacre at the nightclub.

Delgado, along with several other First Responders who were at the scene that night, have since been diagnosed with PTSD.[12] Delgado is tormented with recurrent thoughts about the carnage: "I can recall how everybody was positioned. I can recall the blood, I can see where a lot of the gunshots, the rounds, went into these people."[13] He regularly wakes up screaming from the same

massacre as the deadliest mass shooting in the U.S. *See* Kalhan Rosenblatt, *Las Vegas Shooting is Deadliest in Modern U.S. History*, NBC (Oct. 2, 2017), https://nbcnews.to/2qAcIgd.

10. Hadad, *supra* note 7.

11. Robles, *supra* note 7.

12. *Id.* (detailing stories about officers struggling to return to work following the Pulse nightclub massacre). Joshua Granada, an Orlando firefighter who responded to the shooting at Pulse explains he sometimes gets suicidal ideations due to his PTSD: "If you've never sat on the end of your bed, crying, thinking about killing yourself, and you have no idea why, I mean, I don't wish that on anyone, and that's where I was. . . . I still have days like that, and I don't know why. I'm here to tell you PTSD is real. I was one of those people who was on the fence before." Abe Aboraya, *As Worker's Comp PTSD Bill Clears Hurdle, Pulse Responder Could Be Fired*, WUSF NEWS (Dec. 6, 2017), https://bit.ly/2YvuWMx.

13. Hadad, *supra* note 7. Delgado "has suffered from nightmares, depression and anxiety and has had major difficulty sleeping." *Id.*; *see infra* Sections II.A. & II.B. Delgado explains the

nightmare.[14] The ringing of an iPhone triggers reexperiencing symptoms—"hearing that sound for hours and knowing that there's a loved one trying to call that other person that was inside that club. . . . It was so bad that there was a phone that started floating away in blood because of the vibration of the phone."[15]

A few weeks after the massacre, Delgado attempted to return to patrol duty, but "the stress of patrol [was] too much to bear."[16] He was unable to work for six months.[17] Before long, Delgado was "[d]esperate to pay for therapy and at one point fac[ed] the prospect of going broke."[18] When Delgado returned to the force, he was limited to desk duty.[19] However, due to his PTSD symptoms, a

memories from the massacre are "engraved in [his] head now. . . . like a parasite, just eating away." Aboraya, *supra* note 12.

14. Corey, *supra* note 8.

15. Hadad, *supra* note 7.

16. *Id.* When Delgado initially tried to return to work after the Pulse nightclub shooting, "he had his gun in his hand while chasing a suspect when he heard a loud noise. It brought [] Delgado back to the explosions at Pulse, when the police broke through the club's rear wall and then blew up the gunman's van." Robles, *supra* note 7. Talking about the chase, Delgado explained, "[i]f my finger had been on the trigger, I would have shot my foot off." *Id.*

17. Lauren Holter, *Who Is Omar Delgado? The Pulse Nightclub Hero Cop Who Has PTSD from the Shooting is Losing His Job*, BUSTLE (Dec. 7, 2017), https://bit.ly/2rCg9DS.

18. Robles, *supra* note 7.

19. Holter, *supra* note 17.

doctor found Delgado "unfit for duty."[20] Consequently, Delgado was dismissed from the Eatonville Police Department a mere eighteen months after his courageous efforts during the Pulse nightclub massacre.[21]

Under current Ohio workers' compensation law, Delgado would not receive compensation for the time he missed from work. Nor would he receive medical benefits to treat his PTSD. The plight of Omar Delgado illuminates the hardships faced by First Responders suffering from PTSD. First Responders place their own well-being at risk to protect others. In so doing, they are frequently exposed to traumatic events that can have long-term psychological effects. Mental illness is pervasive among First Responders.[22] Studies reveal there is a high prevalence rate of PTSD among First Responders.[23] First Responder-related PTSD may endanger First Responders themselves, as well as society at-large.[24] The Ohio General Assembly must reconsider its position on First Responder-

20. Hadad, *supra* note 7.

21. Holter, *supra* note 17.

22. HEYMAN ET AL., *supra* note 1, at 11–12.

23. *See infra* Section II.B.

24. *See infra* Section III.C.

related PTSD, and provide First Responders with adequate workers' compensation benefits.

Part II of this Comment will address PTSD generally, the prevalence of PTSD among First Responders, and the various approaches states take to compensate mental injuries. Part III explains the current framework of Ohio workers' compensation law with regard to psychiatric conditions and the concerns surrounding the compensability of mental-mental claims, and argues the evidentiary and floodgate concerns are outweighed by the need to provide workers' compensation coverage of First Responder-related PTSD. Lastly, Part IV proposes two ways in which the Ohio General Assembly could amend Ohio Revised Code ("R.C.") § 4123.01(C)(1) to provide a narrow exception to Ohio's categorical exclusion of mental-mental claims, where there would be a rebuttable presumption in favor of providing some amount of workers' compensation benefits to First Responders diagnosed with PTSD, regardless of an accompanying compensable injury.

II. BACKGROUND

PTSD is a psychological disorder brought about by exposure to a traumatic event.[25] To fully grasp how First Responder-related PTSD endangers First Responders themselves and society at-large, it is useful to have a general understanding of PTSD. Further, it is important to note that workers' compensation law is a construct of state legislation. Because workers' compensation law is state-specific, there are various approaches to compensating mental injuries, including PTSD.

A. Overview of PTSD

Historical conceptualizations of PTSD date back to the 1600s and have been associated with the "traumatic neuroses of war" observed in combat veterans—e.g., "shell shock."[26] The American Psychiatric Association ("APA") recognizes PTSD as a psychiatric disorder under the Diagnostic and Statistical Manual of

25. LAURENCE MILLER, PTSD AND FORENSIC PSYCHOLOGY: APPLICATIONS TO CIVIL AND CRIMINAL LAW 12 (2015).

26. JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR 20–28 (Basic Books 1997); *see also* MILLER, *supra* note 25, at 1–3.

Mental Disorders: DSM-5 ("DSM-5").[27] PTSD manifests in an individual following exposure to a traumatic stressor or experience.[28] Under the DSM-5, an individual may be diagnosed with PTSD when they demonstrate a combination of symptoms, which are identified under various criteria.[29] Individuals afflicted with PTSD are affected emotionally and behaviorally.[30]

i.A Brief History of PTSD

The origin of PTSD dates back over three-hundred years.[31] Throughout history, medical focus on psychological trauma ebbed and flowed with the occurrence of wars.[32] Notably, in the wake of the Vietnam War, "the Veterans' Administration commissioned comprehensive studies tracing the impact of wartime experiences on

27. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS § 2 (5th ed. 2013) (ebook) [hereinafter DSM-5].

28. *See* MILLER, *supra* note 25, at 12.

29. *See* DSM-5, *supra* note 27, at §2 (Posttraumatic Stress Disorder).

30. *Id.*

31. MILLER, *supra* note 25, at 1–3 ("One of the first modern conceptualizations of posttraumatic stress was put forth by the army surgeon Hoffer, who, in 1678, developed the concept of *nostalgia*, which he defined as deterioration in the physical and mental health of homesick soldiers."). Miller explains that other early conceptualizations of PTSD included Oppenheim's theory of "sensory overload," Freud's theory of "traumatic fixation," as well as wartime traumas, such as "shell shock" and "battle fatigue." *Id.*

32. *Id.* at 3–4; HERMAN, *supra* note 26, at 20–28.

the lives of returning veterans."[33] In 1980, the Diagnostic and Statistical Manual of Mental Disorders: DSM-III recognized PTSD "as a distinct diagnostic category."[34]

Since 1980, PTSD has become a well-established psychological phenomenon.[35] And studies of PTSD have extended beyond combat veterans. Notably, First Responders have been the subject of a proliferation of PTSD research[36] because their occupations "necessitate exposure to traumatic, violent and horrific

33. HERMAN, *supra* note 26, at 27; *cf.* MILLER, *supra* note 25, at 4. Interestingly, "[a]fter their service, many Vietnam veterans went to work for government agencies like the US Post Office, and a few isolated reports of disgruntled ex-service members becoming violent at work—'going postal'—led to the stereotype of Vietnam vets as ticking time bombs, ready to explode at the slightest provocation." *Id.*

34. MILLER, *supra* note 25, at 5.

35. Roger K. Pitman, et al., *Biological Studies of Post-Traumatic Stress Disorder*, 13 NATURE REVS. NEUROSCIENCE 769, 769 (2012).

36. *See, e.g.*, Cheryl Regehr & Vicki R. LeBlanc, *PTSD, Acute Stress, Performance and Decision-Making in Emergency Service Workers*, 45 J. AM. ACAD. PSYCHIATRY & L. 184 (2017); Joseph W. Boffa et al., *PTSD Symptoms and Suicidal Thoughts and Behaviors Among Firefighters*, 84 J. PSYCHIATRIC RES. 277 (2017); Tammy L. Austin-Ketch et al., *Addictions and the Criminal Justice System, What Happens on the Other Side? Post-traumatic Stress Symptoms and Cortisol Measures in a Police Cohort*, 23 J. ADDICTIONS NURSING 22 (2012); John M. Violanti, *Police Suicide: A National Comparison with Fire-Fighter and Military Personnel*, 33 POLICING: INT'L J. POLICE STRATEGIES & MGMT. 270 (2010); Jimmy P. Mann & John Neece, *Workers' Compensation for Law Enforcement Related Post Traumatic Stress Disorder*, 8 BEHAV. SCI. & L. 447 (1990).

events."[37] Due to the trauma-laden nature of First Responders' occupations, the prevalence of PTSD among First Responders is high.[38]

ii. PTSD Diagnostic Criteria and Symptoms

Generally speaking, PTSD is "a syndrome of emotional and behavioral disturbance that follows exposure to a traumatic stressor or set of traumatically stressful experiences."[39] As explained by the APA within the DSM-5, "the essential feature of [PTSD] is the development of characteristic symptoms following exposure to one or more traumatic events."[40] As for the characteristic symptoms, the DSM-5 delineates five diagnostic criteria: (A) precipitating traumatic stressor; (B) persistent reexperiencing symptoms; (C) persistent avoidance symptoms;[41] (D) negative alterations in cognitions and mood; and (E) marked alterations in arousal and

37. Tara A. Hartley et al., *PTSD Symptoms Among Police Officers: Associations with Frequency, Recency, and Types of Traumatic Events*, 15 INT'L J. EMERGENCY MENTAL HEALTH 241, 241 (2013).

38. *Id.*; *see also* Austin-Ketch et al., *supra* note 36, at 22.

39. MILLER, *supra* note 25, at 10.

40. DSM-5, *supra* note 27, at § 2 (Posttraumatic Stress Disorder).

41. Under this criterion, individuals avoid "a range of situations which remind, resemble, or symbolically represent the traumatic event . . . ." MILLER, *supra* note 25, at 12; *see also* DSM-5, *supra* note 27, at § 2.

reactivity.[42] An individual may be diagnosed with PTSD when they experience a combination of these criterion for at least one month following a traumatic event.[43]

In accordance with criterion A, PTSD requires a triggering event, where an individual "has been exposed to a traumatic event in which he/she was confronted with death or injury to self or others and which involved the experience of intense fear, helplessness, or horror."[44] First Responders are commonly exposed to traumatic events.[45] In fact, within the DSM-5, experiences of First Responders are used to exemplify exposure to a traumatic event: "e.g., first responders collecting human remains; police officers repeatedly exposed to details of child abuse."[46]

Symptoms relating to persistent reexperiencing of the traumatic event(s) include "waking recollections, disturbing

42. MILLER, *supra* note 25, at 11; *see also* DSM-5, *supra* note 27, at § 2 ("Diagnostic Criteria: Posttraumatic Stress Disorder.").

43. MILLER, *supra* note 25, at 10.

44. *Id.* at 11.

45. *See, e.g.*, Regehr & LeBlanc, *supra* note 36, at 184; MILLER, *supra* note 25, at 20; Austin-Ketch et al., *supra* note 36, at 23; Violanti, *supra* note 36, at 271; Boffa et al., *supra* note 36, at 281.

46. DSM-5, *supra* note 27, at § 2 (Criterion A.4. under Posttraumatic Stress Disorder).

dreams, dissociative reexperiencing, [] psychological or physiological hyperreactivity to stimuli that directly or symbolically resemble the traumatic experience," and flashbacks.[47] Symptoms relating to negative alterations in cognitions and mood include "poor concentration and memory for present circumstances,"[48] as well as "[p]ersistent and exaggerated negative beliefs or expectations about oneself, others, or the world."[49] Lastly, symptoms relating to marked alterations in arousal and reactivity include irritability, angry outbursts, exaggerated startle response, and hypervigilance.[50]

Due to the nature of their occupations, First Responders are prone to experience traumatic events. Unsurprisingly, the adverse impact PTSD has on an individual's physical and psychological health is

47. MILLER, *supra* note 25, at 12 (explaining patients commonly describe persistent reexperiencing symptoms as "'won't let me stop thinking about' the terrifying events surrounding the trauma").

48. *Id.*

49. DSM-5, *supra* note 27, at § 2 (Criterion D.2. under Posttraumatic Stress Disorder).

50. *Id.* at § 2 (Criterion E. under Posttraumatic Stress Disorder); *see also* MILLER, *supra* note 25, at 13 (noting that individuals explain "[t]here is a constant gnawing apprehension that something terrible is about to happen").

not lost on First Responders.[51] PTSD has been found to interfere with First Responders' capacities to perform their duties.[52]

B. The Prevalence of PTSD Among First Responders

Mental illness is pervasive among First Responders because they work in a trauma-laden occupation.[53] In particular, there is a high prevalence of PTSD among First Responders.[54] PTSD—especially when untreated—exerts a toll on the capacities of First Responders.[55] Failing to treat First Responders diagnosed with PTSD potentially endangers First Responders themselves, as well as society at-large.[56]

a. PTSD Among Law Enforcement Officers

A study on law enforcement officers found that they "experience, on average, over three traumatic events for every six

51. *Cf.* Hartley, *supra* note 37, at 242.

52. Regehr & LeBlanc, *supra* note 36, at 189–190; *see also* HEYMAN ET AL., *supra* note 1, at 16–17.

53. HEYMAN ET AL., *supra* note 1, at 16–24; *see also* Lee Ann Neumann, *Workers' Compensation and High Stress Occupations: Application of Wisconsin's Unusual Stress Test to Law Enforcement Post-Traumatic Stress Disorder*, 77 MARQ. L. REV. 147, 151–52 (1993).

54. *Accord* Regehr & LeBlanc, *supra* note 36, at 184.

55. HEYMAN ET AL., *supra* note 1, at 16.

56. *See* Regehr & LeBlanc, *supra* note 36, at 184; *see also* HEYMAN ET AL., *supra* note 1, at 16–17.

months of service."[57] Such events include: being shot at, killing or injuring another person in the line of duty, being threatened with a gun, witnessing a decaying corpse, exposure to a badly beaten child, exposure to a sexually assaulted child, being trapped in a life-threatening situation, exposure to mutilated body or human remains, seeing someone die, and receiving threats against loved ones.[58] Exposure to these events "can have both acute and chronic effects on the emotional, physical, and psychological health" of law enforcement officers.[59]

Despite claims that law enforcement officers are "trained to respond nonemotionally to dangerous environmental stressors," studies reveal PTSD is prevalent among them.[60] One study focusing on law enforcement officers found "[o]fficers had an approximate fourfold risk of being exposed to traumatic work events, a threefold

57. Hartley, *supra* note 37, at 242.

58. Brian A. Chopko et al., *Critical Incident History Questionnaire Replication: Frequency and Severity of Trauma Exposure Among Officers From Small and Midsize Police Agencies*, 28 J. TRAUMATIC STRESS 157, 158 (2015) (studying the frequency and types of traumatic events to which law enforcement officers are exposed).

59. Austin-Ketch, *supra* note 36, at 23.

60. Neumann, *supra* note 53, at 151–152; *see also* Mann & Neece, *supra* note 36, at 449–50.

risk of exhibiting PTSD symptoms, a fourfold risk of alcohol abuse, and a fourfold risk of aggressive behavior."[61] Notably, in another study, 35% of law enforcement officers were found to have symptoms consistent with PTSD.[62] The prevalence of PTSD among law enforcement officers has significant implications when considering the affect PTSD has on their performance in the line of duty.

Law enforcement officers afflicted with PTSD bear various character alterations that are consistent with the diagnostic criteria under the DSM-5.[63] Law enforcement officers who suffer from PTSD are likely to experience "recurrent and intrusive thoughts about the event, feelings of isolation and alienation from fellow officers, anxiety or specific fears associated directly or indirectly

61. Violanti, *supra* note 36, at 271.

62. Austin-Ketch, *supra* note 36, at 22; *see also* Mann & Neece, *supra* note 36, at 447 ("It is estimated that 12-35% of police officers suffer PTSD with various levels of psychological disabilities."); *cf.* Hartley et al., *supra* note 37, at 246 (finding "[t]he prevalence of PTSD in this study was approximately 15% for men and 18% for women using the PCL-C cut point of 33 and higher").

63. Mann & Neece, *supra* note 36, at 449; *see also* Stephanie DeVore, *Devastating Effects of Police Officer and Work Related Shooting Incidents: Re-Evaluating Arizona Workers' Compensation Claims*, 6 PHOENIX L. REV. 359, 367–71 (2013).

with the trauma, depression, hypervigilance," and "suspiciousness and mistrust of the public."[64]

PTSD may adversely affect a law enforcement officer's ability to perform his or her duties. A study found that PTSD in police communicators "was associated with performance deficits" in "high-acuity scenarios."[65] Law enforcement officers may "becom[e] overly cautious in police situations that were once routine."[66] Additionally, law enforcement officers suffering from PTSD "will often demonstrate excessive aggression," and may "becom[e] increasingly violent toward citizens, suspects and even their own families."[67]

b. PTSD Among Firefighters and Emergency Medical Workers

Firefighters experience a myriad of traumatic events: from "personal loss or injury (e.g., a threat to self or a coworker's safety)," to traumatic stimuli, such as "gruesome victim incidence [sic], body handling, completed suicides, and/or mass casualty

64. Mann & Neece, *supra* note 36, at 449.

65. Regehr & LeBlanc, *supra* note 36, at 189–90.

66. Mann & Neece, *supra* note 36, at 449.

67. DeVore, *supra* note 63, at 369.

accidents," to contact with deceased or critically injured children.[68] Similarly, emergency medical workers are routinely exposed to human pain and suffering. Among the bloody and gory exposure, emergency medical workers "collect the remains of suicide victims," "rescue individuals trapped in crashed vehicles," and "extricate people from fires."[69] A study led by Dr. Cheryl Regehr revealed horrific accounts from emergency medical workers:

> One respondent, for instance, described a 10-year-old child whose throat was slit by his father. Another described a dirty, neglected baby who was smothered while sleeping. A third described a baby who had been burned to death in an oven.[70]

While there is less research concerning rates of PTSD among firefighters and emergency medical workers compared to law enforcement officers, those studies that have examined PTSD among firefighters reveal prevalence rates are between 6.5% and

68. Shannon L. Wagner et al., *Mental Health Implications of Fire Service Membership*, 16 TRAUMATOLOGY 26, 27 (2010). Increasingly, firefighters "engage in multiple roles, including the roles of paramedic and emergency medical technician." *Id.* at 26.

69. Cheryl Regehr et al., *Exposure to Human Tragedy, Empathy, and Trauma in Ambulance Paramedics*, 72 AM. J. ORTHOPSYCHIATRY 505, 507 (2002) (finding that "smaller and less sensational events," such as "the lonely death of an elderly person, or the suicide of a desperate individual," frequently triggered an emotional response in emergency medical workers) [hereinafter Regehr et al., *Exposure to Human Tragedy*].

70. *Id.* at 507.

37%.[71] And in studies of emergency medical workers, 20% to 30% of respondents were found to have symptoms consistent with PTSD.[72] The prevalence of PTSD among firefighters and emergency medical workers has important implications on their capacity to perform their duties. Similar to the effects of PTSD on law enforcement officers, PTSD among firefighters and emergency medical workers may lead to "diminished work performance."[73]

In the U.S., PTSD is escalating to the level of an epidemic.[74] In an effort to combat the high prevalence of PTSD—and, more generally, mental illness—among First Responders, states have enacted regulations to promote the treatment of First Responder-

71. Boffa, *supra* note 36, at 278. One study that focused on American firefighters revealed a PTSD prevalence rate of 22%. Wayne Corneil et al., *Exposure to Traumatic Incidents and Prevalence of Posttraumatic Stress Symptomology in Urban Firefighters in Two countries*, 4 J. OCCUPATIONAL HEALTH PSYCHOL. 131, 134 (1999).

72. Regehr & LeBlanc, *supra* note 36, at 184 (citing to David A. Alexander & Susan Klein, *Ambulance Personnel and Critical Incidents*, 178 BRIT. J. PSYCHIATRY 76 (2001); Regehr et al., *Exposure to Human Tragedy*, *supra* note 69, at 505; Sue Clohessy & Anke Ehlers, *PTSD Symptoms, Response to Intrusive Memories and Coping in Ambulance Service Workers*, 38 BRIT. J. CLINICAL PSYCHOL. 251 (1999)). Notably, in the study performed by Regehr and LeBlanc, 50% of emergency medical workers reported symptoms consistent with PTSD. Regehr & LeBlanc, *supra* note 36, at 189.

73. HEYMAN ET AL., *supra* note 1, at 14.

74. Melody Finnemore, *Firestorm on the Horizon: Specialist Say Legal Professionals Ill-Prepared to Help Growing Population of U.S. Military Members with Post-Traumatic Stress Disorder*, 70 OR. ST. B. BULL. 19, 20 (2010).

related PTSD. Workers' compensation law has functioned as a popular vehicle to promote the treatment of First Responder-related PTSD.[75] Specifically, there is a movement among states to establish a rebuttable presumption in favor of compensability for First Responders diagnosed with PTSD.[76]

C. Workers' Compensation Law and Mental Injuries

Workers' compensation was established to safeguard employees who were injured while working.[77] The goal was to provide swift and certain compensation to injured workers.[78] The workers' compensation framework is often perceived as a "quid pro quo" between employer and employee.[79] Under a no-fault system,[80]

75. *See infra* note 181 and accompanying text.

76. *See infra* Section III.

77. For a more in-depth discussion on the inception of workers' compensation laws in the U.S., *see* Daniel T. Doherty Jr., *Historical Development of Workmen's Compensation, in* C. ARTHUR WILLIAMS JR. & PETER S. BARTH, COMPENDIUM ON WORKMEN'S COMPENSATION 11 (Marcus Rosenblum ed., 1973).

78. *See* Emily A. Spieler, *(Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017*, 69 RUTGERS L. REV. 891, 915 (2017).

79. Eston W. Orr Jr., *The Bargain is No Longer Equal: State Legislative Efforts to Reduce Workers' Compensation Costs Have Impermissibly Shifted the Balance of the Quid Pro Quo in Favor of Employers*, 37 GA. L. REV. 325, 326 (2002).

80. Under workers' compensation law, "negligence and fault are largely immaterial, both in the sense that the employee's contributory negligence does not lessen his or her rights and in the sense that the employer's complete freedom from fault does not lessen its liability." 1 LEX K. LARSON &

an employee is able to receive compensation for an injury sustained in the course of and arising out of their employment.[81] In exchange, the employer is immune from tort liability, and pays limited benefits.[82] Governed by state law, workers' compensation statutes vary by jurisdiction.[83] Accordingly, workers' compensation claims for mental illnesses are treated in a variety of ways, as "[e]ach state legislature weighs pros and cons in deciding what laws to enact and what injuries to compensate to best serve the overarching workers' compensation goal."[84]

During the late twentieth century, "[t]he most lively development in compensation law . . . was the explosion of 'stress claims.'"[85] Since the explosion of stress claims, our understanding

THOMAS A. ROBINSON, LARSON'S WORKERS' COMPENSATION § 1.01 (Matthew Bender rev. ed. 2019).

81. *Id.*

82. *See* Spieler, *supra* note 78, at 916–18. Under the workers' compensation framework, employers' costs regarding "workplace injuries [are] rolled into an insurable risk with limited liability." *Id.*

83. DeVore, *supra* note 63, at 372.

84. Travis J. Foels, *Rescuing the Rescuer: Reforming How Florida's Workers' Compensation Law Treats Mental Injury of First Responders*, 69 FLA. L. REV. 1439, 1445 (2017).

85. Neumann, *supra* note 53, at 163 n.121 (quoting 1B ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION 42.25(a) (1991 & Supp. 1992)). Neumann explains there were an abundance of work-related stress claims from the 1970s through the 1990s. *Id.* at 148.

about and the legitimacy of psychiatric illnesses has only advanced, and "there is little excuse for treating [mental-mental claims] as non-compensable *per se*."[86] Stress claims are claims for mental injuries caused by work-related stress.[87] There are three, varying approaches to determine compensability for mental injuries: (1) physical-mental; (2) mental-physical; and (3) mental-mental.[88]

i.Physical-Mental Injuries

A physical-mental claim may occur when a claimant develops a mental illness as a sequela of a physical injury.[89] For example, a law enforcement officer who suffers a gunshot wound in the line of duty, and subsequently develops PTSD from the injuring incident, would likely have a compensable physical-mental claim. With respect to the compensability of psychiatric conditions that result from a physical injury, Larson explains "[t]here is almost no limit to the variety of disabling 'psychic' conditions that have []

86. Adam Tucker, *A Matter of Fairness: How Denying Mental-Mental Claims Frustrates the Central Purposes of Workers' Compensation Law*, 31 J. LEGAL MED. 467, 482 (2010).

87. *See* Neumann, *supra* note 53, at 163.

88. *Accord* Logan Burke, *Finding a Way Out of No Man's Land: Compensating Mental-Mental Claims and Bringing West Virginia's Workers' Compensation System into the 21st Century*, 118 W. VA. L. REV. 889, 896 (2015).

89. *Id.*

been recognized as legitimately compensable–conditions which not many years ago would have received little understanding or recognition on the part of courts."[90] Under the Ohio Workers' Compensation Act, a compensable physical injury or occupational disease is a prerequisite to receive compensation for a psychiatric condition.[91] Subject to the sexual conduct exception under R.C. § 4123.01(C)(1), a physical-mental claim is the only way a claimant may receive compensation for a psychiatric condition in Ohio.[92]

ii.Mental-Physical Injuries

A mental-physical claim is one in which a mental stimulus causes a "distinct physical injury."[93] The classic type of mental-physical claim is when the precipitating mental stimulus occurs

90. LARSON & ROBINSON, *supra* note 80, at § 56.03. The scope of compensable physical-mental claims includes: "[I]n a New York case claimant was bitten by a cat, and developed a psychoneurotic fear of rabies for which he was compensated. In a Maryland case, the claimant was disabled by a neurasthenia in the form of a conviction that his backbone, which had been injured, was relentlessly decaying. Florida granted compensation for a neurosis that occurred when a slight blow on the head activated the claimant's memory of the accidental death of her son from a head injury." *Id.*

91. OHIO REV. CODE ANN. § 4123.01(C)(1) (LexisNexis 2019).

92. *Id.* A claimant in Ohio may receive compensation for psychiatric conditions that arise "from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate." *Id.*

93. LARSON & ROBINSON, *supra* note 80, at § 56.02.

contemporaneously with the physical injury.[94] Examples of the classic type of mental-physical claim include: a sudden noise or flash that causes paralysis; and accidents or near-accidents that cause a claimant to suffer a heart attack or cerebral hemorrhage.[95] In comparison to physical-mental claims, claimants that bring mental-physical claims may experience greater difficulty establishing a causal connection between the mental stimulus and the physical injury.[96]

iii. Mental-Mental Injuries

Under a mental-mental claim, a claimant may receive compensation for a work-related mental injury that results from a mental stimulus.[97] As indicated by the term, mental-mental claims do not contain a "physical component in either the cause or the disabling consequence."[98] A minority of states, including Ohio,

94. *Id.* (classifying this type of case as "Sudden or Relatively Brief Stimulus").

95. *Id.* The viability of mental-physical claims in Ohio was established by the Supreme Court of Ohio in Ryan v. Connor, 503 N.E.2d 1379 (Ohio 1986). In Ohio, the mental-physical line of cases have elucidated that a claimant cannot bring a mental-physical claim to receive compensation for a "stress-related purely *psychological* injury." Ireland v. S. Ohio Corr. Facility, 2006 Ohio App. LEXIS 3470, at **7 (Ohio Ct. App. 2006).

96. *Id.*; *see also* Burke, *supra* note 88, at 896–97.

97. LARSON & ROBINSON, *supra* note 80, at § 56.06.

98. *Id.*

exclude compensability of mental-mental claims altogether.[99] Workers' compensation statutes that completely bar mental-mental claims arguably "undermine[] the basic premises of workers' compensation law."[100] While a majority of states compensate mental-mental claims, the standards for coverage vary by jurisdiction. Of those jurisdictions that compensate mental-mental claims, their laws largely track three approaches to coverage: (1) the mental injury results from a sudden stimulus; (2) the mental injury results from unusual stress; or (3) the gradual onset of a mental injury resulting from ordinary work-related stress.[101]

Mental Injury Resulting from a Sudden Stimulus—Jurisdictions that follow the sudden stimulus approach compensate mental-mental claims "only if the cause of the mental injury is surprising and unanticipated."[102] The common view among sudden stimulus jurisdictions is that a claimant's psychiatric condition must

99. Larson explains that "fifteen states and the Jones Act have expressly ruled out liability in any kind of mental-mental case." *Id.*

100. Tucker, *supra* note 86, at 468.

101. *See* Nicholas B. Haynes, *Indecisiveness in Compensating Post Traumatic Stress Disorder: Where does Illinois Leave First Responders?*, 34 S. ILL. U. L.J. 151, 160 (2009).

102. Neumann, *supra* note 53, at 164 (explaining the employee must "link a sudden or frightening event to the development of a mental illness").

be the product of a single event, "rather than the general conditions of employment."[103] As far as compensability of mental-mental claims goes, the sudden stimulus approach is considered to be narrower than the other two approaches.[104]

Mental Injury Resulting from Unusual Stress—Jurisdictions that adhere to the unusual stress approach compensate mental-mental claims where the psychiatric condition is caused by stress "greater than the stress of everyday life"[105] or "the normal conditions of the particular employment."[106] In other words, compensation will not be provided for mental injuries "that result from normal, day-to-day strains of the job."[107] Scholars view the unusual stress approach as a middle ground between the two other approaches to mental-mental claims.[108] Nevertheless, First

103. Jordan Michael Janoski, *Extraordinary and Unusual Circumstances: Compensability of Psychological Injuries Under South Carolina's Workers' Compensation*, 64 S.C. L. REV. 1063, 1070 (2013).

104. *See id.*

105. LARSON & ROBINSON, *supra* note 80, at § 56.06.

106. Janoski, *supra* note 103, at 1068.

107. Natalie D. Riley, *Mental-Mental Claims—Placing Limitations on Recovery Under Workers' Compensation for Day-to-Day Frustrations*, 65 MO. L. REV. 1023, 1034 (2000).

108. *Id.* at 1034 n.86.

Responders experience difficulties when bringing a claim for PTSD in jurisdictions that follow the unusual stress approach.[109]

The unusual stress approach creates a catch-22 situation when applied to employees with high stress occupations, such as First Responders.[110] As discussed above, First Responders are frequently confronted with traumatic events.[111] Consequently, prevalence rates of PTSD among First Responders are high.[112] Yet because traumatic events are not unusual for their occupation, First Responders are commonly denied compensation for mental-mental claims for PTSD in unusual stress jurisdictions.[113] The unusual stress approach is impracticable for First Responders because they are burdened with an onerous evidentiary threshold.[114] Essentially, a First Responder must prove the traumatic event that precipitated

109. *See* Haynes, *supra* note 101, at 161–64; DeVore, *supra* note 63, at 375, 383–84.

110. *See* DeVore, *supra* note 63, at 375.

111. *See supra* Section II.B.

112. *Id.*

113. DeVore, *supra* note 63, at 376; *see also* Haynes, *supra* note 101, at 161–63.

114. DeVore, *supra* note 63, at 379.

their PTSD was an extraordinary, uncommon, or unusual event for a First Responder.[115]

The Pennsylvania case of *Payes v. Workers' Compensation Appeal Board*,[116] provides an apt illustration of the catch-22 situation created by the unusual stress approach when applied to First Responders. In *Payes*, the claimant, a state trooper, struck a mentally disturbed woman on the highway when the woman ran in front of the claimant's patrol vehicle.[117] Upon stopping his patrol vehicle, the claimant "observed blood coming out of the [woman's] mouth as she lay in the road."[118] Despite the claimant's resuscitation efforts, the woman died as a result of her injuries.[119] Following the incident, the claimant filed a workers' compensation claim for total disability based on PTSD.[120]

115. The event must be more stressful than that to which a First Responder "would be subjected in the normal course of employment." Haynes, *supra* note 101, at 162.

116. Payes v. Workers' Comp. Appeal Bd., 5 A.3d 855, 860 (Pa. Commw. Ct. 2010), *appeal granted*, 20 A.3d 1182 (Pa. May 11, 2011).

117. *Id.* at 857.

118. *Id.*

119. *Id.*

120. *Id.*

A psychiatrist testified that the claimant was diagnosed with "major depression of moderate degree and severe PTSD," and determined the claimant was not capable of returning to work as a state trooper.[121] Further, the claimant testified that he believed he facilitated the victim's suicide.[122] However, a superior officer testified against the claimant, explaining that another patrol officer "had a similar situation years ago where someone ran in front of a patrol car and was struck and killed."[123] In denying the claim, the Workers' Compensation Appeal Board ("Board") found the incident did not amount to "an abnormal working condition given the nature of Claimant's stressful and perilous profession."[124]

The Commonwealth Court of Pennsylvania affirmed the Board's decision to deny the claim, and explained that satisfying the unusual stress standard is more difficult for First Responders like the claimant:

> Inasmuch as Claimant is employed as a police officer, he is engaged in employment that is by its

121. *Id.*

122. *Id.* "Suicide by cop" is a phenomenon where people "attempt to use officers as a means to facilitate their own suicide." *Id.* at 858.

123. *Id.* at 859.

124. *Id.*

> very nature highly stressful. He may not have a higher burden of proof than someone engaged in a different type of profession, but it will be more difficult for Claimant to establish abnormal working conditions in his job than it may be for others.[125]

To that end, although the claimant's "attempt at mouth-to-mouth on a woman who was bleeding from that area may be an unusual event for the average citizen," the court explained such an event "does not appear extraordinary for a police officer."[126] While acknowledging "[t]he circumstances that resulted in Claimant's PTSD and depression [were] tragic," the court was constrained to hold the events "were not above and beyond what would be considered normal working conditions for a state trooper."[127] *Payes* evinces the unusual stress approach is an unworkable standard in relation to First Responder-related PTSD claims.

To combat the catch-22 situation created by the unusual stress approach when applied to First Responders, some jurisdictions have created an exception for First Responders.[128] Specifically, some

125. *Id.* at 861–62. The court went on to explain that exposure to "traumatic visuals such as injured children, maimed adults, and, unfortunately, death" are not "deemed 'extraordinary' or 'abnormal'" for claimants who work "in the line of employment" of a First Responder. *Id.*

126. *Id.* at 862.

127. *Id.*

128. DeVore, *supra* note 63, 384.

states have established a rebuttable presumption, where a diagnosis of PTSD in a First Responder is presumed to be the result of work-related events, unless otherwise proven.[129]

Gradual Onset of a Mental Injury Resulting from Ordinary Work-Related Stress—Jurisdictions that observe this approach provide compensation for mental injuries to claimants so long as their psychiatric condition is caused by work-related stress.[130] Unlike unusual stress jurisdictions, jurisdictions that follow this approach "do not ask whether the stress is greater than that of ordinary life or employment; it is enough that this stress contributed to this breakdown."[131] This approach offers the broadest coverage of mental-mental claims.[132]

II. Analysis

Ohio workers' compensation law was "founded upon wise, beneficent and humanitarian principles" to provide compensation to

129. *Id.*; *see, e.g.*, VT. STAT. ANN. TIT. 21, § 601(11)(I) (LEXISNEXIS 2019); ME. REV. STAT. ANN. TIT. 3-A, § 201(3-A)(B) (2019).

130. Neumann, *supra* note 53, at 164–65.

131. LARSON & ROBINSON, *supra* note 80, at § 56.06. *See generally* State v. Cephas, 637 A.2d 20 (Del. 1994) (the Supreme Court of Delaware adopted the gradual onset of a psychiatric condition resulting from ordinary work-related stress approach).

132. Neumann, *supra* note 53, at 164–65.

employees injured in the course of, and arising out of, their employment,[133] as well as to prevent injured workers and their families from the enduring hardships of tort litigation.[134] While workers' compensation laws regarding First Responder-related PTSD have evolved in other states, they have not in Ohio. Under Ohio law, unless their PTSD is a sequela of a compensable injury,[135] First Responders diagnosed with PTSD resulting from workplace stimuli are precluded from the right to avail themselves of workers' compensation. Ohio's failure to cover First Responder-related PTSD under the Ohio Workers' Compensation Act undermines the principles upon which Ohio workers' compensation law was founded.[136] This Part will scrutinize Ohio's onerous stance on mental-mental claims, and argue that the benefits of providing workers' compensation coverage of PTSD for First Responders

133. Suez Co. v. Young, 195 N.E.2d 117, 120 (Ohio Ct. App. 1963); *see also* OHIO REV. CODE ANN. § 4123.01 (LexisNexis 2019).

134. *See* Doherty Jr., *supra* note 77, at 14.

135. For purposes of this part, "compensable injury" when referred to in relation to R.C. § 4123.01, is to mean a physical injury or occupational disease.

136. *See* Tucker, *supra* note 86, at 468, 482 (explaining there is "simply no reason" to not compensate mental injuries, and the failure to do so is "patently unfair and undermines the basic premises of workers' compensation law").

outweigh the costs. Lastly, this Part proposes two ways in which the Ohio General Assembly could amend R.C. § 4123.01(C)(1) to establish a narrow exception for First Responder-related PTSD claims.

A. Ohio Workers' Compensation Law: Compensable Injury as a Prerequisite for a Psychiatric Condition

Unlike the majority of states, Ohio expressly excludes workers' compensation coverage for mental-mental claims.[137] R.C. § 4123.01(C)(1) states, in pertinent part:

> "Injury" does not include:
>
> (1) Psychiatric conditions except where the claimant's psychiatric conditions have arisen from an injury or occupational disease sustained by that claimant or where the claimant's psychiatric conditions have arisen from sexual conduct in which the claimant was forced by threat of physical harm to engage or participate.[138]

Described as "especially restrictive," and referred to as "the minority Ohio rule,"[139] R.C. § 4123.01(C)(1) limits compensation

137. TIMOTHY GLYNN ET AL., EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 874 (4th ed. 2019).

138. OHIO REV. CODE ANN. § 4123.01(C)(1) (LexisNexis 2019). "R.C. 4123.01(C)(1) explicitly codified that 'mental-mental' claims–psychiatric conditions arising solely from job-related emotional stress–were not compensable under the system." Bailey v. Republic Engineered Steels, 741 N.E.2d 121, 126 (Ohio 2001) (Cook, J., dissenting).

139. LARSON & ROBINSON, *supra* note 80, at § 56.06D.

of psychiatric conditions to physical-mental claims.[140] Thus, "a claimant must sustain physical injury or occupational disease as a prerequisite to recovering workers' compensation benefits for a mental condition."[141]

Consequently, First Responders afflicted with work-related PTSD are able to receive workers' compensation benefits only when their PTSD is a sequela of a compensable injury. Notably, R.C. § 4123.01(C)(1) affects both indemnity benefits[142] and medical benefits.[143] Recall Omar Delgado.[144] In Ohio, he would not receive indemnity benefits for the time he missed from work after the Pulse nightclub shooting. Nor would he receive medical benefits to treat his PTSD. Sadly, under Ohio workers' compensation law, Delgado

140. *See supra* Section II.D.1.

141. Armstrong v. John R. Jurgensen Co., 990 N.E.2d 568, 571 (Ohio 2013).

142. Indemnity benefits, also referred to as "income," "disability" or "cash" benefits, "are money payments made directly to injured workers to compensate for earnings lost as a result of compensable injuries. . . . [A]nd are most commonly calculated as a percentage of the recipient's average weekly wage, subject to a specified dollar amount." JOSEPH W. LITTLE ET AL., WORKERS' COMPENSATION 498 (7th ed. 2014).

143. "Medical benefits cover the reasonable cost of physicians, hospitalization, medication and other necessary treatment. . . . [A] variety of incidental care and equipment may also be covered by workers' compensation." LITTLE ET AL., *supra* note 142, at 482.

144. *See supra* Part I.

would be in a better position to receive compensation for his PTSD had he also sustained a nonfatal gunshot wound.[145] Such an outcome is absurd. Ohio's failure to provide workers' compensation coverage of First Responder-related PTSD, regardless of an accompanying compensable injury, is unreasonable and undermines the wise, beneficent, and humanitarian principles upon which Ohio workers' compensation law was founded.

B.Dispelling the Ohio General Assembly's Concerns

During Summer 2019, House Bill 80, the budget bill for Ohio's workers' compensation system, included a proposal that would allow PTSD unaccompanied by a compensable injury to be a compensable workers' compensation condition for First Responders.[146] After House Bill 80 passed in the Ohio House of Representatives, the Ohio Senate shot down the proposal.[147]

145. By sustaining a nonfatal gunshot wound, Delgado may have a viable physical-mental claim in relation to receiving workers' compensation for his PTSD.

146. Caroline E. Diwik & Anthony Jagoditz, *PTSD Compensation for First Responders without Associated Physical Injury Revisited by Ohio Legislature in New House Bill*, NAT'L L. REV. (Nov. 4, 2019), https://bit.ly/2PuccJ7.

147. Randy Ludlow, *Ohio Senate Strips PTSD Coverage for First Responders from Workers' Comp Budget*, COLUMBUS DISPATCH (Jun. 27, 2019), https://bit.ly/357Mil9.

Those against compensating First Responder-related PTSD unaccompanied by a compensable injury ground their opposition on two concerns. First, they are worried about malingering, and that allowing a type of mental-mental claim will lead to evidentiary difficulties in proving that a First Responder's diagnosis of PTSD was precipitated by workplace stimuli.[148] Second, they are concerned that compensating First Responder-related PTSD unaccompanied by a compensable injury will open the proverbial "floodgates," resulting in a costly increase in the number of claims filed and too great a fiscal impact on employers, taxpayers, and the Ohio Bureau of Workers' Compensation.[149] These concerns "are largely overblown."[150] Failing to provide compensation to First Responders afflicted with PTSD is unjustifiable.[151]

148. Tucker, *supra* note 86, at 477.

149. *Creates FY 2020-2021 Workers' Compensation Budget: Hearing on Sub. H.B. 80 Before the H. Comm. on Ins. & Fin. Insts.*, 133d Gen. Assemb. (Jun. 19, 2019) (testimony of Robert A. Minor), https://bit.ly/2rpSJ4x [hereinafter *Hearing on Sub. H.B. 80: Testimony of Robert A. Minor*]; *see also* Tucker, *supra* note 86, at 478.

150. Tucker, *supra* note 86, at 479.

151. *See id.* at 468; Foels, *supra* note 84, at 1461.

i.Evidentiary Concerns

Because psychiatric conditions such as PTSD develop through "the 'complex interrelation' between one's 'internal, subjective reality' and [one's] 'external, environmental reality,'" those opposed to compensating mental-mental claims argue the evidentiary burden regarding causation will be too difficult.[152] Additionally, fears of malingering[153] and fraudulent claims have played an influential role in shaping legislative and "judicial attitudes toward mental injuries."[154] Some policymakers fear that PTSD may be more difficult to evaluate and may consequently be easier to falsify.[155]

152. Tucker, *supra* note 86, at 477; *see also* Foels, *supra* note 84, at 1462.

153. Malingering, sometimes referred to as "feigning," is "the intentional production of false or grossly exaggerated physical or psychological symptoms, motivated by external incentives such as avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs." DSM-5, *supra* note 27, at § 2 (ICD-9-CM: V.65.2).

154. Lawrence Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 VAND. L. REV. 263, 273 (1983).

155. Ashley R. Bailey, *Stress is [Not] Part of the Job: Finding the Appropriate Balance Between Fairness and Efficiency to Compensate Posttraumatic Stress Disorder Under Workers' Compensation Statutes*, 2015 WIS. L. REV. 507, 514 (2015).

While once arguably credible, concerns about malingering and causation difficulty have by and large been stifled by experts' enhanced understanding of PTSD—and psychiatric conditions generally.[156] PTSD "has been empirically tested" and "subjected to critique for several decades, [] PTSD studies have been published and peer reviewed," and "PTSD has been accepted as textbook science by the scientific community for [nearly forty] years."[157] Further, in court, PTSD evidence satisfies *Daubert* standards.[158]

The fear of malingering is untenable, as studies show only 1–2% of workers' compensation claims are fraudulent.[159] The DSM-5 specifies numerous factors a clinician can use to detect

156. LARSON & ROBINSON, *supra* note 80, at § 56.04. Larson and Robinson explain the modern medical view: "[I]t is no longer realistic to draw a line between what is 'nervous' and what is 'physical.'. . . Perhaps, in earlier years, when much less was known about mental and nervous injuries and their relation to 'physical' symptoms and behavior, there was an excuse, on grounds of evidentiary difficulties, for ruling out recoveries based on such injuries, both in tort and in workmen's compensation. But the excuse no longer exists." *Id.*

157. Edgar Garcia-Rill & Erica Beecher-Monas, *Gatekeeping Stress: The Science and Admissibility of Post-Traumatic Stress Disorder*, 24 U. ARK. LITTLE ROCK L. REV. 9, 30 (2001).

158. *Id.* at 29–30. Garcia-Rill and Beecher-Monas explain that "*Daubert* requires that the judge examine the proffered testimony for falsifiability, error rate and the existence of protocols, peer review and publication, and general acceptance. . . . [A]nd *Kumho Tire* extends the validity inquiry to all types of expert testimony, including psychology." *Id.* at 29.

159. Lisa Cullen, *The Myth of Workers' Compensation Fraud*, FRONTLINE PBS (2013), https://to.pbs.org/2sePw7I; *see also* Tucker, *supra* note 86, at 479.

malingering.[160] And there "is an entire subfield of clinical psychology [that] centers around the detection of malingering."[161] Moreover, one of the cornerstones of the modern workers' compensation system is "a highly specialized trier of fact that considers expert testimony with an eye toward the concern that the claimant may be malingering, exaggerating his or her injuries, or attempting to claim an injury unrelated to employment."[162] It is standard operating procedure in workers' compensation cases to present expert witness testimony regarding the veracity and causation of a claimant's physical injury or psychiatric condition as a sequela of a compensable injury.[163] Courts and other workers' compensation adjudicatory bodies currently rely on specialized triers of fact to "detect and weed out fraudulent or illegitimate claims."[164] Hence these fact finders should likewise be able to

160. DSM-5, *supra* note 27, at § 2 (ICD-9-CM: V.65.2).

161. Tucker, *supra* note 86, at 479.

162. Foels, *supra* note 84, at 1463; *see also* Tucker, *supra* note 86, at 479–80.

163. Tucker, *supra* note 86, at 480; *see also* Diedre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1, 45 (2011).

164. Foels, *supra* note 84, at 1463; *see also* Tucker, *supra* note 86, at 480.

examine evidence to determine whether a First Responder's diagnosis of PTSD has arisen out of, and in the course of, their employment, just as they do for physical injuries and occupational diseases.[165]

ii. The "Floodgates" Concerns

Opponents of compensating First Responders who suffer from PTSD unaccompanied by a compensable injury have expressed that the possible fiscal consequences will raise workers' compensation insurance premium costs to a burdensome amount because such a policy will open a floodgate of First Responder-related PTSD claims.[166] Specifically, those against the policy assert that local counties, cities, and municipalities will be most affected by the expansion in workers' compensation coverage.[167] The costs of providing workers' compensation benefits for First Responder-related PTSD may not be as significant as people fear, however. When the Ohio Senate considered a similar policy in 2015, estimates

165. Tucker, *supra* note 86, at 480.

166. *See Hearing on Sub. H.B. 80: Testimony of Robert A. Minor*, *supra* note 149; *cf.* Tucker, *supra* note 86, at 478.

167. *Hearing on Sub. H.B. 80: Testimony of Robert A. Minor*, *supra* note 149.

indicated the cost of compensating First Responder-related PTSD totaled $182 million.[168] However, estimates as recent as October 2019, indicate the cost would be approximately $44 million.[169]

Undoubtedly, expanding compensability to First Responder-related PTSD will likely increase the number of workers' compensation claims filed. But it is important to keep in mind First Responders represent only a small proportion of claimants.[170] Further, failing to compensate First Responders afflicted with PTSD may be more costly for employers of First Responders, as mental illness in the workplace is associated with reduced efficiency.[171] For example, it is estimated that "'impaired efficiency at work associated with mental health problems' costs the United Kingdom

168. *Id.*

169. OHIO LEGIS. SERV. COMM'N, H.B. 308: FISCAL NOTE & LOCAL IMPACT STATEMENT (2019), https://bit.ly/35ct0Lj.

170. *Compare* KRISTINA SCHAFER ET AL., U.S. DEP'T OF LABOR, CHARACTERISTICS OF INDIVIDUALS AND EMPLOYMENT AMONG FIRST RESPONDERS i (2015), https://bit.ly/2McqCNo (estimating approximately 1.2 million people work as First Responders), *and* Foels, *supra* note 84, at 1466, *with U.S. and World Population Clock*, U.S. Census Bureau, https://www.census.gov/popclock/ (last visited Dec. 10, 2019) (estimating over 330 million people live in the United States).

171. Tucker, *supra* note 86, at 480.

approximately $22.5 billion a year."[172] If First Responders diagnosed with PTSD are not provided adequate treatment or time to recover, they may be unable to continue their employment as a First Responder[173] and may be forced to resort to disability programs funded by the government.[174] Moreover, local governments may also incur additional costs that will result from "a bevy of lawsuits filed against [Ohio] cities and counties" under common law theories of tort, including intentional infliction of emotional harm.[175]

Under Ohio workers' compensation law, exclusivity of remedy is codified under R.C. § 4123.74.[176] In *Bunger v. Lawson*

172. *Id.* (citing Michael Roizen & Keith Roach, *Wellbeing in the Workplace*, 340 BRIT. MED. J. 1743, 1743 (2010)).

173. Approximately eighteen months after responding to the Pulse nightclub massacre, Omar Delgado was notified by the Eatonville Police Department that he was going to be dismissed from the force. Delgado "said he was told that a doctor hired by the department to evaluate his health found him 'unfit for duty' and that there is no civilian position available for him." Hadad, *supra* note 7.

174. Foels, *supra* note 84, at 1466.

175. *Creates FY 2020-2021 Workers' Compensation Budget: Hearing on Sub. H.B. 80 Before the H. Comm. on Ins. & Fin. Insts.*, 133d Gen. Assemb. (Jun. 18, 2019) (testimony of Philip J. Fulton), https://bit.ly/2rpSJ4x [hereinafter *Hearing on Sub. H.B. 80: Testimony of Philip J. Fulton*]; *cf.* Tucker, *supra* note 86, at 480–82 (explaining that failing to compensate mental-mental claims frustrates the purpose of workers' compensation because injured workers are then forced to seek recourse in tort litigation).

176. OHIO REV. CODE ANN. § 4123.74 (LexisNexis 2019) ("Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment, or for any death resulting from such

Co., the Supreme Court of Ohio held that "[i]f a psychological injury is not an injury according to the statutory definition of 'injury,' then it is not among the class of injuries from which employers are immune from suit."[177] Thus, First Responders "who suffer purely psychological injuries," such as PTSD, "may seek redress through common-law causes of action that allow recovery for those injuries."[178] By failing to provide workers' compensation coverage of First Responder-related PTSD, employers of First Responders are confronted with the possibility of even greater costs "[b]ecause workers' compensation claims are generally more manageable and less costly to employers than tort actions."[179]

Ultimately, the cost-benefit analysis regarding workers' compensation coverage of First Responder-related PTSD "depends on and incorporates moral and political judgments about how

injury, occupational disease, or bodily condition occurring during the period covered by such premium so paid into the state insurance fund.").

177. Bunger v. Lawson Co., 696 N.E.2d 1029, 1031 (Ohio 1998).

178. *Id.* at 1032. *See generally* Marilyn Brenner, *Bunger v. Lawson Co.: A Step Forward Toward Recognition of Purely Psychological Injuries, But Is it in the Wrong Direction?*, 32 U. TOL. L. REV. 249 (2001) (explaining the impact of the Supreme Court of Ohio's decision in *Bunger*).

179. Tucker, *supra* note 86, at 481–82.

resources should be distributed."[180] Presently, at least fifteen states[181] have passed legislation to specifically provide workers' compensation coverage of First Responder-related PTSD, demonstrating that the proper distribution of resources includes such a cost.

C. The Benefits of Providing Workers' Compensation Coverage of First Responder-Related PTSD Outweigh the Costs

The recent deluge of legislation[182] focused on providing workers' compensation coverage of PTSD for First Responders illuminates the benefits of such a policy outweigh the evidentiary and floodgate concerns of those opposed to compensating First

180. Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform"*, 50 RUTGERS L. REV. 657, 666 (1998).

181. California (CAL. LAB. CODE § 3212.15 (Deering 2019) (effective Jan. 1, 2020)); Colorado (COLO. REV. STAT. § 8-41-301 (2019)); Connecticut (Sub. S.B. 164, 2019 Gen. Assemb., Reg. Sess. (Conn. 2019)); Idaho (IDAHO CODE § 72-451(4) (2019)); Florida (FLA. STAT. ANN. § 112.1815(5) (LexisNexis 2019)); Louisiana (LA. STAT. ANN. § 33:2581.2 (2019)); Maine (ME. STAT. TIT. 39-A, § 201(3-A)(B) (2019)); Minnesota (MINN. STAT. ANN. § 176.011(15)(e) (LexisNexis 2019)); Nevada (NEV. REV. STAT. ANN. § 616C.180 (LexisNexis 2019)); New Hampshire (N.H. REV. STAT. ANN. § 281-A:17-c (LexisNexis 2019) (effective Jan. 1, 2021)); New Mexico (N.M. STAT. ANN. § 52-3-32.1 (LexisNexis 2019)); Oregon (Or. Rev. Stat. Ann. § 656.802 (LexisNexis 2019)); Texas (TEX. LAB. CODE § 504.019 (LexisNexis 2019)); Vermont (VT. STAT. ANN. TIT. 21, § 601(11)(I) (2019)); and Washington (WASH. REV. CODE. ANN. § 51.08.142 (LexisNexis 2019)).

182. Thomas A. Robinson, *Challenges for First Responders (and a Society that Respects Them)*, LEXISNEXIS (Oct. 2, 2019), https://bit.ly/36wXAzM; *see supra* note 181 and accompanying text; *see also Hearing on Sub. H.B. 80: Testimony of Philip J. Fulton*, *supra* note 175.

Responder-related PTSD. PTSD exerts a toll "on the intuition, energy, and decision-making skills of first responders."[183] And PTSD—especially when untreated—endangers First Responders themselves, as well as society at-large.[184]

As previously discussed, the prevalence of PTSD—and mental illness in general—is abundant among First Responders because they work in a trauma-laden occupation.[185] Mental illness among First Responders is associated with several adverse consequences, including substance abuse and suicide.[186] Tragically, a white paper issued by the Ruderman Family Foundation found that "First responders are more likely to die by suicide than to die within the line of duty."[187] The white paper detailed that PTSD is often present in First Responders before a suicide.[188] Providing workers' compensation coverage of First Responder-related PTSD in Ohio is

183. HEYMAN ET AL., *supra* note 1, at 16.

184. *Id.*; *see also* Mann & Neece, *supra* note 36, at 450.

185. *See supra* Section II.B.

186. HEYMAN ET AL., *supra* note 1, at 18–24.

187. *Id.* at 36 (noting that the Firefighter Behavioral Health Alliance, which tracks reports of firefighter suicide, "estimates that approximately 40% of firefighter suicides are reported").

188. *Id.* at 18.

an opportunity "to provide treatment that could potentially save lives."[189]

Our society depends on First Responders "to make sound judgements and perform effectively in response to highly stressful, life-threatening events."[190] PTSD has been found to diminish a First Responder's capacity "to assess risks, plan multi-step responses to an emergency, and pay attention to competing stimuli (i.e., more than one victim and/or perpetrator)."[191] The effects of First Responder-related PTSD are not limited to performance deficits, however. PTSD has been found to cause First Responders to engage in "sensation-seeking behavior" above their premorbid levels.[192] Given that First Responders work in a profession that authorizes the use of weapons, licenses excessive speed in traffic, and, in some circumstances, necessitates the use of force, it follows that sensation-seeking behavior above premorbid levels endangers First

189. *Id.* According to statistics from the Centers for Disease Control and Prevention ("CDC"), from 1984-1998, Ohio had the third highest percentage of police suicides among states. Violanti, *supra* note 36, at 274–75.

190. Regehr & LeBlanc, *supra* note 36, at 184.

191. HEYMAN ET AL., *supra* note 1, at 16–17.

192. Mann & Neece, *supra* note 36, at 450.

Responders themselves and society at-large.[193] Moreover, PTSD has been found to cause First Responders to act with excessive aggression and violence toward citizens, suspects, and their own family members.[194]

The question of whether First Responders should receive workers' compensation benefits for PTSD comes down to an evaluation of two policy considerations. On one hand, by withholding compensation from First Responders diagnosed with PTSD unaccompanied by a compensable injury, employers avoid a counteracting increase in workers' compensation insurance premium costs.[195] On the other hand, withholding compensation may deprive First Responders of life-saving psychiatric treatment and perpetuate the dangers to society of First Responder-related PTSD—i.e., First Responders acting with sensation-seeking behavior above premorbid levels and potentially working in the line

193. *Id.* at 450.

194. DeVore, *supra* note 63, at 369.

195. On a related note, on June 28, 2019, the Ohio Bureau of Workers' Compensation ("BWC") approved a rebate proposal "to give back $1.5 billion, or 88% of the premiums employers paid for the policy year that ended on June 30, 2018. . . . This rebate is the fifth time that the BWC has returned at least $1 billion to employers since 2013." Matthew R. Hunt, *Ohio BWC to Provide a $1.5 Billion Rebate to Ohio Employers*, KWGD (July 11, 2019), https://bit.ly/34kd4W8.

of duty with performance deficits. While fiscal concerns "may arguably outweigh the need to compensate every Average Joe for a stress-related mental injury suffered on the job," such concerns do not carry the same weight when applied to First Responder-related PTSD.[196]

D.Proposed Law Change:

This Comment has advocated for the Ohio General Assembly to provide workers' compensation benefits to First Responders diagnosed with PTSD, regardless of whether they suffer an accompanying compensable injury. This change could be actualized by merely amending R.C. § 4123.01(C)(1). In light of the difficulties experienced by First Responders under the sudden stimulus and unusual stress approaches,[197] Ohio should promulgate a rebuttable presumption in favor of compensability for First Responders diagnosed with PTSD, regardless of an accompanying compensable injury. Alternatively, insofar as providing indemnity and medical benefits for First Responder-related PTSD would be too great a fiscal strain, Section III.D.2. proposes the Ohio General

196. Foels, *supra* note 84, at 1466.

197. *See supra* Section II.D.3.

Assembly amend R.C. § 4123.01(C)(1) to provide only medical benefits to First Responders diagnosed with PTSD, regardless of whether they suffer an accompanying compensable injury.

i. Presumption in Favor of Compensability for First Responders Diagnosed with PTSD, Regardless of an Accompanying Compensable Injury

To mitigate the potential ramifications of First Responder-related PTSD, several states have recently amended their workers' compensation laws to provide a rebuttable presumption in favor of compensability for First Responders diagnosed with PTSD, regardless of an accompanying compensable injury.[198] Ohio should amend R.C. § 4123.01(C)(1) in a like manner. To adequately cover First Responders at a heightened risk of being exposed to traumatic events, the amendment should apply to the following terms: "Peace officer," "Firefighter," and "Emergency medical worker."[199] "Peace

198. California, Louisiana, Maine, Minnesota, New Hampshire, New Mexico, Oregon, and Vermont are among the states that have enacted legislation providing a rebuttable presumption in favor of compensability for First Responders diagnosed with PTSD, regardless of an accompanying compensable injury. *See supra* note 181. Other evidentiary standards include: Idaho (clear and convincing evidence); Florida (clear and convincing medical evidence); Nevada ("gradual mental stimulus" proven by clear and convincing medical or psychiatric evidence under NEV. REV. STAT. ANN. § 616C.180(4)); and Texas (preponderance of the evidence). *See supra* note 181.

199. *See infra* notes 200–202 and accompanying text.

officer" shall have the same meaning as in R.C. § 2935.01.[200] "Firefighter" shall include paid and volunteer firefighters of a lawfully constituted fire department.[201] "Emergency medical worker" shall mean a "first responder," "emergency medical technician-basic," "emergency medical technician-intermediate," or "emergency medical technician-paramedic," as defined under R.C. § 4765.01.[202]

To sufficiently mitigate the potential ramifications of First Responder-related PTSD by virtue of providing workers' compensation to First Responders diagnosed with PTSD resulting from workplace stimuli, R.C. § 4123.01(C)(1), in pertinent part, should be amended to read:

> "Injury" does not include:
>
> (1) Psychiatric conditions except *as follows:*
>
> *(a) Where the claimant is a peace officer, firefighter, or emergency medical worker and is diagnosed with posttraumatic stress disorder, in which case the posttraumatic stress disorder is presumed to have been received in the course of, and have arisen out of, the claimant's employment. This presumption*

200. OHIO REV. CODE ANN. § 2935.01 (LexisNexis 2019).

201. OHIO REV. CODE ANN. §§ 742.01 & 146.01 (LexisNexis 2019).

202. OHIO REV. CODE ANN. § 4765.01 (LexisNexis 2019).

> *may be rebutted by clear and convincing evidence to the contrary.*

These changes will ensure that First Responders who suffer from PTSD due to workplace exposure to traumatic events will receive necessary medical treatment and adequate compensation for their injury.

ii. Presumption in Favor of Medical Benefits for First Responders Diagnosed with PTSD, Regardless of an Accompanying Compensable Injury

Alternatively, if the fiscal burden of providing indemnity and medical benefits would be too great, the Ohio General Assembly could amend R.C. § 4123.01(C)(1) to provide only medical benefits to First Responders diagnosed with PTSD, regardless of an accompanying compensable injury. This would ensure First Responders receive sufficient medical treatment for PTSD, yet mitigate the fiscal impact of the policy with respect to workers' compensation insurance premium costs. Such a provision could resemble a former version of Florida Statutes § 112.1815(2)(a)(3), which stated, in pertinent part:

> For a mental or nervous injury arising out of the employment unaccompanied by a physical injury involving a first responder, only medical benefits [] [] shall be payable for the mental or nervous injury. However, payment of indemnity . . . may not be made

> unless a physical injury arising out of injury as a first responder accompanies the mental or nervous injury.[203]

An ideal amendment to R.C. § 4123.01(C)(1) would additionally establish a rebuttable presumption for First Responders diagnosed with PTSD, regardless of an accompanying compensable injury.[204] However, instead of a rebuttable presumption in favor of compensability, the amendment would establish a rebuttable presumption in favor of medical benefits. Notably, the Ohio Workers' Compensation Act does not expressly define indemnity benefits and medical benefits, but rather, both types of benefits are construed from R.C. § 4123.54(A): "every employee, who is injured or who contracts an occupational disease . . . is entitled to receive the *compensation for loss sustained* on account of the injury, occupational disease, or death, and the *medical, nurse, and hospital services and medicines* . . . as are provided by this chapter."[205] All

203. 2007 Fla. Laws 1066–67 (codified at Fla. Stat. § 112.1815(2)(a)(3) (2007)). This provision has since been amended to provide both indemnity and medical benefits for First Responders diagnosed with PTSD unaccompanied by a compensable injury. *See* 2018 Fla. Laws 1655–57.

204. For a discussion of why the amendment to R.C. § 4123.01(C)(1) should establish a rebuttable presumption for First Responders diagnosed with PTSD, regardless of an accompanying compensable injury, *see supra* Section III.D.1.

205. OHIO REV. CODE ANN. § 4123.54(A) (LexisNexis 2019). Medical benefits are to mean "the medical, nurse, and hospital services

things considered, R.C. § 4123.01(C)(1), in pertinent part, should be amended to read:

> "Injury" does not include:
>
> (1) Psychiatric conditions except *as follows:*
>
> *(a) Where the claimant is a peace officer, firefighter, or emergency medical worker and is diagnosed with posttraumatic stress disorder, in which case the posttraumatic stress disorder is presumed to have been received in the course of, and have arisen out of, the claimant's employment. This presumption may be rebutted by clear and convincing evidence to the contrary. In the case of a peace officer, firefighter, or emergency medical worker diagnosed with posttraumatic stress disorder that has been received in the course of, and has arisen out of, the claimant's employment unaccompanied by an injury, only medical, nurse, and hospital services and medicines, as applicable under R.C. § 4123.54(A), shall be payable.*

Amending R.C. § 4123.01(C)(1) as such would provide a middle ground between Ohio's wholesale exclusion of mental-mental claims and the rebuttable presumption in favor of compensability—both indemnity and medical benefits—for First Responders diagnosed with PTSD, regardless of an accompanying compensable injury. To the extent that providing workers'

and medicines." *Id.* The distinction between indemnity benefits and medical benefits is further evinced by the provision's reference to "compensation *and* benefits." *Id.*

compensation coverage of First Responder-related PTSD would impose at least some additional cost to those affected by workers' compensation insurance premiums, limiting coverage to only medical benefits would temper the cost. Meanwhile, First Responders who have legitimate and proven claims of PTSD unaccompanied by a compensable injury would be able to receive medical treatment.

III. Conclusion

To serve and protect. First Responders take on selfless responsibility. Society depends on First Responders to deploy when atrocity occurs. They safeguard our society from crime and are indispensable to disaster relief efforts, placing their own well-being in jeopardy. However, due to the frequency with which First Responders are exposed to harrowing and traumatic events, they experience high prevalence rates of PTSD—markedly higher than the average employee.[206] PTSD has been found to adversely affect the ability of First Responders to perform their duties, endangering themselves and society at-large. Yet in Ohio, First Responders diagnosed with PTSD are unable to receive *any* workers'

206. Neumann, *supra* note 53, at 177.

compensation benefits, unless their PTSD developed as a sequela of a physical injury or occupational disease. Current Ohio law regarding First Responder-related PTSD is unjustifiable and undermines the principles upon which the Ohio Workers' Compensation Act was founded. The Ohio General Assembly should reevaluate its onerous position on First Responder-related PTSD, and provide First Responders with *some* amount of support—either indemnity benefits and medical benefits, or just medical benefits. It is in the best interests of society to provide workers' compensation coverage of PTSD for First Responders, regardless of an accompanying compensable injury.